

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of)
Berkshire Power Development, Inc. for)
Approval to Construct a Bulk Generating)
Facility and Ancillary Facilities)

EFSB 95-1

FINAL DECISION

ON COMPLIANCE

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Hearing Officer
December 22, 1997

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The Energy Facilities Siting Board hereby APPROVES the petition of Berkshire Power Development Inc. to construct a 252 megawatt bulk generating facility and ancillary facilities in Agawam, Massachusetts.

I. INTRODUCTION

On June 19, 1996, the Energy Facilities Siting Board (“Siting Board”) conditionally approved the petition of Berkshire Power Development, Inc. (“BPD”) to construct a 252 megawatt (“MW”) natural gas-fired, combined-cycle independent power plant on an approximately 40-acre undeveloped parcel of land located at the Shoemaker Industrial Park in the Town of Agawam, Massachusetts (“Town” or “Agawam”) which would commence commercial operation in 1999. Berkshire Power Development, Inc., 4 DOMSB 221, 237 (1996) (“BPD Decision”). In the BPD Decision, the Siting Board found that BPD had established that, upon confirmation by the Siting Board of adequate compliance with specific conditions, the proposed project is likely to be viable. Id. at 346, 447-448. Therefore, the Siting Board specified additional evidence on project viability that BPD would need to provide for the Siting Board to make the additional findings that would support a decision to allow BPD to construct its proposed facility. Id.

As a result, the Siting Board approved BPD’s petition subject to four conditions regarding viability.¹ Id. On November 25, 1997, BPD submitted a compliance filing relative to the viability conditions and certain other issues.²

The viability conditions required BPD to provide: (1) an executed engineering, procurement and construction contract (“EPC contract”) between BPD and Black and Veatch Construction, Inc. and ABB Power Generation (“B&V/ABB Power Generation”), the entity

¹ The Board also imposed six additional conditions relative to the construction and operation of the facility. 4 DOMSB at 448-449.

² The viability compliance filing is hereby moved into evidence as Exhibit HO-V-32 with Attachments 1 through 9b. BPD has requested confidential treatment of Attachments 1 through 5 and such treatment is hereby granted.

which will construct the project; 2) an executed interconnection agreement between BPD and Northeast Utilities (“NU”); 3) an executed operations and maintenance (“O&M”) agreement between BPD and ABB Operations and Maintenance Department (“ABB O&M”), the entity which will operate and maintain the proposed facility; and 4) an executed contract for firm transportation of natural gas for 335 days or more to the proposed facility from Wright, New York or a comparable location. Id. at 447-448.

The Siting Board also found that upon compliance with all conditions set forth in the decision, the construction of the proposed facility 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.

In addition to the conditions imposed, the Siting Board required BPD to notify the Siting Board of any changes to BPD’s proposed project, other than minor variations, so that the Siting Board could decide whether to further inquire into any issue associated with a particular change. Id. at 450. Accordingly, in its viability compliance filing, BPD also noted three changes in the project: a change in the joint development team for the project; improvements to the project resulting from design changes in the ABB GT-24 turbine; and changes in back-up fuel storage capacity and deliveries to the facility resulting from BPD’s settlement with the Agawam Zoning Board of Appeals (“ZBA”). The Siting Board addresses the viability compliance and the three changes in the project in the following sections.

II. PROJECT VIABILITY

A. Standard of Review

The Siting Board determines that a proposed non-utility generating project is likely to be a viable source of energy if (1) the project is reasonably likely to be financed and constructed so that the project will actually go into service as planned, and (2) the project is likely to operate and be a reliable, least-cost source of energy over the life of its power sales agreements. U.S. Generating Company, EFSB 96-4, 1, 71-72 (1997) (“USGen Decision”); BPD Decision, 4 DOMSB at 328-329; Northeast Energy Associates, 16 DOMSC 335, 378-380 (1987) (“NEA Decision”).

In order to meet the first test of viability, the proponent must establish (1) that the project is financiable,³ and (2) that the project is likely to be constructed within the applicable time frames and will be capable of meeting performance objectives. In order to meet the second test of viability, the proponent must establish (1) that the project is likely to be operated and maintained in a manner consistent with appropriate performance objectives, and (2) that the proponent’s fuel acquisition strategy reasonably ensures low-cost, reliable energy resources over the terms of the power sales agreements. USGen Decision, EFSB 96-4, at 71-72; BPD Decision, 4 DOMSB at 328-329; NEA Decision, 16 DOMSC at 378-380.

