COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of Eastern Energy Corporation for Approval to Construct a Bulk Generating Facility and Ancillary Facilities	)	EFSB 90-100R2

FINAL DECISION

Robert P. Rasmussen
Hearing Officer
June 27, 1995

On the Decision:
Phyllis Brawarsky
William Febiger

APPEARANCES: John A. DeTore, Esq.
Donna Sharkey, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
FOR: Eastern Energy Corporation
Petitioner

Frederick D. Augenstern, Esq.
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
200 Portland Street
Boston, Massachusetts 02114
Intervenor

Melanie Hagopian, Esq.
Andy Backman
Department of Environmental Management
100 Cambridge Street, 14th Floor
Boston, Massachusetts 02202
Intervenor

Arthur J. Caron, Jr., Esq.
Office of City Solicitor
The City of New Bedford
133 William Street
New Bedford, Massachusetts 02740
Intervenor

GNB NO-COALition
c/o Irwin Marks
1122 Main Street
Acushnet, Massachusetts 02743
Intervenor

Robert H. Ladino
81 Long View Road
New Bedford, Massachusetts 02740
Interested Person

Henry Riley
408 County Road
New Bedford, Massachusetts 02740
Interested Person

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I. INTRODUCTION

A. Procedural History

On January 29, 1990, Eastern Energy Corporation ("EEC" or ""Company") filed with the Energy Facilities Siting Council ("Siting Council"),[1] a petition to construct a 300 megawatt ("MW"), coal-fired, circulating fluidized bed ("CFB") boiler cogeneration power plant on a 282 acre parcel of land in the Greater New Bedford Industrial Park in New Bedford, Massachusetts. The Siting Council docketed the petition as EFSC 90-100.[2] On July 23, 1991, the Hearing Officers issued the Tentative Decision in the proceeding. The Siting Council, by majority vote, adopted the Tentative Decision with some minor amendments at its August 2, 1991 meeting. EEC Decision, 22 DOMSC at 188.[3]

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[1] Pursuant to Chapter 141 of the Acts of 1992 ("Reorganization Act"), the Siting Council was merged with the Department of Public Utilities ("Department") effective September 1, 1992. Reorganization Act, § 55. Petitions for approval to construct facilities that were pending before the Siting Council prior to September 1, 1992 were to be decided by the newly created Energy Facilities Siting Board ("Siting Board") which is within, but not under the control or supervision of, the Department. Id., §§ 9, 15, 43, 46. The terms Siting Council and Siting Board will be used throughout this Decision as appropriate to the circumstances being discussed.

[2] Jurisdiction over EEC's petition originally arose pursuant to G.L. c. 164, §§ 69H and 69I, which required electric companies to obtain Siting Board approval for construction of proposed facilities. Eastern Energy Corporation, 22 DOMSC 188, 200-202 (1991) ("EEC Decision"). Said jurisdiction is now codified in G.L. c. 164, §§ 69H and 69J.

[3] In the EEC Decision, the Siting Council conditionally approved EEC's petition. The conditions imposed on EEC fell into two categories: viability and environmental issues. EEC was required to return to the Siting Council with supplemental filings that addressed each of these two categories. EEC Decision, 22 DOMSC at 315-316. Upon receipt of the supplemental filings, all parties to the initial proceeding were to be afforded the opportunity to address the supplemental filings and provide additional relevant information to supplement the record further. Id. at n.234.

On February 10, 1992, EEC filed its response to the environmental conditions contained in the EEC Decision ("Compliance Filing"), which was docketed as EFSC 90-100A. The Siting Council issued its Final Decision on the Compliance Filing on July 30, 1992.

(continued…)

Timely appeals of the EEC Decision were filed with the Supreme Judicial Court ("Court") sitting in the County of Suffolk by the City of New Bedford ("CNB") and the Office of the Attorney General ("Attorney General"), both intervenors in the proceeding, pursuant to G.L. c. 164, § 69P and c. 25, § 5. The two appeals were reported by a single justice to the full Court and were consolidated as Civil Action S-5856.

On August 20, 1992, subsequent to the issuance of the EEC Compliance Decision, the Court issued its decision in the appeal. City of New Bedford v. Energy Facilities Siting Council (and a companion case), 413 Mass. 482 (1992) ("City of New Bedford"). In City of New Bedford, the Court concluded that the Siting Council exceeded ita authority under G.L. c. 164, § 69H, and, as a result, the Court remanded the matter to the Siting Council "to compare alternative energy resources in its review of Eastern's application." Id. at 484. The Court also identified four "Other Issues which may Arise on Remand to the Council."[4] Id. at 489-490. In conclusion, the Court remanded the matter to the Siting Council 'for reconsideration of Eastern's applications consistent with this opinion." Id. at 490.

The proceedings on remand were docketed as EFSB 90-100R. The Siting Board

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[3] (…continued)
Eastern Energy Corporation, 25 DOMSC 296 (1992) ("EEC Compliance Decision"). No appeal was taken from the EEC Compliance Decision.

[4] The four issues were as follows: (1) "Because the statute mandates a 'necessary energy supply for the commonwealth' (emphasis added)," the Siting Council's specific finding that additional energy resources are needed for the New England area was "inadequate." City of New Bedford, 413 Mass. at 489. (2) "A finding that the new power would be produced at the lowest possible cost is necessary to conform to the council's legislative mandate." Id. (3) "Ensuring an adequate supply is not the same as 'provid[ing] a necessary energy supply for the commonwealth' (emphasis added). G.L. c. 164, § 69H. In addition, the mandate requires a balancing of minimum environmental impact and lowest possible cost. It is inappropriate for the council to elevate to primary importance the economic benefits to be contributed to the Commonwealth over a balancing of these factors." Id. at 490. (4) "The final decision must do more than merely identify conflicting interests and contentions. See Hamilton v. Department of Pub. Utils., 346 Mass. 130, 137 (1963). The decision must be 'accompanied by a statement of reasons … including determination of each issue of fact or law necessary to the decision'." Id.

conduct4d 18 days of evidentiary hearings in which the parties to the original proceeding were afforded the opportunity to address al issues identified by the Court in City of New Bedford. EEC presented two witnesses, the Attorney General presented four witnesses and the Greater New Bedford NO-COALition ("NO-COAL") presented six witnesses.[5] The Hearing Officer entered 312 exhibits into the record, EEC entered 327 exhibits into the record, the Attorney entered 158 exhibits into the record and NO-COAL entered 28 exhibits into the record.[6]

On October 5, 1993, the Hearing Officer issued the Tentative Decision in the remand proceeding.[7] The Siting Board, by unanimous vote, adopted the Tentative Decision as amended at its October 22, 1993 meeting. Eastern Energy Corporation (on remand), 1 DOMSB 511 (1993) ("EEC (remand) Decision").[8]

Appeals of the EEC (remand) Decision were filed with the Court by the Attorney

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5 The initial proceedings entailed 14 days of hearings in which EEC sponsored 13 witnesses, the Attorney General sponsored two witnesses, the Massachusetts Department of Environmental Management sponsored one witness, and the CNB and NO-COAL sponsored the written testimony of one witness each.

6 These exhibits were in addition to the 872 exhibits entered into the record in EFSC 90-100 and EFSC 90-100A. The exhibits in those two proceedings were incorporated into and made a part of the record of the remand proceedings.

7 Although the Tentative Decision was dated October 4, 1993, from a practical perspective, it was not readily available to all parties until the following day.

8 The Siting Board found that there would be a need for 300 MW or more of additional energy resources for reliability purposes beginning in the year 1998 for Massachusetts and beginning in the year 2000 in New England. EEC (remand) Decision, 1 DOMSB at 465, 495. As it was unclear from the record whether the regional surplus would be available to meet the earlier need for power in the Commonwealth, the Siting Board found that the submission of (1) signed and approved power purchase agreements ("PPAs") which include capacity payments for at least 75 percent of the proposed project's electric output, and (2) signed PPAs which include capacity payments with Massachusetts customers for at least 25 percent of the proposed project's electric output which are the result of a competitive resource solicitation process beginning in 1993 or beyond and which are approved pursuant to G.L. c. 164, § 94A, would be sufficient evidence to establish that the proposed project would provide a necessary energy supply for the Commonwealth. Id. at 499.

General, NO-COAL, and EEC, pursuant to G.L. c. 164, § 69P and c. 25, § 5. The Court subsequently dismissed EEC's appeal as untimely. Eastern Energy Corporation v. Energy Facilities Siting Board, 419 Mass. 151 (1994). The Attorney General's and NO-COAL's appeals were consolidated as Civil Action S-6632. The Court issued its decision on the appeal on January 11, 1995. Attorney General v. Energy Facilities Siting Board (and a Companion Case), 419 Mass. 1003 (1995) ("Attorney General v. Siting Board").

B. The Appeal of the EEC Decision (on remand) and the Court's Decision in Attorney General v. Energy Facilities Siting Board

In their petitions for appeal, the Attorney General and NO-COAL, raised several issues as causes of action. The first of these issues related to the Siting Board conditioning approval of the EEC project on the submission of signed and approved PPAs to demonstrate an earlier year of need. The Attorney General argued that, by conditioning approval on evidence that would not be submitted until some time in the future, the Siting Board precluded him from rebutting the evidence when it was submitted, in violation of his rights under G.L. c. 30A, §§ 10 & 11 (Attorney General Petition for Appeal at 12-14). NO-COAL interpreted the Siting Board's decision to condition approval on the submission of signed and approved PPAs as a failure to find a need for the proposed project (NO-COAL Petition for Appeal at 2, 7, 8). With regard to future need, NO-COAL also speculated that future electrical loads might in fact decrease as additional energy efficient appliances are installed and that "improvements in renewable resource technologies could reduce the costs for alternative methods of electrical generation which could also result in reduced environmental harm" (id.).

As a second issue, both the Attorney General and NO-COAL argued that the list of alternatives contained in G.L. c. 164, § 69J includes the alternative of conservation (Attorney General Petition for Appeal at 14-17) or conservation and load management ("C&LM") (NO-COAL Petition for Appeal at 5-7) and faulted the Siting Board for not evaluating these as

alternatives to the proposed project.[9] As a third issue, both the Attorney General and NO-COAL argued that the Siting Board's balancing of cost and environmental impacts, a requirement that the Court in City of New Bedford specifically acknowledged to be a proper function of the agency was not properly conducted.[10]

As noted above, the Court issued its decision in Attorney General v. Siting Board on January 11, 1995.[11] The Court remanded the case to the single justice with instructions that the Siting Board decision conditionally approving the siting of the EEC facility be vacated, and directed that "[a]ny question concerning a reopening of the [Siting B]oard's hearings is left to the discretion of the [Siting B]oard." Attorney General v. Siting Board, 419 Mass. at 1005.

Addressing the Siting Board's conditional approval of the proposed EEC project, the

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9 In paragraph #63 of the Attorney General's Petition for Appeal the Attorney General argued that "In the context of G.L. c. 164, § 69J, and the entire statutory scheme, the term 'no additional electrical power' means conservation."

NO-COAL cited the language of G.L. c. 164, § 69I and asserted that the language "and no additional electrical power or gas; a reduction of requirements through load management" means that conservation and load management must be considered as an alternative (NO-COAL Petition for Appeal at 5). The Siting Board notes that Section 69I does not apply to the present proceeding, but that the cited language is identical in Section 69J, the section that does apply.

