The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

October 22, 1997

D.P.U. 96-104

Petition of Berkshire Power Development, Inc. for approval by the Department of Public Utilities for an exemption from the Zoning By-Laws of the Town of Agawam, pursuant to G.L. c. 40A, § 3.

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I. INTRODUCTION

On October 21, 1996, pursuant to G.L. c. 40A, § 3, Berkshire Power Development, Inc. ("BPD" or "Company") filed with the Department of Public Utilities ("Department"), a petition for an exemption from the operation of the zoning by-laws of the Town of Agawam ("Town" or "Agawam"). BPD seeks the exemption to allow for the construction of a 252-megawatt ("MW") (nominal net) gas-fired generating plant and ancillary facilities at an approximately forty-acre undeveloped site located in the Town. The Department docketed the petition as D.P.U. 96-104.

Pursuant to notice duly issued, the Department held a public hearing in Agawam on November 19, 1996 to afford interested persons an opportunity to be heard. The Department subsequently granted petitions for leave to intervene filed by Cynthia A. and Frank J. Lawlor ("Lawlors")[1] and a group of ten members of the Concerned Citizens and Businesses of Agawam ("CCBA Members").[2] The Department also granted limited participant status to Thomas J. Ennis, the Massachusetts Federation of Planning and Appeal Boards, Inc., and Michael Del Negro.

The Department held an evidentiary hearing at its offices in Boston on May 6, 1997. In support of its petition, the Company sponsored the testimony of Kenneth Roberts, Sr., chief

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[1] On June 23, 1997, the Lawlors withdrew their intervention.

[2] On March 22, 1997, two of the named CCBA Members who petitioned to intervene (Woodlawn Realty Corporation and Crestview Country Club) withdrew their appearance as intervenors in this matter. On July 2, 1997, one additional named CCBA Member (Springfield Corrugated Box, Inc.) also withdrew.

operating officer of Power Development Company, Inc. ("PDC"), and treasurer of BPD, who testified regarding the construction and operation of the proposed project and general project matters including issues relevant to the business entities involved in the development of the proposed project; and Frederick M. Sellars, a vice-president at Earth Tech, who testified regarding general environmental and siting matters.

The CCBA Members presented a direct case and sponsored the testimony of Curt M. Freedman, P.E., owner of C.M.F. Engineering, Inc., who testified regarding cooling towers and visible plumes from such towers.

The evidentiary record includes eighty (80) exhibits and four (4) responses to record requests. On May 30, 1997, BPD, the CCBA Members, and the Lawlors filed initial briefs ("BPD Initial Brief," "CCBA Initial Brief," "Lawlor Brief," respectively). On June 6, 1997, BPD and the CCBA Members filed reply briefs ("BPD Reply Brief" and "CCBA Reply Brief," respectively).

BPD is a joint venture of PDC, ABB Energy Ventures, Inc. ("ABB EV"), and Cogeneration Services Corporation ("CSC") (Exh. BP-1 at 2). BPD was formed on May 4, 1995, to manage the development process, execute necessary contracts, and initially hold the permits issued in the development of BPD's proposed project in Agawam (Tr. at 6). See also Berkshire Power Development, Inc., 4 DOMSB 221, 238 (1996) ("Berkshire Power Decision"). PDC is a privately held company, incorporated in Delaware on April 7, 1993, that develops electric/energy related projects. Berkshire Power Decision, 4 DOMSC at 238. PDC holds a one hundred percent ownership interest in BPD (Tr. at 7). CSC ensures that the

proposed project is technically sound, meets all deadlines, and stays within budget. Berkshire Power Decision, 4 DOMSC at 238. CSC also provides development management, community relations and permitting oversight. Id. BPD likely will establish either a limited partnership or a limited liability corporation to take ownership of the project sometime prior to financial closing, and will transfer all contracts, obligations and permits acquired during the development process to this new entity (Tr. at 11-12).

II. PROCEDURAL BACKGROUND

On June 20, 1995, BPD filed a petition, under G.L. c. 164, § 69H, with the Energy Facilities Siting Board ("Siting Board") for approval to construct a nominal 252-MW natural gas fired independent power plant and ancillary facilities in Agawam (Exh. BP-IP-1 at 3). The Siting Board proceeding[3] culminated in a Final Decision in which the Siting Board found "that the proposed [BPD] project is needed to provide a necessary energy supply for the Commonwealth beginning in 1999 and beyond." Berkshire Power Decision, 4 DOMSB at 304. In addition, the Siting Board found that, upon compliance with several conditions listed in the Final Decision, "the construction and operation of the proposed project and ancillary facilities at the primary site will be consistent with providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Id. at 446. The Siting Board's conditional approval was issued on June 19, 1996. Id. at 221,

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[3] The Siting Board granted the CCBA intervenor status in the Siting Board proceeding with regard to all matters, and the Siting Board granted the Lawlors intervenor status with regard to all matters associated with environmental and cost issues. Berkshire Power Decision, 4 DOMSB at 241.

237.

BPD also received an Order of Conditions from the Agawam Conservation Commission and site plan approval from the Town Planning Board (Exh. BP-1 at 3). The Agawam Zoning Board of Appeals ("ZBA") denied BPD's requested zoning relief because of the ZBA's belief that such relief required a unanimous vote of the ZBA, and BPD had received two votes approving and one vote denying the request (id. at 7). BPD challenged the denial in Hampden Superior Court and moved for summary judgment, seeking a determination that a simple majority vote of the ZBA was all that was required for the grant of BPD's requested relief (id. at 8). The ZBA opposed the Motion for Summary Judgment (id.). A group of 14 local opponents of the proposed project unsuccessfully moved to intervene in the court proceeding (id.). The Hampden Superior Court granted BPD's Motion and entered Final Judgment on June 13, 1996 (id.; Exh. BP-IP-5).

Subsequently, BPD and the Agawam ZBA entered into a settlement agreement concerning the requested zoning relief (Exh. BP-1 at 9). On July 3, 1996, the 14 local opponents filed an "Emergency Motion for Reconsideration (or in the Alternative) Motion to Intervene," which was allowed. On July 15, 1996, the 14 local opponents filed an appeal of the Court's June 13th summary judgment decision and the final judgment (id.). The decision of the ZBA is currently the subject of appeals pending in the Appeals Court, Superior Court and Land Court (id. at 2).

On October 21, 1996, while these court cases were pending, BPD filed its petition for a zoning exemption with the Department.

III. SCOPE OF THE PROCEEDING

A. Hearing Officer January 9, 1997 Memorandum and Responses

On January 9, 1997, the Hearing Officer issued a Memorandum which noted, among other things, that the State Administrative Procedure Act states that "[p]arties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). Accordingly, the Hearing Officer found that it was appropriate, as a preliminary matter in this proceeding, to define the issues further. Noting that the scope of the present proceeding is defined by G.L. c. 40A, § 3, he directed all parties who chose to present direct evidence or argument on the issue of whether BPD qualifies as a public service corporation ("PSC") within the meaning of Massachusetts law, to provide a Memorandum of Law which addressed the issue. See 220 C.M.R. § 1.06(d)(1). The Hearing Officer also directed those parties to provide a Memorandum which identified (1) factual issues that the party believed required discovery or development on the record (with a brief explanation as to which component of the legal standard of review each issue addressed), and (2) the evidence that that party was seeking to introduce to address those issues (Hearing Officer Memorandum, January 9, 1997 at 1-2). The Hearing Officer also directed all parties who chose to present direct evidence with respect to any other aspect of the case to provide a Memorandum which identified those issues and the evidence that the party was seeking to introduce on those aspects of the case (id. at 2). The Company ("Company Memorandum"), the CCBA Members ("CCBA Members Brief"; "CCBA Members Proposed Discovery Topics Regarding Public Service Corporation Status"; "CCBA Members

Proposed Discovery Topics Regarding Zoning Exemption Generally"), and the Lawlors ("Lawlors Summary") all submitted Memoranda.

