

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

)
Request of Massachusetts Development)
Finance Agency for an Advisory Ruling)
pursuant to 980 CMR, § 3.02(7),)
regarding jurisdiction of a proposed)
69 kV transmission line)

ACTION BY CONSENT

I. PROCEDURAL HISTORY

This Action by Consent is made pursuant to authority granted the Chairman of the Energy Facilities Siting Board (“Siting Board”) under 980 CMR, § 2.06. Section 2.06 provides the Siting Board with the authority to render a decision “when it would be a hardship to the public welfare to defer the decision until the next scheduled meeting of the [Siting Board].” 980 CMR, § 2.06(1).

By letter dated June 23, 2000 (“Request”) and signed by its attorneys, Kenneth M. Barna, Robert D. Shapiro, and Christopher J. Pollart, Rubin and Rudman LLP, Massachusetts Development Finance Agency (“MDFA”) petitioned the Siting Board for an advisory ruling pursuant to the provisions of 980 CMR, § 3.02(7). The Request seeks the opinion of the Siting Board as to whether the construction of a 69 kV transmission line greater in length than one mile by the MDFA at the former Fort Devens, located within the towns of Ayer, Harvard, and Shirley, is jurisdictional to the Siting Board under G.L. c. 164.

In its Request, MDFA states a reliable source of electricity is required for American Superconductor, which will locate at Fort Devens (Request at 1). In order to meet the energy needs of American Superconductor and future development at Fort Devens, MDFA states it needs to extend a 69 kV transmission line and add a substation (*id.* at 2). The new 69 kV transmission line would parallel two existing 69 kV transmission lines from the West Main Street Substation, along West Main Street, until a point where the existing transmission lines enter United States Fish and Wildlife (“USFW”) land; the new transmission line then would follow a similar path on MDFA land “uphill of the present lines until approximately the Hospital Road area where the new [transmission] line would branch off to follow Hospital Road to the proposed third 69 -- 13.8 kV substation and along the rear of Lot 10 to the Lake George Substation” (*id.*). In the alternative, MDFA could construct a 13.8 kV upgrade, which MDFA indicates would allow it to serve American Superconductor, but would not provide the long-term reliability and economic advantages of the 69 kV project (*id.* at 2-3).

MDFA states it needs to make a decision as to which type of transmission facilities to construct approximately forty-five days from June 23, 2000, and requests a ruling issue by August 15, 2000 (id. at 10). The purpose of this advisory ruling is to enable MDFA to determine whether it will proceed to construct a 69 kV transmission line which is greater than one mile in length, or a 13.8 kV upgrade, which would not qualify as a “facility” under G.L. c. 164, § 69G and therefore would not be jurisdictional to the Siting Board (id. at 2).

II. POSITION OF MDFA

MDFA argues it is generally exempt from state regulation because its enabling legislation provides it:

shall not be subject to the supervision or control of [the executive office of administration and finance] or of any board, bureau, department or other agency of the commonwealth except as specifically provided in this chapter.

G.L. c. 23G, § 2(a) (id. at 8). MDFA interprets this language to mean it is exempt from Siting Board regulation unless c. 23G specifically makes MDFA or the Massachusetts Government Land Bank¹ subject to the Siting Board’s jurisdiction (id.). Because c. 23G does not specifically make the MDFA subject to the Siting Board’s jurisdiction, MDFA suggests it is exempt (id., citing City of New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard & Nantucket S. S. Auth., 329 Mass. 243 (1952)). Moreover, the “Legislature specifically set forth the regulatory obligations which would apply to development at Devens” at St. 1993, c. 498, §§ 9-11, which regulatory obligations do not include the Siting Board (id. at 10).

In addition, MDFA argues it is not a “person,” as the term is commonly understood in Massachusetts law, and, therefore, not an applicant over which the Siting Board has general jurisdiction as defined in the Siting Board’s enabling legislation (id. at 6, citing G.L. c. 164, § 69H).

