

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of)
Sithe Edgar Development LLC for Approval)
to Construct a Bulk Generating Facility in)
in the Town of Weymouth, Massachusetts)

EFSB 98-7A

FINAL DECISION
PROJECT CHANGE

Selma Urman
Hearing Officer
November 30, 2001

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The Energy Facilities Siting Board hereby approves, subject to conditions, changes to the Sithe Edgar project as further described below.

I. INTRODUCTION

A. Background

On February 3, 2000, the Energy Facilities Siting Board (“Siting Board”) conditionally approved the petition of Sithe Edgar Development LLC (“Sithe Edgar” or “Company”)¹ to construct a natural gas-fired combined-cycle, electric generating facility with a net nominal electrical output of 775 megawatts (“MW”) in the Town of Weymouth, Massachusetts (“Town”). Sithe Edgar Development LLC, 10 DOMSB 1 (2000) (“Final Decision”).

On June 27, 1999, the Town of Weymouth and Sithe Edgar entered into a Host Community Agreement (“Host Agreement”) that provided, inter alia, that the Town of Weymouth and Sithe Edgar negotiate in good faith and attempt to reach an agreement on a construction protocol for the proposed facility. On November 9, 1999, Sithe Edgar and the Town entered into a Memorandum of Agreement (“MOA”) that provided, inter alia, a set of construction protocols for the proposed facility. Pursuant to Condition A of the Final Decision, Sithe Edgar was required to develop and submit a plan for noise mitigation during construction consistent with the noise protocol developed with the Town of Weymouth. Final Decision at 148.² Pursuant to Condition K of the Final Decision, the Company was directed to provide a traffic analysis indicating, inter alia, the status of the road improvements at the Washington Street and Baker/South Street intersection. Id. at 150.

On May 31, 2000, Sithe Edgar submitted a compliance filing including a Noise Mitigation Plan for Construction intended to comply with the construction protocols for the

¹ The Siting Board notes that subsequent to the issuance of the Final Decision, Sithe Edgar Development LLC changed its name to Sithe Fore River Development LLC. In order to maintain consistency with the Final Decision, the Siting Board shall continue to refer to the petitioner as Sithe Edgar.

² On September 2, 1999, the Hearing Officer granted the August 5, 1999 motion of the Town of Weymouth to withdraw from the proceeding (Tr. 14, at 1274). The Town of Weymouth, therefore, is not a party to this proceeding.

proposed facility³. By letter dated August 10, 2000, the Siting Board indicated that, with implementation of a regular means of communication with the neighborhood regarding construction noise, the Company had demonstrated its compliance with Condition A.

On June 2, 2000, Sithe Edgar submitted to the Siting Board a compliance filing with respect to Condition K of the Final Decision.⁴ The compliance filing provided for a day construction shift (“day shift”) of 600 workers arriving at 7:00 a.m. and departing at 3:30 p.m., and indicated that some work would be performed on multiple shifts and weekends (Exh. PC-Sithe-5, at 2-3). In addition, the Company indicated that, after six months, the extended day shift would end, and a second shift of 300 workers would arrive at 4:30 p.m. and depart at 12:00 midnight (*id.*). The June 2, 2000 compliance filing also addressed the status of traffic conditions at certain intersections. By letter dated August 10, 2000, the Siting Board approved the June 2, 2000 compliance filing.⁵

B. The Company’s Filing

1. Requested Project Changes

On September 28, 2001, Sithe Edgar provided the Siting Board a notice of project change with respect to the Company’s decision to alter construction schedules and the number of construction workers approved in the Final Decision and the compliance filing approved on August 10, 2000 (“September 28, 2001 Filing”).⁶ The proposed changes included two ten-hour shifts: a day shift arriving at 7:00 a.m. and departing at 5:30 p.m.; and a night shift that would run from 4:30 p.m. to 2:00 a.m. (Exh. PC-Sithe-1, at 3). The proposed changes also included an increase in the number of day shift workers from 600 to 900 workers and an increase in the

³ The Company’s May 31, 2000 compliance filing is hereby marked for identification and moved into the record as Exh. PC-Sithe-7.

⁴ The Company’s June 2, 2000 compliance filing is hereby marked for identification and moved into the record as Exh. PC-Sithe-5.

⁵ The Siting Board’s August 10, 2000 letter to the Company is hereby marked for identification and moved into the record as Exh. PC-Sithe-6.

⁶ The Company’s September 28, 2001 Filing of notice of project change is hereby marked for identification and moved into the record as Exh. PC-Sithe-1.

number of night shift workers from 300 to 400 workers (id.). On October 5, 2001, Sithe Edgar submitted a traffic study in support of its notice of project change.⁷

By letter dated October 23, 2001, the Company notified the Siting Board of changes to the construction shift schedule proposed in its September 28, 2001 Filing. The Company indicated that, subject to union approval, the first shift would arrive at 7:00 a.m. and depart at 5:00 p.m., and that the second shift would arrive at 5:30 p.m. and depart at 2:00 a.m. (“October 23, 2001 Filing”).⁸ On November 2, 2001, Sithe Edgar submitted a revised traffic study in support of its notice of project change.⁹

2. Memorandum of Law

The Company’s filing also included a memorandum of law on the Siting Board’s jurisdiction to approve the requested project changes (Exh. PC-Sithe-1, App. C). The Company asserted that the proposed project changes are consistent with the Host Agreement and MOA that it entered into with the Town of Weymouth, but suggested that the Town of Weymouth may not agree with this assessment (id. at 12). Accordingly, the Company has requested that the Siting Board rule that even if the Town’s interpretation of the Host Agreement and MOA is correct, the Siting Board has the authority to void any provisions in the contract that it finds are contrary to public policy (id., App. C at 8).

