

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Southern Energy Kendall, LLC)
Motion for Further Extension)
to Comply with Condition E)
EFSB 99-4A)
_____)

July 14, 2003

ACTION BY CONSENT

I. INTRODUCTION

This “Action by Consent” is made pursuant to 980 CMR 2.06, which provides the Energy Facilities Siting Board (“Siting Board”) with the authority to render a decision via Action by Consent when the Board “determines that expeditious action is necessary.” 980 CMR 2.06(1).

On December 15, 2000, the Siting Board 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. Southern Energy Kendall, LLC, 11 DOMSB 255 (2000) (“Final Decision”). In the Final Decision, the Siting Board imposed three conditions, Conditions D, E, and F, for Mirant Kendall to meet prior to the commencement of operation. On November 15, 2002, the Siting Board found the Mirant Kendall has complied with Condition D. Final Decision on Compliance and Request to Amend Condition E, 13 DOMSB 279 (2002) (“Compliance Decision”). At that time, the Siting Board also amended Conditions E and F. Id. Specifically, Condition E was amended directing the Company to negotiate a mutually acceptable emergency water agreement with the City of Cambridge and to provide a copy to the Siting Board on the earlier of: (a) March 1, 2003 or (b) that time when Mirant begins taking water from the Broad Canal/Charles River for process and steam purposes, relying upon the City only for sanitary purposes and for emergency process and steam use. Mirant Kendall was also directed to limit its use of City water to historical levels, or obtain City consent to use City water at higher levels, until such time as it ceases to rely regularly on City water for process and steam purposes. Id. Since that time, Mirant Kendall has filed four requests to extend the time in which it is required to file a copy of its emergency water agreement with the City of Cambridge.¹ On each occasion, the

¹ Mirant Kendall Request for Extension dated February 25, 2003, Mirant Kendall Request for Extension dated March 31, 2003, Mirant Kendall Request for Extension dated April 29, 2003, and Mirant Request for Extension dated May 30, 2003.

Siting Board granted Mirant Kendall's request and amended Condition E accordingly.² As a result of the June 13, 2003 Siting Board Ruling, Condition E establishes July 1, 2003 as the date for Mirant Kendall to comply with Condition E ("Amended Condition E"). On July 1, 2003, Mirant Kendall filed a motion requesting an additional one-month extension from July 1, 2003 to August 1, 2003 to comply with Amended Condition E ("Request for Further Extension"). The Request for Further Extension is the only subject of this Action by Consent.

II. REQUEST FOR FURTHER EXTENSION

In support of its Request for Further Extension, the Company states that Mirant Kendall will make a final attempt to reach agreement with the City of Cambridge ("City") on a draft agreement that appropriately reflects the verbal understanding the Company believes it reached with the City in March 2003 (Request for Further Extension at 2). Mirant Kendall states that it will continue to negotiate in good faith but that it is possible that no agreement will be reached (*id.* at 2). In that case, Mirant Kendall states that it may file a notice of project change seeking relief from Amended Condition E (*id.*).

The City states that it has no objection to the Request for Further Extension and that it will continue to negotiate in good faith (City Comments at 1-2). The City also states that counsel for Mirant Kendall and the City have "tried to identify the principal issues and work toward a resolution before tackling the entire agreement" (*id.* at 1).

III. RULING ON REQUEST FOR FURTHER EXTENSION

In evaluating Mirant Kendall's request, the Siting Board notes that the purpose of granting the initial amendment to Condition E was to allow Mirant Kendall to operate the upgraded Kendall Station facility while allowing the Company and the City the time needed to reach an emergency water agreement. Compliance Decision at 288. In that decision, the Siting Board placed considerable weight on the fact that the City was amenable to such an amendment provided that restrictions were placed on Mirant Kendall's consumption, so that the City's water supply was not overburdened in the interim.³

² The Siting Board granted Mirant Kendall's requests via the following documents: Siting Board Ruling in EFSB 99-4A dated June 13, 2003, Siting Board Action by Consent dated May 22, 2003, Siting Board Action by Consent dated March 10, 2003, and Siting Board Action by Consent dated April 10, 2003.

³ All amendments to Condition E have retained the provision in original Condition E directing Mirant Kendall to limit its use of City water to historical levels, or obtain City consent to use City water at higher levels, until such time as it ceases to rely regularly on City water for

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Id. Because Mirant Kendall did not expect to receive a modified National Pollutant Discharge Elimination System (“NPDES”) permit for Kendall Station until early 2003, and given the agreement by the City and the Company, the Siting Board permitted Mirant Kendall to commence operations without an emergency water agreement. Id. However, the Siting Board also stated that, given the importance of the emergency water supply agreement, it was important to impose a deadline for contract negotiations and set a deadline of March 1, 2003. Id.

The Siting Board has, to date, granted four separate extensions to the original March 1, 2003 deadline for reaching such an agreement. It is apparent from the parties’ comments that, while Mirant Kendall and the City both are willing to continue to negotiate in good faith, they have differing opinions of the probability that a mutually acceptable agreement can be reached. The Siting Board is not a party to the negotiations, and does not have independent information about the status of the negotiations. However, based on both sets of comments, it is reasonable to infer that additional discussion needs to take place on a range of issues if a mutually acceptable agreement is to be reached. It seems possible that such discussion could take more than a month, particularly since the individuals involved in the negotiations may already have scheduled summer vacations. Based on the stated willingness of both parties to continue negotiations, and the apparent breadth of unresolved issues, the Siting Board concludes that it is reasonable to grant a two-month extension to the current deadline for filing the emergency water agreement with the Siting Board. During this time, the Siting Board expects both parties to engage in intensive negotiations aimed at executing a mutually acceptable agreement and filing that agreement with the Siting Board by September 2, 2003. If negotiations extend into August, Mirant Kendall shall file status reports with the Siting Board on August 1 and August 15 indicating the steps that have been taken (e.g. meetings held, drafts exchanged, telephone conferences) to advance the negotiations. The City may file companion status reports, if it so chooses. Accordingly, the Siting Board amends Condition E to read as follows:

In order to minimize water impacts, the Siting Board directs the Company to negotiate a mutually acceptable emergency water agreement with the City of Cambridge and to provide a copy to the Siting Board on the earlier of: (a) September 2, 2003 or (b) that time when Mirant begins taking water from the Broad Canal/Charles River for process and steam purposes, and relying upon the City water only for sanitary purposes and for emergency process and steam use. The Siting Board also directs Mirant to limit its use of City water to historical levels, or obtain City consent to use City water at higher levels, until such time as it ceases to rely regularly on City water for process and steam purposes.

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process and steam purposes.

The Siting Board regards September 2, 2003 as the final deadline for negotiations between Mirant Kendall and the City with respect to an emergency water agreement. We anticipate that Mirant Kendall may explore other procedural options if a mutually acceptable agreement has not been executed by that date.

Signed:

Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Date

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Date

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Date

David L. O'Connor
Commissioner
Division of Energy Resources

Date

Joseph Donovan
for Barbara B. Berke, Director
Department of Economic Development

Date

Stephen R. Pritchard
for Ellen Roy Herzfelder
Secretary of Environmental Affairs

Date

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Louis A. Mandarin, Jr.
Public Member

Date