10 In the Eastern (remand) Decision, the Siting Board's analysis established that EEC's proposed facility was clearly superior to five alternatives. 1 DOMSB at 396. In a comparison of the proposed facility with the remaining alternative, a natural gas-fired, combined-cycle power plant, the proposed facility had a significant cost advantage, but the natural gas-fired alternative was preferable with respect to environmental impacts, with a significant advantage only in the area of air impacts. Id. at 386-390. The Siting Board then balanced the environmental impacts and costs of the proposed facility and the natural gas alternative as directed by the Court. City of New Bedford, 413 Mass. at 486.

11 On the same day that it issued its decision in Attorney General v. Siting Board, the Court issued its decision in Point of Pines Association, Inc. v. Energy Facilities Siting Board, 419 Mass. 281 (1995) ("Point of Pines"). The Court relied on its discussion of the issues in Point of Pines in its disposition of the Siting Board decision at issue in Attorney General v. Siting Board.

Court stated that the Siting Board had not explained how the approval of PPAs by the Department, which may show need for an individual utility, implies a need for the Commonwealth. Id. at 1004-1005. The Court noted that it had not received a reasoned explanation of the inferability of Commonwealth need from utility need in either this case, arguments before the Court concerning this case, or its previously cited Siting Board decisions. Point of Pines, 419 Mass. at 284-285. Further, the Court noted that the Siting Board may not abdicate its independent responsibility to ensure that projects are necessary by relying solely on conclusions of the Department and that the Siting Board must make an independent finding of Commonwealth need before approving the construction of a new facility. Id. at 286; Attorney General v. Siting Board, 419 Mass. at 1004-1005.

The Siting Board will comply with the Court's directive relative in making an independent finding regarding the need for EEC's proposed project in Section II.B, below. Before doing so, however, the Siting Board notes that the Court's decision in Attorney General v. Siting Board did not address several other issues which were raised on appeal. Our analysis in this decision will rely in part on portions of the EEC (remand) Decision which were not addressed by the Court. Therefore, we find it necessary to also address herein the misunderstandings or misinterpretations of the parties reflected in those other issues which were raised on appeal, in order to clarify the basis for, and the subsidiary findings of, this decision and the EEC (remand) Decision.

As to the first issues raised on appeal, i.e., use of signed and approved PPAs as evidence of need earlier than the year 2000, the Siting Board acknowledges that it did not properly justify their use in the EEC (remand) Decision. Further, the Siting Board will neither place any reliance on such PPAs as evidence of need in this decision, nor place any condition on EEC that requires the submission of PPAs for such purpose in the future. Accordingly, the Attorney General's argument with regard to this issue is moot.

In regard to NO-COAL's assertion as to the Siting Board's failure to find a need for the proposed project, the Siting Board will address this in Sections II.B.2 and II.B.3, below. As to NO-COAL's speculation that future need may decrease, the Siting Board notes that the record

evidence provides no support for such speculation. Further, the Siting Board examined both of the contingencies identified by NO-COAL in its Petition for Appeal during hearings and in the need analysis projections of demand-side management ("DSM") that were used in the EEC (remand) Decision. Based on that analysis, the Siting Board found that, contrary to NO-COAL's assertions, future need would increase.

With regard to the second issue raised on appeal regarding conservation, or conservation and load management, in essence, both the Attorney General and NO-COAL urged the Siting Board to ignore the plain language of its statute and Court decisions that indicate the proper tools for use in statutory interpretation.[12] In considering whether conservation or conservation and load management should be analyzed as alternatives to a proposed project, "[t]he starting point of our analysis is the language of the statute, 'the principal source of insight into Legislative purpose.' Commonwealth v. Lightfoot, 391 Mass. 718, 720 (1984)." City of New Bedford, 413 Mass. at 484, citing, Simon v. State Examiners of Electricians, 395 Mass. 238, 242 (1985).

Specifically, G.L. c. 164, § 69J's requirements include that:

> [a] petition to construct a facility shall include … the following information: a description of actions planned to be taken by the applicant to meet future needs or requirements, including, but not limited to … a description of alternatives to planned action such as … no additional electrical power or gas; a reduction of requirements through load management … (emphasis added).

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[12] The Court has held that, in construing a statute, common words and phrases employed in the statute are to be accorded their usual meaning. Commissioner of Corp. & Tax v. Chilton Club, 318 Mass. 285, 288-289 (1945), citing, Fluet v. McCabe, 299 Mass. 173; Hinckley v. Retirement Board of Gloucester, 316 Mass. 496, and Killiam v. March, 316, Mass. 646. In addition, statutory language, when clear and unambiguous, must be given its ordinary meaning. Bronstein v. Prudential Ins. Co. of America, 390 Mass. 701, 704 (1984); Hashimi v. Kalil, 388 Mass. 607, 610 (1983). Further, none of the words of a statute is to be disregarded, for they are the main source for the ascertainment of the legislative purpose. Commissioner of Corp. & Tax v. Chilton Club, 318 Mass. 285, 288 (1985); Nichols v. Commissioner of Corporations & Taxation, 314 Mass. 285 (1943). And, "no word in a statute is to be treated as superfluous, unless no other possible course is open." Commonwealth v. McMenimon, 295 Mass. 467, 469 (1936).

Additional requirements of Section 69J include that:

> [t]he [Siting B]oard shall … approve a petition to construct a facility … if it determines that it meets the following requirements: … projections of the demand for electric power, or gas requirements and of the capacities for existing and proposed facilities are based on substantially accurate historical information and reasonable statistical projection methods and include an adequate consideration of conservation and load management … (emphasis added).

Based on the ordinary meaning of the words of Section 69J, the Legislature has directed the Siting Board to include consideration of "conservation and load management" in its projections of the demand for electric power. Had the Legislature meant "conservation" to be included as an alternative, the Siting Board presumes the Legislature would have so stated. To assume that the legislature intended the term "no additional electrical power"[13] to mean the same as "conservation" when it hd used this latter term elsewhere in the same statute, would result in the Siting Board ignoring the plain meaning of the words that were used and disregarding other words in the statute. Therefore, the Siting Board declines to accept the argument of the Attorney General that would have the Siting Board ignore the intent of the Legislature as ascertained by the Legislature's choice of words.

Similarly, NO-COAL would have the Siting Board ignore that (1) the language they cite does not include the word "conservation," and (2) the term "load management" as used in the language cited modifies the phrase "description of actions planned to be taken by the applicant to meet future needs and requirements" and is not included in the clause that lists "a description of alternatives to such action."[14] G.L. c. 164, § 69J. In City of New Bedford, the

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[13] The Siting Board more fully addressed the meaning of the words "no additional electrical power" in the context of its statute in the Eastern (remand) Decision, 1 DOMSB at 286-288.

[14] The Siting Board is cognizant of the fact that the terms "conservation" and "load management" are often used interchangeably or combined, as in "conservation and load management," although their meanings are distinguishable. In regard to the use of these terms in G.L. c. 164, it is important to acknowledge that the Legislature used the terms in distinctly different situations, a point that is not lost by the Siting Board in reviewing the records in proceedings before it. See, EEC (remand) Decision, 1 DOMSB at n.94

(continued…)

Court faulted the Siting Council for failing to undertake a comparison of alternatives, a requirement that was clear from the language of the statute and identified by the Court in that decision. 413 Mass. at 487-488. Where as here, the language of the statute is clear, and the rules of statutory interpretation prevent us from ignoring the plain language or treating it as superfluous, the Siting Board has refused to adopt the arguments of the Attorney General and NO-COAL to do otherwise.[15,16]

The third issue raised on appeal by the Attorney General and NO-COAL addresses the Siting Board's balancing of environmental impacts and cost. Specifically, the Court stated that the mandate of the siting statute requires the Siting Board to "balance environmental harm that would be caused by a new power plant against the other statutory objectives – providing a necessary energy supply at the lowest possible cost." 413 Mass. at 485. Further, this

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[14] (…continued)
for definitions of those terms.

[15] In addition, the Siting Board's interpretation of the language of its statute is consistent with an attempt to read the statute in a manner that will make sense of the legislative enactment. The Siting Board requires developers to "include an adequate consideration of [C&LM]" in its projections of the demand for power by requiring the inclusion of all cost-effective C&LM measures, based on reasonable statistical projections. Projections of future demand are then reduced by the identified amount that can be attributed to such C&LM to establish the level of future need. As all cost-effective C&LM has been assumed, no additional cost-effective C&LM measures would be available as an alternative to the planned action.

[16] The Siting Board also notes that, as the Court indicated in City of New Bedford, prior to the review of EEC's proposed facility in the EEC Decision, the Siting Council "had required a nonutility applicant to establish that its proposed project was superior to alternative approaches in terms of cost, environmental impact, reliability, and ability to address the previously identified need for energy. This past practice comports with the [Siting C]ouncil's statutory mandate." 413 Mass. at 482. These past comparisons, for the reasons cited above, did not include a comparison of conservation as an alternative. Rather, conservation was analyzed in these earlier cases as required by the statute by adequately considering C&LM in the projections of the demand for electric power. The Siting Board can find no basis for abandoning a practice that is consistent with the language of its statute and that has been specifically acknowledged by the Court to comport with the statutory mandate.

"statutory balance involves weighing minimum environmental impact and cost." Id. at 486. Neither the statute nor the Court indicated how such a balancing should be accomplished.[17]

The Court did acknowledge that the Siting Board could site a project with greater environmental impacts if it explicitly stated that it was doing so on the basis of a determination that other factors outweighed those environmental impacts. Id. at 490. The Siting Board did exactly that in the EEC (Remand) Decision. 1 DOMSB at 396. Further, the Siting Board looked to the language of its statute for guidance in balancing the environmental impacts and cost. See Id., 1 DOMSB at 390-396, 397.

Since one predominant concern of the statute is the provision of a necessary energy supply for the Commonwealth, and necessary energy might not be available to provide if the energy supply lacked reliability, the Siting Board found it necessary to weigh the relative value of the costs and environmental benefits of the proposed project and the natural gas alternative (see n.10, above) in light of their respective contributions to the reliability of the Commonwealth's energy supply.[18] Id., 1 DOMSB at 391,392. That reliability lies, in part, in maintaining an energy supply which prevents overdependence on any one fuel.[19] Id., 1 DOMSB at 392. As record evidence supported a finding that reliance on natural gas was

increasing at a rate faster than reliance on coal, the Siting Board found that the proposed project (which would be fired with coal) would provide system reliability advantages over the

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17 Although both the Attorney General and NO-COAL fault the balancing approach adopted by the Siting Board in the EEC (remand) Decision in response to the Court's directive, neither party has indicated an alternative approach that would be responsive to the Court's directive or justified under the statute.

18 As stated in note 16, above, reliability was one aspect of the Siting Council's alternatives analysis in cases prior to the EEC Decision, which the Court noted comports with the statutory mandate.

19 The Siting Board also noted that other issues relative to the reliability of the electric energy supply as a whole include transmission and distribution system reliability. EEC (remand) Decision, 1 DOMSB at n.242.

natural gas-fired alternative. Id., 1 DOMSB at 394-396. Thus, the Siting Board took the "mandate of the siting statute" (as identified by the Court on page 485 of City of New Bedford) and "balance[d the] environmental harm that would be caused by [the proposed] new power plant against the other statutory objectives – providing a necessary energy supply at the lowest possible cost." Upon doing so, the Siting Board determined that it was appropriate to give more weight to the specific cost benefits of the proposed facility in comparison to the air quality benefits of the natural gas-fired alternative. Id. at 396. This was so because the proposed facility would increase the system reliability of the Commonwealth's energy supply, and would, therefore, help to provide a necessary energy supply.