B. Construction

With respect to BPD’s construction strategy, the Siting Board considered whether the project is reasonably likely to be constructed and go into service as planned. BPD Decision, 4 DOMSB at 332. The Siting Board reviewed a Term Sheet, which was to be the basis for negotiation of the final EPC contract. Id. at 333-35. The Siting Board found that BPD would be able to demonstrate that the project was reasonably likely to be constructed and go into service as planned by submitting a signed EPC contract between BPD and B&V/ABB Power Generation that “contains all of the significant provisions included in the Term Sheet.” Id. at

³ In the BPD Decision, the Siting Board found that BPD had established that the proposed project is financiable. 4 DOMSB at 332.

336. The Siting Board found that the Term Sheet submitted by BPD (Exh. HO-V-13) included “a number of advantageous provisions, such as incentive and penalty terms, which the Siting Board has recognized in previous reviews as ensuring timely and quality construction projects.” Id.

In response to this condition, BPD presented to the Siting Board as executed EPC contract between BPD and B&V/ABB Power Generation. The executed EPC contract contains the “advantageous provisions” that were included in the Term Sheet (Exh. HO-V-32(att. 1)). Section 6.1 of the EPC contract provides for a lump sum price (id. at 31). Section 4.1 provides for a guaranteed schedule (id. at 28). Section 29.1.1 provides for liquidated damages for failure to achieve substantial completion by the guaranteed completion date (id. at 62). Section 29.1.2 provides for liquidated damages for failure to achieve operational guarantees (id. at 63). Section 30.1 provides for an early completion bonus (id. at 72). Section 15 provides for warranties (id. at 42). Section 27.2 provides for insurance (id. at 57). Section 22 through 26 provide for acceptance testing (id. at 52).

BPD noted that some details in the EPC contract vary from the submitted Term Sheet (Exh. HO-V-32, at 2-3). BPD explained that most of these variances are relatively minor and are the expected result of the usual process of developing a term sheet into a more comprehensive and formal contract (id. at 2). BPD further noted that some variances reflect the improvements in turbine design efficiency that BPD presented to the staff of the Siting Board on May 7, 1997 and which the Siting Board staff concluded would not alter in any substantive way either the assumptions or the conclusions reached in the Siting Board’s analysis of environmental impacts in the BPD Decision (see Exh. HO-V-32(atts. 8 & 9)). BPD contends that these improvements in output, heat rate, and overall economic efficiency have only served to improve the EPC contract in comparison to the Term Sheet (id. at 2-3). The remaining variances reflect efforts by BPD to negotiate even more beneficial performance standards.

Based on its review of the EPC Contract, the Siting Board finds that the protections reflected in the guarantees, warranties, milestones, and other provisions of the EPC contract,

ensure the BPD's proposed project is likely to be constructed on schedule and to perform as expected.

C. Interconnection to the Regional Electric Transmission Grid

The Siting Board found that to establish that the proposed project is likely to be capable of being dispatched as expected, BPD must submit a signed interconnection agreement between BPD and Northeast Utilities ("NU"). BPD Decision, 4 DOMSB at 336. BPD submitted a signed system impact study agreement with NU for the interconnection planned for the proposed BPD facility (Exh. HO-V-32(att. 2)).⁴ Following the close of the evidentiary record in the underlying proceeding, the Federal Energy Regulatory Commission ("FERC") issued an order that requires utilities owning, controlling, or operating transmission facilities to allow others open and equal access to the regional transmission grid. FERC Order 888 (April 24, 1996). FERC Order 888 requires utilities that own, control or operate transmission facilities used in interstate commerce to file tariffs setting rates and other terms for service to all customers for network, load-based service and point-to-point, contract-based service. BPD stated in its compliance filing that pursuant to its right to access the electric transmission grid under FERC Order 888, it will request service under the filed tariff rather than through a separate agreement (Exh. HO-V-32, at 3). BPD requested that the Siting Board accept its rights under FERC Order 888 as proof of the proposed project's access to the regional transmission grid.

Based on NU's open access tariffs, filed pursuant to FERC Order 888, and the signed system impact study agreement, the Siting Board finds that BPD has access to the regional transmission grid.

Consistent with the Siting Board's conditional approval in the BPD Decision, 4 DOMSB

⁴ The Siting Board notes that paragraph 8 of the system impact agreement provides that BPD's rights to wheel over or interconnect with NU's transmission or distribution system "shall be provided for under separated agreement and in accordance with the [NU]'s open access tariff" (Exh. HO-V-32(att. 2) at ¶ 8).

at 336, the Siting Board here finds that BPD has complied with (1) the condition relative to the provision of a signed EPC contract, and (2) given the post-BPD Decision changed federal requirements as a result of FERC Order 888, the intent of the condition relative to the provision of a signed interconnection agreement. Accordingly, the Siting Board finds that BPD has established that its proposed project is likely to be constructed within the applicable time frames and be capable of meeting performance objectives. Further, in conjunction with the finding as to the financiability of BPD's proposed project (see BPD Decision, 4 DOMSB at 332), the Siting Board finds that BPD has established that its proposed project meets the Siting Board's first test of viability.