The Company argued that the Department should limit the scope of the factual issues in this proceeding since: (1) whether BPD qualifies as a PSC required legal analysis rather than factual resolution; (2) the need for the BPD facility had been adjudicated by the Siting Board; (3) the Department did not need to determine the specific zoning by-laws for which the Company needs exemption; and (4) sufficient undisputed facts existed regarding BPD's need for an exemption from the zoning by-laws (Company Memorandum at 3, 18, 21). BPD therefore requested that the Department adopt and incorporate the record of the Siting Board proceedings and "limit the introduction of evidence to new evidence relating to local interests that was not considered, and could not have been considered by the Siting Board," noting that such a limitation was especially appropriate in this proceeding because the parties were the same as those in the Siting Board proceeding (id. at 22-23).

The CCBA Members argued that the Company failed to meet the standard set forth in Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975), because it did not operate pursuant to a franchise, would not be a monopoly provider of electricity, and had no obligation to serve (CCBA Members Brief at 4-5). Further, since BPD would be a qualifying facility under the Public Utility Regulatory Policies Act of 1978, ("PURPA") 16 U.S.C. §§ 796, 824a-3, the CCBA Members claimed that BPD would be subject to significantly less governmental regulation than electric utilities at both the federal and state level (id. at 5-6). The CCBA Members specifically argued that the extent of regulation of the Company's rates

must be examined in this proceeding (id. at 7). The CCBA Members also argued that any public benefit that the Company's facility might provide must give due respect to municipal interests and that the Siting Board's determination of need for the facility must be reevaluated using current demand and supply circumstances (id. at 8).

The CCBA Members proposed the following topics for discovery: BPD's obligation to serve; the nature and extent of the Company's regulation, including regulation of its rates; the extent to which the need for the BPD facility has changed since the information reviewed by the Siting Board was analyzed; supply and demand for electricity in the region to be served by the Company; the existence of power purchase agreements; the nature of benefits to Agawam and its residents; local property value, traffic, environmental, safety and visual impacts; and whether the facility was an allowed use pursuant to the Agawam zoning by-law (CCBA Members Proposed Discovery Topics Regarding Public Service Corporation Status). The CCBA Members also proposed that discovery be allowed on whether the BPD facility would serve the public convenience and necessity, and the "availability and comparative value/impacts of alternative sites" (CCBA Members Proposed Discovery Topics Regarding Zoning Exemption Generally at 1-2).

The Lawlors argued that, in seeking an exemption, the Company should have filed with the Siting Board under G.L. c. 164, § 69K, rather than with the Department under G.L. c. 40A, § 3 (Lawlor Summary at 1). The Lawlors (1) sought to explore the background and areas of expertise of members of the Siting Board and Department, and (2) expressed their concern about the decision in this proceeding "being made by the same individuals who

decided the [Siting Board] matter" (id.). The Lawlors also contended that a review of the direction and goals of a deregulated electric industry must be an important part of this proceeding (id. at 3).

The Lawlors further argued that the term "necessity" has a different definition when reviewed before the Siting Board than before the Department, and that a review of the Company's site selection process is necessary for a determination of need for the facility in Agawam as opposed to some other location (id. at 3-4). The Lawlors contended that the Department must clearly understand "the scope and import of zoning issues" with regard to Agawam and other municipalities in the State, the scope and nature of the various local and court proceedings which are associated with this proceeding, and the opinions of various elected officials (id. at 4-5). The Lawlors argued that the Department must review the environmental impacts of the Company's facility that were reviewed by the Siting Board without balancing those impacts with costs, and should use the Department's Order in Dispatch Communications of New England, Inc. d/b/a/ Nextel Communications, Inc., D.P.U. 95-59 (1996) ("Nextel") as a guide in ruling in this proceeding (id. at 5-6, 7).

The Lawlors sought to explore through discovery the intent of specific sections of the Massachusetts General Laws regarding zoning exemptions (G.L. c. 40A, § 3) and certificates of environmental impact and public need (G.L. c. 164, § 69K); copies of correspondence between the Company and either the Siting Board or Department and between the Company and Agawam officials; the background and areas of expertise of members of the Siting Board and Department; definitions of specific statutory and regulatory terms; the nature of the public

service to be provided by the Company; the nature of the Company as it relates to the provision of a public service; laws, rules and land-use plans from other communities in which the Company's alternative sites were located; and various contracts, studies and plans executed by, or produced for, the Company (Lawlor Summary).

B. Hearing Officer Procedural Order -- February 21, 1997

The Hearing Officer reviewed the submissions of the parties and issued a Procedural Order on February 21, 1997 ("February Procedural Order"). The February Procedural Order noted that the Department reviews petitions pursuant to the standard contained in the statute under which a petition has been filed (February Procedural Order at n.2). He stated that "said Section 3 [of G.L. Chapter 40A] establishes the issues that are properly before the Department in this proceeding (id. at 4). Specifically, those issues are whether BPD is a PSC, which exemptions to the zoning by-law are required, and whether the proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public" (id. at 4). He further found that whether the petitioner may be able to petition other agencies pursuant to other statutes was not relevant to the issues to be decided by the Department in this proceeding, and that BPD had standing to pursue a zoning exemption for its approved facility (id. at 4-5 and n.2).

The Hearing Officer next reviewed the various arguments of the parties in light of the decision in Planning Board of Braintree v. Department of Public Utilities, 420 Mass. 31 (1995), the Order of the Department in Braintree Electric Light Department, D.P.U. 90-263 (1991) (which was the basis for the appeal in Planning Board of Braintree, supra), and the

associated Final Decision of the Energy Facilities Siting Council ("Siting Council") (now the Siting Board), EFSC 87-32 (id. at 6-9). The Hearing Officer noted that in D.P.U. 90-263, (1) the Department entered into its record relevant factual findings from the Siting Council proceeding in which the same project was reviewed, with the understanding that the Department was not bound by those findings, but concluded that those determinations of the Siting Council, in light of the record before the Department, demonstrated that the facility was needed, and (2) the Department's review of site selection deferred to the findings made by the Siting Council (id. at 8). The Hearing Officer noted the similarities between the proceedings surrounding the decision in Planning Board of Braintree and the present case (id. at 6). The Hearing Officer further noted that the Supreme Judicial Court ("SJC") upheld the Department's reliance on the findings of other state agencies, specifically the Siting Council, at least in situations that relate to an identical project and that have similar or identical issues to be determined, and where no contrary evidence has been provided (id. at 8). Based on this precedent, and as allowed by G.L. c. 30A, §§ 11(2), (4) & (5), the Hearing Officer took official notice of the Berkshire Power Decision, supra, and the evidence that supported the findings of fact therein and that were relevant to the present proceeding (id.).

With regard to the Company's claimed status as a PSC, the Hearing Officer found that discovery and the presentation of evidence on such status were appropriate in this proceeding, but that legal argument related thereto was an inappropriate topic for discovery and was appropriate only in motions, memoranda, and briefs (id. at 9). The Hearing Officer also found that, based on Department practice, discovery and the presentation of evidence on the

issue of which exemptions are being requested was appropriate, although he acknowledged that the SJC has said that "[t]here is no reason to require the [D]epartment to determine which specific by-laws apply, simply so it can list them as the specific by-laws from which the use is exempted" (id. at 9-10). Planning Board of Braintree, supra, 420 Mass. at 29.

In light of Planning Board of Braintree, the Hearing Officer agreed with the Company that the Department could make its required findings as to the public convenience or welfare based on the record in the Siting Board proceeding, noting however, that the intervenors would be provided the opportunity to contest the findings of fact that were officially noticed by the Hearing Officer, as allowed by G.L. c. 30A, § 11(5) (February Procedural Order at 10). Accordingly, the Hearing Officer permitted the introduction of new evidence to contest the findings of fact in the Berkshire Power Decision as part of the intervenor's direct case (id.).[4] The Hearing Officer further restricted the introduction of evidence to those issues that the Hearing Officer deemed relevant to this proceeding, i.e., those issues raised by either G.L. c. 40A, § 3 or the cases that have provided guidance in its interpretation (id. at 9-12).

