

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Petition of Southern Energy Kendall, LLC)
for Approval to Upgrade and Replace)
Generating Facilities at the Existing)
Kendall Square Station in Cambridge,)
Massachusetts)

EFSB 99-4

FINAL DECISION ON
MOTION FOR CLARIFICATION

Sheila R. McIntyre
Hearing Officer
August 31, 2001

On the Decision:
William Febiger

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I. INTRODUCTION

On December 15, 2000, the Energy Facilities Siting Board (“Siting Board”) issued its final decision in Southern Energy Kendall, LLC, 11 DOMSB 255 (2000) (“Final Decision”). The Final Decision conditionally approved the petition of Mirant Kendall, LLC (“Mirant Kendall” or “Company”), formerly known as Southern Energy Kendall LLC, to upgrade generating facilities at the existing Kendall Square Station (“Kendall Station”) in Cambridge, Massachusetts. The proposed project would upgrade the existing cogeneration plant into a natural gas-fired, combined cycle, electric generating facility and increase generating capacity at Kendall Station from approximately 64 megawatts to approximately 234 megawatts. Final Decision, 11 DOMSB 255, 266.

On January 2, 2001, Mirant Kendall timely filed a motion to extend the judicial appeal period of the Final Decision. The Siting Board granted this motion and subsequently granted timely requests to further extend the appeal period.¹ On April 20, 2001, Mirant Kendall filed a Motion for Clarification of Condition G of the Final Decision (“Motion”).² Condition G states the following:

In order to minimize air impacts, the Siting Board directs the Company to limit oil firing for the new equipment and boilers 1, 2, and 3 to the months outside the ozone season of May 1 through September 30, except in the case of a natural gas supply interruption beyond the Company’s control, and to seek an air quality plan approval from MDEP incorporating this condition. The Company shall provide the Siting Board with a copy of its pre-construction air quality plan approval prior to the commencement of construction.

Id. at 293, 393.^{3,4}

¹ Final Decision, 11 DOMSB 255 (rulings on extension of judicial appeal periods; January 25, 2001, February 16, 2001, March 3, 2001).

² Mirant Kendall also filed for further extension of the judicial appeal period until 10 days after action on the Motion. On April 20, 2001 we granted the requested extension.

³ Mirant Kendall states that its Motion concerns only the first sentence of Condition G and that it has already complied with the last sentence of Condition G (Motion at 1, 2).

⁴ In its Motion, Mirant Kendall seeks clarification or reconsideration of Condition G. Since, as
(continued...)

II. BACKGROUND

The existing Kendall Station produces steam using three main steam boilers (boilers 1, 2, and 3) and two back-up steam package boilers (boilers 4 and 5). Id. at 267. Mirant Kendall has proposed to expand the existing Kendall Station by constructing a new building to house a 170 MW combustion turbine generator (“CTG”) and a heat recovery steam generator (“HRSG”). The CTG would run primarily on natural gas, with a 30-day back-up supply of oil. Id. The new CTG would generate electricity and the new HRSG would produce steam for use in the steam turbines of the existing plant and for sale to COM/Steam. Id. at 267-268. Boiler 3 would be used for additional steam capacity during peak steam sale days when the CTG is operating on oil and for back-up in the event that the CTG breaks down or is shut down for maintenance. Id. at 268. Boilers 1 and 2 would serve as additional back-up for steam in the event that either boiler 3 is down or the CTG is down and boiler 3 cannot meet the steam demand.⁵ Id.