The Attorney General apparently misunderstood this finding, construing it as a finding that coal as a fuel for the Commonwealth's energy supply would be more reliable than natural gas or less subject to fuel disruptions (Attorney General Petition for Appeal at 18-20).[20] He then argued that the Siting Board had failed to support this finding with substantial record evidence or with adequate subsidiary findings (id. at 17). The Siting Board, however, did not make such a finding, as it had no reason to do so. Accordingly, the Attorney General's argument that the finding is not supported is misplaced.[21]

Rather, the Siting Board found that the increasing reliance on natural gas as a part of the fuel mix for the Commonwealth's energy supply when compared to the reliance on coal as a part of the fuel mix, which was at best remaining static and likely to be decreasing, meant that

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[20] In fact, the Siting Board found the percentage of coal and natural gas currently present in the Commonwealth's and region's fuel mix to be relatively comparable. EEC (remand) Decision, 1 DOMSB at 393. Further, the Siting Board explicitly recognized "that there is still a need for additional gas-fired generation for system-wide reliability purposes." Id., 1 DOMSB at 395.

[21] Alternatively, the Attorney General's claim might be construed as an argument that the Siting Board would have to make such a finding in order to find that an advantage existed for the proposed project as compared to a natural gas-fired alternative. However, such a finding is not necessary to support the Siting Board's conclusion that the proposed project, as an incremental addition to the Commonwealth's energy supply, would improve the reliability of that energy supply.

the fuel mix of the Commonwealth's energy supply would be more diverse, and hence more reliable, with the addition of a coal-fired project as compared to the addition of another natural gas-fired project. EEC (remand) Decision, 1 DOMSB at 394-395. Accordingly, in balancing the relative value of environmental impacts and cost of the proposed coal-fired project and those of a natural gas-fired alternative, the Siting Board provided a specific determination that, as the Court explicitly allowed in City of New Bedford, 413 Mass. at 490, it was siting a project with greater environmental impacts on the basis of a determination that other factors outweighed those environmental impacts. Id., 1 DOMSB at 396. The Siting Board based this finding on substantial record evidence as set forth in the EEC (remand) Decision, 1 DOMSB at 390-396, and adequate subsidiary findings as set forth in those same pages and summarized on page 397 of that same decision.[22]

C. Post-Appeal Procedural History

As noted above, the Court left to the discretion of the Siting Board whether to reopen hearings. Attorney General v. Siting Board, 419 Mass. at 1005. Thus, the Siting Board must first determine whether it is necessary to reopen hearings to respond to the Court's directive. In order to make such a determination, the Siting Board must review the existing record and determine whether the evidence contained therein is sufficient for a response to the Court, and if it is sufficient, whether the evidence remains valid. Finally, if the record evidence is sufficient and valid, the Siting Board must determine whether other factors might require the Siting Board to exercise its discretion and reopen hearings.

The Siting Board notes that it has before it both EEC's pending petition and an extensive evidentiary record that has been developed over more than four years by all parties to

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[22] NO-COAL raised three other issues in its Petition for Appeal but failed to pursue them on brief before the Court. NO-COAL argued that the Siting Board: (1) erroneously found the proposed project to be lowest possible cost (NO-COAL Petition for Appeal at 10-11); (2) failed to apply Department and [Siting] Board standards in a consistent manner (id. at 13-14); and (3) denied NO-COAL due process by the systematic exclusion of evidence (id. at 14-16).

the proceeding. In order to make the above-noted determinations and move the proceeding toward closure, the Hearing Officer issued a memorandum on February 2, 1995 ("Memorandum") that provided all parties to the proceeding with an opportunity to address the issue of the reopening of hearings. In it, the Hearing Officer asked parties "to address the continued validity/sufficiency of the [existing] record evidence for the purpose of responding to the Court's directive" in Attorney General v. Siting Board (Memorandum at 2). The Memorandum established a procedure that provided all parties with the opportunity to "make an Offer of Proof, as to specific additional information which should be included in the record to enable the Siting Board to decide those issues relevant to the Court's directive" (id.). The information to be submitted by the parties was to indicate the nature of the evidence (e.g., testamentary, documentary, etc.) that would constitute the Offer of Proof, the expectations of the movant as to what issues would be addressed and what would be demonstrated if such evidence were introduced, and the reasons why such evidence was not available att the time of the earlier development of the administrative record in the proceeding (id.). Further, all parties were provided an opportunity to submit a rebuttal to any Offer of Proof that was submitted (id.).[23]

The following four Offers of Proof were submitted: (1) February 21, 1995 Memorandum of the Greater New Bedford NO-COALition ("NO-COAL Offer of Proof"); (2)

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[23] The Memorandum did not require the parties to submit additional record evidence (Hearing Officer Procedural Order of February 16, 1995) ("Procedural Order"). Rather, it asked parties to indicate whether the existing record remained valid and sufficient to enable the Siting Board to respond to the Court's directive (Memorandum at 2). Further, if any party believed the record was not valid or sufficient, he was directed to identify specifically the additional information which the Board should consider, explain what the information would demonstrate, and explain why it was not previously available (id.). The Hearing Officer requested this information to assist him in determining whether it was necessary to reopen hearings to take additional evidence in order to respond to the Court's concerns. However, parties were under no obligation to provide the Hearing Officer with such assistance (Procedural Order at 2). The submissions that were made addressed the Hearing Officer's request to varying degrees and in varying ways, but for purposes of further discussion, all submissions will be referenced as Offers of Proof or Rebuttals as envisioned by the Memorandum.

February 23, 1995 Letter from Robert Ladino ("R. Ladino Offer of Proof"); (3) February 24, 1995 Offer of Proof of the Attorney General ("Attorney General Offer of Proof"); and (4) February 24, 1995 Filing of Eastern Energy Corporation in Response to the Hearing Officer's Memorandum ("EEC Offer of Proof"). In addition, the following four rebuttals were submitted: (1) March 6, 1995 NO-Coal's Motion in Opposition ("NO-COAL Rebuttal"); (2) March 6, 1995 Letter from Robert Ladino in response to EEC's February 24th Filing ("R. Ladino Rebuttal"); (3) March 6, 1995 Rebuttal of the Attorney General to EEC's Filing ('Attorney General Rebuttal"); and (4) March 6, 1995 Filing of EEC in response to Hearing Officer's Memorandum ("EEC Rebuttal").

1. The Parties' Offers of Proof

The Attorney General asserted that the record should not be reopened, and noted that the Court confirmed the Siting Board's finding that it was unable to find Massachusetts need before the year 2000 (Attorney General Offer of Proof at 2). Therefore, he concluded that the petition to construct the proposed facility should be denied (id.). Further, the Attorney General argued that, if the Siting Board did not deny the petition based on the existing record, it must reopen the record to address new evidence (id. at 3, 8).[24]

The Attorney General then outlined information that should be evaluated if the record is reopened. In regard to the issue of need, the Attorney General stated that the latest New England Power Pool Forecast Reports of Capacity, Energy, Loads and Transmission ("CELT Reports") need projections should be analyzed as they demonstrate reduced need (id. at 3). Further, he stated that he would analyze issues of economic stagnation and growth, substantial recent developments in the use of renewables, and the potential effects of the electric industry

[24] Specifically, the Attorney General stated that if the Siting Board "refuse(s) to deny [EEC's] Petition on the existing record, the [Siting] Board has no choice but to reopen the record and hold new hearings. The [Siting] Board cannot, consistent with the Court's opinion and the siting statute, keep the record closed and then approve the project by recasting the existing evidence" (Attorney General Offer of Proof at 3).

restructuring efforts (id. at 4).[25] The Attorney General also stated that, since the close of the record, evaluations of DSM programs have progressed significantly and utilities have incentives, and are likely, to implement additional DSM programs (id. at 5). Further, he argued that DSM would also increase with the upgrades of building codes as a result of Federal legislation from 1987, 1988 and 1992 and that for this reason and others, utilities have under-forecasted savings from DSM (id. at 5-6). The Attorney General asserted that, if appropriate corrections were made for this under-forecasting of DSM, there would be a further reduction in need for new generation (id.).

The Attorney General also stated that he would demonstrate that natural gas prices are projected to decrease and concluded that, as a result, the natural gas/oil-fired combined cycle and natural gas-fired alternatives would be less costly or of equal cost to the proposed plant (id. at 7). The Attorney General asserted, therefore, that he would demonstrate that there is neither Massachusetts nor regional need for the proposed facility within the reasonable planning horizon (id. at 5).

NO-COAL and Mr. Ladino argued that the record should not be reopened, and that a new final decision denying EEC's petition would be warranted (NO-COAL Offer of Proof; R. Ladino Offer of Proof at 1-2).[26] Neither NO-COAL nor Mr. Ladino identified any issues that would need to be addressed in response to the Court's directive, but NO-COAL reserved its right to submit a rebuttal to other Offers of Proof and Mr. Ladino reserved his right to participate in future proceedings (id.).

EEC asserted that the record should not be re-opened and that the existing record is

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[25] The Attorney General maintained that "[t]he scope of the presentation is likely to be as extensive as, or more extensive than, the prior need evaluations performed by the Attorney General in this case" (Attorney General Offer of Proof at 5).

[26] Mr. Ladino's submission was premised, in part, on his belief that the Court interpreted the siting statute as requiring "that the demonstrated need must be established before the size of [a proposed] plant can be determined" (R. Ladino Offer of Proof at 3). Mr. Ladino noted that, in the current record, plant size was established before being justified by statistical forecasts (id.).

sufficient to support a decision to approve the proposed facility (EEC Offer of Proof at 1). EEC stated that the Court's decision found fault only with the Siting Board's new "market-based test" of need, which required the submission of signed and approved PPAs (id. at 3). The Company argued that the Siting Board has already made the mandated independent finding of need required to approve the facility, in as much as the Siting Board has determined that EEC will provide a necessary energy supply for the Commonwealth beginning in the year 2000 (id. at 4, 5).

The Company stated that, due to delays in the construction schedule for the proposed facility arising from litigation, the in-service date of the project would be pushed back until the 1999-2000 time frame (id. at 6). EEC cited record evidence that indicated that it would need 47 months for further permitting and construction following financial closing, which would not occur until some time after Siting Board approval (id. at 6, citing, Exh. HO-PV-1). As Siting Board approval could occur no earlier than the summer of 1995, the earliest possible on-line date for EEC's proposed project wold be in the summer of 1999, assuming financial closing was contemporaneous with Siting Board approval, a logistically unlikely result (id. at 6-7). EEC stated that the Siting Board has found that it is appropriate to consider the need for a project in the first few years of operation, and that at the worst, the EEC project, if built in 1999, would be needed by its second year of operation (id. at 8).

EEC argued that the Siting Board could also make a finding of need for at least 300 MW of additional capacity before the year 2000 based on the current record and a reconsideration of the October 4, 1993 Tentative Decision (id.). The Company asserted that overwhelming evidence supported the staff conclusion in the Tentative Decision that the proposed facility would be needed in the Commonwealth beginning in 1998 even after applying identified regional surpluses in that year (id. at 9-11). Similar analyses showed a continued need in the year 1999 (id.). The Company further argued that it would be appropriate to adopt staff's analyses, since the language that discussed them was deleted from the Final Decision as a result of the amendment that contained the condition relative to PPAs that was rejected by the Court in Attorney General v. Siting Board (id. at 9).