The Hearing Officer also noted that in Planning Board of Braintree, supra, at 30, citing, Martorano v. Department of Public Utilities, 410 Mass. 257, 265 (1987), the SJC

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[4] The Hearing Officer noted that the Siting Board statute, G.L. c. 164, § 69J, requires that "the projections of demand" be "based on ... reasonable statistical projection methods" and that the Siting Board deems such projections suitable for granting a three year window in which commencement of construction can begin (February Procedural Order at 11). The Hearing Officer, therefore, rejected the argument that the passage of what was less than a year rendered the Siting Board's analyses of need, environmental impact and cost so stale as to require relitigation of those issues (id.).

stated that "General Laws c. 40A, § 3, does not require consideration of alternative sites" and that an exempted site need not be the "best" site available, but rather, that its use be "reasonably necessary for the convenience or welfare of the public" (id. at 10). Accordingly, the Hearing Officer found that topics related to the "availability and comparative value/impacts of alternative sites" were not the proper subjects for this proceeding (id. at 10-11).[5]

C. The Appeal of the February Procedural Order

In accordance with the provisions of 220 C.M.R. § 1.06(6)(d)(3), the CCBA Members filed with the Commission[6] a written appeal of the February Procedural Order on February 28, 1997 ("Notice of Appeal"). On March 5, 1997, the Company filed its response ("Response").

1. The CCBA Member's Notice of Appeal

In their Notice of Appeal, the CCBA Members argued that the Hearing Officer's rulings "inappropriately limit[ed] the scope of th[e] proceeding" (Notice of Appeal at 1). The CCBA Members first argued that the Department "must evaluate the need for [the Company's] product given current demand and supply circumstances," because the Siting Board findings

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[5] The Hearing Officer further noted that: (1) the backgrounds and areas of expertise of the members of the Department and Siting Board were not relevant to the present proceeding; (2) the SJC's decision in Planning Board of Braintree appeared to contradict the argument that "necessity" has a different definition when reviewed by the Department than when it is reviewed by the Siting Board; and (3) the SJC has stated that Department proceedings under G.L. c. 40A, § 3 "were not prohibited by [ongoing] Superior Court litigation" (Planning Board of Braintree, supra at 34) (February Procedural Order at 12, and n.6).

[6] The Department is under the supervision and control of a three-member Commission. G.L. c. 25, § 2.

are not conclusive in a Department zoning exemption proceeding (id. at 2-3). The CCBA Members further argued that in order to "challenge the findings made in the [Siting Board] Decision" they needed to be able to introduce evidence "which was or could have been available at the time of the Siting Board hearings," and that they should be afforded the opportunity to conduct discovery on issues raised in that proceeding (id. at 3). Finally, the CCBA Members argued that the Department has an "established practice of examining the availability and comparative values and impacts of alternative sites" in determining whether a proposed use is reasonably necessary for the public convenience or welfare, and cited three Department Orders in support thereof (id. at 4). The CCBA Members therefore concluded that this last issue should be subject to both discovery and evidence in this proceeding, and that they should be entitled to conduct discovery and enter evidence on the issues considered by the Siting Board to contradict those findings of the Siting Board (id.).

2. The Company's Response

BPD argued that the CCBA Members were attempting to expand the scope of the proceeding by urging the Department to relitigate the issues of need, alternative sites and other issues that have already been decided by the Siting Board in the Berkshire Power Decision (Response at 1, 2-3). The Company likened this to an attempt to belatedly and inappropriately appeal the Siting Board's decision in that docket (id.). BPD noted the Department's reliance on need findings of the Siting Board in prior cases and argued that the Department should rely on the Siting Board's findings on need as dispositive in this case (id. at 4). Finally, BPD argued that the CCBA Members' reliance on the Department's "practice" of reviewing issues

related to alternative sites ignores the Court's determination that the Department is not required to do so under G.L. c. 40A, § 3 (id. at 5).

3. The Commission's Order

As an initial matter, in its Order dated April 3, 1997, in this docket ("Commission Order"), the Commission acknowledged the authority of the Department, pursuant to G.L. c. 30A, § 11(5), to take official notice of specified types of facts provided parties are afforded an opportunity to contest these facts (Commission Order at 5). Accordingly, the Commission rejected the Company's argument that the Siting Board determinations on the issue of need for the Company's facility should be dispositive in this proceeding, as to do so would preclude any contest to the facts (id. at 5-6).

With regard to the argument of the CCBA Members that the Department must evaluate the need for the proposed facility given current demand and supply circumstances, the Commission found that in Planning Board of Braintree, the SJC accepted the Department's reliance on the need determination made by the Siting Council, the predecessor agency to the Siting Board, where both the Department and Siting Council proceedings related to the same project (id. at 6).[7] The Commission acknowledged that it has exercised its discretion to examine supply and demand levels in appropriate cases under G.L. c. 40A, § 3, but noted that it is not required to do so, and in fact, has previously relied on determinations made by other

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[7] The Commission noted that a similar situation existed in this Department proceeding, which was reviewing the need for a zoning exemption for the same proposed project that the Siting Board found was needed in the Berkshire Power Decision.

agencies (id.). The Commission found that the issue of need had received close scrutiny in the Siting Board's recent proceeding, and therefore concluded that it was not necessary for the Commission to exercise its discretion to revisit the issue of need in this proceeding unless new evidence was introduced that demonstrated that the Siting Board's need determination was no longer valid (id. at 7).[8]

In so deciding, the Department provided all parties an opportunity, consistent with the requirements of G.L. c. 30A, § 11(5), to contest the continued validity of the Siting Board's determination that BPD's proposed facility was needed, one of the findings of fact that was officially noticed by the Hearing Officer as allowed by G.L. c. 30A, §§ 11(2), (4) & (5) (id. at 7-9) (see also February Procedural Order at 8). Parties could do so by providing new evidence on the issue of need. The Commission then found that (1) evidence as to "current demand and supply circumstances," which the CCBA Members argued must be evaluated in this proceeding, would constitute such new evidence, and (2) the February Procedural Order specifically allowed for the submission of such evidence, thereby allowing parties to contest those matters as they related to this proceeding (id. at 7).[9]

Finally, with regard to the argument of the CCBA Members that the Department has an

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[8] The Commission also found reasonable the Siting Board's determination in its proceeding that its need analysis would be valid for the three-year planning window within which construction of the Company's facility must commence (Commission Order at 7).

[9] The Commission further noted that any challenge to findings of fact made by the Siting Board would have been appropriate only on appeal of those findings pursuant to G.L. c. 164, § 69P (Commission Order at 8).

"established practice of examining the availability and comparative values and impacts of alternative sites," the Commission acknowledged that it frequently reviews this type of information in cases where no other forum exists for local site-specific concerns to be addressed (id. at 9). However, in light of legal precedent on the issue, and of the Court's acknowledgment in Planning Board of Braintree, supra at 30, that G.L. c. 40A, § 3 does not require consideration of alternative sites (see, February Procedural Order at 10), the Commission found that there was no statutory requirement for the Department to review information about alternative sites in proceedings filed pursuant to G.L. c. 40A, § 3 (id. at 10).

The Commission concluded that:

> the similarities are significant between the present proceeding before the Department and the Department's proceeding which was reviewed by the [SJC] in Planning Board of Braintree. Accordingly, the Commission finds that the Hearing Officer's decision to conduct this proceeding in a manner that is consistent with that followed in D.P.U 90-263 [the Department proceeding which was appealed in Planning Board of Braintree] is reasonable and appropriate. Further, the Commission finds that the Hearing Officer's limitation of issues and restrictions as to discovery and the introduction of evidence in this proceeding, as set forth in the February Procedural Order, are reasonable and consistent with Department practice and legal precedent.

(id.).

Accordingly, the Commission denied the CCBA Members' appeal (id. at 11).

IV. STANDARD OF REVIEW

The Department is authorized to grant a zoning exemption pursuant to G.L. c. 40A, § 3, which, in pertinent part, provides:

> Land or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the [D]epartment of [P]ublic [U]tilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public ....

Under this section, the Company first must qualify as a PSC (see Save the Bay, supra, at 678). Second, the Company must establish that it requires an exemption from the local zoning by-laws. Finally, the Company must demonstrate that the present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare.

With respect to whether a company qualifies as a PSC for purposes of G.L. c. 40A, § 3, the SJC has stated:

> among the pertinent considerations are whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.

Save the Bay, supra, at 680.

With respect to whether a company needs a zoning exemption, the SJC has held that the Department need not determine which specific by-laws apply "simply so it can list them as the specific by-laws from which the use is exempted." Planning Board of Braintree, supra, at 29. Rather, the Department is authorized to exempt land or structures in all respects or to the extent applicable. Id. The exemption is based on whether the use of the land or structure is "reasonably necessary for the convenience or welfare of the public." Id. The availability of

alternative means by which relief from zoning restrictions may be obtained, such as appeals to the court system, do not negate the fact that a zoning exemption may be required. Id. at 31-32.

