COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of Nickel Hill Energy, LLC, for Approval to Construct a Bulk Generating Facility in the Town of Dracut, Massachusetts	)))))	EFSB 99-3 RULING ON MOTION TO VACATE

ACTION BY CONSENT

I. PROCEDURAL HISTORY

On April 1, 1999, Nickel Hill Energy, LLC ("Nickel Hill") filed with the Energy Facilities Siting Board ("Siting Board") a petition for approval to construct a 750 megawatt ("MW") gas-fired combined-cycle generating facility in the Town of Dracut ("proposed project") pursuant to G.L. c. 164, § 69J¼. The Siting Board issued its Final Decision approving the project on November 13, 2000. Nickel Hill Energy, LLC, 11 DOMSB 83 (2000) ("Final Decision"). On December 20, 2000, Merrimack Valley Residents for the Environment, Inc. ("MVRE") and the Town of Andover ("Andover") filed a joint petition to appeal the Final Decision, pursuant to G.L. c. 25, § 5 and G.L. c. 164, § 69P, with the Supreme Judicial Court.[1]

On June 1, 2001, MVRE filed a Motion to Vacate the Final Decision of the Energy Facilities Siting Board ("MVRE Motion").[2] On June 7, 2001, Nickel Hill and the Town of Dracut each filed an opposition to MVRE's Motion ("Nickel Hill Opposition;" "Town of Dracut Opposition"). Also on June 7, 2001, MVRE filed a Reply to Nickel Hill's Opposition ("MVRE Reply"). On June 21, 2001, MVRE filed a Supplement to the MVRE Motion ("MVRE Supplement"). On June 25, 2001, Nickel Hill filed a response to the MVRE Supplement ("Nickel Hill Response"). On June 27, 2001, MVRE filed a Second Reply ("MVRE Second Reply").

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[1] The parties filed a Joint Motion to Reserve and Report the matter to the full Supreme Judicial Court. This motion was granted by the Single Justice on March 21, 2001. Briefing has concluded and oral argument before the Supreme Judicial Court is scheduled for September 6, 2001 (Supreme Judicial Court Notice of Oral Argument, August 3, 2001).

[2] In its cover letter, MVRE requests oral argument on its Motion.

II. POSITIONS OF THE PARTIES

A. Position of MVRE

MVRE argues that the Final Decision should be vacated because certain representations made by Nickel Hill during the proceeding may no longer be accurate (MVRE Motion at 1). In support, MVRE asserts that affidavits[3] submitted in support of MVRE's Motion and the public announcement[4] by Constellation Power, Inc. ("Constellation"), Nickel Hill's parent company, indicating that Constellation will not develop the proposed project at this time contradict testimony and evidence offered by Nickel Hill during the evidentiary hearings (MVRE Motion at 1-2; MVRE Supplement at 2). MVRE argues that such contradicted testimony and evidence cannot serve as a basis for any finding in the Final Decision (id.).[5]

MVRE also contends that because Nickel Hill has "abandoned the Project because of . . . its inability to compete," a controversy no longer exists and, consequently, it is appropriate to vacate the Final Decision as moot (MVRE Motion at 1-2, citing Building Comm'r of Cambridge v. Building Code Appeals Bd., 34 Mass. App. Ct. 696 (1993); Jones v. Superintendent, Massachusetts Correctional Inst. at Bridgewater, 5 Mass. App. Ct. 880 (1977); Lebel v. Cardone, Mass. Superior Court, No. Civ. A 990646, 1999 WL 674247; Connolly v. Moreno, Mass. Superior Court, No. Civ. A 98-00325, 1998 WL 472038).

Finally, MVRE notes the possibility that Nickel Hill may seek a purchaser for the proposed

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[3] MVRE provided an affidavit of an MVRE officer indicating that she had been told that Constellation would not develop the proposed project and that Nickel Hill had withdrawn from a Payment in Lieu of Taxes ("PILOT") Agreement with the Town of Dracut and an agreement to lease with the site owner (MVRE Motion at 2, Affdiavit A). MVRE also provided affidavits by counsel of record for MVRE, with appended newspaper articles (MVRE Motion at 2; Affidavit B, and attachment, Affidavit C).

[4] MVRE provided an "External Statement" authored by Constellation Power Source dated May 22, 2001, which indicates it will not build the proposed facility "due primarily to the changed conditions in the New England energy market" (MVRE Supplement at Exhibit A).