Finally, EEC asserted that the submission of new evidence would only reinforce the previous findings of the Siting Board and would accelerate the year of need (id. at 13). In support of its assertion, the Company provided information in the form of an affidavit prepared by Robert Graham, of La Capra Associates ("Graham affidavit") that it would submit as evidence if hearings were reopened (id., Attachment B). The Graham affidavit purports to show an earlier year of need based on analyses of recent CELT Reports (id.).

2. The Parties' Rebuttals

In response to EEC's Offer of Proof, the Attorney General acknowledged that the Siting Board has the authority not to reopen the record in this proceeding (Attorney General Rebuttal at 1). However, he challenged EEC's assertion that the Siting Board could approve EEC's petition without reopening the record, by arguing that to do so would be legal error (id.). The Attorney General further noted in agreement with EEC, that the Siting Board had found that EEC's proposed project would be needed beginning in the year 2000 by citing to the Final Decision whereas the Siting Board found that the record demonstrated a need for at least 300 MW in the Commonwealth for the years 2000 and beyond (id. at 2, citing, EEC (remand) Decision, 1 DOMSB at 498).

The Attorney General also argued that if the Siting Board accepts EEC's assertion that the in-service date of the proposed facility has been delayed as the result of litigation, then EEC should be required to reevaluate two other areas of the decision, the alternative technologies comparison and the balancing of environmental impacts and costs, based on the new in-service date (id. at 6). He asserted that the evidence used in the EEC (remand) Decision was geared to evaluate a plant designed to come on-line in 1997 (id.). He further asserted that as technology changes, alternatives to the proposed project, such as renewables and cleaner generations of fossil fuel plants, are becoming more readily available (id.).[27] The Attorney General argued,

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[27] For example, the Attorney General cited the testimony of his witness during the remand proceedings that a coal gasification plant would likely reach comparable availability to

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therefore, that "[i]f the [Siting] Board accepts any new evidence on need as of the year 2000, the [Siting] Board should not effectively freeze in time the required alternatives analysis and environmental impacts/costs balancing" (id. at 7).

The Attorney General also challenged EEC's argument that the Siting Board staff analyses in the Tentative Decision support a finding of need before the year 2000. Specifically, the Attorney General stated that the Siting Board had rejected the Tentative Decision's reasoning concerning meeting Massachusetts need out of the regional surplus because no record on that point had been developed. He therefore concluded that the Siting Board could not now make any different finding regarding Massachusetts' first year of need (id. at 3). The Attorney General noted that the "Final Decision contained over one hundred pages of need analysis which culminated with the finding" that the record did not support a finding of need before the year 2000 (id. at 4). In addition, he noted that the Court did not disturb the Siting Board's factual finding that no record was developed on the surplus issue, and that the existing record does not support a conclusion that the forecasted regional surplus in 1998 and 1999 would not be available to the Commonwealth in those years (id.).

Finally, the Attorney General argued that the Siting Board may not selectively consider new information concerning need, such as that submitted by EEC as an affidavit to its Offer of Proof (id. at 4). In addition, he took issue with many of the conclusions and methods contained in EEC's affidavit (id. at 5 & n.5). The Attorney General argued that a new need analysis, such as that submitted in the EEC Offer of Proof, should be considered only in a reopened proceeding, where the intervenors would be allowed to rebut the evidence submitted (id. at 5). The Attorney General concluded that EEC's submission "cries out for a full re-evaluation of need" (id. at 6).

NO-COAL also disagreed with EEC's assertion that the existing record supports an approval of the proposed facility, and cited the release of more updated CELT reports as a

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[27] (…continued)
the proposed project by the mid-to late-1990s and would become "mature" by 2000 (Attorney General Rebuttal at 6).

premise for its disagreement (NO-COAL Rebuttal). NO-COAL asserted that the affidavit submitted by EEC with its Offer of Proof is inadmissible if the record is not reopened, and argued that EEC should not fear reopening the record if, as EEC has claimed, its evidence would corroborate the reliability of the existing record (id.).[28]

Mr. Ladino took issue both with the scope of our present review in EFSB 90-100R2 and with EEC's statement that the Court found fault only with the new "market-based" test of need, noting that the Court found that the decision lacked an independent finding of need (R. Ladino Rebuttal at 2). In regard to EEC 's argument that the staff's analyses in the Tentative Decision demonstrated a need before the year 2000, Mr. Ladino asserted that the Tentative Decision was inadequate when it was presented and that it remains so (id. at 4). Mr. Ladino urged that EEC's affidavit be rejected as it did not constitute the independent finding of need required by the Court, and based on his analysis, the affidavit was inaccurate and biased (id. at 5-7). Finally, Mr. Ladino stated that the Siting Board's only option, based on the existing record, would be to deny the petition (id. at 8).

EEC asserted that the Attorney General's Offer of Proof failed to provide the specificity or sufficiency necessary for an Offer of Proof in an administrative setting or to meet the essential criteria established by the Hearing Officer in his Memorandum (EEC Rebuttal at 2-3). The Company indicated that, through the use of the Offer of Proof, the Siting Board had given the parties the opportunity to identify specific, concrete evidence of the type on which the Siting Board could rely in deciding the case if it decided to re-open the record (id. at 3).[29] EEC stated

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[28] NO-COAL's Rebuttal also took issue with various statements made by the Hearing Officer and Siting Board. As the purpose of the rebuttal submissions was to allow responses to the parties' Offers of Proof, these additional non-rebuttal issues will not be addressed here.

[29] EEC asserted that, due to the magnitude of the delay in resolving this case, the record should be re-opened under only the most extraordinary of circumstances where compelling new evidence has been offered (EEC Rebuttal at 3). EEC noted that G.L. c. 164, § 69J envisions a twelve-month schedule for the Siting Board review of petitions thereunder (id.). EEC further noted that more than five years has passed since its initial

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that the Attorney General's Offer of Proof "falls far short of this standard" as it only identified the issues the Attorney General would explore if the record were reopened (id. at 3-4). EEC urged the rejection of the Attorney General's Offer of Proof as inadequate support for the Attorney General's assertions regarding EEC's petition (id. at 3, 5).

Nevertheless, in response to issues raised by the Attorney General, EEC responded that the most recent data on load forecasts and available energy resources, including the initial 1994 CELT forecast, support a finding of a significantly greater need than that found in the EEC (remand) Decision (id. at 6). Specifically, EEC refuted the Attorney General's claims that recent economic projections and DSM estimates would tend to reduce forecasted loads, providing a second affidavit from Mr. Graham, which concluded that those factors would increase load growth and require the addition of new capacity before the year 2000 (id.). EEC argued that the Attorney General's statement that he would "analyze issues of economic stagnation," does not constitute an Offer of Proof and noted that Mr. Graham's statistics show that the economy has improved since the close of the record, rather than stagnating as the Attorney General claimed (id. at 6-7).

In regard to regulatory restructuring and DSM, the Company noted that the Attorney General offered no additional projections of DSM and no specific evidence as to the effects of restructuring on the need for electricity[30] (id. at 7-8). Further, EEC argued that the Attorney General offered no proof that the DSM projections used in the EEC (remand) Decision are inaccurate, and concluded, therefore, that there was no reason to revisit the issue (id. at 8).

Finally, with respect to the Attorney General's assertions relative to gas prices, EEC acknowledged the volatility of gas and oil prices in the short-run. However, EEC noted that the Siting Board had reviewed several long-run forecasts of gas and oil prices, which have not

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29 (…continued)
petition was filed and, to date, no final resolution of that petition has been reached (id.).

30 EEC noted that since the scope and timing of any future restructuring is currently unknown, it is "hardly possible to come to any rational conclusions about" it at this time (EEC Rebuttal at 7).

been challenged by the Attorney General, and asserted that the Siting Board must focus on these in the comparison of alternative facilities (id. at 10). Thus, the Attorney General's assertion that the natural gas-fired alternative and the gas/oil-fueled alternative would be less costly than EEC's proposed project if compared on the basis of these lower fuel costs ignores the true fuel costs on which a comparison of energy facilities should be made (id. at 10-11). EEC noted that, even assuming lower gas prices, the Attorney General did not assert that the natural gas-fired alternative would be equal or less in cost than the proposed project, and be provided no documentation for his assertion that the gas/oil alternative would be so (id. at 9, 10). In addition, EEC argued that the Attorney General ignored other cost factors, such as lower interest rates, which would favor EEC's proposed project if a complete new analysis were required (id. at 10-11). EEC concluded that the comprehensive analysis of alternatives conducted by the Siting Board in the EEC (remand Decision was based on voluminous record evidence and that the Attorney General's "conclusory and unsupported assertions are simply not a sufficient basis to revisit the [Siting] Board's findings on this issue" (id. at 11).

3. Analysis

An analysis of the issues and arguments provided in the various Offers of Proof and Rebuttals must commence with a review of the Court's decision in Attorney General v. Siting Board, specifically with regard to the scope of the Court's directive to the Siting Board. In that decision, the Court noted that, in response to its remand in City of New Bedford, the Siting Board "conducted further hearings and, after examining numerous capacity and demand forecasts, concluded that 'based on the record, the [board] is unable to determine that the proposed project is needed to provide a necessary energy supply for the Commonwealth prior to the year 2000.'" 419 Mass. at 1004. The Court continued by noting that "[b]ecause the board in this case failed to make an independent finding that the proposed project is needed to provide a necessary energy supply for the Commonwealth, and because standing alone, signed and approved power purchase agreements do not warrant an influence of need, we conclude the board's decision must be vacated." Id. at 1005. The Court then left to the Siting Board's

discretion "whether to reopen hearings on this matter." Id. Thus, the Court vacated the Siting Board's decision due to the lack of a single finding and the improper or unexplained substitution of a proxy for that finding. Accordingly, the Siting Board finds that the scope of the Court's directive in Attorney General v. Siting Board is very specific and is limited to the requirement that the Siting Board make an independent finding of need and not rely on signed and approved PPAs to take the place of such a finding.

The Court did not indicate that this necessary finding could not be made on the existing record. Rather, the Court acknowledged that the Siting Board has reviewed pertinent evidence, i.e., numerous capacity and demand forecasts.[31] Further the Court authorized the Siting Board to use its discretion in determining whether this record needed to be reopened. Therefore, the Siting Board finds that it must determine whether the existing record evidence on which its findings of need are based remains valid and sufficient. First, however, in light of various arguments raised by the parties that would limit the Siting Board's options in this proceeding, the Siting Board must address what is meant by the term "discretion" as used by the Court.

A look at pertinent case law establishes that when discretion is exercised, it cannot lead to arbitrary action, but it also cannot lead to actions based on decisions made in a vacuum. Discretion implies flexibility and requires judgment based on consideration of all facts surrounding a situation. The Court has held that the term discretion when used in a statute denotes "freedom to act according to honest judgment." Paquette v. Fall River, 278 Mass. 172, 174 (1932); Corrigan v. School Committee of New Bedford, 250 Mass. 334, 339 (1924). In Paquette, the Court noted a United States Supreme Court decision that stated "The term *discretion* implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should be a word for arbitrary will or inconsiderate action. 'Discretion means a decision of what is just and proper in the

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[31] In fact, this was the second time that need had been analyzed, as the Siting Council, in the EEC Decision, had also undertaken a complete regional need analysis in which capacity and demand forecasts were investigated.

circumstances.'" 278 Mass. at 174, citing, The Styria v. Morgan, 186 U.S. 1, 9 (1902). The Siting Board, therefore, must reject any argument that would require us to ignore the circumstances surrounding this proceeding. Further, the history surrounding the enactment of statute provides additional circumstances that must be considered.[32] The Siting Board must then use honest judgment as to what is just and proper in deciding whether to reopen hearings. Thus, in determining whether to exercise its discretion, the Siting Board must consider the specifics of the Court's directive in Attorney General v. Siting Board, the state of the existing record, and the historical context of the Siting Board's statutory mandate.

