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Pursuant to G.L. c. 164, § 69J¼, the Massachusetts Energy Facilities Siting Board (“Siting Board”) hereby dismisses for lack of subject matter jurisdiction the Petition of Cranberry Point Energy Storage, LLC (“Cranberry Point” or “Company”) to construct a 150 megawatt (“MW”), 300 megawatt-hour (“MWh”) battery energy storage system (“BESS”) and ancillary facilities to be located in Carver, Massachusetts.<sup>1</sup> The Siting Board furthermore relinquishes its jurisdiction over the Company’s petition filed pursuant to the zoning exemption statute, G.L. c. 40A, § 3. The zoning exemption petition will be decided by the Department of Public Utilities (“Department”).

## I. INTRODUCTION

### A. Description of the Proposed Project

On August 27, 2021, pursuant to G.L. c. 164, § 69J¼, Cranberry Point Energy Storage, LLC (“Cranberry Point”) filed with the Energy Facilities Siting Board (the “Siting Board”) a petition (the “Siting Board Petition”) for approval to construct a battery energy storage system (“BESS”), a new substation (“Project Substation”), ancillary electrical equipment, and a new Eversource-owned switching station (“Switching Station”) (collectively, the “Project”). On May 11, 2022, pursuant to G.L. c. 40A, § 3, the Company filed a petition for a Comprehensive Exemption from the Operation of the Town of Carver Zoning Bylaws with the Department of Public Utilities (“Department”).

The Project would be located on a six-acre parcel of land at 31R Main Street, Carver, Massachusetts (“Project Site”), currently under an Option to Lease held by the Company with the landowner (Exhs. CP-B at 1; CP-8; CP-9; EFSB-G-7; Tr. 1 at 10). The Project (except for the Eversource Switching Station and certain transmission facilities) will be owned and operated by Cranberry Point (Exh. CP-B at 1, 11). Cranberry Point is a subsidiary of Plus Power, LLC, which develops utility-scale standalone battery energy storage projects (Exh. CP-AJS at 1). According to Cranberry Point, the Project would store electricity, during times of oversupply, and dispatch the electricity, during times of peak demand on the electric grid (Exh. CP-B at 1).

The Project would include the construction of a 150 megawatt (“MW”), 300 megawatt-hour (“MWh”) BESS with lithium-iron phosphate battery modules built into approximately

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<sup>1</sup> The Siting Board is concurrently issuing a decision on the limited issue of Siting Board jurisdiction in Medway Grid, LLC, EFSB 22-02/D.P.U. 22-18/22-19 (“Medway Grid”).

82 individual enclosures supported by concrete slabs and pier foundations and surrounded by crushed stone (Exh. CP-B at 11; Tr. 1, at 10). The Switching Station on the western portion of the Project Site, and new transmission structures on an existing Eversource right-of-way (“ROW”), would both be constructed, owned, and operated by NSTAR Electric Company d/b/a Eversource Energy (“Eversource”) (Exh. CP-B at 11-12; Eversource Brief at 1).

The Project Site is located in the Town of Carver’s (“Town”) Residential Agricultural (“RA”) zoning district (Exh. CP-Z at 2). The Town’s Zoning Bylaw requires obtaining Site Plan Review Approval and a Special Permit from the Town of Carver Planning Board before constructing and/or operating a BESS in the RA district (Exh. CP-Z at 2). Cranberry Point received Site Plan Review Approval and a Special Permit from the Carver Planning Board and an Order of Conditions by the Town’s Conservation Commission to construct the Project on March 26, 2019, and February 6, 2019, respectively. (Exhs. CP-Z at 2; CP-3, at 1; CP-B at 10). The Town of Carver Zoning Bylaws Article II, § 2100, allows BESS in the RA district after receipt of a Site Plan Review Approval and Special Permit by the Town (Exh. CP-Z, Attach. 1 at 2100 (C), p. 7; Tr. 1 at 90-91).

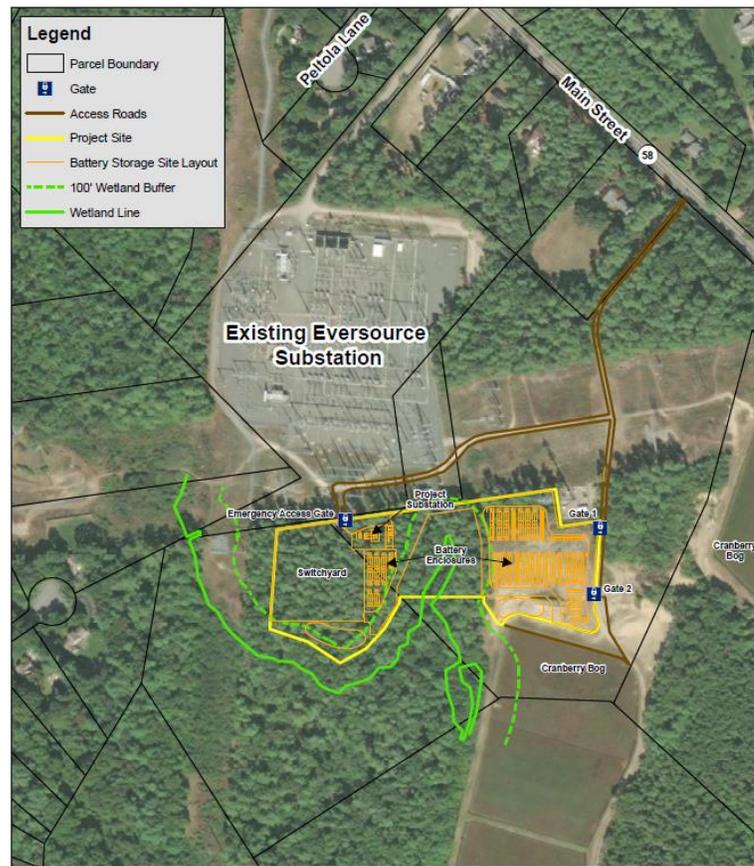
The Switching Station and the transmission structures (referred to collectively as the “Eversource Transmission Facilities”) are needed to interconnect the BESS with the regional electric grid (Exhs. CP-A at 11; CP-Z at 6, 7; CP-7, at 10). The Switching Station is adjacent to an existing Eversource ROW that contains two existing 115 kV transmission lines (Exh. CP-A at 1). New transmission structures will be constructed in the ROW and tap lines, approximately 130 feet in length, will be installed as part of the Project to connect the Switching Station with existing Line 127 (Exhs. CP-Z at 7; CP-A at 12-13). Said interconnecting line, and the two new dead-end structures, will not cross any public ways and will be entirely located on the Project Site and Eversource’s ROW (Exh. CP-A at 13).

On March 23, 2021, the Carver Planning Board voted to extend the period of use of the Site Plan Review Approval and Special Permit to March 31, 2023 (Exhs. CP-4; CP-Z at 7; Cranberry Point Brief at 49-50). On June 26, 2021, the Carver Planning Board approved a minor modification of the Site Plan, which changed the location of some components of the Project to provide space for the Eversource’s Switching Station on the Project Site (Exhs. CP-Z at 7; CP-4).