[5] MVRE argues that the contradicted testimony and evidence concern a proposed noise easement; an executed term sheet for the potential lease and option to purchase of the 25-acre site; displacement of New England regional emissions; a special permit issued by the Town of Dracut addressing the widening of an intersection and street; "the entire pollution profile assigned to the plant;" and other "numerous representations" (MVRE Motion at 1-3; MVRE Supplement at 2; MVRE Reply at 1).

project, and argues that any transfer of the Siting Board approval is prohibited by G.L. c. 164, § 1F (MVRE Motion at 4). In the alternative, MVRE asserts that the Siting Board relied in its Final Decision upon the expertise of Constellation as a major reason for approving the project, and argues that another developer might not have similar expertise (id.).

In summary, MVRE requests that the Siting Board vacate its Final Decision, after which the pending appeal may be dismissed as moot (MVRE Motion at 6). In the alternative, MVRE requests that the Siting Board schedule an evidentiary hearing and/or briefing of the issues raised in MVRE's Motion to allow for appeal of this ruling on MVRE's Motion as part of the current appellate proceeding (MVRE Motion at 3, 5-6; MVRE Supplement at 3). In support, MVRE argues it is appropriate to add newly discovered evidence to a motion and argues a judgment may be vacated based upon newly discovered evidence or subsequent developments (id.)(citing Mass. R. Civ. P. 59; Commonwealth v. Lanigan, 419 Mass. 15 (1994); Commonwealth v. Jones, 432 Mass. 623 (2000)).

B. Position of Nickel Hill

Nickel Hill argues MVRE's Motion lacks any basis because it raises issues not currently before the Siting Board and is not a proper pleading (Nickel Hill Opposition at 1). Nickel Hill argues that, although Constellation has made an initial determination not to proceed with the project, the formal announcement of this determination has been postponed to allow other qualified entities to acquire Nickel Hill and its assets (id. at 2). Nickel Hill states that it has not formally withdrawn from any permits, contracts, or approvals, and that it remains in complete compliance with the Siting Board's approval (id. at 2-4). Nickel Hill also argues that the Final Decision rendered by the Siting Board must be considered as final because if an agency retained jurisdiction to vacate its own decision after it has become appealable to the court system, no agency decision could ever be considered final under G.L. c. 30A, § 14 (id. at 2).

Nickel Hill further argues that even if MVRE's Motion were properly before the Siting Board, the interests of Constellation in this project are freely assignable (id. at 1). Nickel Hill notes that, in the past, Siting Board approvals have been validly transferred to other entities and that such approvals are transferable and assignable as long as the Siting Board is noticed and the substantive requirements of the Final Decision are followed (id. at 3-4). Nickel Hill states that should a transfer occur, the Siting Board would be informed (id. at 4). Nickel Hill further argues G.L. c. 164, § 1F is irrelevant and inapplicable to Nickel Hill or this proceeding (id. at 3-4).

In response to MVRE's argument that the Final Decision is moot, Nickel Hill argues MVRE has not demonstrated that Nickel Hill has relinquished its stake in the validity of the Siting Board's Final Decision (id. at 5)(citing Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976)(holding litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome)). Nickel Hill notes that MVRE's Motion is based solely on two newspaper

articles and conversations between MVRE and the Town Manager, the press, or agents for Nickel Hill (Nickel Hill Opposition at 5). Nickel Hill asserts that such information cannot serve as a basis for the Siting Board to vacate its own decision as moot (id. at 3-4). Finally, Nickel Hill argues that the statements attributable to Nickel Hill and Constellation regarding a possible or expected event, printed in a newspaper, are not "binding admissions" and MVRE's arguments are therefore based on speculation, hearsay, and a desire to see this project terminated (id.).

C. Position of the Town of Dracut

The Town of Dracut asserts that, contrary to MVRE's assertions, the Dracut Town Manager did not state to an officer of MVRE that Nickel Hill was withdrawing from its PILOT Agreement or its agreement with the owner of the site of the proposed project (Town of Dracut Opposition at 1).[6] The Town of Dracut also argues that the affidavit of an MVRE officer describing her conversation with the Town Manager regarding Nickel Hill's plans constitutes hearsay and should not be given any weight (id. at 2). The Town of Dracut asserts that while hearsay statements may be admissible in administrative proceedings to support the truth of the matter asserted, the Hearing Officer should determine the reliability of the statements by looking to the circumstances under which the statements were made (id.).