With respect to considering the Court's directive in Attorney General v. Siting Board, the Siting Board's actions in response to the Court's directive in City of New Bedford are instructive. In that decision, the Court remanded this matter to the Siting Council "to compare alternative resources in its review of Eastern's application," and raised four"Other Issues which may Arise on Remand to the Council." 413 Mass. at 484, 489-490. In his determination of the procedures that would be followed to address the Court's directive after that remand, the Hearing Officer found that the Court's directive was specific and required reconsideration only of the five issues identified by the court (Hearing Officer Memorandum, October 1, 1992). In that memorandum, the Hearing Officer noted that, as all parties had a full and fair opportunity to develop the record on those issues, there was no reason to reopen the record for further development (id. at 6, 7). Nevertheless, the Hearing Officer agreed to allow parties to address those issues by accepting new evidence provided that it was shown that evidence was not previously available (id. at 8).[33] It was only after an agreement by three of the parties to the

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[32] The Siting Board notes that the Court has held that: "[s]tatutes are to be interpreted, not alone according to their strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, [and] prior legislation …" Wilcox v. Riverside Park Enterprises, Inc., 399 Mass. 533, 535 (1987), quoting, Commonwealth v. Welosky, 276 Mass. 398, 401 (1931).

[33] The Siting Board notes that, during the period between EEC's initial filing and the remand proceedings, the state and region experienced a major economic slowdown that directly impacted the validity of the need projections in the EEC Decision. The need

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proceeding that the Hearing Officer allowed a more extensive reopening of the record, although again the reopening was restricted only to those issues raised by the Court's decision in City of New Bedford. The result of that process, as noted above, was a record on those limited issues that was almost as extensive as the original record.

In this docket, rather than requiring the parties to provide new updated evidence that was not previously available as he had in the previous remand, the Hearing Officer requested Offers of Proof and Rebuttals in order to assist him in determining whether the record evidence remained valid and sufficient or whether the record needed to be reopened in order to address the Court's directive.[34] Here the Siting Board reviews those Offers of Proof and Rebuttals, mindful that, although presented with several other issues on appeal, unlike in City of New

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[33] (…continued)
projections in that decision, which were based on substantially accurate historical information and reasonable statistical project methods as required by the statute, forecasted continued growth (22 DOMSC at 211-220, 222-227, 233-241). The Hearing Officer, therefore, was prepared to accept previously unavailable information on the issue of need for the proposed facility due to the potential for significant changes in the need projections. Such a general or technical fact, i.e., that major economic changes will impact future need for energy resources, was clearly within the "specialized knowledge" of the Siting Council within the meaning of G.L. c. 30A, § 11(5), on which to conclude that the introduction of new evidence of need would be appropriate.

[34] As noted in Section 1.C.1, and note 23, above, the Hearing Officer's request for Offers of Proof was not a request that parties enter new evidence into the record. Rather, the Hearing Officer's request was to identify evidence that would justify a finding by the Siting Board as to the continued validity and sufficiency of the existing record such that the Siting Board could respond to the Court's directive. Such an offer of proof is comparable to an offer of proof made during a judicial proceeding that would identify evidence to allow the presiding officer or appeals court to make a determination as to whether that information should be allowed into the record of the judicial proceeding.

The Siting Board notes that any evidence submitted with the Offers of Proof would become a part of the record in this proceeding to be considered by the Hearing Officer and staff in the preparation of a tentative decision if, and only if, a finding were made that it was necessary to reopen the record. The Siting Board acknowledges that such a finding would then result in the evidence submitted being subject to discovery, cross-examination, and rebuttal as per the requirements of G.L. c. 30A, § 11.

Bedford, the Court's only stated concern with the EEC (remand) Decision was with the lack of an independent finding of need.

As an initial matter, the Siting Board notes that all parties in their Offers of Proof agreed that the record should not be reopened, although they differed as to the conclusions which the Siting Board should draw from the existing record. Although EEC argued that the record supports approval of its petition, the remaining three commenters argued, in essence, that the record was sufficient and valid for purposes of denying the petition, but not so if the petition was to be approved. The Attorney General went further and argued that the Siting Board could not approve the project without reopening the record, as to do so would be inconsistent with the siting statute and the Court's opinion and would be legal error. However, the Attorney General failed to cite language either from the statute or from the Court decision in support of his assertion. Neither did he explain how the discretion which the Court specifically gave to the Siting Board in this matter is consistent with a hard-and-fast rule requiring either the rejection of EEC's petition or the reopening of the record. It is the Siting Board's judgment that the determination of what is just and proper under the circumstances surrounding this proceeding is considerably more complex.

Such a determination requires the Siting Board to acknowledge that it and its predecessor agency, the Siting Council, were empowered to oversee a process whereby the Commonwealth's future energy needs would be identified early enough so that plans to meet those needs could be approved, and actions to meet those future needs could be taken. The parties to this proceeding may differ as to the extent and timing of future need, but if projections of need are subject to continued evaluation, timely action to meet those future needs may be prevented. Such possibilities were seen by the Legislature when it first studied the problems associated with siting energy facilities.

The Massachusetts Electric Power Plant Siting Commission ("Siting Commission"), the commission responsible for the drafting of the initial siting legislation, was concerned that a collision of "contradictory public attitudes about electric power" could slow the orderly development of essential power supplies. Third Report of the Massachusetts Electric Power

Plant Siting Commission, House No. 6190, March 30, 1973 ("Third Report").[35] The Siting Commission sought to mitigate two factors it perceived as delaying new and needed capacity, i.e., insufficient public notice and environmental challenges. Id. at 8, 9, 15. The enactment of Sections 69G through 69J of G.L. Chapter 164 was aimed at addressing these two concerns. Id. at 15, 20. Thus, the siting statute envisioned the approval of facilities before a need for such facilities actually existed.

To establish future need and ensure timely action to meet such need, G.L. c. 164, § 69I required all electric companies to file annual long-range forecasts for the ensuing ten-year period with respect to the power needs and requirements of their market area. With respect to an electric utility that is required to file such forecasts, the Siting Board may approve a petition to construct a facility only if it is consistent with the company's most recently approved long-range forecast.[36] G.L. c. 164, § 69J. With respect to an electric company with no set market area, i.e., a non-utility developer, the Siting Board has required comparable long-range forecasts of power needs and requirements in conjunction with its petition for approval of a proposed facility. Approval of a non-utility developer's petition to construct a facility, therefore, is appropriate if the Siting Board finds that the long-range forecasts demonstrate a need for the proposed facility.[37]

The Siting Board acknowledges that future need for electric power is dependent on numerous factors, any one of which, if altered, could affect the ultimate timing of need. The

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35 A more complete analysis of the activities of the Siting Commission can be found in the EEC (remand) Decision, 1 DOMSB at 246-251.

36 Accordingly, after a Siting Board review, consistent with the requirements of G.L. c. 164, § 69J, an electric utility proposal to construct a facility could be approved up to ten years prior to its on-line date, assuming that the most recently approved long-range forecast for that utility indicated a need for the facility in that year.

37 In City of New Bedford, the Court acknowledged the Siting Council's argument "that the review format of the long-range forecast is not easily applied to a non-utility producer." 413 Mass. at 488. The Court stated that modifications to the procedure may be necessary to accommodate the non-utility producer but cautioned that any such modifications "must permit a review that fulfills the statutory mandate." Id.

Siting Board finds that its statute requires that projections of future need must be based on substantially accurate historical information and reasonable statistical projection methods. G.L. c. 164, §§ 69I & 69J. In the present proceeding, the Siting Board and its predecessor agency conducted an analysis of need forecasts for the region consistent with the statutory guidelines that are contained in G.L. c. 164, § 69J in two separate decisions. In the remand proceedings, the Siting Board responded to the Court's directive raised in City of New Bedford, that the statute requires a finding of Commonwealth need, and conducted a Massachusetts need analysis in addition to the regional need analysis. EEC (remand) Decision, 1 DOMSB at 466-495. The Siting Board finds that the existing record on both regional and Massachusetts need is extensive and provided sufficient evidence to support an independent finding regarding need at the time that the EEC (remand) Decision was issued. Therefore, as the Siting Board has undertaken the analysis of need required under its statute and as directed by the Court in City of New Bedford, and no party has identified any information that would lead the Siting Board to conclude that the record is insufficient to do so, the Siting Board also finds that the record evidence is sufficient to respond to the Court's directive. Accordingly, the Siting Board now looks to the continued validity of the record evidence.

Findings of future need that are based on such substantially accurate historical information and reasonable statistical projection methods are not rendered inaccurate or in violation of the statute simply with the passage of time. Thus, the Siting Board finds that in an ongoing proceeding such as this, it is only if evidence of a nature that would demonstrate that one or more factors that affect the historical information or statistical projection methods have significantly changed that findings of future need based on such information or methods would be brought into question. The Siting Board does not adopt the standard proposed by EEC that there must be "compelling new evidence" before the record is reopened. However, the Siting Board concludes that sufficient evidence to indicate that future projections are significantly changed should be required.

With regard specifically to the future demand for electricity, all commenters noted that if the record were reopened, the Siting Board should consider recent versions of the CELT report

that are not contained in the existing record. Some parties asserted that the more recent reports would show that load growth has slowed such that need for additional generating capacity would not arise until later than the year 2000. However, these parties did not provide sufficient justification for their assertion that the more recent CELT reports would support an expectation of a significant delay of need beyond the year 2000.[38] In contrast, we note that the Company submitted affidavits which, if entered into the record, would explain how these same CELT reports show that need would actually occur one or more years prior to 2000.

Since the Siting Board has determined that the record should be reopened only in light of sufficient evidence that would indicate that projections of future need are significantly changed, we must consider whether the existence of later CELT reports constitutes such evidence. This requires a review of our consideration of those CELT reports that are present in the record. The Siting Board notes that all the CELT reports that were previously admitted into the record have been subjected to numerous corrections, analyses and other manipulations by the parties to the proceeding. Thus, the information provided in the CELT reports amounts to a starting point for analysis, not a definitive statement as to future need.[39] Indeed, if the CELT reports could serve that purpose, the Siting Board's independent finding of need, although it would still be required by the statute as the Court has indicated, would be superfluous.

Given the experience with adjustments to those CELT reports that are in the existing record, the Siting Board has no independent basis to conclude that more recent CELT reports necessarily provide more accurate demand projections than earlier CELT reports. Of those making Offers of Proof regarding the later CELT reports, only EEC addressed the accuracy of

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[38] The Siting Board notes that, although the Attorney General focussed on reduced growth in demand as an indicator that need would be later than the year 2000, consideration of both demand and supply would be required to address the likelihood of a significant delay in the year of need.

[39] Our rejection, after a complete analysis, of the 1991 CELT Report (see, EEC Decision, 22 DOMSC at 235-236) illustrates that CELT reports are not to be treated any differently than any other piece of evidence that is submitted.

those reports. However, EEC's analysis does not provide convincing evidence indicating that an examination of more recent CELT reports is likely to result in a substantial change in the year of need. Thus, no party's offer of proof provides clear reason for the Siting Board to reopen the record, based on any expectation that review of more recent CELT reports is likely to lead to a finding of substantially earlier or later need.