D. Operations

With respect to operation of the proposed project, the Siting Board examined whether the proposed project is likely to be operated and maintained in a manner consistent with appropriate performance objectives. BPD Decision, 4 DOMSB at 328. Consistent with this objective, the Siting Board evaluated the ability of the project proponent or other reasonable entities to operate and maintain the facility in a manner which ensures a reliable energy supply. Id. at 337. In the underlying case, the Siting Board required BPD to establish that experienced and competent entities are contracted for, or otherwise committed to, the performance of critical tasks. Id. The Siting Board required that such tasks be enumerated in detailed contracts or other agreements that include financial incentives and/or penalties which ensure reliable performance over the life of the power sales agreements. Id.

The Siting Board found that in order to establish that BPD's proposed project is likely to be operated and maintained in a manner consistent with appropriate performance objectives, BPD must provide a copy of a signed O&M agreement with the project's selected O&M contract provider. Id. at 338-448. The Siting Board stated that to satisfy this condition, the executed O&M agreement should be similar in all significant provisions to the draft contract submitted by BPD during the course of the proceeding. Id. at 338-39.

In response to this condition, BPD presented to the Siting Board an executed term sheet

with ABB (Exh. HO-V-32(att. 3)). The executed term sheet contains bonus, penalty and incentive provisions related to availability, heat rate, capacity and budget variation similar or superior to those in the draft contract, which ensure that the project with the turbine design enhancements previously reviewed by the Siting Board will operate in a reliable manner over the term of the agreement (id.).

The Siting Board finds that the executed term sheet is similar or superior in all significant provisions to the draft submitted during the proceeding. Accordingly, the Siting Board finds that BPD has demonstrated that its proposed project is likely to be operated and maintained in a manner consistent with appropriate performance objectives.

E. Fuel Acquisition

In considering BPD's fuel acquisition strategy, the Siting Board considered whether BPD's strategy reasonably ensures low-cost, reliable energy resources over the planned life of the proposed project. BPD Decision, 4 DOMSB at 343. The Siting Board found that a firm transportation contract from a major interconnection point to the proposed project is essential to ensuring that BPD's gas supply strategy is viable. Id. at 344. The Siting Board therefore required BPD to provide the Siting Board with a signed contract(s) for 335 days or more of firm transportation from Wright, New York or a comparable location, or a comparable agreement, in order to secure final approval of the proposed project. Id. at 344-345.

In response to this condition, BPD presented to the Siting Board a fuel management services agreement with El Paso Energy Marketing (Exh. HO-V-32(att. 4)).⁵ El Paso Energy Marketing's obligations will be guaranteed by El Paso Natural Gas Company, which recently acquired Tennessee Gas Pipeline Company (id. (att. 4) at 1). Pursuant to the fuel management services agreement, El Paso Energy Marketing will provide all the natural gas and fuel oil

⁵ In addition, BPD provided a copy of an executed firm natural gas transportation assignment agreement between Power Development Company ("PDC") and Bay State Gas Company (Exh. HO-V-32(att. 5)). PDC is one of the development partners of the proposed BPD project (see BPD Decision, 4 DOMSB at 238).

requirements of the facility (id. (att. 4) at 1, 2-3, 5-6). The fuel management services agreement calls for initial arrangements through an assignment of firm capacity from Bay State Gas Company on the Tennessee Gas Pipeline system from Zone 0 or Zone 1 (Gulf Coast) to BPD's proposed project (Exh. HO-V-32(att. 4) at 2-3).

The Siting Board finds that BPD has demonstrated that its gas supply strategy is viable. Accordingly, the Siting Board finds that BPD's fuel acquisition strategy reasonably ensures low-cost, reliable energy resources over the planned life of the proposed project.

Consistent with the Siting Board's conditional finding in the BPD Decision, 4 DOJMSB at 345, the Siting Board here finds that BPD has complied with (1) the condition relative to the provision of a signed O&M contract and, (2) the condition relative to the provision of a signed contract(s) for 335 days or more of firm transportation from Wright, New York or a comparable location. Accordingly, the Siting Board finds that BPD has established that its proposed project meets the Siting Board's second test of viability.

In conclusion, the Siting Board finds that BPD has established that its proposed project is likely to be a viable source of energy.