C. Procedural History

On October 17, 2001, the Hearing Officer issued a memorandum seeking legal analysis from intervenors and interested persons, as well as the Town of Weymouth,¹⁰ on the issue of the

⁷ The October 5, 2001 traffic study is hereby marked for identification and moved into the record as Exh. PC-Sithe-2.

⁸ The Company’s October 23, 2001 Filing is hereby marked for identification and moved into the record as Exh. PC-Sithe-3.

⁹ The Company’s November 2, 2001 revised traffic study is hereby marked for identification and moved into the record as Exh. PC-Sithe-4.

¹⁰ Although the Town of Weymouth withdrew as a party to the proceeding, the Hearing
(continued...)

Siting Board's jurisdiction to approve the requested project changes. On October 31, 2001, J. Gary Peters, and the Town of Weymouth filed memoranda of law.¹¹ On November 8, 2001, the Company filed its response to the memoranda of law submitted by J. Gary Peters and the Town of Weymouth. On November 15, 2001, the Town of Weymouth filed a response to the November 8, 2001 response of the Company.

On October 23, 2001, the Siting Board conducted a technical conference at its offices in Boston, Massachusetts. On October 29, 2001, the Hearing Officer issued a procedural schedule which provided the opportunity for intervenors to issue information requests or submit comments on the proposed project changes. No party issued information requests. The Company filed responses to four sets of information requests issued by Siting Board staff.¹²

D. Scope of Review

In its approval of the Sithe Edgar project, the Siting Board required Sithe Edgar to notify it of any changes other than minor variations to the proposal as presented to the Siting Board, so that it might decide whether to inquire further into such issues. Final Decision at 363. The standard of review to determine whether further inquiry is warranted was articulated by the Siting Board in the Berkshire Power Decision on Compliance ("Berkshire Compliance Decision") 7 DOMSB 423, at 437 (1997). In the Berkshire Compliance Decision, the Siting Board declined to make further inquiry regarding certain project changes if the change did not alter in any substantive way either the assumptions or conclusions reached in its analysis of the

¹⁰ (...continued)
Officer permitted the Town of Weymouth to submit a legal analysis, since it is a party to both the Host Agreement and MOA with Sithe Edgar (October 17, 2001 Hearing Officer Memorandum at 2).

¹¹ On October 30, 2001, the Fore River Watershed Association ("FRWA") submitted a filing to the Siting Board that did not provide a legal analysis of Sithe Edgar's Memorandum of Law. The Siting Board will treat FRWA's October 30, 2001 filing as a submission of comments.

¹² The Company's responses to the Siting Board's information requests are hereby marked for identification and moved into the record as Exh. PC-EFSB-1 through Exh. PC-EFSB-23.

project's environmental impacts in the underlying proceeding. Id.; see also IDC Bellingham LLC Decision on Compliance, 11 DOMSB 27, at 38-39 (2000).

The Siting Board notes that the proposed construction shift schedule differs from that approved by the Siting Board in its August 14, 2000 letter. In light of the proximity of the construction site to a residential neighborhood and Sithe Edgar's request that the Siting Board determine that the proposed change conforms to the Host Agreement/MOA, the Siting Board finds that further inquiry into the noise impacts of the proposed project is necessary to determine whether additional mitigation is needed to minimize the construction noise impacts of the proposed project. Further, in light of the relief requested by Sithe, the Siting Board finds that further inquiry is necessary to determine whether additional mitigation is required to minimize the traffic impacts of the proposed project. The Siting Board reviews the traffic and noise impacts of the proposed project in Section II, below.

As stated in Section I.B.2, above, Sithe Edgar also has requested that the Siting Board make a finding that it has the authority to render void any and all provisions of the Host Agreement/MOA that it determines are contrary to public policy. The Siting Board considers the Company's request in Section III., below.

II. ANALYSIS OF PROJECT CHANGES

A Purpose of Project Changes

Sithe Edgar stated that it was proposing an increase in the number of first shift workers and the implementation of a ten-hour second shift in response to (1) construction delays resulting from the abandonment of the project by its earlier engineering, procurement, and construction ("EPC") contractor, and (2) conditions in the Boston-area construction labor market (Exhs. PC-Sithe-1 at 3-4; PC-EFSB-14). Sithe Edgar indicated that, without a second shift, the peak construction period would extend until September 15, 2002; construction would not be complete until November 3, 2002; and testing would not be complete until February 2003 (Exh. PC-EFSB-1). The Company indicated that, with a second shift, peak construction would be complete by April 30, 2002; construction would be complete by June 18, 2002; and testing would be complete by September 13, 2002 (Exh. PC-EFSB-1). The Company indicated that a close-to-ten hour shift was needed to attract sufficient skilled labor for the project at a time when

numerous other projects are under construction in the greater Boston area, noting that Sithe Edgar already has had to recruit labor for the project from out-of-state and from Canada (Exh. PC-EFSB-14).

Sithe Edgar argued that there is a significant public interest in bringing the Sithe Edgar project into commercial operation by the 4th quarter of 2002 (Exh. PC-EFSB-1). First, Sithe Edgar stated that this schedule would make Edgar Station available for the entire 2002/2003 winter period (id.). The Company noted that, while there should be adequate installed capacity in New England to meet demand during this period, nearly 50% of the new capacity added by the winter of 2003 will be gas-only (id. at 2). The Company argued that the availability of the dual-fueled Edgar Station would enhance the reliability of electric supply to Massachusetts customers in case of an unexpected interruption in the gas supply or delivery system into New England (id. at 3).