In 2021, Cranberry Point participated in ISO-NE’s Forward Capacity Market Auction and was selected to provide capacity starting in 2024. Exh. CP-B at 4. Cranberry Point stated that the

Project is time sensitive and must meet its Commercial Operation Date of June 1, 2024; failure to meet this deadline could result in a substantial financial loss and/or termination of the seven-year Capacity Supply Obligation. (Cranberry Point Brief at 49, citing Exh. EFSB-G-6). To meet this deadline, the Company asserts that approval to construct the Project must be received by June 2023 (Exh. EFSB-G-6). The Company's preliminary project schedule estimated the length of construction at approximately 283 days (Exh. EFSB-G-2).

**Figure 1. Site Layout Map.**



Source: Exh. CP-B at 6.

#### B. The Proposed Project Site

The Project is located on two undeveloped, primarily wooded properties (Map 61, Lots 7 and 10) at 31R Main Street in Carver, Massachusetts (Exh. CP-B, Figure 1.1-1). The approximate six-acre area of the Project Site that will be leased from the current landowner is part of two larger parcels, one of which is 21.5 acres and the other is 12.5 acres (Exh. CP-B, Figure 1.1-7 and Figure

1.1-8). An existing Eversource Substation (Station No. 726) and electrical transmission/distribution lines are located within a ROW just north of the Project Site (Exh. CP-B, Figure 2). The Project Site also includes existing unimproved roads to access a cell tower, to the northeast of the Project, and cranberry bogs to the south (Exh. CP- B, Figure 1.1-7). Electrical transmission and distribution lines are also located to the north and west of the Project Site within an additional ROW (see Exh. CP-B, Figure 2). Residential properties are located more than 400 feet of the proposed Project Site boundaries (Exh. CP-B at 8). There are wetlands and commercial cranberry bogs located to the south and east of the Project Site (Exh. CP-B at 8-9).

### C. The Proposed Project

The BESS design includes: (1) battery enclosures manufactured by Tesla; (2) oil-filled step-up transformers; (3) medium voltage circuit breakers; and (4) associated electrical control and interconnection equipment (Exh. CP-B at 11). The entire BESS will be electrically connected to a Project Substation, which includes a single large power transformer, circuit breaker, and interconnection structures that are used to match up to the electrical interface of the Eversource grid (Exh. CP-B at 11). Lastly, the Eversource-owned Switching Station will electrically allow Eversource and ISO New England (“ISO-NE”) to either connect, disconnect, or bypass the Project based on market and grid conditions (Exh. CP-B at 11).

Within the Project’s BESS, groups of two battery enclosures will connect to their own 3,000 kilovolt-Ampere (“kVA”) transformer (Exh. CP-B at 11). Lithium-ion battery cells, which are hermetically sealed, are combined electrically within each battery module (Exh. CP-B at 11). Each enclosure will have approximately 22 inverters and 15 battery modules to provide the necessary power and energy required from each enclosure (Exh. CP-B at 11). Enclosures in the current design are 23.5 feet long, 5.4 feet wide, and stand 8.3 feet tall atop one-foot concrete pad foundations and every two enclosures will be installed back-to-back (Exh. CP-B at 11).

The Company notes that the battery storage units generate noise primarily through their cooling system, which features a set of eight rooftop fans for each enclosure that pulls fresh air through louvered openings and exhausts it upward through a grill (Exh. CP-8S, at 8). The Company’s noise studies conclude that the Project’s predicted operation sound levels were compliant with applicable regulatory criteria (specifically, the Massachusetts Department of

Environmental Protection (“MassDEP”) noise policy), and in turn that noise attenuation measures are not needed (Exh. CP-8S, at 8).

## II. PROCEDURAL HISTORY

Pursuant to G.L. c. 164, § 69J¼ Cranberry Point filed a petition to construct a 150 MW/300 MWh BESS and ancillary electrical equipment to be located at 31R Main Street, Carver, Massachusetts on August 27, 2021 (Exh. CP-A at 1). The Siting Board issued Notices of Adjudication and Public Hearing for both public comment hearings requiring that Cranberry Point provide notice by first class mail to all U.S. Mail addresses and owners of property within one-half mile of the Project Site, and through publication in The Carver Reporter and The Patriot Ledger. The Company was also required to provide copies of the Notice to the Town’s Planning Board, the Board of Selectmen, Town Manager, Zoning Board of Appeals, Department of Public Works, and Conservation Commission. Finally, the Siting Board directed Cranberry Point to request the Town of Carver to post the notice of the public comment hearings on the Town’s website. The Siting Board conducted a remote public comment hearing regarding the Company’s petition via Zoom on November 8, 2021.

There are no mapped Environmental Justice (“EJ”) populations within one mile of the proposed Project (Exh. CP-7 at 14). Given the demographic data and project impact thresholds in the surrounding area of the Project, the Siting Board did not require either enhanced public participation or enhanced analysis of impacts and mitigation under the Executive Office of Energy and Environmental Affairs (“EEA”) Environmental Justice Policy; translation/interpretation in languages other than English was neither required by, nor requested under, the Language Access policies of the Commonwealth. The Siting Board created a [comprehensive public information website](#) for the Project, including notices of hearings and a recorded video thereof, public participation information, Project and related information, and links to the Company’s petitions.

As provided in the initial Notice of Adjudication and Notice of Public Comment Hearing, and as stated at the public comment hearing, the deadline for filing petitions to intervene and to participate as a limited participant in the Company’s was November 29, 2021. The Siting Board received two timely petitions to intervene, filed by Save the Pine Barrens, Inc. (“STPB”), and Melissa Ferretti (“Ms. Ferretti”). The Siting Board also received a late-filed petition to intervene from Eversource on January 18, 2022, which was assented to by the Company. On May 6, 2021,

the Presiding Officer issued a ruling granting the petition to intervene by STPB and Eversource (“Initial Ruling on Intervention”). The Initial Ruling on Intervention denied Ms. Ferretti status to participate as a full intervenor and granted her status to participate as a limited participant.

On May 11, 2022, Cranberry Point filed a petition with the Department of Public Utilities (the “Department”), pursuant to G.L. c. 40A, § 3, seeking a comprehensive exemption from the operation of the Zoning Bylaws for the Town of Carver (“Zoning Bylaw” and the “Zoning Petition”) in connection with the Project. The Zoning Petition (docketed as D.P.U. 22-59) was referred to the Siting Board and consolidated with the Siting Board Petition. Cranberry Point LLC, EFSB 21-02/D.P.U. 22-59, Referral and Consolidation Order (June 1, 2022). In its Zoning Petition, the Company stated that Cranberry Point sought a comprehensive zoning exemption in light of contemplated changes to the Carver Zoning Bylaw which could have an impact on the Company’s ability to construct and operate the Project (Exh. CP-Z at 8).