III. STANDARD OF REVIEW

The Siting Board has established a standard of review for motions for clarification of a final decision by adopting the standard of review for clarification used by the Department of Public Utilities (now the Department of Telecommunications and Energy). See Eastern Energy Corporation, EFSB 90-100R (final decision on remand from the Supreme Judicial Court), Procedural Order on Motions for Clarification and Extension of Judicial Appeal Period (December 14, 1993) (“Eastern Energy Procedural Order”). That standard is as follows:

A Motion for Clarification of a Final Decision may be granted when a Final Decision is silent as to the disposition of a specific issue requiring determination in the Final Decision, or when the Final Decision contains language that is sufficiently ambiguous to leave doubt as to its meaning. Clarification does not involve reexamining the record for

⁴ (...continued)
indicated below, we determine that Mirant Kendall’s request falls within the standard of review for clarification, we need not address any issues regarding reconsideration of a final decision.

⁵ Mirant Kendall has an obligation to meet its steam sale requirements on an uninterruptible basis. Final Decision, 11 DOMSB 255, 281.

the purpose of substantively modifying the decision. Eastern Energy Procedural Order at 3.

IV. ANALYSIS

Mirant Kendall states that it seeks clarification regarding the application of Condition G for two reasons (Motion at 6). First, Mirant Kendall argues that the exceptions for ozone season oil-firing allowed by the Massachusetts Department of Environmental Protection (“MDEP”) in its Proposed Conditional Major Comprehensive Plan Approval (“Proposed Conditional Approval”) for the Mirant Kendall project are more broad in scope than those set forth in Condition G (id.).⁶ Second, Mirant Kendall argues that the Proposed Conditional Approval does not restrict oil-firing in boilers 1, 2 and 3 (id.). The Siting Board examines these issues in turn.

A. Exceptions to Prohibition on Ozone Season Oil-Firing

Mirant Kendall has provided a copy of the MDEP’s Proposed Conditional Approval for the Mirant Kendall project. In its Proposed Conditional Approval, the MDEP set limits on the use of fuel oil in the CTG. Specifically, Proviso E of the Proposed Conditional Approval provides that Mirant Kendall “shall not burn transportation distillate fuel oil during the time period May 1 through September 30 inclusive of any calendar year, except during initial compliance testing, initial plant demonstration and performance testing, periodic readiness testing, in the event of the unavailability of natural gas, or in the case of a variance obtained from the Department to operate during an emergency.”

The Siting Board’s Condition G also restricted the use of oil during the ozone season, specifically requiring the Company to “limit oil firing . . . to the months outside of the ozone season of May 1 through September 30, except in the case of a natural gas supply interruption beyond the Company’s control . . .” Final Decision, 11 DOMSB 255, 296. A comparison of the two conditions makes it clear that, while the Final Decision addresses the use of oil only during normal operations, the

⁶ The Siting Board notes that the MDEP may issue a Proposed Conditional Major Comprehensive Plan Approval for a proposed generating project pursuant to 310 CMR 7.02.

Proposed Conditional Approval also addresses the use of oil during periods of testing and during emergency conditions. The lack of explicit discussion in the Final Decision regarding either testing periods or emergency conditions creates sufficient ambiguity as to leave doubt as to the meaning of Condition G. Consequently, the Siting Board grants Mirant Kendall's request for clarification on this issue.

In the Final Decision, the Siting Board approved the construction and operation of the Kendall Station project. The Siting Board notes that the project cannot move from construction into commercial operation without initial testing of the new equipment, and cannot continue to operate as designed and in compliance with its permits without further periodic testing. Thus, any condition imposed in the Final Decision should be construed to allow testing as necessary to comply with the requirements of our sister agencies. Similarly, the Siting Board has a fundamental duty to provide for "a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." G.L. c. 164, § 69H. Thus, the conditions imposed by the Board in the Final Decision should not be read to preclude the use of oil at Kendall Station during emergency conditions, provided that Mirant Kendall has sought and obtained a variance from the MDEP.

Consequently, the Siting Board clarifies that the restriction on oil-firing set forth in Condition G was intended to apply to periods of normal operation, and not to periods of testing or to operation during emergency conditions. The exceptions allowed under Condition G should be construed to be consistent with the exceptions allowed in the MDEP Proposed Conditional Approval.