F. Additional Issues

The Siting Board requires that project proponents notify the Siting Board of any changes other than minor variations to the proposal as presented to the Siting Board, so that it may decide whether to inquire further into such issues. BPD Decision, 4 DOMSB at 450. In addition to the viability compliance issues addressed above, BPD also provided the Siting Board with information concerning three changes in the project: (1) a change in the joint development team for the project; (2) improvements to the project resulting from design changes in the ABB GT-24 turbine; and (3) changes in back-up fuel storage capacity and deliveries to the facility resulting from BPD's settlement with the ZBA.

1. Change in Development Team

With respect to the change in the development team, BPD stated in its compliance filing

that El Paso Energy Corporation⁶ signed a joint development agreement with PDC to jointly develop, construct and operate the proposed project (Exh. HO-V-32 at 5). BPD stated that with the addition of El Paso Energy Corporation, former development members ABB Energy Ventures and Cogeneration Services Corporation (“CSC”) had withdrawn from the development team.⁷ BPD stated that El Paso Energy Corporation is one of the world’s largest energy corporations (id. at 6). BPD noted that El Paso Energy Corporation is a publicly traded company with a holding company structure of five business units, including a natural gas transmission subsidiary with the nation’s only integrated coast-to-coast natural gas pipeline; a field services company that provides gathering, treating, processing, compression and intrastate transmission services to gas producers; an energy marketing company skilled in the gas, oil, electricity and natural gas liquids markets; and an international energy project development group (id. at 6 and (att. 6)). BPD further stated that El Paso Energy Corporation has extensive experience in gas-fired power generation (id. at 7). BPD noted that, currently, El Paso Energy Corporation is a co-owner, developer and operator of cogeneration, baseload and peaking projects around the world, including the MASSPOWER plant in Springfield, Massachusetts (id. at 6 and (att. 6)). BPD stated that in 1997, El Paso Energy Corporation had over 1,000 MW in operation, including three plants in the United States, one in Hungary and two in Argentina with an additional 1,450 MW under construction in four countries, including integrated pipeline and power projects in South Sulawesi, Indonesia and Aguaytia, Peru (id.).

BPD noted that, in addition to providing fuel management capability as described in Section II.E, above, El Paso Energy Marketing will provide power marketing services to the BPD project (Exh. HO-V-32 at 6).

The Siting Board finds that BPD has demonstrated that El Paso Energy Corporation is a viable substitute development partner. Like ABB Energy Ventures and CSC, El Paso Energy

⁶ El Paso Energy Corporation is the parent of Tennessee Gas Pipeline Company, the interstate pipeline to which the BPD’s proposed project will be interconnected.

⁷ El Paso Energy Corporation is the successor to both ABB Energy Ventures and Cogeneration Services Corporation (Exh. HO-V-32, at n.7).

Corporation has a broad range of experience in overall project development. See BPD Decision, 4 DOMSB at 331. In addition, like ABB Energy Ventures, El Paso Energy Corporation has substantial worldwide experience in the power development field, as well as significant capital resources. See Id. at 331-332. Accordingly, the Siting Board finds that the substitution of El Paso Energy Corporation for ABB Energy Ventures and CSC as a development partner does not require further inquiry.

2. ABB GT-24 Turbine Design Changes

BPD noted that design changes in the ABB GT-24 turbine have resulted in improvements to the project (Exh. HO-V-32 at 6). As originally proposed, the project had a planned capacity of 252 MW (net nominal). BPD Decision, 4 DOMSB at 237, 447. BPD informed the Siting Board by letter of May 7, 1997 that, as a result of the actual performance of the GT-24 turbine design, the average annual output of the facility would increase by 18 MW (about 7%) and the net plant heat rate would improve by approximately 150 Btu/kWh (Exh. HO-V-32(att. 7)).

The Siting Board staff stated by letter of May 21, 1997 that the design changes in the ABB GT-24 turbine would improve the project's output, heat rate, and overall economic efficiency, without altering in any substantive way either the assumptions or the conclusions reached in the Siting Board's analysis of the project's environmental impacts in the underlying proceeding (Exh. HO-V-32(att. 8)). The staff determined that further inquiry into the design changes was not required (id.).

The Siting Board agrees with the staff's determination and finds that the ABB GT-24 turbine design change does not warrant further inquiry.

3. Changes due to ZBA Settlement Agreement

Following the issuance of the Siting Board's decision, BPD negotiated and executed a Settlement Agreement with the ZBA (Exh. HO-V-32(att. 9a)). Two conditions imposed by the Settlement Agreement will result in a change in on-site oil storage capacity and provide for

more flexible fuel oil delivery hours than those referenced in the BPD Decision (Exhs. HO-V-32, at 7; HO-V-32(att. 9a, Conditions 4 & 25).