On June 14, 2022, the Siting Board issued a second notice for the Project. The Siting Board conducted a second remote public comment hearing regarding the Company’s petition via Zoom on July 12, 2022. As provided in the second Notice of Adjudication and Notice of Public Comment Hearing, and as stated at the public comment hearing, the deadline for filing petitions to intervene and to participate as a limited participant was July 26, 2022. The Siting Board received eleven timely petitions for Limited Participation, filed by ten Carver residents, Nancy Ryan, Mary Dormer, Daniel & Donna Ferrini, Frank & Patricia Dangelo, John & Patricia Anderson, and Alan & Gisela Hayes, and Pine DuBois (Executive Director) on behalf of the Jones River Watershed Association (“JRWA”). On August 22, 2022, the Presiding Officer issued a ruling on those requests, granting limited participation to Nancy Ryan, Mary Dormer, Daniel & Donna Ferrini, Frank & Patricia Dangelo, John & Patricia Anderson, and Alan & Gisela Hayes (“Ruling on Requests for Limited Participation”). The Presiding Officer denied the request of Pine DuBois/Jones River Watershed Association (“JRWA”) be a limited participant based on insufficient filing information.<sup>2</sup>

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<sup>2</sup> The Presiding Officer’s ruling of August 22, 2022, indicated that he would consider an amended petition for limited participant status that clarifies the entity seeking such status, and contains the information required by Siting Board regulations. JRWA did not file an amended petition.

At the first public comment hearing, residents raised concerns regarding public health and safety related to issues such as the risk of fire, adequacy of fire suppression systems, ability of the local fire department to respond, and potential wetlands contamination to the Town's sole source aquifer. In the second public comment hearing, residents also expressed opposition to the zoning exemption request and the grant of a zoning exemption to override voter concerns related to safety and the vote for a moratorium on BESS projects. Finally, residents also commented on concerns related to the Project's proximity to heavily residential areas, service life issues for battery operations, and the potential for alternative safer battery technologies.

In addition to its filings in this proceeding, Cranberry Point filed an Expanded Environmental Notification Form ("EENF") and a Single Environmental Impact Report ("SEIR") pursuant to 309 CMR 11.03(7)(1) for review by the Massachusetts Environmental Policy Act Office ("MEPA"). On October 18, 2022, the Secretary of EEA issued a certificate reviewing the Project's environmental impacts with mitigation and allowing it to proceed to permitting (Exh. CP-9S).

According to the Company, Cranberry Point seeks a comprehensive zoning exemption because otherwise it will have to conform to amendments of the Town of Carver's ordinance or by-laws as they pertain to a BESS, which are set to become effective on or about March 23, 2023 (i.e., the date that the Company's Site Plan Review Approval and Special Permit expires) (Cranberry Point Brief at 50). Therefore, the Company states that the prior Town approvals for the Project appear to be in jeopardy (Cranberry Point Brief at 50).

According to the Company, it notified the Town of its intent to seek a comprehensive zoning exemption from the Department because the Site Plan Review and Special Permit expires on March 31, 2023, and the new zoning bylaws may preclude a BESS such as the Project (Cranberry Point Brief at 50). The Company highlights that the Town submitted a letter to the Siting Board on July 6, 2022, indicating that the Select Board voted to oppose the issuance of a "comprehensive exemption permit," but did not state a reason for the opposition (Cranberry Point Brief at 50).

The Siting Board issued two rounds of discovery to the Company regarding materials presented in its petitions. In addition, Cranberry Point issued one set of discovery to STPB. STPB also issued one set of discovery questions to Cranberry Point. The Siting Board conducted three days of remote evidentiary hearings beginning on October 26, 2022 and concluding on October 31,

2022. At those hearings, Cranberry Point presented the testimony of the following witnesses: Allyson J. Sand, director of project development for the Northeast for Plus Power; Thomas J. Keough, environmental scientist and permitting specialist with AECOM; Paul Rogers, co-founder of Energy Safety Response Group; Christopher Quaranta, director of engineering and construction for Plus Power; Polly Shaw, head of policy and communications for Plus Power; and Christopher Kaiser, senior acoustics and noise control specialist with AECOM. STPB presented the testimony of two witnesses: John Hinkley, Senior Managing Consultant with ALL4 LLC, and Milosh T. Puchovsky, Associate Department Head and Professor of Practice in the Department of Fire Protection Engineering at Worcester Polytechnic Institute. After hearings, initial briefs were filed by Cranberry Point, STPB and Eversource on November 22, 2022. Reply briefs were filed by the Company and STPB on December 13, 2022.

After the conclusion of evidentiary hearings and the filing of briefs, Siting Board staff drafted a Tentative Decision regarding the question of whether the Siting Board has jurisdiction to review the BESS pursuant to G.L. 164, § 69J¼. On April 26, 2023, staff served a copy of the Tentative Decision on the Siting Board and all parties and the limited participants for review and comment. Notice of the Siting Board meeting was provided electronically in English, Spanish, Portuguese, Mandarin Chinese, Vietnamese and Haitian Creole and sent to community-based organizations as well as the service list. The parties and limited participant were given until May 5, 2023, to file written comments. The Siting Board received timely written comments from the Company and STPB. The Siting Board also received written comments from New Leaf Energy, Inc., an energy developer who was not a party to this proceeding.

The Siting Board conducted a remote public meeting to consider the Tentative Decision on May 10, 2023. Cranberry Point, STPB, Mary Dormer, and Daniel Ferrini provided oral comments to the Siting Board regarding the Tentative Decision. After deliberation, the Board directed staff to prepare a Final Decision dismissing the Section 69J¼ petition for lack of subject matter jurisdiction.

### III. SITING BOARD JURISDICTION PURSUANT TO G.L. C. 164, § 69J¼

#### A. Introduction

The question as to whether the Siting Board has jurisdiction over BESS has been raised in both the Cranberry Point and Medway Grid proceedings. Both proceedings are fully briefed, and

the question of jurisdiction is before the Board. As the question of jurisdiction is foundational to the Siting Board's review of these projects, the Siting Board determines that it is appropriate to address jurisdiction at this stage in the proceedings.

Below, the Siting Board reviews its statutes for authority from the Legislature. Where the Siting Board statutes do not provide clear direction from the Legislature, the Siting Board looks to other sections of G.L. c. 164 for insight into the Legislature's intended treatment of BESS. The Siting Board also reviews ISO-NE treatment of BESS, which applies to the two BESS projects in these dockets. The Siting Board concludes that given the lack of explicit authority, and different energy processes involved in generating and storing energy, the Legislature has not granted authority over BESS projects to the Siting Board.

#### B. Standard of Review

Interpretation of a statute necessarily begins with the statutory text itself, because "[e]lementary rules of statutory construction require that each statute be interpreted as enacted." Commonwealth v. Gore, [366 Mass. 351](#), 354 (1974). The Supreme Judicial Court ("SJC") reviews de novo questions concerning the meaning of an agency's enabling statute. See Commerce Ins. Co. v. Commissioner of Ins., [447 Mass. 478](#), 481 (2006). "[W]here the statute's meaning is clear and unambiguous, [the SJC will] give effect to the Legislature's expressed intent." Providence & Worcester R.R. v. Energy Facilities Siting Board, [453 Mass. 135](#), 141 (2009). If the SJC concludes, however, that the statutory language is "sufficiently ambiguous to support multiple, rational interpretations," Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., [454 Mass. 174](#), 186 (2009), then it will "look to the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Entergy Nuclear Generation Co. v. Department of Env'tl. Protection, [459 Mass. 319](#), 329 (2011). Kain v. Department of Environmental Protection, [474 Mass. 278](#) (2016); Engie Gas and LNG v. Department of Public Utilities, [475 Mass. 191](#), 199 (2016).