Finally, with respect to whether the present or proposed use is reasonably necessary for the public convenience or welfare, the Department must balance the interests of the general public against the local interest. Save the Bay, supra, at 685-686; Town of Truro v. Department of Public Utilities, 365 Mass. 407 (1974). Specifically, the Department is empowered and required to undertake "a broad and balanced consideration of all aspects of the general public interest and welfare and not merely [make an] examination of the local and individual interests which might be affected." New York Central Railroad v. Department of Public Utilities, 347 Mass. 586, 592 (1964). When reviewing a petition for a zoning exemption under G.L. c. 40A, § 3, the Department is empowered and required to consider the public effects of the requested exemption in the state as a whole and upon the territory served by the applicant. Save the Bay at 685; New York Central Railroad at 592.

With respect to the particular site chosen by a petitioner, G.L. c. 40A, § 3 does not require the petitioner to demonstrate that its preferred site is the best possible alternative, nor does the statute require the Department to consider and reject every possible alternative site presented. Martarano v. Department of Public Utilities, 401 Mass. 257, 265 (1987); New York Central Railroad at 591; Wenham v. Department of Public Utilities, 333 Mass. 15, 17 (1955). Rather, the availability of alternative sites, the efforts necessary to secure them, and the relative advantages and disadvantages of those sites are matters of fact bearing solely upon

the main issue of whether the preferred site is reasonably necessary for the convenience or welfare of the public. Martarano at 265; New York Central Railroad at 591; Wenham at 17.

Therefore, when making a determination as to whether a petitioner's present or proposed use is reasonably necessary for the public convenience or welfare, the Department examines: (1) the present or proposed use and any alternatives or alternative sites identified (see Braintree Electric Light Department, D.P.U. 90-263, at 51, 53 (1991); Southwestern Bell Mobile Systems, D.P.U. 89-110, at 3-5 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207, at 18-20 (1986)); (2) the need for, or public benefits of, the present or proposed use (see Tennessee Gas Pipeline Company, D.P.U. 91-197, at 11-12 (1992); Berkshire Gas Company, D.P.U. 91-204, at 10-12 (1992); Tennessee Gas Pipeline Company, D.P.U. 85-207, at 6-9 (1986)); and (3) the environmental impacts or any other impacts of the present or proposed use (see New England Power Company, D.P.U. 92-79/80, at 9-10 (1992); Southwestern Bell Mobile Systems, D.P.U. 89-110, at 5-6 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207, at 20-25 (1986)). After examining these three issues, the Department balances the interests of the general public against the local interest, and determines whether the present or proposed use is reasonably necessary for the convenience or welfare of the public.

V. DISCUSSION

We therefore commence our review of whether BPD should be granted a zoning exemption pursuant to G.L. c. 40A, § 3 with an analysis of the issue of whether BPD qualifies as a PSC for the purposes of this statute.

A. Status as a Public Service Corporation

1. Positions of the Parties

a. The Company

BPD asserts that it fully meets the test for a PSC in Save the Bay, supra, when measured against the entities that the Department and SJC previously have found to qualify as PSCs within the meaning of G.L. c. 40A, § 3 (BPD Initial Brief at 10). As noted above, the pertinent considerations in the Save the Bay test are:

> whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.

BPD asserts that the first part of the Save the Bay test for PSC status does not require the existence of a "franchise" (id. at 15). BPD states that the Department has not required applicants for PSC status to qualify as public utilities organized pursuant to G.L. 164, § 1 with an obligation to serve, but that, instead, the majority of successful PSC applicants (liquified natural gas ("LNG") companies, sightseeing companies, cellular carriers, natural gas pipelines) have provided a service determined to be necessary for the public convenience and welfare by a state or federal agency (id. at 11). BPD asserts that the issuance of a certificate of public convenience and necessity satisfies the first part of the PSC test and that the Siting Board

approval is tantamount to a certificate of public convenience and necessity (id.).[10] BPD also states that the statutory and regulatory requirements governing its activities are above and beyond the type of regulatory requirements governing private businesses and thus set it apart from other organizations that provide a service through the ordinary channels of business (id. at 16-17).

BPD asserts that it is subject to the requisite degree of governmental control and regulation and therefore meets the second part of the Save the Bay test (id. at 17). On the state level, BPD states that, under G.L. c.164, § 2, it will be subject to the jurisdiction of the Department as an electric company,[11] and the Siting Board (id. at 18).[12] In addition, BPD

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10 BPD states that the Department has relied on the issuance of a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") in determining that natural gas pipelines are PSCs; and that the FERC and Siting Board review are similar in scope (BPD Initial Brief at 11-13). BPD also states that LNG, natural gas pipeline and bus companies do not have an obligation to serve analogous to that of a Section 1 utility in that none of these entities has an obligation to make all investment necessary to provide service to any customer in a specific geographic area (BPD Reply Brief at 10-11). BPD states that it has the same type of obligation as LNG and natural gas companies (id.).

11 BPD states that it would be subject to the Department's G.L. c. 164, general supervisory authority (§ 76), rulemaking authority (§ 76C), informational requirements (§§ 80-83), oversight regarding the rights of bulk electricity users (§ 92A), and rate regulation to the extent not preempted by FERC (§§ 94, 94A) (BPD Initial Brief at 18-19).

12 BPD states that G.L. c.164, § 2 subjects BPD to jurisdiction of the Siting Board pursuant to G.L. c.164, §§ 69G-69O (BPD Initial Brief at 19). BPD further states that Siting Board approval is required before the facility can be constructed, the Siting Board regulates environmental and safety aspects of the facility, and Siting Board regulation continues throughout the operating life of the facility (id.).

states that as a New England Power Pool ("NEPOOL") member it would be subject to G.L. c. 164A (id. at 20).[13] BPD states that it also would be subject to federal regulation as an "Exempt Wholesale Generator" ("EWG") (id. at 21).[14]

BPD asserts that in Save the Bay, the SJC considered the nature of the public benefit from the service to be provided to be paramount in the determination of an entity's status as a PSC (id. at 29). Further, BPD argues that the SJC affirmed the Department's view that it was appropriate in zoning exemption cases to emphasize the need for the product rather than the existence of the obligation to serve (id.). BPD concludes, therefore, that the need for electricity should be the appropriate focus for the Department in this proceeding (id.). The Company notes that the Siting Board found a need for the facility in Massachusetts and the region by 1999 (id.).

BPD also argues that the future reliability of the supply of electricity will be jeopardized by denying the availability of zoning exemptions to entities like BPD (BPD Initial Brief at 32-33). BPD stated that, after restructuring, G.L. c. 164, § 1 utilities will no longer have an obligation to provide reliable generation to their customers (id.). Since only entities like BPD will be providing generation service, reliability of electric service will suffer if entities like BPD do not have the right to receive zoning exemptions (id.). BPD further argues

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13 BPD states that NEPOOL membership is necessary in order to gain access to the regional electric transmission grid (BPD Initial Brief at 20).

14 BPD states that FERC has jurisdiction over granting EWG status, interstate wholesale sales by an EWG, sales by EWGs to affiliated utilities, and EWG wheeling requests (BPD Initial Brief at 21).

that (1) the grant of a zoning exemption to the developer of a power plant who has already been granted approval of construction by the Commonwealth represents a minimal intrusion of state authority on local interests, and (2) the Department should not depart from a policy of a flexible application of the Save the Bay standard as it relates to status as a PSC (id. at 31-33; BPD Reply Brief at 3-4).

b. The CCBA Members

The CCBA Members argue that BPD is not a PSC (CCBA Initial Brief at 4-5). The CCBA Members assert that companies that have satisfied the first pertinent consideration of the Save the Bay standard are utilities or monopoly providers of services that have an obligation to serve[15] and that such companies have traditionally been characterized by public ownership and grant of monopoly power given by the state in order to promote the cost effective construction of infrastructure necessary to provide services to all (id. at 4, 8-9). The CCBA Members state that BPD does not meet this standard since it will not operate pursuant to a franchise from the state with an obligation to serve the public, but instead is a private business that will compete in the wholesale power market to furnish a product through the ordinary channels of private business (id. at 5; CCBA Reply Brief at 2).[16] The CCBA

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[15] The CCBA Members state that LNG and bus companies found to be PSCs have an obligation to serve because (1) under the Natural Gas Act, FERC may order an LNG company to extend its facilities to serve other LNG distribution facilities, and (2) the SJC has found that a bus company is a common carrier that has to observe filed rate schedules and serve the public without discrimination (CCBA Initial Brief at 10-11).