The Siting Board finds that no party has provided any support for its conclusion that the more recent CELT reports provide substantially different and more accurate information or demonstrate that those CELT reports currently in the record are invalid.[40] Accordingly, the Siting Board finds that it has no basis on which to conclude that the analyses of need based on those CELT reports that are currently in the existing record are any less valid today than when they were previously conducted. Further, the Siting Board has no basis on which to conclude that the more recent CELT reports, standing alone, would better enable it to respond to the Court's directive.

With regard to other issues raised by the parties in their Offers of Proof that may be considered to be indirectly related to the issue of need, the Siting Board finds that no party provided more than assertions that issues addressed in the EEC (remand) Decision have changed substantially. The Siting Board carefully reviewed long-range forecasts of economic growth and DSM in the EEC (remand) Decision and no party has identified any information that would support a finding that these forecasts are no longer valid. While the possible future restructuring of the electric power industry may affect demand for electricity at some time in the future, uncertainty about the timing and the nature of such restructuring is so great that no party could provide anything more than conjecture on this topic. Such conjecture, unsupported by any facts or even current statements of policy, cannot serve as a basis for concluding that the existing record is invalid or insufficient. The Attorney General's arguments that recent

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[40] The Siting Board acknowledges that the later CELT reports were not available at the time the record was closed, but is unable to conclude that a later report is necessarily more accurate based on its having been issued at a later time, without the identification of information on that point.

federal appliance efficiency legislation would affect need ignores the fact that the projections of future need in the EEC (remand) Decision did account for savings that would result from such mandated federal standards (see, Exhs. HO-RR-38 at 2-11; HO-70 at 46).

In addition, the Siting Board finds that none of the parties has identified any other evidence, as requested by the Hearing Officer, that would indicate that the Siting Board's analysis of need in the EEC (remand) Decision is no longer valid or is based on insufficient evidence, such that we are compelled again to revisit the issue of need. Further, the Siting Board finds that none of the parties has identified other factors that would compel us to reopen the record. Finally, the Siting Board finds that it does not have independent general, technical or scientific facts within its specialized knowledge which would lead it to determine that the existing record is invalid or insufficient.[41]

4. Findings and Conclusions

In Section I.C.3, above, the Siting Board has found that:

- the scope of the Court's directive in Attorney General v. Siting Board is very specific and is limited to the requirement that the Siting Board make an independent finding of need and not rely on signed and approved PPAs to take the place of such a finding (p. 21);
- it must determine whether the existing record evidence on which its findings of need are based remains valid and sufficient (p. 21);
- its statute requires that projections of future need must be based on substantially accurate

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41 The Siting Board notes that during the period between the EEC (remand) Decision and this decision, the state and region did not undergo major changes in the economy similar to those experienced during the period between EEC's initial filing and the remand proceedings (see note 33, above). More importantly, no party has identified any evidence that would support a finding by the Siting Board that current economic conditions are different than those that were used in the need projections in the EEC (remand) Decision. Accordingly, the Siting Board has no basis on which to conclude that the introduction of new evidence on need would do any more than provide an opportunity to relitigate an issue that already has been resolved.

historical information and reasonable statistical projection methods. G.L. c. 164, §§ 69I & 69J (p. 26);

- the existing record on both regional and Massachusetts need is extensive and provided sufficient evidence to support an independent finding regarding need at the time that the EEC (remand) Decision was issued (p. 26);
- the record evidence is sufficient to respond to the Court's directive (p. 26);
- in an ongoing proceeding such as this, it is only if evidence of a nature that would demonstrate that one or more factors that affect the historical information or statistical projection methods have significantly changed that findings of future need based on such information or methods would be brought into question (p. 27);
- no party has provided any support for its conclusion that the more recent CELT reports provide substantially different and more accurate information or demonstrate that those CELT reports currently in the record are invalid (p. 28);
- it has no basis on which to conclude that the analyses of need based on those CELT reports that are currently in the existing record are any less valid today than when they were previously conducted (p. 28);
- no party provided more than assertions that issues addressed in the EEC (remand) Decision have changed substantially (p. 29);
- none of the parties has identified any other evidence, as requested by the Hearing Officer, that would indicate that the Siting Board's analysis of need in the EEC (remand) Decision is no longer valid or is based on insufficient evidence, such that we are compelled again to revisit the issue of need (p. 29);
- none of the parties has identified other factors that would compel us to reopen the record (p. 29); and
- it does not have independent general, technical or scientific facts within its specialized knowledge which would lead it to determine that the existing record is invalid or insufficient (p. 29).

Accordingly, the Siting Board concludes that the existing record evidence on which its need

analyses in the EEC (remand) Decision were based remains valid and can serve as the basis for an independent finding of need in response to the Court's directive in Attorney General v. Siting Board.

As the Offers of Proof and Rebuttals provided to the Siting Board fail to identify information that would lead the Siting Board to conclude that the existing record is either invalid or insufficient or that the need projections have significantly changed, the Siting Board will not, based on conjecture and supposition, reopen the record. The Siting Board concludes that to do so would be contrary to the Court's discussion in Paquette v. Fall River, supra., in that it would amount to an arbitrary action that is not just and proper under the circumstances, and therefore would amount to an abuse of the discretion afforded the Siting Board by the Court.

In making such a determination, the Siting Board is mindful of the Legislature's concern, as expressed in the Third Report, that new and needed capacity could be delayed. The need to plan in advance for future requirements dictates a reasonable limitation on analysis and a move to action on that analysis at some point. Where, as here, the Court has identified one legal error in the EEC (remand) Decision, the Siting Board concludes that it would be contrary to legislative intent to allow for a relitigation of issues likely to be, using the Attorney General's words, "as extensive as, or more extensive than" prior evaluations. The history of this proceeding demonstrates the potential for such an outcome. Where no evidence has been identified by the parties that would lead the Siting Board to conclude that the existing record was insufficient to address, or no longer valid for addressing, the sole issue raised by the Court after affording all parties an opportunity to do so, the Siting Board can find no reason to further delay these proceedings by reopening the record, and will address the Court's directive based on the existing record.[42]

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[42] Had no record been developed on the issue of need, the Siting Board would have been in a comparable position to the Department in the Court's recent decision in Boston Edison Company v. Department of Public Utilities, and would have needed to reopen the record. 419 Mass. 738 (1995). In that case, the Department found it unnecessary

(continued…)

The Siting Board notes that its decision not to reopen the record in this case is not inconsistent with its decision to reopen the record in response to the Court's directive in City of New Bedford. First, as noted above, the Court's directive was significantly more limited in scope in Attorney General v. Siting Board than in City of New Bedford.

Further, the record developed in the EEC Decision was neither sufficient nor valid to respond to the Court's directive in City of New Bedford. The Court's directive required reconsideration of two issues for which a full record was not developed in the EEC Decision – the comparison of alternative resources and the analysis of Massachusetts need.[43] In addition, new evidence of need was appropriate due to the major economic slowdown during the period between EEC's initial filing and the remand proceedings (see n.33, above). In contrast, a sufficient record has been developed in the EEC (remand) Decision to address the Court's one stated concern in Attorney General v. Siting Board. Further, as stated in note 41, above, there has been no major change in the state or regional economy between the EEC remand Decision and this decision similar to the major economic slowdown experienced between EEC's initial filing and the remand proceedings. Finally, as stated in note 41, above, no party has identified

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42 (…continued)
to reopen the record to consider an offer of proof on an issue that had not been reviewed, i.e., Boston Edison's avoided costs in light of the deferral of its proposed generating plant. Id., 419 Mass. at 744, 746. In contrast, as the Court has recognized in this proceeding, the Siting Board has reviewed the issue of future need, based on a record that was fully developed by all parties, in direct response to the Court's earlier directive. As no party has identified information that would establish that the existing record was either insufficient (as in Boston Edison) or no longer valid for purposes of reviewing future need and responding to the Court's concern in Attorney General v. Siting Board, the Siting Board has exercised the discretion afforded it by the Court and decided that, to reopen the record would not be just and proper under the circumstances surrounding this proceeding. See, Paquette v. Fall River, 278 Mass. at 172.

43 In its original filing the Company provided a comparison of alternatives consistent with past Siting Council practice and an analysis of Massachusetts need. EEC (remand) Decision, 1 DOMSB at n. 88, n.259. However, the Siting Board did not evaluate these analyses in the EEC Decision. EEC Decision, at 267-285; EEC (remand) Decision, 1 DOMSB at n.259.

any information that would support a finding by the Siting Board that current economic conditions are different than those used in the need projections in the EEC (remand) Decision.

Having determined that no evidence has been identified by the parties that would lead the Siting Board to conclude that the existing record is either invalid or insufficient to respond to the Court's directive in Attorney General v. Siting Board, and having no independent basis on which to make such a determination, the Siting Board, therefore, will consider the existing record in making its independent determination as to the need for EEC's proposed facility. Before doing so, however, the Siting Board must revisit those findings in the EEC (remand) Decision that the Court has indicated were improper.

II. ANALYSIS OF THE PROJECT[44]

A. The Final Decision in EFSB 90-100R

1. Identification of Affected Findings

The following excerpts from the EEC (remand) Decision constitute the Siting Board's requirements of EEC relative to the submission of PPAs. In accordance with the Court's directive in Attorney General v. Siting Board, the Siting Board hereby rescinds these requirements of the Company and amends its EEC (remand) Decision by deleting from it the following language.

- The Siting Board finds that the existence of a signed and approved PPA with a Massachusetts utility will continue to be one method of establishing Massachusetts Need, although clearly, not the only method. EEC (remand) Decision, 1 DOMSB at 419, 421.
- The Siting Board also finds that the amount of facility output subject to signed and approved PPAs that would be sufficient to establish Massachusetts need will depend on

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[44] In determining whether a proposed project will provide a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, the Siting Board conducts a broad analysis addressing a number of specific issues: (1) need for additional energy; (2) alternative project technologies; (3) project viability; and (4) site selection, facility environmental impacts, facility costs and facility reliability. In this proceeding, as discussed in Section I.A, above, the Siting Board has issued three decisions that collectively address these issues.

other factors which contribute to Massachusetts need as well as the size and type of facility. Id.

- The Siting Board notes that, in addition to an analysis of regional and Massachusetts capacity need, the standard of review set out in Section II.C.2.d, above, identifies signed and approved PPAs with capacity payments as a means of establishing need for additional energy resources on reliability grounds. Therefore, in light of the uncertainty surrounding the first year of need for the proposed project, the Siting Board finds that, in this case, it is appropriate to require the Company to submit such PPAs as evidence of the need for the proposed project to provide a necessary energy supply for the Commonwealth. The Siting Board has found that the amount of facility output subject to signed and approved PPAs that would be sufficient to establish Massachusetts need will depend on other factors which contribute to Massachusetts need as well as the size and type of facility (see Section II.C.2.d, above). Here , in light of the need for the proposed project beginning in the year 2000, the Siting Board finds that submission of (1) signed and approved PPAs which include capacity payments for at least 75 percent of the proposed project's output, and (2) signed and approved PPAs which include capacity payments with Massachusetts customers for at least 25 percent of the proposed project's electric output which is the result of a competitive resource solicitation process beginning in 1993 or beyond and which is approved pursuant to G.L. c. 164 § 94A, will be sufficient evidence to establish that the proposed project will provide a necessary energy supply for the Commonwealth. EEC must satisfy this condition within four years from the date of this conditional approval. EEC will not receive final approval of its project until it complies with this condition. The Siting Board finds that, at such time that EEC complies with this condition, EEC will have determined that the proposed project will provide a necessary energy supply for the Commonwealth. Id., 1 DOMSB at 498-499.
- Further, the Siting Board has found that at such time as EEC complies with the condition set forth in Section II.C.5, above EEC will have demonstrated that the proposed project will provide a necessary energy supply for the Commonwealth. Id., 1 DOMSB at 499, 509.