An administrative agency has "a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation." Moot v. Department of Env'tl. Protection, [448](#)

[Mass. 340](#), 346 (2007),<sup>3</sup> quoting Levy v. Board of Registration & Discipline in Med., [378 Mass. 519](#), 525 (1979). Nonetheless, statutory interpretation is ultimately the duty of the courts, and for that reason, the "principle of according weight to an agency's discretion ... is one of deference, not abdication, and [the] court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable" (citations and quotations omitted). Moot, [448 Mass. 340](#), 346. Kain, [474 Mass. 278](#) (2016); Engie Gas, [475 Mass. 191](#), 199 (2016).

We are guided by two well-established principles of statutory construction. First, where the same word is used in different parts of a statute, it "should be given the same meaning ... barring some plain contrary indication." TM Buckley/North LLC v. Assessors of Greenfield, [453 Mass. 404](#), 408 (2009), quoting Connolly v. Division of Pub. Employee Retirement Admin., [415 Mass. 800](#), 802-803 (1993). Second, "all words of a statute are to be given their ordinary and usual meaning" and we construe "each clause or phrase [...] with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose." Worcester v. College Hill Props., LLC, [465 Mass. 134](#), 139 (2013), quoting Selectmen of Topsfield v. State Racing Comm'n, [324 Mass. 309](#), 312-313 (1949). Kain v. DEP, [474 Mass. 278](#), 287 (2016); Engie Gas, [475 Mass. 191](#), 199 (2016); Providence and Worcester R.R. Co. v. Energy Facilities Siting Board, [453 Mass. 135](#), 142 (2009).

### C. Positions of the Parties

Cranberry Point and Save the Pine Barrens have a fundamental disagreement regarding the characterization of the BESS proposed by Cranberry Point as a generating facility subject to the provisions of G.L. c. 164, §69J¼, and accordingly the applicability of the Siting Board's jurisdiction to review the Project. Eversource did not address the issue of the Siting Board's jurisdiction over the Project directly and limits its brief to the need for the Siting Board's approval of Eversource's interconnection facilities and the grant of a comprehensive zoning exemption from the Town of Carver zoning by-laws for those facilities.

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<sup>3</sup> Moot v. Department of Env'tl. Protection, [448 Mass. 340](#), 346 (2007), was superseded in part by statute, "An Act relative to the licensing requirements for certain tidelands," St. 2007, c. 168, § 1, as recognized in Moot v. Department of Env'tl. Protection, [456 Mass. 309](#) (2010).

1. Cranberry Point Asserts that the Siting Board Has Jurisdiction Over the Project

Cranberry Point filed its Petition to Construct the Project pursuant to G.L. c. 164, § 69J¼, which provides that no applicant shall commence construction of a “generating facility” unless a petition for approval of construction of that generating facility has been approved by the Siting Board. Pursuant to G.L. c. 164, § 69G, a jurisdictional “generating facility” is defined as: any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.

Cranberry Point argues that the Project is subject to the Siting Board’s review because the Project falls under the definition of “generating facility” and therefore is subject to G.L. c. 164, § 69J¼ (Cranberry Point Brief at 8-10). Cranberry Point notes that while the Siting Board’s statutes and regulations do not define “generating unit,” “generating facility” or “generation,” G.L. c. 164, § 1 does include definitions for “generation” and “generation facility,” and that the Project meets these definitions (Cranberry Point Brief at 8-9). Cranberry Point describes its BESS Project as “a commercially available technology that is capable of absorbing energy, storing it for a period of time and thereafter dispatching the energy” (Exh. CP-A; Cranberry Point Brief at 9).

Cranberry Point argues that since the Project will function as a generator, as that term is used by ISO-NE, it must be deemed to be a “generating facility” subject to Siting Board review (Cranberry Point Brief at 9). The Company asserts that the Project is a BESS that participates in the ISO-NE marketplace as a Generator Asset, defined in the ISO-NE Tariff as a “device (or a collection of devices) that is capable of injecting real power onto the grid” (Cranberry Point Brief at 9). Cranberry Point argues that since the Project will function as a generator, as that term is used by ISO-NE, it must be deemed to be a “generating facility” subject to Siting Board review (Cranberry Point Brief at 9). Cranberry Point notes that the Project has been designed to participate in ISO-NE’s Forward Capacity Market (“FCM”) and will contribute to system reliability with its 150 MW of capacity in Southeast Massachusetts within ISO-NE’s Southeast New England (“SENE”) capacity zone (Cranberry Point Brief at 9-10).

Cranberry Point describes the ISO-NE market rules in which the Project intends to operate as technology neutral in its dispatch of energy resources including BESS to meet system needs (Cranberry Point Brief at 10). The Company contends that “[f]rom a wholesale electricity market

standpoint, the Project will operate as a generator in that it will act as a source of wholesale electricity and provide wholesale services in the same manner as other resources, i.e., by dispatching electricity into the marketplace” (Cranberry Point Brief at 10). ISO-NE has “implemented a technology-neutral market construct, meaning that a resource participating as a BESS must register under existing market constructs” (Cranberry Point Brief at 10).

Cranberry Point references other elements of the ISO-NE market requirements as clear indicia of the Project’s status as a generator (Cranberry Point Brief at 8-10). Essentially, under ISO-NE’s market rules, a BESS acts as and is modeled as a generator when dispatching electricity into the marketplace (Cranberry Point Brief at 10). Cranberry Point also notes that the Project has registered as a Generator per NEPOOL GIS system and has entered into a Large Generator Interconnection Agreement (“LGIA”) with Eversource (Cranberry Point Brief at 10).

Cranberry Point concludes that the ISO-NE’s market rules should be determinative of the Project’s status as a generating facility, arguing that given “ISO-NE’s characterization of storage facilities as Generator Assets under the market rules, this Project qualifies as a ‘generating unit’ or a ‘generating facility,’ and its operation should be considered to be ‘generation’ over which the Siting Board’s exercise of jurisdiction is appropriate” (Cranberry Point Brief at 10).

In replying to STPB’s assertions that the Siting Board should look to other jurisdictions in determining the appropriate regulation of BESS facilities, Cranberry Point rejects STPB’s arguments that jurisdictional decisions written in Rhode Island and New York should be accorded precedential weight in this proceeding (Cranberry Point Reply Brief at 2). Cranberry Point instead urges the Siting Board to consider the status accorded to the Project by key agencies, with oversight of grid activities, such as ISO-NE and NEPOOL, and the position of Eversource in the Determination of Jurisdiction docket, EFSB 19-01, arguing that all understand and acknowledge that the facility is operating as a generator and treat the Project as such (Cranberry Point Reply Brief at 2-4).

Cranberry Point also emphasizes federal policy treatment of BESS in urging the Siting Board to treat BESS as a generating facility (Cranberry Point Reply Brief at 4). Cranberry Point states that the Federal Energy Regulatory Commission (“FERC”) has found that when an energy storage company sells electric energy at wholesale, the facility is deemed to be a generating facility, and cites several FERC decisions: Marengo Battery Storage, LLC, EG19-19-000 (Nov. 13, 2018) (an energy storage facility that provides only frequency regulation services is a

generator); Engie 2020 ProjectCo-NH1 LLC, Docket No. EG22-15-000 (Oct. 27, 2021) (battery energy storage facility used to provide peak shaving services in addition to making wholesale sales of ancillary services is a generator); KEI Mass Energy Storage I, LLC, Docket No. EG21-121-000 (Apr. 12, 2021) (battery energy storage facility used to provide peak shaving services in addition to making wholesale sales of ancillary services is a generator) (Cranberry Point Reply Brief at 4).