B. Use of Oil in Boilers 1, 2 and 3

In its Motion, Mirant Kendall also identifies a discrepancy between Condition G of the Final Decision and the Proposed Conditional Approval with respect to the issue of oil-burning in existing boilers 1, 2 and 3 (Motion at 7). Specifically, Condition G directs the Company to "limit oil firing for the new equipment and boilers 1, 2 and 3 to the months outside of the ozone season of May 1 through September 30, except in the case of a natural gas supply interruption beyond the Company's control, and to seek an air quality plan approval from the MDEP incorporating this condition." Final Decision,

11 DOMSB 255, 296. The Proposed Conditional Approval, however, places no condition on oil-firing in boilers 1, 2 and 3.

Mirant Kendall suggests that the Siting Board intended in Condition G to require that the Company “comply with permit conditions imposed by MDEP regarding air quality,” and on this ground seeks clarification or reconsideration of Condition G as it applies to boilers 1, 2 and 3 (Motion at 8-9). The Siting Board notes that its intent in imposing Condition G was not simply to ensure that Mirant Kendall complied with conditions imposed by the MDEP. The obligation to comply with permits issued by agencies of the Commonwealth is incumbent upon any person proposing any project requiring such permits; no special condition is required to impose such an obligation. Rather, the Siting Board in the Final Decision sought to restrict the use of oil in both the new CTG and boilers 1, 2 and 3, and to provide for consistency of resource use permits between state agencies by instructing Mirant Kendall to seek a consistent permit from the MDEP.⁷ However, the Final Decision was silent as to the Company’s responsibilities pursuant to Condition G if the MDEP did not similarly restrict the use of oil in both the new CTG and boilers 1, 2 and 3. Because the Final Decision specifically references the MDEP air plan approval, but is silent as to the disposition of any inconsistency between the terms of the Proposed Conditional Approval and Condition G, the Siting Board grants Mirant Kendall’s request for clarification on this issue.

In determining the disposition of this specific issue, the Siting Board considers both its intent in the Final Decision, and the information contained in the MDEP’s Proposed Conditional Approval. As noted above, the Siting Board in the Final Decision sought both to place restrictions on the use of oil in existing boilers 1, 2 and 3, and to provide for consistency in permitting between state agencies dealing with related matters. The Proposed Conditional Approval places no restrictions on the use of oil in existing boilers 1, 2 and 3, and thus introduces a level of inconsistency between the Final Decision and the MDEP permits. This inconsistency could be resolved simply by requiring Mirant Kendall to comply with the stricter Siting Board requirements. However, the Proposed Conditional Approval also notes

⁷ The Siting Board notes that Siting Board staff also communicated directly with the MDEP regarding Condition G after the Final Decision was issued.

that further restrictions on the use of the CTG may be imposed to mitigate the project's increased thermal impacts on the Charles River from the discharge of cooling water (Proposed Conditional Approval at 44). Specifically, the Proposed Conditional Approval states that:

Based on its preliminary review of the NPDES application, the Department foresees that facility operations may have to be significantly curtailed during the period from late spring to early fall in order to adequately protect the habitat and fish population. . . . Detailed facility operational limitations, design modifications and mitigation measures will be established, as necessary, in the final NPDES permit and Water Quality Certification (id.).

Thus, it appears that the operating and related economic assumptions upon which the Siting Board relied when it placed restrictions on the use of oil in boilers 1, 2 and 3 during the ozone season (which also runs from late spring to early fall) may no longer be accurate. Further, the Siting Board is concerned that if it continues to restrict the use of oil in boilers 1, 2 and 3, it may unnecessarily complicate the MDEP and the Environmental Protection Agency's review of the project's NPDES permit and Water Quality Certification. In this specific situation, and in light of the sizable reductions in NO_x and SO₂ emissions provided by the Kendall Station project,⁸ the goal of achieving consistent resource permits for the project takes precedence over the goal of restricting oil use in the existing boilers. Consequently, the Siting Board clarifies that Mirant Kendall need not restrict its use of oil in boilers 1, 2 and 3 pursuant to Condition G if the MDEP does not impose a similar requirement in its Conditional Air Permit.