Sithe Edgar also argued that the early availability of Edgar Station would provide air quality benefits in the form of emissions reductions within New England (id. at 3-7). Specifically, Sithe Edgar argued that NO_x, SO₂, and CO₂ emissions from Edgar Station will be below the marginal emissions rate of plants in the New England region, and that New England-wide emissions therefore will be higher when Edgar Station is not on-line (id. at 3). Using the marginal emissions rate for plants in New England, the Company estimated the additional quantities of NO_x, SO₂, and CO₂ that would be emitted for each week that the operation of Edgar Station is delayed, and concluded that a 20-week delay in the on-line date of Edgar Station would result in the emission of an additional 1447 tons of NO_x, 6264 tons of SO₂, and 404,099 tons of CO₂ (id. at 3-4).

Sithe Edgar also indicated that, while it is difficult to characterize the price effects of the availability of Edgar Station, wholesale spot market prices for electricity exchanged through New England's Independent Systems Operator ("ISO-NE") might be somewhat higher without Edgar Station (Exh. PC-EFSB-1). The Company explained that the hourly energy clearing price for the ISO-NE market is based on the bid price of the last eligible generator dispatched to meet load (Exh. PC-EFSB-23). The Company asserted that, since Edgar Station would be relatively efficient compared to many existing generators, it would be dispatched toward the middle of the supply curve, which would tend to lower the energy clearing price during many hours of the year

(id.).

In addition to analyzing the benefits directly related to an earlier on-line date for Edgar Station, Sithe Edgar provided a letter from Frederic Laskey, Executive Director of the Massachusetts Water Resource Authority (“MWRA”), describing the relationship between the project schedule for Edgar Station and the project schedule for the MWRA Braintree-Weymouth Relief Facilities (Exh. PC-EFSB-21). Mr. Laskey’s letter stated that the MWRA is under an Administrative Consent Order (“ACO”) from the Massachusetts Department of Environmental Protection (“DEP”) regarding this project, and has set milestones for project construction consistent with the ACO (id. at 2). Construction of one element of the project, the Fore River Siphons, is scheduled to begin in July 2002, with completion in June 2003 (id. at 1). Mr. Laskey’s letter stated that the staging area for construction of the Fore River Siphons is currently being used by Sithe Edgar as a staging area for Edgar Station construction; thus, any delay in the Edgar Station project would result in a further delay of the MWRA project (id. at 2). Mr. Laskey’s letter stated that any further delay of the MWRA project would place the MWRA in non-compliance with the ACO, would defer the project’s environmental benefits, and would be costly to the MWRA and its ratepayers (id. at 2).

B. Noise

1. Final Decision

In the Final Decision at 92, the Siting Board reviewed Sithe Edgar’s plans for minimizing and mitigating construction noise. The Siting Board noted the proximity of the proposed facility to a sizable residential area (45 to 50 residences within approximately 1100 feet of the facility footprint), and concluded that neighborhood concerns relating to construction noise impacts could arise. Final Decision at 95. The Siting Board recognized that the Company planned to limit the noisiest construction activities to daytime hours, but expressed a concern that additional measures might be warranted to minimize construction impacts. Id. at 95-96. The Siting Board therefore required Sithe Edgar to develop a construction noise mitigation plan, consistent with the construction protocols entered into with Weymouth, that would limit noisier construction during evening and weekend hours consistent with safe construction practices, and would incorporate measures such as temporary noise barriers and advance community notification

procedures on an as-needed basis (“Condition A”). Id. at 96.

2. Compliance Filing

On May 31, 2000, Sithe Edgar filed a letter in compliance with Condition A (“May 31st Letter”).¹³ With the May 31st Letter, the Company submitted a Noise Mitigation Plan for Construction (“Noise Mitigation Plan”) intended to comply with the Construction Protocols (Exh. PC-Sithe-7, Att.1). The Noise Mitigation Plan stated that “[b]y spring/summer 2001 much of the main turbine building will be enclosed and in-door construction activities may extend to a second shift (6:00 p.m. to 2:00 a.m).¹⁴ In general, much of the noise from in-door work will be attenuated by building enclosures” (id. at 3-4). The Company stated that Saturday work would be conducted on a schedule similar to weekday shifts, but that noisy activities such as heavy excavation or the use of impact devices would be avoided on Saturdays (Exh. EFSB-NT-10). The Company indicated that it would make an effort to schedule any necessary loud activities between 9:30 a.m. and 4:30 p.m. on Saturdays (id.).

Siting Board staff undertook a review of the June 2nd Letter which focused on the proposed second shift construction activities and on the possibility of full-day construction on Saturdays. In its response to the June 2nd Letter, staff noted that:

“... both the size and the regularity of the second shift were not anticipated by the Company at the time of the issuance of the Final Decision. ... in light of the Company’s plans to employ a regular second shift during construction and possibly to conduct full-day Saturday construction on a regular basis, it is critical that the Company maintain open lines of communication with the neighborhood immediately adjacent to Edgar Station...” (Exh. PC-Sithe-6).

The August 10th Letter required Sithe Edgar to develop a mechanism for regular communication with the neighborhood, and to notify the Siting Board of that method (id. at 3). The August 10th Letter determined that, with the implementation of a regular means of communication with the neighborhood regarding construction noise, the Company had satisfied the requirements of

¹³ The May 31st Letter also addressed compliance with Condition B of the Final Decision, which required Sithe Edgar to file the construction section of its emergency response plan with Weymouth, Braintree and Quincy prior to construction (Exh. PC-Sithe-7, at 3).