Cranberry Point concludes that the Siting Board has jurisdiction over the Project (Cranberry Point Reply Brief at 3-4).

2. Save the Pine Barrens Asserts that the Siting Board Statutes Do Not Provide the Siting Board with Jurisdiction over BESS Facilities

STPB disagrees that the Siting Board should characterize the Project as a generating facility subject to its jurisdiction under Section 69J¼. STPB relies upon the statutory language set forth in G.L. c. 164, primarily the definitions set forth in Section 1 and the specific language applicable to Siting Board jurisdiction in Sections 69G and 69J¼. STPB asserts that Cranberry Point has failed to establish the Siting Board’s jurisdiction over the Project as a “generating facility” under Section 69J¼ or within the definition set forth in Section 69G (STPB Brief at 9-13).

In support of its argument, STPB states that BESS installations such as the Project do not add any electricity to the grid or generate energy (STPB Brief at 3). STPB states that “[a]ll they do is store and shift the availability of the electricity produced by other facilities to a different time. Those operations do not satisfy the statutory definition of a ‘generating facility’ in G.L. c. 164, §69G, and the Siting Board, therefore, lacks jurisdiction over this Project” (STPB Brief at 3).

Instead, STPB asserts that the Siting Board should dismiss (for lack of jurisdiction) or deny both the Company’s Petitions (STPB Brief at 4).<sup>4</sup> The Siting Board cannot grant approval to the Company to construct this Project because it is not a “generating facility” within the meaning of Section 69J¼ and thus the Siting Board lacks statutory jurisdiction to act on the Section 69J¼ Petition (STPB Brief at 3).

STPB states that the Siting Board’s implementing statutes do not define the word “generating” or an “energy storage system,” pointing to G.L. c.164, §§69G-69S (STPB Brief at 9-11). STPB instead insists that G.L. c.164, §1 should be relied on in interpreting the applicable

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<sup>4</sup> The Siting Board is returning the request for a comprehensive zoning exemption to the Department for a determination on the merits.

type of facilities subject to Siting Board jurisdiction and that its definitions of three terms — “energy storage system,” “generation,” and “generation facility” all show that a BESS is not a Section 69J¼ generating facility (STPB Brief at 9). STPB asserts that the definitions of these terms within G.L. c.164, §1 reflect the legislative determination that electrical energy “generation” and “storage” are different and not coterminous (STPB Brief at 9).

In its reply brief, STPB urges the Siting Board to reject the Company’s arguments related to regional energy markets and instead focus solely on the principles of statutory interpretation (STPB Reply Brief at 3, citing Commonwealth v. Peterson, [476 Mass. 163](#), 167 (2017) (“The plain language of the statute, read as a whole, provides the primary insight into that intent”). STPB concludes “[t]his proposed Project is not a generating facility, and the Siting Board, therefore, has no jurisdiction under § 69J¼ to approve it” (STPB Reply Brief at 4).

#### D. Analysis and Findings

##### 1. Siting Board Statutes

The Siting Board only has such powers as have been expressly or impliedly delegated by the Legislature. Engie Gas and LNG v. DPU, [475 Mass.191](#) (2016), citing Entergy Nuclear Generation Co. v. Department of Env'tl. Protection, [459 Mass. 319](#), 331 (2011) (“Where ... the scope of agency authority is at issue, we must determine whether the agency is acting within the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission” [quotation and citation omitted]). Here, the Siting Board’s jurisdiction is defined in G.L. c. 164, §§ 69G-69S (“Siting statutes”). See also 980 CMR 2.02. Specifically, the Legislature has delegated authority to the Board, inter alia, to approve or reject petitions for construction of “facilities.” G.L. c. 164, § 69H. The Board’s governing statutes define the types of energy infrastructure that constitute a “facility”.<sup>5</sup> G.L. c. 164, § 69G. BESS is not explicitly included on the list of facilities over which the Siting Board has jurisdiction, nor is BESS explicitly excluded. See G.L. c. 164, § 69G.

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<sup>5</sup> Section 69G defines the following types of facilities: generating units 100 MW or more; certain new transmission lines and ancillary structures which are integral parts of the operation of any transmission line; certain structures for the manufacturing or storage of gas; and certain new gas pipelines.

Where the Legislature enumerates certain powers, it is presumed that powers not so enumerated or reasonably implied are not delegated by the Legislature. See Providence & Worcester R.R. v. Energy Facilities Siting Board, [453 Mass. 135](#) (2009) (Legislature granted the Siting Board eminent domain authority to take land needed for new oil pipelines only; therefore, the Board lacked eminent domain jurisdiction over land containing existing oil pipelines); Life Insurance Association of Massachusetts v. Commissioner of Insurance, [403 Mass. 410](#) (1988) (“When the Legislature has wanted the commissioner to have the authority to issue regulations, it has said so expressly”); Commissioner of Revenue v. Marr Scaffolding Co., Inc., [414 Mass. 489](#), 493 (1993) (“An administrative agency has no inherent or common law authority to do anything. An administrative board may act only to the extent that it has express or implied statutory authority to do so”).

The Legislature’s omission of BESS as an explicit category of Board-jurisdictional facilities in G.L. c. 164, § 69G, could be determinative in finding a lack of Board jurisdiction for BESS projects. It seems reasonable to conclude that since the Siting statutes were adopted initially in 1973, and last updated significantly in the 1997 Restructuring Act, they reflect an electric system when BESS technology was not a significant type of electrical infrastructure.<sup>6</sup> As BESS technology has become an emerging and significant form of energy infrastructure, the Legislature has introduced BESS incentives and directives elsewhere in Chapter 164, but not in Siting statutes. The Legislature could have addressed this gap but has not done so to date. See Alliance v. Energy Facilities Siting Board, [457 Mass. 663](#), 673 (2010) ([w]e presume that the Legislature acts with full knowledge of existing laws).

While acknowledging that the Legislature has not specifically included BESS in the list of jurisdictional facilities, Cranberry Point argues that the Siting Board has jurisdiction over BESS

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<sup>6</sup> The Energy Facilities Siting Council was formed in 1973. St. 1973, c. 1232. The Legislature reorganized the agency into the Energy Facilities Siting Board in 1992. St. 1992, c. 141. The Siting Board’s statutory framework was further revised to create a separate review statute for generating facilities pursuant to the Electric Restructuring Act in 1997. St. 1997, c. 164. As noted in the *State of Charge* (2016) “To date, energy storage in Massachusetts has primarily been limited to Pumped Hydro Storage...(.).” Utility-scale battery energy storage systems have only in recent years achieved technical and commercial feasibility and significant market interest. In fact, no BESS projects were presented to the Board or the Department for any type of siting review until 2019. See Cranberry Point, EFSB 19-01.

because it is a “generating facility,” which is an explicitly listed jurisdictional facility. Specifically, Cranberry Point asserts that its project constitutes a “generating facility” because the project includes a “generating unit” with a nameplate gross capacity of 100 MW or more, to be connected to the ISO-NE administered transmission system, with intended participation in the ISO-NE wholesale market and the ISO-NE FCM.<sup>7</sup>

G.L. c. 164, § 69G gives the Siting Board jurisdiction over a “generating facility,” defined as “any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.” G.L. c. 164, §69G. The term “generating unit” is not defined in the Siting statutes. However, other areas of the Siting statutes address various aspects of generation and storage, and we look to these statutes for evidence of how the Legislature may have intended BESS to fit into the Siting Board’s statutory scheme. Specifically, the Siting Board reviews fuel sources in its statutes relating to generating, and statutory references to storage, and finds that none of these references address the concept of BESS.