The Town of Dracut also notes that the Town Manager has no authority to speak on behalf of Nickel Hill (id.). Moreover, the Town of Dracut asserts such statements cannot be used for estoppel purposes (id.).

D. Analysis and Findings

1. Request for Oral Argument

Under Siting Board regulations, the scheduling of oral argument on a motion is discretionary. 980 CMR, §1.04(3). Because the parties have submitted extensive written argument, MVRE's request for oral argument is hereby denied.

2. Motion to Vacate

After taking into consideration all argument presented, MVRE's Motion to Vacate the Final Decision is denied on two grounds: first, the motion is not properly before the Siting Board at this time, and second, MVRE's substantive arguments do not support its Motion to Vacate.

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6 The Town of Dracut submitted an affidavit from the Town Manager to this effect (Town of Dracut Opposition).

A motion to vacate a Siting Board final decision currently on appeal with the Supreme Judicial Court is inappropriate. Because an appeal of a Siting Board final decision may be taken to the Supreme Judicial Court by an aggrieved party in interest pursuant to G.L. c. 164, § 69P and c. 25, § 5, the Siting Board may not reverse or vacate its Final Decision absent certain extraordinary circumstances which are not present in this case. See G.L. c. 30A, § 14 ("[w]here a statutory form of judicial review is provided such statutory form shall govern in all respects, except as to standards of review"); Fitchburg Gas and Elec. Light Co. v. Department of Public Utilities, 394 Mass. 671, 677 (1985); Federman v. Board of Appeals of Marblehead, 35 Mass. App. Ct. 727 (1994); Pastene Wine & Spirits Co., Inc., v. Alcoholic Beverages Control Comm'n, 16 Mass. App. Ct. 156 (1983). Moreover, an administrative agency may not reverse or vacate a decision on the basis of evidence obtained after the close of an administrative proceeding without reopening the proceeding. See Vitale v. Planning Bd. of Newburyport, 10 Mass. App. Ct. 483 (1980). Therefore, because an appeal of the Final Decision may be and was filed, MVRE's Motion to Vacate the Final Decision is denied on procedural grounds.

MVRE's substantive arguments in support of its Motion to Vacate also are inapposite. MVRE argues that the Final Decision should be vacated on two grounds. First, MVRE argues that because Constellation has decided not to pursue development of this project, no controversy exists and the Final Decision is moot and should be vacated. Second, MVRE argues that Constellation's decision not to pursue development of the proposed project undercuts certain testimony of Nickel Hill's witnesses offered during the proceeding, which testimony may have served as a basis for findings in the Final Decision.

MVRE's argument that no controversy exists, and that the Final Decision therefore is moot and should be vacated, fails because the procedural posture of this matter has not changed.[7] Nickel Hill's petition to construct a generating facility was properly adjudicated and decided by the Siting Board. The decision is final, and is in fact on appeal. No credible evidence altering this procedural posture has been presented. Newspaper articles notwithstanding, it is evident from the pleadings that Nickel Hill retains an interest in either constructing or selling the Nickel Hill project and a strong interest in the continuing validity of the Final Decision. Logically, no person other than Nickel Hill is capable of determining or authorized to determine when Nickel Hill no longer retains any interest in the project. If

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[7] The Siting Board also notes that MVRE cites case law that addresses the mootness of complaints and appeals rather than mootness of an adjudicated administrative law decision. See Lebel v.Cardone, Mass. Superior Court, No. Civ. A 990646, 1999 WL 674247; Connolly v. Morneo Mass. Superior Court, No. Civ. A 98-00325, 1998 472038; Building Comm'r. of Cambridge v. Building Code Appeals Bd., 34 Mass. App. Ct. 696 (1993); Jones v. Superintendent, Massachusetts Correctional Institution at Bridgewater, 5 Mass. App. Ct. 880 (1977).

Nickel Hill ever determines that it has no remaining interest in the Final Decision, it may, if it chooses, withdraw its petition to construct. See Silver City Energy Limited Partnership (Action by Consent), 4 DOMSB 445 (1994); Eastern Energy Corporation (Action by Consent), 4 DOMSB 213 (1996); Altresco Lynn, Inc. (Action by Consent), 4 DOMSB 459 (1993). The Siting Board will consider a motion to withdraw if and when Nickel Hill chooses to file one.