2. Status of Remaining Findings

In City of New Bedford, after noting the Siting Council's failure to conduct an analysis of alternative, the Court identified several other issues of concern. In Attorney General v. Siting Board, although presented with several issues on appeal, the Court faulted the Siting Board only for its failure to make an independent finding of need and its reliance on PPAs in place thereof and did not identify any other issues of concern. The Court also did not disturb any of the subsidiary findings in the EEC (remand) Decision except as they relate to the issue

of the independent finding of need and the reliance on PPAs.

In the EEC (remand) Decision, the Siting Board noted that the findings in the EEC Decision and EEC Compliance Decision, beyond those specifically remanded by the Court, remained in effect and there was, therefore, no reason to revisit them. 1 DOMSB at 509. The findings in the EEC (remand) Decision, beyond those identified in Section II.A.1, above, are based on the record evidence, which the Siting Board has concluded in Sections I.C.3 and I.C.4, above, to be sufficient and valid. Accordingly, the Siting Board reaffirms all of the other findings, conditions, and recommendations in the EEC (remand) Decision and hereby incorporates them by reference.[45]

B. Need Analysis

1. Introduction

As discussed in Sections II.A.1 and II.A.2, above, the Court's decision in Attorney General v. Siting Board was confined to the findings and conditions associated with need for the proposed facility, and specifically the condition pertaining to the reliance on signed and approved PPA's. In the following section we review our findings on the issue of need for EEC's proposed project.

2. The Commonwealth's Need for Additional Energy Resources

In response to the Court's directive in City of New Bedford, the Siting Board set forth the following standard of review for evaluating need for non-utility developers:[46]

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[45] The Siting Board has included the findings relative to the issue of need from the EEC (remand) Decision in Appendix A to this decision.

[46] The Siting Board notes that this standard of review would be identical for an electric utility proposing to construct a facility to meet a Commonwealth need as opposed to its own need. If such an electric utility were proposing to construct a facility to meet its own needs, the Siting Board would only need to review that utility's most recently approved long-range forecast. Thus, the Siting Board's need analyses for electric utilities and non-utility developers are comparable.

> Where a non-utility developer has proposed a generating facility for a number of power purchasers that include purchasers that are as yet unknown, or for purchasers with retail service territories outside of Massachusetts, the need for additional energy resources must be established through an analysis of regional capacity and a showing of Massachusetts need based on reliability, economic or environmental grounds directly related to the energy supply of the Commonwealth.

EEC (remand) Decision, 1 DOMSB at 423.

Therefore, in order to evaluate the need for the proposed project on reliability grounds, the Siting Board reviewed forecasts of demand and supply, which were provided by the parties and made part of existing record, for both the New England region and the Commonwealth. Id., 1 DOMSB at 423-459, 466-491. The Siting Board review focussed on demand forecast methodologies and estimates of DSM savings over the forecast period, and supply forecasts, including the capacity assumptions, contingency adjustments, and required reserve margin assumptions. Id. The Siting Board then reviewed the need forecasts, which are based on a comparison of the various demand and supply forecasts. Id., 1 DOMSB at 460-565, 491-495.

Based on this extensive analysis, the Siting Board found that Massachusetts will have a need for an amount of capacity equal at least to that of EEC's proposed facility by the year 1998. Id., 1 DOMSB at 495. The Siting Board also found that there will be a need for 300 MW of additional energy resources in New England for reliability purposes beginning in 2000. Id., 1 DOMSB at 497. The Siting Board further found that (1) Massachusetts' need for 300 MW of additional capacity will occur earlier than New England's need for the same, and (2) it is clear that, for all years in which there will be a regional need for EEC's proposed project, i.e., for the years 2000 and beyond, said project would provide a necessary energy supply for the Commonwealth. Id. at 498.

This analysis also showed that surplus supply in parts of the region in the years 1998 and 1999 might be available to meet the Commonwealth's need in those years, although the record was unclear regarding the ability of Massachusetts utilities to acquire surplus supplies from out-of-state providers in those years. Id. The Siting Board concluded that there was insufficient evidence to establish that there would be any Massachusetts need until at least the

year 2000.[47] Id. Finally, the Siting Board found that for all years in which there will be a regional need for EEC's proposed project, i.e., for the years 2000 and beyond, said project would provide a necessary energy supply for the Commonwealth. Id.

The Court has acknowledged that the Siting Board reviewed numerous capacity and demand forecasts in reaching the conclusion that the proposed project was not needed to provide a necessary energy supply for the Commonwealth prior to the year 2000. Attorney General v. Siting Board, 419 Mass at 1004. The Attorney General has acknowledged that (1) over one hundred pages of need analysis culminated in the finding that the record did not support a finding of need before the year 2000, and (2) the Court did not disturb the Siting Board finding that a regional surplus existed in the years 1998 and 1999 but not beyond (Attorney General Rebuttal at 4). EEC noted that the Siting Board had determined that its proposed facility would constitute a necessary energy supply for the Commonwealth beginning in the year 2000 and continuing thereafter (EEC Offer of Proof at 5; citing, EEC (remand) Decision, 1 DOMSB at 498). And finally, no party challenged on appeal the finding that the Commonwealth will have a need for an amount of capacity equal at least to that of EEC's proposed facility in the year 2000 and beyond.

Accordingly, the Siting Board finds that the existing record clearly establishes a need for reliability purposes in the Commonwealth in the year 2000 and beyond for an amount of capacity equal at least to that of EEC's proposed facility.[48]

The Siting Board must, therefore, determine whether EEC's proposed facility will be available to meet in the year 2000. In its initial petition, EEC proposed an initial on-line date of 1994 (Exh. HO-1A at 46). EEC introduced evidence in the first set of hearings in this proceeding that established that the construction schedule for the proposed facility would take

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[47] The Siting Board agrees with the Attorney General and rejects EEC's argument that the existing record supports a finding of need earlier than the year 2000.

[48] The Siting Board notes that this finding follows inevitably from the unchallenged subsidiary findings in the EEC (remand) Decision, and does not constitute a "recasting of the evidence" of the sort against which the Attorney General has properly cautioned us.

47 months following financial closing (Exh. HO-PV-1). No party has challenged this evidence in either appeal of the Siting Council or Siting Board's decisions, and no party has identified any evidence that it would provide, were the record to be reopened, that is contrary to such a timetable for construction.

Following the Court's decision in City of New Bedford, EEC's subsequent filing indicated that the earliest possible on-line date would be 1997. The record did not indicate that the proposed facility would, in fact, come on-line in 1997, but rather that after EEC received Siting Board approval, EEC would act to finalize its financial arrangement after which it would take an additional 47 months before the facility would be available to sell power. Following the remand, the earliest possible date for this purpose was 1997. Accordingly, the Siting Board premised its analyses in the EEC (remand) Decision on the assumption that the first year of availability of the proposed facility and of the alternatives would be 1997.[49]

At this point in time, if the final Siting Board approval is granted in the number of 1995, the earliest possible on-line date for EEC's proposed facility would be the summer of 1999. This assumes that (1) financial closing also occurred in the summer of 1995, and (2) no further judicial proceedings are required. As it is likely that financial closing will take, at a minimum, several months, the Siting Board finds that EEC's proposed facility will come on-line no earlier than the summer of 1999, and probably not until some time during the year 2000.[50]

The Attorney General, however, has argued that the Siting Board cannot recognize that the on-line date of the proposed facility has been delayed from 1997 to 1999 or 2000 without doing a complete recomparison of the alternatives using updated information, since renewable technologies and cleaner generations of fossil fuel plants are becoming more readily available

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[49] The Siting Board recognizes that proposed on-line dates are subject to change for a variety of reasons over which the developer has little or no control. The Siting Board, however, must choose some point in time as a starting-point for cost comparisons that require the use of inflation factors and other associated adjustments.

[50] The Siting Board agrees with the Company that the Siting Board has determined that it is appropriate to explicitly consider need within a time frame beyond the first year of facility operation. EEC (remand) Decision, 1 DOMSB at 463.

and the relative costs of the alternative technologies has changed (Attorney General Offer of Proof at 7-8; Attorney General Rebuttal at 6-7). The Siting Board rejects this argument for the following reasons.

With regard to changes in technology, no new evidence has been identified by any party that is likely to alter the Siting Board's finding that non-conventional technologies such as municipal solid waste, biomass, wind, solar-photovoltaic cells, fuel cells, geothermal and hydroelectric alternatives, several of which can be classified as renewable technologies, are not reasonable alternative approaches to meeting a need of the size identified in the projections of need in the EEC (remand) Decision. 1 DOMSB at 498. In addition, the Attorney General did not identify any information regarding the availability of cleaner generations of fossil fuel plants or further advancements in coal gasification technology or the likelihood of this technology reaching maturity by the year 2000, that he could provide to the Siting Board beyond that presented by his witness in the remand proceedings. See, EEC (remand) Decision, 1 DOMSB at 378.

With regard to the cost comparison of the technology alternatives, the Attorney General argued that the Siting Board's analysis is no longer valid due primarily to decreases in the cost of natural gas in the New England region (Attorney General Offer of Proof at 7). However, the Siting Board's cost analysis was based on the 20-year levelized cost of the technology alternatives, rather than specific yearly costs. Initial 1993 fuel prices were adjusted by various fuel price forecasts to estimate fuel prices for 20 years of facility operation. Even if the current cost of natural gas has declined, the Attorney General has not identified any information that he could provide to the Siting Board to establish that what may be a short-term perturbation is inconsistent with the long-range projection of natural gas prices that served as a basis for the Siting Board's analysis in the EEC (remand) Decision. Further, the Attorney General has not identified any information that he could provide to the Siting Board regarding changes in projections of the relative prices of coal and natural gas.

The Siting Board notes that its statute explicitly provides for the conditional approval of petitions to construct jurisdictional facilities. G.L. c. 164, § 69J. Such conditions may include

prerequisites for establishing viability, as well as design or mitigation conditions related to minimizing environmental impacts. The Siting Board further notes that, whenever it exercises its statutory authority to approve the construction of a facility subject to need or viability conditions, it accepts the continuing validity of those portions of its analysis upon which it does not place conditions. If facilities were repeatedly refused approval because a newer technology, which may have some marginal benefit over the facility under review, has been developed, needed power facilities could not be approved and constructed in a timely fashion. For this reason, the Siting Board establishes a deadline for compliance with the conditions of such approvals.

In the Eastern (remand) Decision, the Siting Board allowed EEC four years from the date of the conditional approval to submit signed and approved PPAs to establish the need for the proposed project. 1 DOMSB at 499. In doing so, the Siting Board accepted the continuing validity of its analysis of alternatives so long as EEC complied with the conditions of the approval regarding need for the project by October 27, 1997. The Siting Board was fully aware that, if EEC did not receive final approval until October 1997, it would not be constructed and operational until late in 2001. Thus, a delay in the project's on-line date until the year 2000 is a contingency that was provided for and accepted in the Eastern (remand) Decision, and does not affect not affect the continuing validity of the analysis of alternatives conducted in that decision.