While the Siting Board statute regarding generating facilities does refer to several types of primary energy sources and fuels that are typically associated with electric power generation, the statute does not provide an exhaustive listing of such energy sources and fuels, nor does it specify any exclusions. Siting statute references to fuel and primary energy sources used in generating electricity do not explicitly reference BESS. For example, the requirements in G.L. c. 164, § 69J¼ for Technology Performance Standards reflect “emission rates achievable by state of the art *fossil fuel* generating and control technologies. G.L. c. 164, § 69J¼ (emphasis added). G.L. c. 164, § 69I includes provisions for the Board to review long-range forecasts of electric and gas companies.<sup>8</sup> Section 69I provides insights on the types of electric generating facilities that were once included in the Siting Board forecast reviews, including “*other sources of electrical power or*

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<sup>7</sup> Although the parties did not address the possibility that that BESS could be considered a jurisdictional electric transmission line, which may include an ancillary structure integral to its operation, ISO-NE has proposed a tariff revision to FERC to treat certain BESS projects as transmission assets. See Section III.D.3.

<sup>8</sup> Massachusetts electric companies are now exempt from the requirements of G.L. c. 164, § 69I. Electric Restructuring Act; D.T.E. 98-84A.

gas, including facilities which operate on solar or geothermal energy and wind or facilities which operate on the principle of cogeneration or hydrogeneration...”. See G.L. c. 164, § 69I (emphasis added). Hydrogeneration is further addressed in G.L. c. 164, § 69H½, giving the Board authority to coordinate the permitting and licensing of hydropower generating facilities and defining “hydropower generating facility” as any electrical or mechanical power generating unit whose power source is water flow and which is not a facility as defined in Section 69G.<sup>9</sup>

To date, the Siting Board has not been asked to issue an approval to construct hydroelectric facilities.<sup>10</sup> Existing large-scale hydroelectric facilities (over 100 MW) in Massachusetts are exclusively pumped storage units and all of these units pre-date the establishment of the Energy Facilities Siting Council. In a 2008 Advisory Ruling, the Board looked at the question of whether it had jurisdiction over a project that would increase the capacity of an existing pumped storage hydro facility by 66 MW in light of the Board’s generating facility authority. Because the capacity increase was less than the Board’s 100 MW threshold, the Board concluded that it did not have jurisdiction over the project. Bear Swamp Power Company, LLC Advisory Ruling (June 13, 2008).<sup>11</sup>

The Siting Board’s statutes also address fuel storage including: storage of gas (definition of facility includes “a unit, including associated buildings and structures, designed for and capable of the manufacture or storage of gas; see also 980 CMR 1.01); storage of oil (definition of oil facility includes “any new unit... designed for, or capable of, the refining, storage or more than five hundred thousand barrels... of oil). G.L. c. 164, § 69G. None of these fuel storage facilities refers to BESS or is applicable to the concept of BESS.

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<sup>9</sup> G.L. c. 164, § 69H½ provides the Siting Board with statutory authority to both intervene in FERC hydroelectric licensing proceedings as a coordinating agency for other state and local permit agencies, and also issue a written decision that is deemed equivalent to a final state or local agency approval, permit, license, certificate or permission – if subject of an appeal.

<sup>10</sup> It is possible that the Siting Board is pre-empted by FERC jurisdiction from issuing an approval to construct hydroelectric facilities.

<sup>11</sup> The Board’s decision, below, that it does not have generating facility jurisdiction over BESS does not preclude possible jurisdiction by the Board over other types of generating facilities reliant on energy storage technologies such as pumped storage hydroelectric.

In summary, Siting Board statutes do not explicitly reference BESS as a type of facility over which the Siting Board has jurisdiction. In addition, other statutes that define Siting Board jurisdiction do not provide a clear indication of what the Legislature may have intended for BESS treatment or whether BESS should be treated as a type of generating facility. While jurisdiction over BESS would be consistent with the Siting Board's overall mandate, because the Siting statutes are inconclusive regarding BESS jurisdiction, the Board considers other statutes in Chapter 164 for indicia of legislative intent.

## 2. Other G.L. c. 164 Statutes

As noted above, the Siting statutes do not define “generating unit” or “generating.” In the past when the Siting statutes were ambiguous or lacked explicit direction, the Siting Board looked to other sections of G.L. c. 164 for insight into legislative intent. See Harbor Electric Energy Company, EFSB 17-03, Determination of Jurisdiction (2017) (Board looked to definition of “transmission” in G.L. c. 164, § 1, to assess jurisdiction over submarine cable). G.L. c. 164, § 1, includes definitions that apply to all of Chapter 164, including the Siting statutes.

For example, section 1 of Chapter 164 defines “Generation” as the *act or process of transforming other forms of energy* into electric energy or the amount of electric energy so produced. (Emphasis added.) “Generation facility”, is defined as “a plant or equipment used to *produce, manufacture or otherwise generate electricity* and which is not a transmission facility or an energy storage system procured by a distribution company for support in delivering energy services to end users.”<sup>12</sup> G.L. c. 164, § 1 (emphasis added). “Generation service” is defined as “the provision of generation and related services to a customer.” G.L. c. 164, § 1. A “wholesale generation company” is defined as a company engaged in the business of producing, manufacturing or generating electricity for sale at wholesale only. G.L. c. 164, § 1. See also “Renewable energy” (does not include BESS in its list of “existing or emerging non-fossil fuel energy sources or technologies,” although this is not an exhaustive list); “Small power production facility” (a facility which is any electrical generating unit which produces electric energy solely by

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<sup>12</sup> The definition of “generation facility” explicitly excludes energy storage systems procured by distribution companies. This exclusion could be viewed as necessary if energy storage systems were viewed as “generation” and could therefore violate the Electric Restructuring Act’s prohibition on distribution companies owning generation assets (with minor exceptions, such as solar resources).

the use, as a primary energy source, of fuels not including BESS). G.L. c. 164, § 1. Compare “distributed energy resource” (small-scale power generation *or* storage technology). G.L. c. 164, § 1 (emphasis added). The generation statutes appear to contemplate energy that is the product of transformation of other forms of energy, or energy that is produced or manufactured.