¹⁴ The Company later indicated that it intended to end the second shift at midnight, rather than at 2 a.m. (Exh. EFSB-NT-1, at 1).

Condition A (id. at 3).

On August 17, 2000, Sithe Edgar submitted a letter stating that it would circulate to 70 area households informational memos outlining the Company's work plans and providing information on how to contact Sithe Edgar with questions and concerns ("August 17th Letter").¹⁵ The Company stated that these memos would be updated as necessary to inform residents of significant changes (Exh. PC-Sithe-8, at 2).¹⁶

3. Project Change

Sithe Edgar now proposes to run a day shift extending from 7:00 a.m. to 5:00 p.m., and a night shift extending from 5:30 p.m. to 2:00 a.m., Monday through Saturday¹⁷ (Exh. PC-Sithe-3). The Company indicated that night work generally would take place in and around the turbine building, inside two warehouse buildings attached to the turbine building, and within the pipe that runs to the air-cooled condensor (Exh. PC-EFSB-2). The Company indicated that the turbine building is partially enclosed, and that large pieces of equipment within the turbine building would provide a noise barrier between working areas within the building and the community (id.).

Sithe Edgar stated that night shift activities would include welding and fabrication,¹⁸

¹⁵ The Company's August 17, 2000 Letter is hereby marked for identification and moved into the record as Exh. PC-Sithe-8.

¹⁶ The Siting Board notes apparent confusion among the parties regarding Condition A. Condition A required the Company to make a specific filing with the Siting Board prior to commencement of construction on the Sithe Edgar project. The Company made such a filing in May 2000; the filing was certified as being in compliance with Condition A in August 2000. The Company thus fulfilled its obligations under Condition A over a year prior to filing its Notice of Project Change. Condition A therefore has no relevance to the pending matter.

¹⁷ The Company stated that Saturday activities would generally be limited to catch-up work from earlier in the week, and that noisy construction would not be routinely scheduled on Saturdays (Exh. PC-EFSB-9).

¹⁸ The Company noted that slagging, defined as removing excess metal from surfaces as part of the welding process, would take place on the night shift if it did not create

(continued...)

cable pulling, electrical work, rigging, assembly and alignment of pipes, flushing of pipes, instrumentation and control work, painting, and material movement to support these activities (id.). The Company indicated that most of these activities are manual activities that would be performed inside building structures and that would not cause excessive noise (id.). The Company indicated that fabrication might initially occur either in temporary enclosures or in the boiler building, but would be moved to the warehouse buildings once these were complete (id.). The Company noted that the potential for nighttime noises would be greatest on those occasions when it is necessary to use an outdoor crane to lift heavy materials but that as reasonably possible any such activities will be limited to areas inside project structures or to the west of project structures (i.e., on the side away from nearest residences) to provide acoustical shielding (id.). The Company stated that no night shift work would take place beyond a line running approximately 340 to 600 feet north of Monatiquot Street (Exh. PC-EFSB-2a).

Sithe Edgar stated that noisier activities, including excavation, jack hammering, structural steel assembly, and other similar activities, would be confined to the day shift (Exh. PC-EFSB-3). However, the Company noted that noisy activities could take place on the night shift in limited circumstances, and cited as an example the delivery of an oversized load which could not be delivered during the daytime for public safety reasons (id.).

The Company provided a list of noise mitigation measures intended as a supplement to the Noise Mitigation Plan (Exh. PC-Sithe-1, App. B). Measures specifically intended to reduce the noise impacts of the night shift included: installing temporary shrouds or curtains around noisy activities that can be confined; eliminating back-up beepers in favor of flaggers during the night shift; and instructing the workforce to turn off vehicles and equipment when they are not in use (id.). The list of noise mitigation measures also called for night shift workers to park on the North Parcel, located on the opposite side of Route 3A from the immediate neighborhood, before using parking on the South Parcel (id.). The Company provided a map showing the anticipated location of day- and night-shift parking (Exh. PC-EFSB-2(a)). The Company stated that, in addition to the areas shown on the map, the laydown area on the North Parcel would be

¹⁸ (...continued)

excessive noise; however, slag that required “aggressive removal” would be scheduled for the day shift (Exh. PC-EFSB-3).

converted to parking spaces, creating sufficient parking on the North Parcel to accommodate all night shift vehicles (Exh. PC-EFSB-17).

The Company indicated that, to respond to complaints of noise during the night shift, it would retain an employee of an independent firm with construction and noise mitigation experience to serve as “Noise Monitor” (Exh. PC-EFSB-7). The Noise Monitor would be on site during night shifts to anticipate noise, monitor noise mitigation, and respond to noise complaints by identifying and addressing the source of the noise (id.). The Company provided a summary of noise complaints received between April 20, 2001 and October 23, 2001 (id.). The summary indicated that a significant portion of the noise complaints addressed to Sithe Edgar actually were attributable to noise from MWRA and Massachusetts Highway Department (“MHD”) construction at or near Edgar Station (id.). Complaints associated with work on the Edgar Station project were related primarily to premature day shift construction by Sithe Edgar subcontractors, although in one instance a crane was found to be operating at night on the Sithe Edgar site (id.). The summary indicated that the Noise Monitor asked that the crane be shut down (id.).

Sithe Edgar stated that it keeps the immediate neighborhood informed of construction activities via mail and flyers delivered to the neighborhood, phone calls to individuals, and community meetings (Exh. PC-EFSB-8). The Company indicated that it also meets monthly with Town of Weymouth officials and maintains a construction website (id.).