[16] The CCBA Members state that where a competitive market exists for the service, an (continued...)

Members further state that issuance of a Siting Board approval to operate the facility is not the type of franchise contemplated by the SJC in Save the Bay -- a franchise granted by the Legislature or other regulatory body to serve a particular area (id. at 6).[17] The CCBA Members add that whether an applicant holds an appropriate franchise is determined based on the nature of the permit rather than the review entailed in the issuance of such approvals (CCBA Reply Brief at 3).[18]

The CCBA Members argue that BPD's business decisions and operations that are regulated, such as the nominal regulation of BPD's rates, are not the type of government regulation which warrants PSC status (CCBA Initial Brief at 11-16). The CCBA Members state that EWG status will exempt BPD from laws which generally regulate the ownership of PSCs and that the decision from the Siting Board does not constitute sufficient government regulation for the Department to find that BPD is a PSC (id. at 12-13, 15-16).[19] The CCBA

(...continued)
appropriate franchise does not exist and that the wholesale electricity market in New England is a bilateral, voluntary and competitive free market (CCBA Brief at 5-6).

17 The CCBA Members state that many heavily regulated industries must go through a siting process or receive a determination of need in order to operate but that these permits are not considered to be state-issued franchises (CCBA Initial Brief at 6-7).

18 The CCBA Members state that although the federal certificate issued under the Natural Gas Act and siting approval from the Siting Board both require a finding of need, the rights and obligations associated with both are not analogous (CCBA Initial Brief at 8). The CCBA Members state that the federal certificate confers franchise rights and other rights and obligations, which are not conferred by approval from the Siting Board (id.).

19 The CCBA Members state that a certificate of public convenience and necessity is not determinative of the issue of whether an entity is sufficiently regulated so as to be a
(continued...)

Members add that BPD will experience less regulation after electric industry restructuring (CCBA Reply Brief at 3-5). Further, the CCBA Members note that NEPOOL membership is voluntary (id., CCBA Initial Brief at 10).

The CCBA Members argue that the fact that BPD will produce a commodity the public demands does not establish that the public benefit from these services is sufficient to warrant PSC status (CCBA Initial Brief at 17). The CCBA Members state that BPD will sell electricity to distributors rather than end-users and that the nature of the public benefit derived from its service is materially different from the benefit derived from retail sellers (id.). The CCBA Members add that other types of companies that are regulated by the state or federal government that benefit the community (i.e., hospitals, banks, hazardous waste facilities) are not considered PSCs (id.).[20]

The CCBA Members add that BPD differs from New England LNG, the company that was the petitioner before the Department in Save the Bay, supra, in that New England LNG (1) was assigned a specific service area and has power of eminent domain under its certificate of public convenience and necessity; (2) is subject to rate regulation by the Department; (3) distributes its product to Massachusetts companies; and (4) is subject to G.L. c. 164,

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PSC, noting that in Nextel, supra, the Department found that a federal certificate of public convenience and necessity did not constitute sufficient governmental control to qualify that petitioner as a PSC (CCBA Initial Brief at 15-16).

[20] BPD responded that entities like banks are not entitled to zoning exemptions under G.L. c. 40A, § 3 because they are not regulated by the Department (BPD Reply Brief at 4, n.1).

§§ 76A and 85 as an entity affiliated with a G.L. c. 164, § 1 utility (id. at 18-20).[21] In addition, the CCBA Members asserted that entities that are G.L. c.164, § 2 electric companies and that also qualify for tax exempt manufacturing status are not PSCs (id. at 20-22).[22]

c. The Lawlors

The Lawlors note that BPD acknowledged in response to a Department information request that it "does not possess a franchise in the traditional sense of the word in the utility context" and therefore argued that BPD does not possess an appropriate franchise from the State (Lawlor Brief at 1). The Lawlors further argue that in a restructured electric market, non-regulated utility generators would distribute power through the ordinary channels of private business (id. at 1-2). The Lawlors therefore conclude that BPD fails to "meet the first prong of the Save the Bay considerations" (id. at 2). In addition, the Lawlors note that BPD does not have an obligation to serve (id.).

2. Analysis and Findings

In determining whether BPD qualifies as a PSC under G.L. c. 40A, § 3, we take into account the purposes of the statute, the pertinent consideration identified by the SJC in Save

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21 BPD responded that: (1) there is no indication in Save the Bay that New England LNG was assigned a specific service area pursuant to its certificate of public convenience and necessity; (2) intrastate retail sales made by BPD will be subject to Department review; (3) the need for the gas to be supplied by the petitioner was the critical threshold factor in Save the Bay; and (4) affiliation with a G.L. c. 164, § 1 utility was only one factor in establishing the requisite degree of government control and regulation in that proceeding (BPD Reply Brief at 13-17).

22 BPD replied that the determination of the appropriate manner in which an entity must pay taxes is irrelevant to its qualification as a PSC (BPD Reply Brief at 17).

the Bay, supra, and the precedent of the courts and the Department on this issue. Specifically, the Department has stated that

> the statute is intended to provide regulated entities, most often public utilities, with the ability to site necessary facilities in order to benefit the public, and to provide a broad and balanced consideration of all the public interests involved, including local and more general public interests. See [Planning Board of] Braintree, 420 Mass. at 27 (focusing on zoning exemptions as a means to enable utilities to fulfill their obligation to serve) (citations omitted); New York Central Railroad, 347 Mass. at 592.

Nextel, supra, at 11. In Nextel, the Department acknowledged that the types of entities which have been granted PSC status under G.L. c. 40A, § 3, include investor-owned and municipal gas and electric utilities, pipelines, railroads, common carriers, and two cellular service providers. Id. In that decision, the Department noted that among the important attributes of the companies that have received this status are the following: the company is a utility or monopoly provider of services; the company has an obligation to serve; and the company is subject to a scheme of significant governmental regulation (cites omitted). Id. at 12. The Department also acknowledged that "[w]hile a petitioner need not demonstrate that it possesses all of these characteristics to qualify for [PSC] status, it must demonstrate that its purpose comports with the goals of the statute and with the criteria of Save the Bay." Id.

With regard to the goals of the statute, the Department has said in a review of a municipal electric utility's zoning exemption petition that "[t]he cases indicate that the zoning exemption available under G.L. c. 40A, § 3 was intended to assure that utilities' obligation to serve is not precluded by local concerns." Braintree Electric Light Department, D.P.U. 90-263 (1991) at 41.

Here, the Department must determine whether an independent power producer such as BPD qualifies as a PSC for the purposes of G.L. c. 40A, § 3. Although independent power producers and other non-utility generators have played an increasing role in the Commonwealth's electric industry since the passage of PURPA in 1978, the Department has never been asked to rule on whether they qualify as PSCs. Therefore, this is a case of first impression. Moreover, the role of independent power producers in the Commonwealth's electric industry has changed over time. Further changes can be expected as Massachusetts restructures its electric industry, and as electric utilities divest their generating assets. Thus, the issues before the Department in the present proceeding are how the Department should (1) interpret the intent of the Legislature in enacting G.L. c. 40A, § 3 in an environment that is significantly different from that in which the section was first enacted, and (2) apply the section in this changed environment.

In essence, BPD argues that the Department should interpret the statute (i.e., G.L. c. 40A, § 3) and precedent broadly and find that BPD is a PSC. The CCBA Members and the Lawlors, on the other hand, argue that the statute and precedent should be read narrowly so as to exclude such new entities as independent power producers unless they closely resemble a traditional monopoly utility.