In order to assess whether BESS falls within the G.L. c. 164, § 1 definition of “generation,” we must first note how battery storage functions. As a matter of physics, batteries do not actually store electrical energy (*i.e.*, they don’t collect electrons from the grid, store the electrons and then later send those same electrons back) (Exh. STPB-MTP-1, at 5-6; Tr. 1, at 43). Instead, batteries convert electrical energy into chemical energy (colloquially referred to as “charging”), store the chemical energy, and then later transform the chemicals into electrical energy when the connected external circuit calls for electricity (colloquially referred to as “discharging”) (Exh. STPB-MTP-1, at 5-6; Tr. 1, at 43). While as a physical matter, batteries do involve energy “transformation,” the use of the word “transform” by the Legislature was likely grounded in a more conventional understanding at the time that generation involves the use of primary energy sources (such as fossil fuels, flowing water, other renewable sources) that are transformed into electrical energy through combustion, mechanical, or physical processes.<sup>13</sup>

In comparison to the definition of “generation,” G.L. c. 164, § 1 defines “energy storage system” as a commercially available technology that is *capable of absorbing energy, storing it for a period of time and thereafter dispatching the energy* and which may be owned by an electric distribution company; provided, however, that an energy storage system shall: (i) reduce the emission of greenhouse gases; (ii) reduce demand for peak electrical generation; (iii) defer or substitute for an investment in generation, transmission or distribution assets; or (iv) improve the reliable operation of the electrical transmission or distribution grid; and provided further, that an energy storage system shall: (1) use mechanical, chemical or thermal processes to *store energy that was generated for use at a later time*; (2) *store* thermal energy for direct heating or cooling *use at a later time* in a manner that avoids the need to use electricity at that later time; (3) use mechanical, chemical or thermal processes to *store energy generated from renewable resources*

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<sup>13</sup> G.L. c. 164, § 69G, was first created by a statute enacted in 1973. St. 1973, c. 1232, § 1. It has been amended in 1974, 1975, 1982, 1992, and 1997. G.L. c. 164, § 69G. The statute, therefore, was formulated before the evolution of modern battery storage technology. For a history of the evolution of energy storage, *see State of Charge* at 2.

*for use at a later time*; or (4) use mechanical, chemical or thermal processes to capture or harness waste electricity and *to store the waste electricity generated from mechanical processes for delivery at a later time* (emphasis added).<sup>14</sup>

The contention has been made that since a battery “transforms” electrical energy into chemical energy (during charging) and from chemical energy back into electrical energy (during discharging), BESS processes are within the definition of “generation” under G.L. c. 164, § 1. The BESS performs more than one function, depending on whether it is charging or discharging. Merriam Webster defines “transform” as “to change in composition or structure; to change the outward form or appearance of; to change in character or condition, convert.” New Collegiate Dictionary, Merriam Webster (1981) at 1231. It can be argued that a BESS “transforms” electrical energy into electrochemical forms of energy during charging, and from electrochemical energy into electrical energy during discharging, consistent with the definition of generation.

However, as stated above, under the statutory definition of energy storage system, an energy storage system stores energy, including energy generated from renewable resources or energy generated from mechanical processes, instead of “producing, manufacturing or otherwise generating” electricity. G.L. c. 164, § 1. This definition of energy storage systems appears to consider the energy so stored to be generated elsewhere. In addition, the definition says that energy storage systems “defer or substitute for an investment in generation, transmission or distribution assets ....” G.L. c. 164, § 1. Plainly, if an energy storage system is substituting for a

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<sup>14</sup> The definition of “energy storage systems” was added by St. 2016, c. 188, the Energy Diversity Act. The Act revised the rules for distribution company procurement of long term contracts for renewable energy to allow for long term contracts for clean energy generation resources to be paired with energy storage systems. The Act also required DOER to set targets for electric companies to procure energy dispatched from battery energy storage systems. The Legislature did not address whether or how its provisions for battery energy storage systems related to the Siting Board’s jurisdiction.

generation asset, it is not considered to be such an asset but a different type of system. It appears that G.L. c. 164, § 1, treats generation and storage as different types of energy processes.<sup>15,16</sup>

### 3. ISO-NE

Cranberry Point and Medway Grid argue that the Siting Board should treat BESS consistently with ISO-NE's treatment of BESS (Cranberry Point Brief at 9-10; Cranberry Point Reply Brief at 2). ISO-NE treats BESS as a generation resource for purposes of wholesale markets and interconnection (Exh. CP-B, at 3-4). Battery storage resources currently compete in the ISO-NE Wholesale Energy Markets (Day-Ahead and Real-Time), FCM, and Ancillary service markets (Exh. CP-B, at 3-4). More than 700 MW of BESS projects secured capacity supply obligations in the most recent FCA, for the years 2025-2026 (FCA16). ISO-NE states that "storage" can participate as both a Generator or Demand and Capacity Resource.<sup>17,18</sup>

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<sup>15</sup> In carrying out other sections of Chapter 164, the Department has reviewed BESS as distribution level assets. For example, the Department approved two battery storage demonstration programs in the Cape Cod area for Eversource in the Company's 2017 base distribution rate case. See [D.P.U. 17-05](#). These demonstration projects are a 5 MW/20 MWh project in Oak Bluffs, Martha's Vineyard, and a 25 MW/38 MWh project in Provincetown. See <https://www.mass.gov/info-details/utility-scale-battery-energy-storage>.

<sup>16</sup> The Siting Board notes that DOER treats BESS as a distinct energy resource. At DOER, battery storage systems are eligible to participate in the Clean Peak Energy Standard program as Qualified Energy Storage Clean Peak Resources. The Qualified Energy Storage designation is its own class of resource, distinct from renewable Generation Units and Demand Response Resources. While not explicitly stating so, DOER appears to treat energy storage as a distinct resource from generation resources for purposes of setting energy storage targets. See <https://www.mass.gov/doc/clean-peak-resource-eligibility-requirements/download>; <https://www.masscec.com/clean-peak-standard-cps>; <https://www.mass.gov/doc/ess-guideline-clean-final-092221/download>.

<sup>17</sup> <https://www.iso-ne.com/markets-operations/markets/forward-capacity-market/fcm-participation-guide/qualification-process-for-new-demand-resources>.

<sup>18</sup> <https://www.iso-ne.com/static-assets/documents/2017/04/20170411-webinar-energy-storage.pdf#page=34>.

According to ISO-NE, battery storage projects made up 20 percent of proposed generating capacity in the ISO-NE Interconnection Queue as of May 2020.<sup>19</sup> Under Schedule 22 of the Open Access Transmission Tariff (OATT), the Large Generator Interconnection Procedure’s definition of a Generating Facility includes “[an] Interconnection Customer’s device for the [...] storage for later injection of electricity.”<sup>20</sup> Currently, battery storage is treated as a “market resource alternative” in ISO interconnection processes.<sup>21</sup>

In December 2022, ISO-NE filed proposed revisions to its OATT for electric storage facilities to be considered transmission assets under certain limited situations (SATO A Filing).<sup>22</sup> ISO-NE posits that there may be situations and system needs that are more efficiently and cost-effectively addressed by electric storage facilities serving as transmission assets.<sup>23</sup>

It is informative to view BESS through the lens of ISO-NE, as these rules will apply to the Projects. However, the manner in which ISO-NE treats BESS resources is not determinative as to whether the Legislature granted the Siting Board jurisdiction over BESS. See NSTAR Electric Company, EFSB 10-2/D.P.U. 10-131/10-132, at 28 (2012) (differentiating the roles of ISO-NE and Siting Board). Ultimately it is the statutes applicable to the Siting Board which define its jurisdiction.

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<sup>19</sup> <https://www.iso-ne.com/about/what-we-do/in-depth/batteries-as-energy-storage-in-new-england>.

<sup>20</sup> [https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect\\_2/sch22/sch\\_22\\_lgip.pdf](https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_2/sch22/sch_22_lgip.pdf).