Accordingly, the Siting Board finds that, as no party has identified information that would lead the Siting Board to conclude that its analysis of alternative technologies, based on their 20-year levelized cost, is now invalid, the Siting Board has no reason to revisit this analysis.[51] Therefore, the Siting Board finds that its analyses in the EEC (remand) Decision, which demonstrate that the levelized costs for EEC's proposed facility show that it will be a

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51 The Siting Board also dismisses EEC's argument that a review of other project costs would potentially give the proposed facility a cost advantage, relative to the technology alternative, for the same reason. EEC has not identified information that would lead the Siting Board to conclude that its 20-year levelized cost of alternative technologies analysis is now invalid.

least-cost addition to the Commonwealth's energy supply, and that the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost (1 DOMSB at 397), remain valid if the on-line date of the proposed facility is changed from the year 1997 to the year 2000.

3. Findings and Conclusions

In addition to the subsidiary findings on need made in the EEC (remand) Decision and listed in Appendix A, the Siting Board has found that:

- Massachusetts will have a need for an amount of capacity equal at least to that of EEC's proposed facility by the year 1998. [EEC (remand) Decision,] 1 DOMSB at 495 (p. 37);
- there will be a need for 300 MW of additional energy resources in New England for reliability purposes beginning in 2000. Id., 1 DOMSB at 497 (p. 37);
- (1) Massachusetts' need for 300 MW of additional capacity will occur earlier than New England's need for the same, and (2) it is clear that, for all years in which there will be a regional need for EEC's proposed project, i.e., for the years 2000 and beyond, said project would provide a necessary energy supply for the Commonwealth. Id. at 498 (p. 37);
- the existing record clearly establishes a need for reliability purposes in the Commonwealth in the year 2000 and beyond for an amount of capacity equal at least to that of EEC's proposed facility (p. 39); and
- EEC's proposed facility will come on-line no earlier than the summer of 1999, and probably not until sometime during the year 2000 (p. 40).

Consequently, the Siting Board finds that there will be a need for reliability purposes in the Commonwealth for the EEC facility beginning in its first, or at latest, its second, year of operation.

The Siting Board has determined that it is appropriate to consider need explicitly within

a time frame beyond the first year of facility operation. EEC (remand) Decision, 1 DOMSB at 463. In the EEC (remand) Decision, the Siting Board explained that, if need has been established for the first year of operation, reviewing need over a longer time frame helps ensure that the need will continue for a number of years. 1 DOMSB at 464. Further, if need has not been established for the first year of proposed operation, a demonstration of need within a limited number of years thereafter may still be an important factor in reaching a decision as to whether a proposed project should go forward. Id.

Here, the timing of Commonwealth need, as established above, exactly matches the most probable first year of operation of the EEC facility. Consequently, the Siting Board finds that the EEC facility will provide a necessary supply of energy for the Commonwealth.

In Section II.B.2, above, the Siting Board also found that:

- as no party has identified information that would lead the Siting Board to conclude that its analysis of alternative technologies, based on their 20-year levelized cost, is now invalid, the Siting Board has no reason to revisit this analysis (p. 41); and
- its analyses in the EEC (remand) Decision, which demonstrate that the levelized costs for EEC's proposed facility show that it will be a least-cost addition to the Commonwealth's energy supply, and that the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost (1 DOMSB at 397), remain valid if the on-line date of the proposed facility is changed from the year 1997 to the year 200 (p. 41).

Consequently, the Siting Board reaffirms its finding that the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

C. Conclusions on the Proposed Project

Based on the record evidence, developed by all parties to these proceedings, the Siting Board has found that the EEC facility will provide a necessary supply of energy for the

Commonwealth. Further, the Siting Board has reaffirmed its finding that the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

Accordingly, based on the existing record as analyzed and set forth in the EEC Decision and the EEC Compliance Decision, as amended in response to the (1) directives of the Court in City of New Bedford, by the analyses contained in the EEC (remand) Decision and, (2) directive of the court in Attorney General v. Siting Board, by this decision, the Siting Board finds that the proposed EEC facility will provide a necessary energy supply for the Commonwealth with, on balance, a minimum impact on the environment at the lowest possible cost.

III. DECISION

In Attorney General v. Siting Board, the Court vacated the Siting Board's decision conditionally approving the siting of EEC's proposed facility due to the failure of the Siting Board to make an independent finding of need for that facility. 419 Mass. at 1005. The Court left to the discretion of the Siting Board the determination as to whether to reopen hearings. Id.

Based on a review of pertinent Court decisions, the Siting Board determined that such discretion requires a review of circumstances surrounding the proceeding and the historical context of its statute in order to identify appropriate procedures to follow to address the Court's directive that the Siting Board make an independent finding of need. The Siting Board determined that all parties had been provided a full opportunity to develop a record as to the issue of need over the course of more than four years. Further, the Siting Board determined that an extensive record on need had been developed in which regional need had been analyzed on two separate occasions, in addition to a complete analysis of Commonwealth need, conducted in direct response to the Court's directive in City of New Bedford. The Siting Board, nevertheless, provided all parties an opportunity to address the issues as to whether that record was sufficient and remained valid for purposes of addressing the Court's concern.

After reviewing the submissions of the parties, the Siting Board has determined that the existing record is sufficient and remains valid for purposes of making an independent finding of need. The Siting Board, therefore, found no reason to exercise its discretion to reopen hearings in this proceeding.

Accordingly, the Siting Board approves the petition of EEC to construct a bulk generating facility and ancillary facilities, subject to the conditions and recommendations set forth in the EEC Decision, the EEC Compliance Decision, and the EEC (remand) Decision, as amended by Section II.A.1, above.

The Siting Board notes that the approval of EEC's petition remains conditional as EEC has yet to submit its filing relative to viability conditions. EEC Decision 22 DOMSC at 312-313. EEC will not receive a final approval of its proposed facility until such time as this condition has been met. The Siting Board requires EEC to comply with this condition within four years of the final EEC (remand) Decision, i.e., by October 27, 1997.

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Robert P. Rasmussen
Hearing Officer

Dated this 27th day of June, 1995

APPROVED by a majority of the Energy Facilities Siting Board at its meeting of June 27, 1995 by the members and designees present and voting. Voting for approval of the Tentative Decision as amended: Kenneth Gordon (Chairman, EFSB/DPU); Janet Gail Besser (Commissioner, DPU); David L. O'Connor (for Gloria C. Larson, Secretary of Economic Affairs); and Joseph Faherty (Public Member). Voting against approval of the Tentative Decision as amended: Sonia Hamel (for Trudy Coxe, Secretary of Environmental Affairs), and William Sargent (Public Member).

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Kenneth Gordon
Chairman

Dated this 27th day of June, 1995

APPENDIX A – EEC (remand) DECISION
Findings on Need

In Section II.C.3 and 4, above, the Siting Board has made the following subsidiary findings:

- that the reference forecast is an appropriate base case forecast for use in the analysis of regional demand for the years 1996 through 2007 (p. 211);
- that the expected value forecast is an acceptable forecast for use in an analysis of regional demand, but should not constitute a base case forecast (p. 213);
- that the GDP forecast provides a possible high-case forecast for use in an analysis of regional demand, while recognizing that the forecast methodology is not sophisticated and that possible adjustments may be needed to reflect DSM trends over forecast period (p. 214);
- that it is appropriate to adjust the 1992 CELT DSM levels in the base case (p. 214);
- that an adjustment of the 1992 CELT DSM levels by 8.4 percent of the increment over 1991 levels is reasonable for the purposes of this review (p. 214);
- that the Company's low DSM forecast should be adjusted to represent the 1992 CELT low DSM case (p. 215);
- that the Company's high DSM forecast should be adjusted to represent the 1992 CELT high DSM case (p. 215);
- that the base supply case, including 83 MW of the committed capacity of NUG projects that are existing or under construction, represents a reasonable base supply forecast for the purposes of this review (p. 225);
- that the low supply case, including 83 MW of the committed capacity of NUG projects that are existing or under construction, represents a reasonable low supply forecast for the purposes of this review (pp. 225-226).
- that the high supply case, including 83 MW of the committed capacity of NUG projects that are existing or under construction, and as adjusted by 66 MW of the uncommitted capacity of NUG projects that are existing or under construction, represents a

reasonable high supply forecast for the purposes of this review (p. 226);

- that the Company's regional supply contingency analysis provides an acceptable basis for assessing the potential ranae of regional capacity positions that might arise over the forecast period (p. 228);
- that the Company's reserve margin for the years 1997 through 2000 should be adjusted as follows: (1) 22 percent for 1997; (2) 21.5 percent for 1998; (3) 21 percent for 1999; and (4) 20.5 percent for 2000 (p. 228);
- that it is appropriate to explicitly consider need for the proposed facility within the 1997 to 2000 time period (p. 233);
- the need for 300 MW or more of additional energy resources in New England for reliability purposes beginning in 2000 and beyond (p. 234);
- that the Massachusetts reference forecast is an appropriate base case forecast for use in an analysis of Massachusetts demand for the years 1996 to 2007 (p. 246);
- that the Massachusetts expected value forecast is an acceptable forecast fo ruse in an analysis of Massachusetts demand, but should not constitute a base case forecast (p. 248);
- that the Massachusetts end year CAGR forecast provides an acceptable forecast for use in an analysis of Massachusetts demand (p. 250);
- that the Massachusetts linear regression forecast and the Massachusetts CAGR regression forecast provide acceptable forecasts for use in an analysis of Massachusetts demand, while recognizing that the forecast methodologies are not sophisticated and that possible adjustments may be needed to reflect DSM trends over the forecast period (p. 252);
- that (1) an adjustment of the Massachusetts base DSM forecast by 8.4 percent of the increment over 1992 levels is reasonable for purposes of this review; (2) the Company's Massachusetts high DSM forecast should be adjusted to represent Massachusetts'

prorated share of the 1992 CELT high DSM case, and (3) the Company's Massachusetts low DSM forecast should be adjusted to represent Massachusetts' prorated share of the 1992 CELT low DSM case (pp. 253-254);

- that the Company's reserve margin for the years 1997 through 2000 should be adjusted as follows: (1) 22 percent for 1997; (2) 21.5 percent for 1998; (3) 21 percent for 1999; and (4) 20.5 percent for 2000 (p. 258);
- that the Massachusetts high supply forecast should be adjusted to include 30 MW of the uncommited capacity of NUG projects that are existing or under construction (p. 258).
- that (1) the Massachusetts base supply case represents a reasonable base supply forecast for the purposes of this review, (2) the Massachusetts low supply case represents a reasonable low supply forecast for the purposes of this review, and (3) the Massachusetts high supply case, as adjusted by 30 MW of the uncommitted capacity of NUG projects that are existing or under construction, represents a reasonable high supply forecast for the purposes of this review (p. 259);
- that the Company's Massachusetts supply contingency analysis provides an acceptable basis for assessing the potential range of Massachusetts utility capacity positions that might arise over the forecast period (pp. 256-260);
- a need for 300 MW or more of additional energy resources in Massachusetts for reliability purposes beginning in 1998 (p. 264); and
- that the Company's need analysis, including its need forecast and contingency cases, as adjusted, for Massachusetts and New England, demonstrate that Massachusetts' need for 300 MW of additional capacity clearly will occur earlier than New England's need for same (p. 264).

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 General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).