The Siting Board notes that if the operation of the CTG is significantly curtailed during the period from late spring to early fall, the air quality analysis upon which the Siting Board relied in the Final Decision may no longer accurately represent the projected operation of the proposed project. The Siting Board therefore directs Mirant Kendall, at such time as it receives the NPDES permit and Water Quality Certification for the proposed project, to notify the Siting Board and describe any changes in its projected operation so that the Siting Board may decide whether to inquire further into

⁸ The project would reduce annual station-wide emissions from 365 tons per year ("tpy") to 204 tpy for NO_x, and from 247 tpy to 166 tpy for SO₂. Final Decision, 11 DOMSB 255, 284, 294.

the issue.

V. DECISION

The Siting Board's enabling statute directs the Siting Board to implement the energy policies contained in G.L. c. 164, §§ 69H-69Q to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. G.L. c. 164, § 69H. Section 69J^{1/4} requires that, in its consideration of a proposed generating facility, the Siting Board review, *inter alia*, the site selection process, the environmental impacts of the proposed project, and the consistency of the plans for construction and operation of the proposed project with current health and environmental protection policies of the Commonwealth and with such energy policies of the Commonwealth as have been adopted by the Commonwealth for the specific purpose of guiding the decisions of the Siting Board.

In Section III, above, the Siting Board granted Mirant Kendall's request for clarification concerning Condition G of the Final Decision. Specifically, the Siting Board has clarified that the restriction on oil-firing set forth in Condition G was intended to apply to periods of normal operation, and not to periods of testing or to operation during emergency conditions and should be construed to be consistent with the exceptions allowed in the MDEP Proposed Conditional Approval. In Section III, above, the Siting Board also has clarified that Mirant Kendall need not restrict its use of oil in boilers 1, 2 and 3 pursuant to Condition G if the MDEP does not impose a similar requirement in its Proposed Conditional Approval. Further, in Section III, above, the Siting Board has directed Mirant Kendall, at such time as it receives the NPDES permit and Water Quality Certification for the proposed project, to notify the Siting Board and describe any changes in its projected operation so that the Siting Board may decide whether to inquire further into the issue.

Accordingly, the Siting Board finds that upon compliance with the standing conditions in the Final Decision as clarified in Section III, above, the construction and operation of the proposed facility will contribute to a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

In addition, the Siting Board notes that the findings in this decision are based upon the record that supported the Final Decision and information contained in the MDEP Proposed Conditional Approval. A project proponent has an absolute obligation to construct and operate its facility in conformance with all aspects of its proposal as presented to the Siting Board. Therefore, the Siting Board requires the Company to notify the Siting Board of any changes other than minor variations to the proposal so that the Siting Board may decide whether to inquire further into a particular issue. The Company is obligated to provide the Siting Board with sufficient information on changes to the proposed project to enable the Siting Board to make these determinations.

Sheila Renner McIntyre
Hearing Officer

Dated this 31st day of August, 2001

APPROVED by a majority of the Energy Facilities Siting Board at its meeting of August 30, 2001, by the members and designees present and voting. Voting for approval of the Tentative Decision: James Connelly (Chairman, DTE/EFSB); Deirdre K. Manning (Commissioner, DTE); David L. O'Connor (Commissioner, Division of Energy Resources); and Joseph Donovan (for Elizabeth Ames, Director of Economic Development). Voting against approval of the Tentative Decision: Sonia Hamel (for Robert Durand, Secretary of Environmental Affairs); and W. Robert Keating (Commissioner, DTE).

James Connelly, Chairman
Energy Facilities Siting Board

Dated this 30th day of August, 2001.

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).