<sup>21</sup> A “Market Resource Alternative” is defined as a [supply](#)-side (generation) or [demand](#)-side resource that is an alternative to a regulated [transmission](#) solution for meeting an ISO transmission system [reliability](#) need. [https://www.iso-ne.com/participate/support/glossary-acronyms/#supply\\_resource](https://www.iso-ne.com/participate/support/glossary-acronyms/#supply_resource).

<sup>22</sup> [https://www.iso-ne.com/static-assets/documents/2022/12/satoa\\_filing\\_part\\_1.pdf](https://www.iso-ne.com/static-assets/documents/2022/12/satoa_filing_part_1.pdf)

<sup>23</sup> For example, ISO states that “[e]nergy storage facilities, such as SATOAs, that may be capable of quickly providing or absorbing real power to balance power generation versus load, providing their dynamic reactive power to quickly respond to fluctuations in voltage, and meet other needs that may be required for system restoration could be uniquely positioned to help restore the system.” (Attachment 3 of SATOA Filing, Prefiled Testimony of Brent Oberlin).

#### 4. Conclusion

The Siting Board looks to its enabling statutes to determine whether the Legislature has provided it with the authority necessary to exercise jurisdiction over BESS. Review of these statutes indicates that the Legislature did not provide express authority to do so. BESS is not explicitly included in the list of facilities that are subject to Siting Board jurisdiction. The Siting statutes do not provide clear guidance as to whether a BESS is a “generating facility” and therefore, subject to Siting Board jurisdiction. The Siting statutes do not define “generating” or “generating unit” nor do they provide clear guidance on whether “generating unit” includes BESS. Review of other statutes governing the Siting Board, including statutes governing generating facilities, also do not provide clear guidance on Siting Board jurisdiction over a BESS. To the extent there is any guidance provided by the definitions of “energy storage system”, “generation” and “generation facility” in G.L. c. 164, § 1, they seem to reflect a legislative intent that “generation” and “storage” are distinct energy processes. Given the lack of explicit authority, and different energy processes involved in generating and storing energy, the Siting Board finds that the Legislature did not grant jurisdiction over BESS to the Siting Board.<sup>24</sup>

Of course, if the Legislature determines that Siting Board review of BESS projects is necessary or advantageous, the Legislature may choose to grant to the Siting Board clear and unambiguous authority to review BESS facilities. Indeed, doing so would be consistent with the Siting Board’s general statutory mandate, to “implement the provisions contained in sections 69H to 69Q, inclusive, so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.” G.L. c. 164, § 69H. A BESS is a large energy facility, and a key component of the energy system, which was the central focus of the Siting Board’s regulatory genesis. BESS assets are deployed in part to assist with reliability of the electric grid, a central consideration of the Siting Board. Siting Board review of BESS projects would include site selection, environmental impacts to both the natural and built environments during construction and operation, safety, compliance with state policies, and interconnection with

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<sup>24</sup> Without authority over BESS projects, action by the Siting Board to approve or deny a BESS project would be ultra vires.

the electrical grid.<sup>25</sup> Siting Board review of BESS facilities would focus expertise and resources on BESS facilities that may not be available to local communities. In addition, Siting Board review of BESS would provide consistency of treatment throughout the state. These considerations are squarely within the expertise, and consistent with the purpose, of the Siting Board.

However, because the statutes as they stand today do not grant the Siting Board jurisdiction over BESS facilities, the Siting Board dismisses the Petition to Construct for lack of subject matter jurisdiction. See Massachusetts Rules of Civil Procedure Rule 12(b)(1) (motion to dismiss for a lack of subject matter jurisdiction); G.L. c. 30A, § 14(7)(b) (allowing a reviewing court to set aside an agency decision if it is in “excess of the statutory authority or jurisdiction of the agency”).

### III. PROCEDURAL ISSUES (REFERRAL ORDER AND DEPARTMENT REVIEW)

On June 1, 2022, acting under the provisions of G.L. c. 25, § 4, the Chair of the Department referred the zoning petition filed by Cranberry Point on May 11, 2022 and docketed as D.P.U. 22-59, to the Siting Board for review and approval or rejection pursuant to G.L. c. 164, § 69H(2), and 980 CMR 1.09(3). Consequently, D.P.U. 22-59 was consolidated for hearing with EFSB 21-02, pursuant to 980 CMR 1.09(2). The Siting Board accordingly conducted a single adjudicatory proceeding and developed a single evidentiary record with respect to the Petitions as a consolidated docket, EFSB 21-02/D.P.U. 22-59.

In light of the Siting Board’s determination that the proposed Cranberry Point Project does not constitute a generating facility consistent with the definition of G.L. c. 164, § 69J¼, and that the Siting Board does not have jurisdiction to review the proposed Project consistent with the requirements of G.L. c. 164, § 69J¼, the Siting Board hereby returns all matters related to D.P.U. 22-59 to the Department for appropriate disposition, and for the Department to make a determination of each issue of fact or law necessary to a final decision pursuant to G.L. c. 40A, § 3 for Cranberry Point’s Petition for a comprehensive exemption from the operation of the Town of Carver Zoning Bylaw in D.P.U. 22-59. The Department is issuing with this Final Decision: (1) a

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<sup>25</sup> Siting Board jurisdiction over BESS would include authority to issue Certificates of Environmental Impact and Public Interest to BESS projects that have received Siting Board approval, pursuant to G.L. c. 164, §§ 69K – 69O.

procedural order; (2) an Order of Notice; and (3) a Notice of Adjudication for the Department proceeding in this matter.

IV. DECISION

For the reasons set forth above, the Siting Board concludes that it does not have jurisdiction pursuant to G.L. c. 164, §§ 69G, 69J¼ over the Project. Therefore, the Siting Board dismisses the Siting Board Petition.



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Donna Sharkey, Esq.  
Presiding Officer

Dated this 11th day of May 2023

APPROVED by a unanimous vote of the Energy Facilities Siting Board at its meeting on May 10, 2023, by the members present and voting. Voting for the Tentative Decision:

Rebecca L. Tepper, Secretary, Executive Office of Energy and Environmental Affairs and Chair, Energy Facilities Siting Board;

James Van Nostrand, Chair, Department of Public Utilities;

Cecile M. Fraser, Commissioner, Department of Public Utilities;

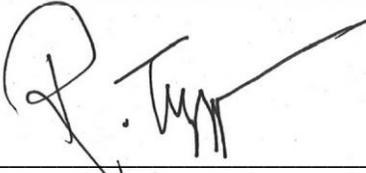
Elizabeth Mahony, Commissioner, Department of Energy Resources;

Bonnie Heiple, Commissioner, Department of Environmental Protection;

Jonathan Cosco, General Counsel and designee for the Secretary of the Executive Office of Housing and Economic Development;

Brian Casey, Public Member, Energy;

Crystal Johnson, Public Member, Environmental.

A handwritten signature in black ink, appearing to read 'R. Tepper', is written over a horizontal line. The signature is stylized and cursive.

Rebecca L. Tepper, Secretary of Energy and Environmental Affairs and Chair of the Siting Board

Dated this 11th day of May 2023

Appeal as to matters of law from any final decision, order or ruling of the Siting Board 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 Siting Board be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the 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. Massachusetts G.L., Chapter 25, Sec. 5; G.L. Chapter 164, Sec. 69P.