Sithe Edgar initially proposed to conduct steam blows between 7:00 a.m. and 8:00 p.m., Monday through Saturday, with orderly completion of steam blows initiated prior to 8:00 p.m. allowed to extend beyond 8:00 p.m. (Exh. PC-Sithe-1, App. B). However, in response to concerns expressed by the Town of Weymouth, Sithe Edgar agreed not to begin steam blows after 6:00 p.m. (Exh. PC-EFSB-16). Sithe Edgar indicated that steam blows are done to clean plant piping of construction debris, and may last from two or three minutes (intermittent steam blows) to two or three hours (continuous steam blows) (Exhs. PC-EFSB-6; EFSB-N-20). The Company indicated that the steam blow period for each of the two Edgar Station units would last approximately a week, with a week between each period (Exh. PC-EFSB-6). The Company stated that it would mitigate the noise associated with the steam blows by use of water injection for continuous steam blows, and by the use of a silencer for intermittent steam blows (id.; Exh.

EFSB-N-20).

4. Positions of the Parties

The FRWA expressed concern about communication between Sithe Edgar and the neighborhood, suggesting that in the spring and early summer of 2001, neighbors learned of Sithe Edgar's proposals through the media, rather than directly from Sithe Edgar (FRWA Comments at 1-2). The FRWA stated that, given the additional five months of construction that would be necessary without a second shift, Sithe Edgar's proposal could be acceptable "... with proper enforcement of a construction protocol that addresses the EFSB staff concerns and an adequate remediation offer to the whole neighborhood ..." (*id.* at 3). The FRWA stated that it would also support a rejection of Sithe Edgar's proposal (*id.*).

5. Analysis and Findings

In its petition, Sithe Edgar proposes to perform construction work at Edgar Station in two shifts: a 900-person day shift, running from 7:00 a.m. to 5:00 p.m., during which most outdoor work and noisy tasks would be conducted, and a 400-person night shift, extending from 5:30 p.m. to 2:00 a.m., which would be used primarily for less noisy tasks such as welding, painting, and electrical work. This proposal is generally consistent with both the Final Decision and with Sithe Edgar's filing in compliance with Condition A, in that both earlier documents anticipated the need for a second shift restricted to quieter construction activities. However, the night shift proposed here would be larger than anticipated either in the Final Decision or in the Company's compliance filing. In addition, it would extend to 2:00 a.m., rather than to midnight, as anticipated in the compliance filing.¹⁹

The Siting Board notes that, as a general rule, it is important to minimize nighttime construction noise at sites which, like Edgar Station, are in close proximity to a residential neighborhood. In this particular instance, noise control also is critical because night work is

¹⁹ The Siting Board recognizes that the Noise Mitigation Plan submitted as part of the compliance filing allowed for construction until 2:00 a.m.; however, during the staff review of the compliance filing, the Company indicated that the night shift would end at midnight.

being undertaken on at least two other projects being staged from Edgar Station: the MHD bridge replacement project and the MWRA Braintree-Weymouth Relief Facilities project. The Siting Board recognizes that Sithe Edgar is not responsible for, and has no control over, noise from the MHD and MWRA construction projects. However, it is clear from Sithe Edgar's noise complaint summary that the neighborhood already has experienced incidents of unacceptable late night noise from a variety of sources; consequently, Sithe Edgar should proceed with night construction in a manner that does not add in any significant way to this noise.

Sithe Edgar's current proposal gives significant attention to noise control issues. Most of the tasks proposed for the night shift are relatively quiet, do not involve the use of noisy equipment, and would take place within enclosed spaces that would provide reasonable noise mitigation. The Company's noise mitigation proposal seeks to address vehicle noises associated with the second shift by directing construction worker parking away from the neighborhood and calling for flagging or other appropriate safety measures, rather than back-up beepers. Further, the Company proposes to minimize the noise impacts of night shift work by confining such work behind a line well into the Edgar Station property. Aside from accidental noise (e.g., dropping a large pipe), the greatest potential for disruptive noise would be outdoor movement of material (and workers) to support the indoor craft work. The Company has highlighted the use of an outdoor crane as particularly noisy; however, the noise associated with the transfer of materials around the property late at night could be disruptive. The Siting Board recognizes that it may be logistically difficult to have all the materials needed for a 400 worker, 10-hour shift in place in an enclosed structure prior to the beginning of the shift. The Siting Board anticipates that the Company will make every effort to put as much of the necessary material as possible in place during the day shift; nonetheless, some movement of materials from storage areas on the Sithe Edgar property to the night shift work areas and some use of outdoor cranes may be necessary during the night shift. However, disturbance to neighbors could be minimized if such activity were limited to truly occasional occurrences in any individual night shift, and did not include any constant or continuously repetitive noisy outdoor operations extending as a part of ongoing construction work during that shift. In addition, late-night disturbances could be reduced if such activity were limited to the early evening hours whenever possible. Consequently, the Siting Board directs the Company to limit material movements and use of outdoor cranes on the night

shift to occasional occurrences during the shift and to the hours prior to 11:00 p.m. to the fullest extent possible. When this is not possible, and when any use beyond the above limits of an outdoor crane or other particularly noisy equipment is required, the Company should provide advance written notice to affected neighbors and to the Town.

The Company intends to limit noise from night shift parking by requiring night shift workers to park first on the North Site, away from the neighborhood, with overflow night shift parking on the South Site. The Siting Board notes that, once the laydown area on the North Site is converted to parking spaces, there should be ample parking for all night shift workers on the North Site. Until this conversion is accomplished, the Company should encourage night shift workers using the South Site to park near the turbine building and away from the neighborhood, perhaps by physically blocking access to parking spaces nearest the neighborhood.