We commence our analysis of the intent of Section 3 with a look at the words and phrases contained in the statute.[23] The Department notes that the term "public service

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[23] The SJC has held that, in construing a statute, common words and phrases employed in (continued...)

corporation" has no statutory definition. The lack of such a statutory definition requires that the Department look elsewhere for guidance. Initially, we look to the rest of the statute,[24] which states that a PSC provides a product or service that is "reasonably necessary for the convenience or welfare of the public."[25]

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the statute are to be accorded their usual meaning. Commissioner of Corp. & Tax v. Chilton Club, 318 Mass. 285, 288-289 (1945), citing, Fluet v. McCabe, 299 Mass. 173, Hinckley v. Retirement Board of Gloucester, 316 Mass. 496, and Killiam v. March, 316, Mass. 646. In addition, statutory language, when clear and unambiguous, must be given its ordinary meaning. Bronstein v. Prudential Ins. Co. of America, 390 Mass. 701, 704 (1984); Hashimi v. Kalil, 388 Mass. 607, 610 (1983).

[24] The SJC has also held that none of the words of a statute is to be disregarded, for they are the main source for the ascertainment of the legislative purpose. Commissioner of Corp. & Tax. v. Chilton Club, 318 Mass. 285, 288 (1985); Nichols v. Commissioner of Corp. and Tax., 314 Mass. 285 (1943).

[25] The Department does not read G.L. c. 40A, § 3 as an expansion of its general supervisory powers, and therefore rejects the argument of the CCBA Members that entities involved in activities outside the scope of the Department's expertise (e.g., hospitals, banks, hazardous waste facilities) could petition the Department under said Section 3. The Department notes the statement of the SJC that: "[n]o word in a statute is to be treated as superfluous, unless no other possible course is open." Commonwealth v. McMenimon, 295 Mass. 467, 469 (1936). Had the Legislature intended all PSCs to be eligible for an exemption to zoning, the words "department of public utilities," as used in G.L. c. 40A, § 3, would be superfluous as the local permitting authority could make the determination of necessity and grant the exemption when appropriate to any PSC. The Department therefore reads Section 3 as giving it the authority to grant zoning exemptions only to entities who provide services in those areas in which the Department acts.

Although other entities may provide a product or service that is "reasonably necessary for the convenience or welfare of the public" and therefore may constitute PSCs under our reading of the statute, without specific language that indicates that G.L. c. 40A, § 3 was intended to expand Department jurisdiction to areas beyond our expertise,

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Similarly, no definition for the term "public service corporation" has been provided by the Courts. Rather, in its decision in Save the Bay, supra, at 680, the SJC has provided a list of "pertinent considerations" to be used when making a determination as to whether an entity is a PSC.[26] The Department interprets this list not as a test, but rather as guidance to ensure that the intent of G.L. c. 40A, § 3 will be realized, i.e., that a present or proposed use of land or structure that is determined by the Department to be "reasonably necessary for the convenience or welfare of the public" not be foreclosed due to local opposition.[27]

These "pertinent considerations" provide a flexible set of criteria which allow the Department to respond to changes in the environment in which the industries it regulates operate and still provide for the welfare of the public. We illustrate this by looking to the first "pertinent consideration" listed in Save the Bay, i.e., whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business.

As noted above, in 1978, three years after the Save the Bay decision, the federal

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petitions to the Department by such entities would likewise be rejected.

[26] The Department notes that "public service corporation" appears to be a unified term as the SJC has held that it "is a term of art which is not limited to corporations." See Planning Board of Braintree, supra, at 26, citing, Brand v. Water Comm'rs of Billerica, 242 Mass. 223, 226 (1922) and other cases.

[27] See, Save the Bay, supra, at 685-586; Town of Truro, supra, at 407; New York Central Railroad, supra, at 592.

government enacted PURPA.[28] Prior to PURPA, electric power generation facilities were constructed and operated by electric utilities with state or federal franchises and distinct obligations to serve the public within their franchise territory. Thus, electric utilities would generate (or purchase) their own electric power, and through their transmission and distribution systems, deliver the electric power to end-users within their franchise territory. After the enactment of PURPA, electric utilities could continue to generate their own electric power, and sell that power as before. However, PURPA opened the power generation market to independent power producers and cogenerators who would generate electric power and sell that power at wholesale to electric utilities for retail sale.

Now, some two decades later, planned restructuring of the electric industry appears to be moving toward independent generation, transmission, and distribution markets, with perhaps only the distribution portion of the industry having an initial state franchise with some kind of obligation to serve. Therefore, the Department finds the pertinent consideration of "an appropriate franchise" as listed in Save the Bay to be of limited value in the electric industry as it has evolved since the Save the Bay decision was issued.

The remainder of the first consideration in Save the Bay, i.e., "to provide for a

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[28] The Department notes that the CCBA Members have incorrectly concluded that the proposed BPD facility would be a qualifying facility under PURPA. A qualifying facility under PURPA is a non-utility electric cogenerator with the capability to generate both electric energy and useable steam, of which a specified portion of the steam byproduct must be sold, in addition to the sale of electric power. 16 U.S.C. §§ 796, 824a-3. BPD has been permitted by the Siting Board as an independent power producer, not as a qualifying facility. See Berkshire Power Decision, 4 DOMSB at 237, 240, & n.6.

necessity or convenience to the general public which could not be furnished through the ordinary channels of private business," however, still retains value in determining whether an entity is a PSC. Electricity is a product that is delivered through an integrated generation, transmission and distribution system. A comprehensive system of regulation has developed at both federal and state levels to ensure that this product is provided to customers safely, reliably and at a reasonable cost, In Massachusetts, the system of regulation also requires that electricity be provided with a minimum impact on the environment. While changes are being made in the electric power industry, and the generation segment of the industry is moving toward competition, that does not change the fact that electricity can only be furnished to customers through a transmission and distribution system that remains comprehensively regulated. Thus, the provision of electricity over such an integrated and regulated system is not comparable to the furnishing of a product through the ordinary channels of private business.

At the time Save the Bay was issued, the Department's authority under G.L. c. 40A, § 3 was equally available to the generation, transmission and distribution elements of the electric power industry. As a result, end-users of electric power could be assured that the Department had the authority to ensure that local zoning issues would not serve as an impediment to the provision of that power by granting a zoning exemption for generation, transmission or distribution facilities. If the Department were to accept the argument of the CCBA Members and the Lawlors that only a local distribution company (which may have an initial state franchise and has some kind of obligation to serve) could qualify as a PSC and

therefore be eligible for a zoning exemption under G.L. c. 40A, § 3, then the Department could approve zoning exemptions only for *distribution* facilities. The Department finds that such a distinction would seriously compromise the original intent of the statute to allow for the use of land or structures in order to provide a product or service that is deemed reasonably necessary for the convenience or welfare of the public. This is especially so where a determination of need for a proposed facility has been made.

Therefore, we conclude that, as in the past, the generation and transmission, as well as the distribution, elements of the electric power industry should be entitled to the same safeguards. The Department finds that electric power is a necessity in the society in which we live. Accordingly, we find that BPD's proposed facility, once operational, will provide a necessity to the general public which could not be furnished through the ordinary channels of private business.[29] We agree with the CCBA Members and the Lawlors that the electric industry has changed and is likely to change further. However, for the reasons stated above, we disagree with the CCBA Members and the Lawlors that the new electric industry entities should therefore be treated differently than we historically have treated electric utilities.[30]

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[29] In so deciding, the Department makes no prediction as to whether changes in the way electric power is furnished in the future may warrant a different conclusion.

[30] The changes that have occurred in the electric power industry since Save the Bay was issued are intended to benefit end-users of electric power in the form of increased choice and decreased costs. The fact that developers of power generation facilities may also benefit from these changes by allowing for competition in this market does not mean that electric customers must lose some of the protections they originally were given through the operation of G.L. c. 40A, § 3. The Department notes that if it were

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The second "pertinent consideration" identified in Save the Bay, is "whether the corporation is subject to the requisite degree of governmental control and regulation." 366 Mass. at 680. Here again, neither the statute nor Court decisions have identified what level of governmental control and regulation is required. The Department has indicated that such regulation, as it has been applied to other PSCs "can include oversight of entry, siting, rates and tariffs, financing, safety, and resolutions of consumer complaints at the federal and/or state level." Nextel, supra, at 18. The Department also has not attempted to define minimum requirements for such control and regulation, but rather has decided the issue based on the specifics of each case before us. In Braintree Electric Light Department, supra, at 30, we identified eleven "attributes and regulatory oversight" that existed for that municipal utility.[31] Further, we have never held that any one specific type of regulatory oversight is necessary for an entity to be considered a PSC.