With respect to the first of these conditions, as originally proposed, the fuel acquisition strategy for the project provided for a back-up fuel supply plan which included a three-day, on-site oil supply. BPD Decision, 4 DOMSB at 343-344. Under the terms of the Settlement Agreement, BPD committed to use good-faith efforts to eliminate all on-site fuel storage, and failing such elimination, agreed to limit the fuel storage tanks to forty feet in height and to a capacity of one-half of that originally contemplated (Exh. HO-V-32(att. 9b, Condition 4)).

With respect to the second of these conditions, BPD acknowledged that the Siting Board noted in the BPD Decision that BPD had committed to limiting delivery of fuel oil to between the hours of 9:30 a.m. to 2:00 p.m. to avoid conflicts with the Agawam school bus schedule. 4 DOMSB at 409. As a condition of the Settlement Agreement however, deliveries may take place between the hours of 7:00 a.m. and 6:00 p.m., with special care taken between the hours of 7:00 a.m. to 9:00 a.m. and 2:00 p.m. to 4:00 p.m., in light of school-pickup and drop-off times (Exh. HO-V-32(att. 9b, Condition 25)).

BPD requested that the Siting Board defer to the specific conditions imposed by local authorities concerning oil storage and deliveries to the facilities (Exh. HO-V-32 at 7). In so requesting, BPD noted that the Department of Public Utilities ("Department") recently approved BPD's petition for an exemption from the zoning by-laws of the Town of Agawam. Berkshire Power Development, Inc., D.P.U. 96-104 (1997). In that approval, the Department relied on the findings of the Siting Board and local permitting authorities, including those found in the Settlement Agreement, and noted that in its balancing of general public and local interests that the local interests would be protected by BPD's compliance with all conditions contained in those documents. Id. at 44-45.

The Siting Board finds that BPD has demonstrated that changes to its proposed project resulting from BPD's compliance with the Settlement Agreement will not alter in any substantive way either the assumptions or conclusions reached in the Siting Board's analysis of the proposed project's environmental impacts. First, the reduction in the amount of fuel to be

stored on the site should not materially affect the viability of BPD's proposed project or prevent it from providing a necessary energy supply for the Commonwealth. And second, the Siting Board finds that safety issues will not be materially affected by deferring to the ZBA with regard to the fuel delivery schedule. Accordingly, the Siting Board finds that the changes in on-site fuel storage capacity and deliveries do not require further inquiry. The Siting Board notes that this finding is consistent with the Department's reliance on BPD's compliance with the conditions in the Settlement Agreement in its decision in D.P.U. 96-104 granting BPD's request for a zoning exemption.⁸

⁸ In making this finding, the Siting Board notes that the conditional approval which was granted BPD in 1996 requires commencement of construction of BPD's proposed project by June 19, 1999. BPD Decision, 4 DOMSB at 449, 450. The Siting Board further notes that the Settlement Agreement becomes null and void if construction does not commence by January 5, 1998 (Exh. HO-V-32(att. 9b, Condition 47). Nothing in this Decision shall be read to imply that the Siting Board approval is either contingent upon (1) construction of BPD's proposed project commencing at the earlier date set forth in the Settlement Agreement, or (2) the continued validity of the Settlement Agreement.

III. DECISION

In the BPD Decision, the Siting Board found that upon compliance with the four viability conditions set forth therein, the construction of the proposed generating facility is consistent with providing a necessary energy supply to the Commonwealth at the lowest possible cost. 4 DOMSB at 447-48.

Here, the Siting Board has found that BPD has complied with the four viability conditions set forth in Section II.C. of the BPD Decision. Id.

In addition, consistent with the Siting Board's directive to BPD to inform the Siting Board of any changes to BPD's proposed project, other than minor variations, BPD has informed the Siting Board of three such changes. The Siting Board has found that none of these changes require further inquiry.

Robert P. Rasmussen
Hearing Officer

Dated this 22nd day of December, 1997

Unanimously APPROVED by the Energy Facilities Siting Board at its meeting of December 19, 1997 by the members and designees present and voting. Voting for approval of the Tentative Decision as amended: Sonia Hamel, Acting Chair (for Trudy Coxe, Secretary, Executive Office of Environmental Affairs); John D. Patrone (Commissioner, DTE); James Connelly (Commissioner, DTE); David L. O'Connor (for David A. Tibbetts, Director, Department of Economic Development); Joseph Faherty (Public Member); and Nancy Brockway (Public Member).

Sonia Hamel
Acting Chair

Dated this 22nd day of December, 1997