III. ANALYSIS

¹ MDFA is the successor to the Massachusetts Industrial Finance Agency and the Land Bank. See G.L. c. 23G, § 1 et seq. The Land Bank was created by St. 1975, c. 212 and given certain powers and responsibilities at Fort Devens pursuant to St. 1993, c. 498, § 12. The MDFA is the successor in interest to the Land Bank and as such acquired all of the Land Bank’s rights and obligations pursuant to G.L. c. 23G, § 2(j).

Pursuant to G.L. c. 30A, § 8 and 980 CMR, § 3.02(7), the Siting Board has discretion to issue or to decline to issue advisory rulings on the applicability to any person, property, or factual situation of any statute or regulation enforced or administered by the Siting Board. Such rulings are not binding upon the Siting Board in any subsequent formal proceeding. Nor may a petitioner for such an advisory ruling plead estoppel if the Siting Board were later, in an actual adjudication based on an evidentiary record, to adopt a view of the law that differed from an earlier advisory ruling. Phipps Product Assoc. v. Massachusetts Bay Transp. Auth., 387 Mass. 687, 693 (1982); McAndrews v. School Comm. of Cambridge, 20 Mass. App. Ct. 356 (1985).

In issuing an advisory ruling, the Siting Board does not find any facts or implicitly sanction or accept any of a petitioner's factual assertions or estimates.

Upon due consideration of MDFA's Request, the Siting Board declines to exercise its discretion to issue an advisory ruling in response to MDFA's Request.

The Request poses complex questions of law subject to varying interpretations which are better explored in the context of an adjudicatory (or judicial) proceeding rather than an advisory ruling. MDFA's first argument, that the language in its enabling statute is intended to exempt it from all general regulation not specifically enumerated in its statute, raises vexing questions of law for which relatively little relevant precedent has been established. See City of Boston v. Massachusetts Port Auth., 364 Mass. 639 (1974); see also Secretary of Env'tl. Affairs v. Massachusetts Port Auth., 366 Mass. 755 (1975). MDFA's second argument turns on the interpretation of the word "person" as it is used in the Siting Board's statute, and whether there is an intent that it be construed to include agencies such as MDFA. See G.L. c. 4, § 7. Because the intent of the Siting Board's legislative framework is to adjudicate facilities proposed by any public or private entity, and particularly given the Siting Board's long-standing jurisdiction over facilities proposed by municipal electric companies, the Siting Board concludes that the issue is not as clear-cut as MDFA suggests. Id. We conclude this matter also is too complex to rule on in an advisory ruling.

The Siting Board recognizes that its decision not to issue an advisory ruling leaves open the question of what steps MDFA should take to serve American Superconductor. We note that MDFA has at least three courses of action open to it, any of which would allow it to meet American Superconductor's requirements. With respect to the course of action MDFA may pursue regarding the construction of a transmission line to serve American Superconductor without the benefit of an advisory ruling, it may: (1) construct a 13.8 kV transmission line which is clearly not jurisdictional to the Siting Board; (2) construct the 13.8 kV transmission line and file with the Siting Board for an adjudication of the proposed 69 kV transmission line; or (3) seek the advice of counsel as to its regulatory status with the Siting Board and build accordingly.

IV. ORDER

Accordingly, after review and consideration, it is:

ORDERED: That the Request for an Advisory Ruling to determine whether the construction of a 69 kV transmission line greater in length than one mile by the Massachusetts Development Finance Agency is jurisdictional to the Energy Facilities Siting Board, filed June 23, 2000, by the Massachusetts Development Finance Agency, is hereby denied.

This Action by Consent is hereby issued within the required sixty days. 980 CMR, § 3.02(7). This Action by Consent may be executed in any number of counterparts, each of which shall be an original, but all of which constitute one agreement, and shall be dated and become effective when the copies bearing all of the signatures of the Siting Board members are received by the Chairman. 980 CMR, § 2.06(2).

Signed:

James Connelly
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia Hamel
For Robert Durand
Secretary of Environmental Affairs

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Louis Mandarin, Jr.
Public Member

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Joseph Donovan
For Dean Serpa, Acting Director
Department of Economic Development

David L. O'Connor
Commissioner
Division of Energy Resources