Moreover, as a general matter, an issued Final Decision does not necessarily become moot simply because the applicant declines to proceed with the proposed project. The Siting Board issues an approval, through the process of an adjudication, of an applicant's petition. See G.L. c. 164, § 69J¼; c. 30A, § 11. Neither statutory nor regulatory law requires the recipient of a Siting Board approval to construct an approved project. However, if the project is to be constructed, construction generally must commence within three years of the date of the Final Decision.[8] See Nickel Hill Energy, LLC, 11 DOMSB 83, at 250 (2000)**;** Sithe West Medway, LLC, 10 DOMSB 274, at 372; Southern Energy Kendall, LLC, 11 DOMSB 255, at 396 (2000). Because an applicant is not compelled to construct an approved project, and because the Final Decision affords the applicant three years in which to begin construction, an interim decision not to construct the proposed project does not warrant vacating the Final Decision. See Building Comm'r. of Cambridge, 34 Mass. App. Ct. 696 (1993).

Finally, after reviewing MVRE's pleadings and the content of the Final Decision, the Siting Board concludes that nothing offered by MVRE directly contradicts testimony relied on in the Final Decision. Changes in the status of the development of the proposed project, if they occur, do not automatically make prior sworn testimony incorrect. Further, a number of issues raised by MVRE, including the economics of the proposed project and the power development expertise of the developer, are clearly outside the statutory scope of the Siting Board's review of power plants. See G.L. c. 164, § 69J¼; Notice of Inquiry with regard to the Siting Board's Standard of Review for Generating Facility Viability, 7 DOMSB 19 (1998). The Siting Board concludes that Constellation's decision not to pursue the Nickel Hill project at this time does not invalidate or make the Final Decision moot.

For the reasons stated above, MVRE's Motion to Vacate the Final Decision also is denied on substantive grounds.

3. Motion for Further Hearings, Disclosure of Plans, and Briefing

MVRE seeks, in the alternative, an order requiring: (1) a further evidentiary hearing;

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[8] The Siting Board notes that, if Nickel Hill or its successor does not commence construction within three years of the date of issuance of the Final Decision, the project approval is void unless an extension is timely sought and granted.

(2) that Nickel Hill disclose its plans to transfer the project; and (3) that the parties be given the opportunity to brief the issue of how the Final Decision may be affected by Constellation's statement that it has abandoned the project. Given the current lack of information regarding the status of the Nickel Hill project, MVRE's motion for further evidentiary hearings, disclosure of plans, and briefing is premature. See Lahey Clinic Found., Inc. v. Health Facilities Appeals Bd., 376 Mass. 359, 376 (1978). However, the Siting Board does have in place procedures for reviewing proposals to alter a project after a final decision has been issued; for purposes of clarity, we discuss these briefly here.

As a preliminary matter, we note that, in the Final Decision in this matter, the Siting Board approved the petition of Nickel Hill to construct a 750 MW generating facility in Dracut, Massachusetts, subject to conditions. Final Decision, at 102, 246-252. The Siting Board found that, upon compliance with the conditions set forth in that decision, the construction and operation of the proposed facility would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Id.; see G.L. c. 164, § 69J¼. In that decision, the Siting Board also required Nickel Hill "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." Id. at 250.

The Siting Board routinely imposes this notification requirement in its final decisions because, by statute, it is the agency of first permit. Specifically, G.L. c. 164, § 69J¼ states that "no state agency of the commonwealth shall issue a construction permit for any such generating facility unless the petition to construct such generating facility has been approved by the [siting] board pursuant to this section." G.L. c. 164, § 69J¼. Because of its role as grantor of the first permit, the Siting Board has long recognized that changes may be made to a project after the Siting Board issues its decision. For this reason, the Siting Board has put into place a process that allows it to determine whether it should take action if specific changes to a project are proposed (or are required by sister agencies) after the Siting Board has rendered its decision. When it is notified of such a change, the Siting Board reviews the scope and detail of the change to determine whether to inquire further into the issue. If further inquiry is necessary, it then determines whether the project change alters in any substantive way either the assumptions or conclusions reached in its analysis of the project's environmental impacts in the underlying proceeding. IDC Bellingham LLC Final Decision on Compliance, 11 DOMSB, 38-39 (2000); Berkshire Power Decision on Compliance, 7 DOMSB 423 (1997).