The Department notes that BPD will be subject to oversight by the Department as an electric utility as defined under G.L. c. 164, § 2, including, among other things, the Department's general supervisory oversight under § 76 of that chapter and the requirement to provide electricity in bulk under that chapter's § 92A anti-discriminatory provisions. Further,

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to adopt the position of the CCBA Members and the Lawlors and treat these new power generators differently than we have historically treated electric utility generators, electric customers would in fact lose some of those protections.

[31] In fact, as discussed below, BPD shares no less than five of those same attributes and would be subject to federal regulation that the Braintree Electric Light Department was not.

BPD is subject to regulation by the Siting Board under G.L. c. 164, to the NEPOOL statute (G.L. c. 164A) and the NEPOOL Agreement,[32] and to the FERC with regard to wholesale sales of electric power and BPD's status as an EWG. As a result, BPD will be subject to oversight of entry, siting, safety, and to a lesser extent, rates and consumer complaints at either the federal or state level. Accordingly, the Department finds that BPD will be subject to the requisite level of governmental control and regulation.[33]

The third "pertinent consideration" identified in Save the Bay, is the "nature of the public benefit to be derived from the service provided." 366 Mass. at 680. Here, the Department reiterates that the service provided, namely the generation of electricity, is a public necessity that is critical to public health and safety, and fundamental to the Massachusetts economy. The nature of the public benefit that is derived from the generation of electricity is not dependent on the vertical integration of the electric industry, or on the

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32 The record indicates that NEPOOL membership is voluntary but is required to obtain access to the New England power grid and therefore is necessary in order to market the electric power generated by a NEPOOL member's generation facility (Tr. at 38-40). As no evidence was offered to contradict this assertion, the argument of the CCBA Members, that any regulation based on such a voluntary membership should be discounted, is unpersuasive.

33 The Lawlors and the CCBA Members also argue that BPD may in the future be less subject to regulation than it is today. The Department holds that its determination in this case must be based on current and known future levels of regulation, not on mere speculation. However, the Department also notes that its efforts over the past two years have been aimed not at deregulation but at restructuring the electric industry to allow retail choice in generation providers. To the extent that BPD wishes to avail itself in the future of direct access to the retail market, it may well be subject to more state-level regulation, particularly in the areas of consumer protection and environmental disclosure, rather than less.

corporate structure of the generator; rather, it stems from the needs of the electricity consumer. Because of the unique role that electricity plays in the economy of the Commonwealth and the lives of its citizens, the Department must be able to ensure that critical infrastructure for the generation, transmission, and distribution of electricity can be sited whenever and wherever it is reasonably necessary to the public convenience and welfare. Based on the nature of the public benefit to be derived from the service provided, the Department finds that the removal of obstacles to the provision of such a public benefit is consistent with the intent of G.L. c. 40A, § 3.

In the Nextel decision, the Department listed various attributes of the companies that have been granted PSC status by the Department in previous cases. Although in that case the Department concluded that Nextel was not a PSC, here, the Department finds that BPD possesses many attributes of the companies that have previously been granted status as a PSC by the Department. Further, the Department finds that BPD has demonstrated that its purpose comports with the goals of the statute and with the criteria of Save the Bay. Accordingly, we find that BPD is a PSC.

B. Need for the Exemptions

We continue our review of whether BPD should be granted a zoning exemption pursuant to G.L. c. 40A, § 3 with an analysis of the issue of whether BPD requires such an exemption.[34]

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[34] The Lawlors did not brief this issue, but argued that the appropriate fora for BPD, "or (continued...)

1. Positions of the Parties

a. The Company

BPD argues that it has established a compelling need for a zoning exemption in that the Commonwealth's interest in the availability of the project by 1999 to meet its energy needs cannot be protected by reliance on the ultimate disposition of the appeal of its zoning permit.

b. The CCBA Members

The CCBA Members argue that BPD has not demonstrated a need for the zoning exemption because BPD may prevail in the appeal and obtain the permit which the Superior Court has determined was granted by the Agawam ZBA.

2. Analysis and Findings

The Department notes that G.L. c. 40A, § 3 authorizes the Department to grant exemptions "in particular respects from the operation of a zoning ordinance or by-law." In Planning Board of Braintree, supra, the petitioner before the Department had filed its petition "due to its concern over the effect prolonged litigation could have on its ability to serve the public." 420 Mass. at 31-32. The SJC noted that the scope of the zoning by-law was being addressed in the litigation before the Superior Court, but that "[t]he proceedings before the [D]epartment were not prohibited by the Superior Court litigation." Id. at 32. The

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any private company, to address zoning issues is before the municipal boards or in the Massachusetts Courts" (Lawlor Brief at 2). The Department here notes that, as a matter of law, if BPD is a PSC, the Department provides a third forum for reviewing such issues.

Department notes that the statute contains neither a requirement that local relief must first be sought, nor that such relief must subsequently be denied, before the Department may be petitioned. Further, the statute contains no language that would indicate that petitioners who attempt to work with a local permitting authority to address local concerns waive their rights to seek an exemption from the Department until the local permitting process, including court appeals, is complete.[35] We therefore conclude that BPD's potential to prevail in its appeal has no relevance to the question of whether BPD needs an exemption to the Agawam zoning by-laws.

In the current case, it is clear that BPD has filed with the ZBA for relief from the Agawam zoning by-laws. Further, it is clear that, although relief has been granted by the ZBA, such relief has been effectively denied as a result of outstanding litigation in the Superior and Land Courts, thereby preventing BPD from constructing its proposed facility, which the Siting Board has found is necessary to provide for the Commonwealth's energy needs starting in 1999. It is also clear from the record, as evidenced by the ongoing litigation before the Superior and Land Courts, that the parties to this proceeding are involved with an active zoning controversy regarding BPD's proposed facility which would be resolved if the Department were to grant BPD an exemption to the Agawam zoning by-laws. The Department has found in Section V.A.2, above, that BPD is a PSC. Accordingly, BPD is

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[35] In fact, the Department finds that such a reading of the statute would create a perverse incentive for a petitioner to forego any attempt to accommodate concerns of the local permitting authority in favor of petitioning the Department for a zoning exemption.

authorized to petition the Department for an exemption to the Agawam zoning by-law pursuant to G.L. c. 40A, § 3. The Department here finds that BPD is involved in litigation that could affect its ability to construct its proposed facility to meet the Commonwealth's energy needs starting in 1999. See, Planning Board of Braintree, supra. Accordingly, the Department finds that BPD has satisfied the showing under G.L. c. 40A, § 3 that a zoning exemption is required for its proposed facility.

C. Public Convenience and Necessity

We complete our review of whether BPD should be granted a zoning exemption pursuant to G.L. c. 40A, § 3 with an analysis of the issue of whether BPD's proposed project is reasonably necessary for the convenience or welfare of the public.

1. Positions of the Parties

a. The Company

The Company argues that BPD's proposed facility meets and exceeds the standards that the Department employs in reviewing the public convenience and necessity as evidenced by the approval it received from the Siting Board (BPD Initial Brief at 34-35, citing, Berkshire Power Decision, 4 DOMSB at 221). Specifically, BPD argues that its proposed facility satisfies the Department's need and benefit standards, in addition to having been sited at an appropriate site that minimizes environmental impacts (id. at 35-39). BPD lists several benefits that would accrue to the Town and notes that "significant local involvement" in the Siting Board process and BPD's agreement to comply with the conditions imposed by the Town's ZBA in the settlement agreement concerning requested zoning relief support a conclusion that "the degree

of intrusion of the general public's interests on the Town's interests will be minimal" (id. at 37, 41, n.13). The Company concludes therefore that, after balancing the interests of the general public against the local interest at stake, the interests of the general public outweigh the local interests (id. at 34, 41).

b. The CCBA Members

The CCBA Members did not specifically address the issue, but state that they do not concede that the proposed project is reasonably necessary for the public convenience or welfare (CCBA Initial Brief at 25). The CCBA Members state that BPD carries the burden of meeting this standard and contend that BPD has not met its burden (id.).