The Siting Board recognizes that, despite Company efforts, night shift construction may result in disruptive noise that leads to neighborhood complaints. It is critical that these complaints be resolved immediately and effectively. The Company's proposal to employ an independent Noise Monitor to resolve complaints as they are received may be effective if the Noise Monitor can be reached at all times and if he or she has the authority to resolve, as well as identify, noise issues. The Siting Board therefore directs the Company to distribute the Noise Monitor's direct telephone number to local residents, and to require its contractors to cooperate with the Noise Monitor in resolving noise complaints as they are received.

The Siting Board also directs the Company for the duration of night construction to provide it with a monthly summary of noise complaints received and the resolution thereof, so that the Siting Board can take further action to minimize construction noise impacts if circumstances warrant.

The Siting Board notes that the FRWA has raised concerns about the frequency and effectiveness of communications between Sithe Edgar and the immediate neighborhood. While it is not clear from the record whether the FRWA represents the views of the neighborhood as a whole, it does appear that Company-initiated communication has been relatively infrequent since the spring of 2001, and that Sithe Edgar is no longer issuing the informational memos to which it committed in its Compliance Filing. As the staff noted in its August 10th Letter,

“... in light of the Company's plans to employ a regular second shift during construction

... it is critical that the Company maintain open lines of communication with the neighborhood immediately adjacent to Edgar Station....”

Consequently, the Siting Board directs the Company to circulate, at least once a month and more frequently if necessary, an informational memo to the 70 area households referenced in the Company’s compliance filing. The informational memo should describe the nature of day- and night-shift work to be undertaken in the following month, describe the nature and, if applicable, the resolution of any complaints that have been received, provide advance notice of unusual activity (delivery of large components by street, steam blows, etc.), and provide day- and night-shift contact information. Circulation of this informational memo should continue through construction and testing until Edgar Station enters commercial operation. The Company shall hold a public meeting shortly after the distribution of each informational memo to respond to questions or concerns raised by the memo.

The Company has agreed to limit steam blows, a particularly noisy aspect of the testing process, by beginning them between 7:00 a.m. and 6:00 p.m. These restrictions, combined with the use of water injection and silencers to reduce the noise levels associated with steam blows, should limit the impact of steam blows on the neighborhood. However, the Siting Board notes that continuous steam blows may last up to three hours. Thus, a continuous steam blow which is begun shortly before 6:00 p.m. could be heard until 9:00 p.m. This outcome would be inconsistent with the spirit of the mitigation proposed by the Company. The Siting Board therefore directs the Company to schedule continuous steam blows in a manner that allows completion by 6:00 p.m. or shortly thereafter if the steam blow proceeds according to plan. The Siting Board also notes that under the proposed schedule, the two weeks of steam blows likely would take place sometime during the summer months, when extended outdoor activity in the neighborhood is likely. Consistent with the commitment made as part of its compliance filing, the Company should make an effort to schedule any necessary Saturday steam blows so that the associated loud noises occur between 9:30 a.m. and 4:30 p.m.

Finally, in order to ensure a consistent understanding of the Company’s noise mitigation policies, the Siting Board directs the Company to revise the noise mitigation protocol submitted in this proceeding to reflect the Siting Board’s directives, above, as well as the Company’s commitment with respect to the timing of steam blows, and to distribute the revised noise

mitigation protocol to its contractors and subcontractors as appropriate.

The record indicates that, without a second shift, the construction period for the Sithe Edgar project would be approximately five months longer than currently projected. The Siting Board notes that a five-month extension of the construction period for this project would in itself constitute a significant noise impact. The proposed project change also concentrates a significant portion of the construction schedule into the late fall, winter, and early spring months, when the community is likely to be less sensitive to noise impacts. Thus, the proposed project change has advantages which offset, in part, the impact of extending the night shift. Accordingly, the Siting Board finds that, with implementation of the above conditions, the construction noise impacts of the proposed project would be minimized.²⁰

C. Traffic

1. Final Decision

In the Final Decision at 106-114, the Siting Board reviewed Sithe Edgar's analysis of construction traffic impacts at three major intersections near the project site: the Washington Street/Southern Artery intersection, the Washington/Baker/South Street intersection, and the Bridge/Neck/Green Street intersection. The Company's analysis assumed a peak day shift workforce of 685 people arriving at the site by 7:00 a.m., and leaving between 3:30 and 4:30 p.m. Final Decision at 107-108. Based on the Company's analysis, the Siting Board determined that, absent construction traffic, the Washington/Baker/South Street intersection and the Bridge/Neck/Green Street intersection both operated at level of service ("LOS") B,²¹ while the

²⁰ The Siting Board notes that, in its comments, the FRWA raised the issue of financial compensation to neighborhood residents. While it may be appropriate for Sithe Edgar to compensate residents for their inconvenience, the negotiation of an adequate financial compensation package is beyond the scope of this proceeding.

²¹ LOS A represents a free flow condition with minimal delays; LOS B represents a stable flow with short delays; LOS C represents a stable flow where speed and maneuverability begin to be restricted with average delays; LOS D represents a high-density traffic condition approaching unstable flow with long delays; LOS E represents conditions at or near capacity with very long delays; and LOS F represents forced flow or breakdown conditions with highly unstable operating conditions (Exh. EFSB-B-11, at 5.11-34).