MVRE's motion for further hearings rests at this time on affidavits and newspaper articles, both indicating that Constellation has determined not to construct the Nickel Hill project and that certain elements of the proposed project are in flux. Nickel Hill in its pleadings has indicated that it is seeking a

qualified purchaser for the project,[9] and that it is currently in compliance with the Final Decision. Nickel Hill has not filed any information with the Siting Board regarding proposed project changes, nor has any other person provided the Siting Board with any evidence that any entity plans to build the project in a manner inconsistent with the Final Decision. Speculation that project changes may occur subsequent to a hypothetical transfer of project ownership does not and should not warrant the expenditure of resources to hold further evidentiary hearings. Such action would serve no useful purpose, and would not foster administrative efficiency. If, in the future, specific substantive changes to the project are proposed, either by Nickel Hill or by another entity that has acquired the Nickel Hill project, the Siting Board will consider the proposed changes to determine whether to inquire further into the issue, and, if so, whether the project changes alter in any substantive way either the assumptions or conclusions reached in our analysis of the project's environmental impacts in the underlying proceeding.

Absent information regarding definitive plans for specific changes to the Nickel Hill project as approved, MVRE's motion for further hearings, disclosure of plans, and briefing is premature. Accordingly, MVRE's motion for further hearings, disclosure of plans, and briefing is denied.

4. Transferability of Approval

MVRE argues that the Nickel Hill approval may not be transferred to another entity, either because G.L. c. 164, § 1F prohibits such a transfer, or because the Siting Board relied on Constellation's expertise in approving the Nickel Hill project. Although this argument is not directly related to the Motion to Vacate, we address it here for clarity.

MVRE's interpretation of c. 164, § 1F as prohibiting transfer of a Siting Board approval because it requires disclosure of an applicant's technical ability is incorrect. Chapter 164, § 1F addresses the licensure, by the Department of Telecommunications and Energy, of generation companies that sell electricity at retail. This statutory provision is wholly inapplicable to the adjudication by the Siting Board of a petition to construct a generating facility. Compare G.L. c. 164, §1F with G.L. c. 164, § 69J¼.

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[9] In response to a motion filed at the Supreme Judicial Court, Nickel Hill stated that Constellation has signed an agreement with a prospective purchaser to engage in a due diligence review of the project. Town of Andover, et al. v. Energy Facilities Siting Board, SJC-08532, Respondents' Joint Response To The Appellant's Motion to (a) To Stay Appeal; (b) To Remand Case To Energy Facilities Siting Board; and (c) To Dismiss Appeal As Moot. The fact that Nickel Hill is negotiating with a purchaser does not by itself signify that a project change has occurred that would warrant inquiry by the Siting Board.

MVRE also suggests that the Siting Board relied on the expertise of Constellation in approving the proposed project. This suggestion is incorrect. The Siting Board could not have considered such information in rendering the Final Decision, because our statutory mandate allows us to review only the environmental impacts of generating facilities, consistent with the Commonwealth's policy of allowing market forces to determine the need and cost of such facilities. G.L. c. 164, § 69H. Further, in 1998, the Siting Board issued a determination concluding that issues such as the experience and expertise of a project proponent had been placed outside the scope of the Siting Board's review by enactment of the 1997 Electric restructuring Act. Notice of Inquiry with regard to the Siting Board's Standard of Review for Generating Facility Viability, 7 DOMSB 19 (1998).

The Siting Board concludes that neither of MVRE's arguments support the proposition that a Siting Board approval may not be transferred to another entity. Changes in corporate ownership of a project are, in fact, commonplace. See IDC Bellingham LLC, EFSB 97-5, at 15, 16 n. 22 (1999); see also Southern Energy Canal II, LLC, 98-9, at 1 n.1 and 3 (2001); and Sithe West Medway Development, LLC, EFSB 98-10 (Letter to EFSB, Jan. 4, 2000). However, the Siting Board notes that any future developer of the Nickel Hill project must build the project in full compliance with the Final Decision, unless it first seeks and receives Siting Board approval of a change to the project.

Signed:

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

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

W. Robert Keating
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