2. Analysis and Findings

Under G.L. c. 40A, § 3, the Department must find that the "proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public." As noted in Section IV, above, when making such a determination, the Department examines the need for, or public benefits of, the proposed use; the proposed use and any alternatives or alternative sites identified; and the environmental impacts or any other impacts of the proposed use. After examining these three issues, the Department balances the interests of the general public against the local interest, and determines whether the proposed use is reasonably necessary for the convenience or welfare of the public.

In an attempt to avoid duplication and, to the maximum extent possible, coordinate reviews of projects, it is the Department's policy to put on the record decisions of other state agencies in which relevant factual findings have been made. See, e.g., Braintree Electric

Light Department, supra, at 50-56; Commonwealth Electric Company, D.P.U. 89-131, at 15 (1990). Although these factual findings are not legally binding or dispositive of the issue, the Department places great evidentiary weight on those findings as a matter of comity and deference. In keeping with this policy and Department precedent, the Berkshire Power Decision, supra, was entered into the record in this docket (see Exh. BP-IP-1).

On the issue of need for BPD's proposed project, the Siting Board found that the record in its proceeding demonstrated "a showing of need for 252 MW or more of additional energy resources in the Commonwealth for reliability purposes beginning in 1999 and beyond and a likely need for 252 MW or more of additional energy resources in the region beginning in 1999 and beyond." Berkshire Power Decision, supra, at 304. Accordingly, the Siting Board further found that BPD's "proposed project is needed to provide a necessary energy supply for the Commonwealth beginning in 1999 and beyond." Id. In addition, the Siting Board found that, upon compliance with specific conditions set forth in its decision, the construction and operation of the proposed project would be consistent with providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at lowest possible cost, in keeping with the Siting Board's statutory obligations under G.L. c. 164, § 69H. Id., at 446.

No evidence has been presented that would refute the Siting Board's determination that BPD's proposed facility is needed, nor have the intervenors proffered any such argument. The record in this proceeding reflects that the issue of need for the subject facility received close scrutiny by the Siting Board. Consistent with the findings of the Siting Board in the Berkshire

Power Decision and our review of record evidence in this proceeding, we find that BPD's proposed project is needed to provide a necessary energy supply for the Commonwealth beginning in 1999 and beyond.

BPD has petitioned the Department for an exemption from the Agawam zoning by-laws, in particular, from the requirements of Section 180-63 of Article XI (building height) and Section 180-62 of Article XI (permitted uses within Industrial District B) (Exh. DPU-8(rev. 2)). In addition, BPD has requested exemption from the Zoning Code in general: (1) to remove any question as to the applicability of future amendments thereto; (2) because various sections of the Zoning Code, including Section 180-62 of Article XI, refer to other Zoning Code sections; and (3) because BPD will need to procure a building permit and oil storage permit in the future, and both of these permits may raise issues related to compliance with local zoning by-laws (id.; DPU-RR-1). BPD argued that granting the requested general exemption to the Agawam Zoning Code was in the Department's authority and would prevent any future challenge to the granting of other permits BPD is required to procure that may be contingent on BPD's proposed project being otherwise consistent with the Zoning Code. The requested exemptions pertain to the site on which BPD plans to construct its proposed facility.

The record reflects that issues pertaining to the siting of the proposed facility have received careful review before appropriate regulatory agencies at both the local and state levels. Under G.L. c. 164, § 69J, a proponent petitioning the Siting Board for approval of a facility must provide information regarding "other site locations." In implementing this

statutory mandate, the Siting Board requires a petitioner to demonstrate that it examined a reasonable range of practical facility siting alternatives. Berkshire Power Decision, supra, at 347-348 (and cases cited therein). Specifically, a petitioner must establish that it developed and applied a reasonable set of criteria for identifying and evaluating site alternatives, with some degree of geographic diversity, in a manner which ensures that it has not overlooked or eliminated any alternatives which are clearly superior to the proposed site. Id.

The record shows that the Siting Board conducted an extensive review of matters pertaining to the siting of the proposed facility. See Id. at 347-357. In the Berkshire Power Decision, the Siting Board noted that BPD developed a broad array of criteria that addressed the critical issues associated with the siting of generating facilities which were consistent with such criteria used in prior energy facility siting cases. Id. at 351-352. The Siting Board further noted that BPD then incorporated "a systematic qualitative approach to comprehensively evaluating site attributes based on their relative importance for ensuring a least-cost, minimum-environmental-impact project." Id. at 352. The Siting Board then concluded that BPD appropriately applied the identified criteria to its twenty identified sites "in a manner that ensure[d] that it ha[d] not overlooked or eliminated any clearly superior sites." Id. at 353, 356.

The Siting Board decision reflects that, in assessing the two "best" sites, the Siting Board considered environmental impacts (i.e., air quality, water-related impacts, visual impacts, noise, traffic, safety, electric and magnetic fields, and land use) and costs associated with constructing the proposed facilities at both sites. Id. at 358-445. In conclusion, the

Siting Board found that BPD's proposed site for its facility was preferable to all of the alternatives with respect to minimizing environmental impacts consistent with minimizing cost. Id. at 445.

On the local level, BPD has received an Order of Conditions from the Agawam Conservation Commission and site plan approval from the Town Planning Board (Exh. BP-1 at 3). BPD has also entered into a settlement agreement relative to requested zoning relief with the ZBA (Id. at 9). This settlement agreement subjects BPD to some 40 conditions with which BPD has agreed to comply, even if granted the exemption requested in this proceeding (see Exh. DPU-8(rev. 2), at 2). The record reflects that BPD made a conscientious effort to secure all governmental and other regulatory approvals perceived to be necessary before petitioning the Department pursuant to G.L. c. 40A, § 3. We find no evidence that BPD deliberately sought to avoid any required approval, and further note that BPD must still procure a building permit and oil storage permit and comply with any conditions imposed by those permits.

The record reflects that environmental impacts and cost were important considerations for BPD in selecting an appropriate site for its proposed facility. The record also reflects that various agencies and organizations within Agawam were approached with, and approved of the siting of the facility. In these matters, the Department finds it reasonable to rely on such local decisions and the decision of the Siting Board which has a statutory mandate to ensure that a proposed site appropriately balances environmental impacts and cost. With due consideration given to the findings by the Siting Board and the local permitting authorities, the Department finds that both BPD's selection process and the choice of sites for the proposed facility were

reasonable.

Accordingly, after reviewing: (1) the need for BPD's proposed facility; (2) the site selection process undertaken by the Siting Board, including alternative sites identified therein, and the reviews and permits issued by the Agawam Conservation Commission, Planning Board, and ZBA; and (3) the environmental impacts and other impacts of the proposed use, the Department finds that in balancing the interests of the general public against the local interest, BPD's proposed use of the Agawam site is reasonably necessary for the convenience or welfare of the public.

In undertaking this balancing of general public and local interests, the Department has relied on the existing permits and approvals, the settlement agreement between BPD and the ZBA, and the conditions contained in these documents. The Department notes that its balancing acknowledges that local interests will be protected by BPD's compliance with all such conditions. Accordingly, nothing in this Order shall be read to grant BPD any relief from the conditions and requirements contained in these documents.

VI. ORDER

After due notice, public hearing, and consideration, the Department

DETERMINES: That the Berkshire Power Development, Inc. proposed facility in Agawam requires exemption under G.L. c. 40A, § 3, from the Agawam zoning by-laws insofar as the application of those by-laws precludes timely construction and operation of the proposed facility; and,

FINDS: That BPD's proposed facility is reasonably necessary for the convenience or welfare of the public under G.L. c. 40A, § 3; and it is

ORDERED: That the petition of Berkshire Power Development, Inc. be allowed and that BPD's proposed facility in Agawam, as described in BPD's exhibits on file with the Department, be exempt, as described herein, from the operation of the zoning by-laws of the Town of Agawam, insofar as the application of those by-laws precludes timely construction and operation of the proposed facility at issue in this petition; and it is

FURTHER ORDERED: That the exemption granted in this Order applies only to the facility proposal presented to the Department in this proceeding.

By Order of the Department,

Janet Gail Besser, Acting Chair

John D. Patrone, Commissioner

A true copy
Attest:

MARY L. COTTRELL
Secretary

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).