Washington Street/Southern Artery intersection operated at LOS D during the early morning peak hour and LOS C during the afternoon peak hour. Id. at 112. The Siting Board determined that construction traffic would increase overall wait times at all three intersections, with a maximum wait time increase of 10.1 seconds in the eastbound direction at the Washington Street/Southern Artery intersection, but that overall intersection LOS would remain unchanged. Id.²²

The Siting Board noted, however, that uncertainty remained regarding: (1) the timing of expected traffic improvements at the Washington/Baker/South Street intersection, (2) the Fore River Bridge opening schedule, and (3) the final construction shift schedule, and that this uncertainty could affect the traffic impacts of the project. Id. at 113-114. The Siting Board therefore directed the Company to file an updated traffic analysis addressing these issues, and potential mitigation, when construction began (“Condition K”). Id. at 114.²³

2. Compliance Filing

On June 2, 2000, Sithe Edgar filed a letter in compliance with Condition K (“June 2nd Letter”). In the June 2nd Letter, the Company described a final construction schedule involving: (1) a regular day shift running from 7:00 a.m. to 3:30 p.m.; (2) an extended day shift running from 7:00 a.m. to 5:30 p.m. for about 50 workers during the first six months of construction; and (3) a 300-worker second shift running from 4:30 p.m. to midnight, beginning after six months (id. at 2-4). The June 2nd Letter also: (1) addressed the status of the Washington/Baker/South Street traffic improvements and the Fore River Bridge opening schedule; (2) discussed the costs and benefits of shuttle bus service and subsidized public transit fares; and (3) provided the comments of the City of Quincy’s Director of Traffic and Parking on the need for police officer

²² The exhibit cited in the Final Decision actually indicates that LOS at the Washington Street/Southern Artery and Bridge/Neck/Green Street intersections would be unchanged by construction traffic, but that the overall LOS at the Washington/Baker/South Street intersection would decline from B to C in the afternoon, with an increase in delay of 2.4 seconds (Exh. EFSB-WG-6-C, Att. at 5.8-8 to 5.8-9).

²³ The Siting Board also directed the Company to avoid peak traffic hours when receiving oil deliveries by truck. Id. at 102.

control at the Washington/Baker/South Street intersection during peak construction (id. at 2, 5-13). Siting Board staff undertook a review of the June 2nd Letter and determined that, with the Company's agreement to contact Quincy prior to peak construction regarding the deployment of a police officer at the Washington/Baker/South Street intersection, the Company had satisfied the requirements of Condition K (Exh. PC-Sithe-6).

3. Project Change

Sithe Edgar provided a traffic study analyzing construction traffic impacts at two major intersections near the project site -- the Washington/Baker/South Street intersection, and the Bridge/Neck/Green Street intersection -- assuming a day shift of 900 workers running from 7:00 a.m. to 5:00 p.m., and an evening shift of 400 workers running from 5:30 p.m. to 2:00 a.m. (Exh. PC-EFSB-4). The traffic study incorporated information from traffic counts conducted in July 2001, when a day shift of approximately 700 workers was in place at the Sithe Edgar site (id. at 1-2). The traffic study found that the morning peak commuter hour in the vicinity of the Sithe Edgar site occurs between 7:45 a.m. and 8:45 a.m., while the evening peak commuter hour occurs between 5:00 p.m. and 6:00 p.m. Traffic counts taken at the site indicated that approximately 0.82 vehicles per employee arrived at the site during the busiest one hour period in the morning, and that approximately 0.90 vehicles per employee left the site during the busiest evening period (id. at 2). The traffic counts also indicated that approximately half of the construction traffic approaches Edgar Station from the north, while the other half approaches from the south (id. at 2). This information was used to estimate the number and distribution of vehicle trips likely to be generated by an expanded first shift and a 400-worker second shift (id. at 2).

The analysis of the Washington/Baker/South Street intersection in Quincy was based on new traffic counts taken at the intersection in July 2001, when a day shift of approximately 700 workers was in place (Exh. PC-EFSB-4, at 1). The analysis demonstrates that this intersection currently operates at LOS A between 6:00 a.m. and 7:00 a.m., when most of the day shift workers arrive, and that the intersection would continue at LOS A with the proposed shift schedule (id. at Exh. 8). During the evening peak construction hour, which overlaps with the evening peak commuting hour, the intersection currently operates at LOS E, with a delay of 57.1

seconds; the proposed shift change would increase the delay to 79.0 seconds (id.). The Company noted that the City of Quincy has just completed installation of a new traffic signal at the Washington/Baker/South Street intersection, and that construction of a new northbound left turn lane should be complete by Thanksgiving (id. at 4 to 5; Exh. PC-EFSB-12). The Company's analysis indicates that, once these improvements are in place, the intersection would operate at LOS D during the evening peak hour, with a delay of 37.7 seconds assuming the current shift schedule, and a delay of 44.9 seconds assuming the proposed shift schedule (Exh. PC-EFSB-4 at Exh. 8). The Company noted that it has agreed to fund police officer control at this intersection, but that the decision to deploy a traffic officer rests with the Quincy traffic engineer (Exh. EFSB-NT-15). The Company indicated that the Quincy traffic engineer has not regularly requested a police detail at this intersection, except during the reconstruction of the intersection (Exh. PC-EFSB-12).

The Company did not conduct new traffic counts at the Bridge/Neck/Green Street intersection; instead, it used baseline traffic data from the traffic study presented in the Draft Environmental Impact Report for the proposed project (Exhs. PC-EFSB-4 at 5; PC-EFSB-20).²⁴ The Company asserted that these counts likely were conservative, since the Harbor Light Mall, located on Route 3A (Bridge Street), approximately ¼ mile southeast of the Bridge/Neck/Green Street intersection, had closed since the earlier traffic counts were taken (Exhs. PC-EFSB-4 at 5; PC-EFSB-19). The Company added current levels of construction traffic to the baseline traffic counts in order to approximate July 2001 traffic patterns (Exh. PC-EFSB-4 at 5, Exh. 9). The Company's analysis indicated that the Bridge/Neck/Green Street intersection would operate at LOS B during the evening peak hour, with delays of 10.6 seconds assuming no construction traffic, 16.3 seconds assuming the current shift schedule, and 17.7 seconds assuming the proposed shift schedule (Exh. PC-EFSB-4, at exh. 9).

4. Analysis and Findings

In its petition, Sithe Edgar proposes to perform construction work at Edgar Station in two

²⁴ The Draft Environmental Impact Report was entered into the record of the underlying proceeding as Exh. EFSB-B-11.

shifts: a 900-person day shift, running from 7:00 a.m. to 5:00 p.m., and a 400-person night shift, extending from 5:30 p.m. to 2:00 a.m. This proposal represents a considerable change from the construction traffic patterns anticipated in the Final Decision and in the Company's compliance filing, both because the number of construction workers on each shift has increased,²⁵ and because the day shift would now end at the height of the evening peak traffic hour, rather than in the middle of the afternoon as previously proposed.

Sithe Edgar has presented an analysis of construction traffic impacts at the Washington/Baker/South Street intersection in Quincy and at the Bridge/Neck/Green Street intersection in Weymouth, given the proposed shift schedule. This analysis incorporates up-to-date information regarding the number of vehicle trips per construction worker and the geographic distribution of trips to and from the Sithe Edgar site. The traffic analysis demonstrates that construction workers arriving for the day shift would have no significant impact on traffic conditions, primarily because the day shift begins at 7:00, well in advance of the 7:45 a.m. to 8:45 a.m. morning peak commuting period. The analysis also demonstrates that traffic conditions at the Bridge/Neck/Green Street intersection in Weymouth would remain at LOS "B" regardless of the level of construction traffic, with average evening peak hour delays increasing from an estimated 10.6 seconds with no construction traffic to 17.7 seconds with implementation of the proposed shift schedule.

However, evening peak traffic conditions at the Washington/Baker/South Street intersection appear to be significantly worse than anticipated in the Final Decision. The Company's analysis, based on recent traffic counts taken while a day shift of approximately 700 workers was in place, indicates that this intersection operates at LOS E during the evening peak period, with an average delay of 57.1 seconds. Because the Company's traffic analysis uses current traffic levels as a baseline, it is not possible to determine how significantly traffic conditions at this intersection have been affected by the existing construction traffic. However, it is reasonable to assume that the approximately 300 construction worker vehicles traveling northbound during the peak commuting hour contribute measurably to the lengthy delays at this

²⁵ The traffic analysis reviewed in the Final Decision did not take into account construction workers arriving for a night shift.

intersection. The increased northbound traffic from the expanded day shift, plus the arriving night shift workers, would increase average delays at this intersection to 79.0 seconds.

The impact of the proposed shift changes at this intersection would be offset in part by the recent installation of a new traffic light and the expected completion of a new northbound left-turn lane. These changes would improve the overall LOS at this intersection to D, and would reduce the average delay at the intersection to 37.7 seconds assuming the current shift schedule, or 44.9 seconds assuming the proposed shift schedule. The impacts of the new shift schedule, and of the Company's earlier decision to end the day shift during the peak commuting hour, are still significant. However, the record indicates that the implementation of two ten-hour shifts would allow Sithe Edgar to complete construction at Edgar Station approximately five months earlier than would otherwise be possible. This represents a considerable reduction in the duration of construction traffic impacts associated with the Edgar Station project. Further, the Company is providing a police detail at this intersection whenever requested by the Quincy traffic engineer. The Siting Board directs the Company to continue its coordination with the City of Quincy regarding this intersection for the duration of project construction.

Accordingly, the Siting Board finds that, with the implementation of the above condition, the traffic impacts of the proposed project would be minimized.

D. Conclusions

In Section II.B, above, the Siting Board found that, with the implementation of certain conditions, the noise impacts of the proposed project would be minimized. In Section II.C, above, the Siting Board found that, with the implementation of a condition, the traffic impacts of the proposed project would be minimized. Consequently, the Siting Board approves, subject to the stated conditions, the project changes proposed by Sithe Edgar in this matter.²⁶

III. HOST AGREEMENT/MEMORANDUM OF AGREEMENT

²⁶ This approval includes approval to provide parking for all day- and night-shift workers at approximately the locations set forth in this proceeding. The Siting Board sees no reason why any outstanding parking concerns cannot be amicably resolved by the Town of Weymouth and the Company without further recourse to this agency.

A. Sithe's Request

The Company stated that on July 27, 1999, Sithe Edgar and the Town of Weymouth executed a Host Agreement that addressed a number of issues between the Town and the Company (Exh. PC-Sithe-1, at 9). As part of the Host Agreement, Sithe Edgar and the Town agreed to negotiate in good faith and attempt to agree on a protocol for the construction of the facility (id.). On November 9, 1999, the Town and the Company signed a Memorandum of Agreement ("MOA") setting out certain construction protocols (id.). Sithe Edgar asserted that neither the Host Agreement nor the MOA (collectively "Host Agreement/MOA") prevent the Siting Board from approving Sithe Edgar's proposed project changes (id., App. C at 1). Regardless of this interpretation, Sithe Edgar requests that the Siting Board make an explicit finding that any order issued in this proceeding would supercede conflicting provisions of the Host Agreement/MOA (id., App. C at 8).

B. Positions

1. Sithe Edgar

Sithe Edgar asserted that the Siting Board has the authority to determine the appropriate construction conditions for the project regardless of the Host Agreement/MOA (id. App. C at 1). In support, Sithe Edgar cited Holyoke Street Railroad v. Department of Public Utilities, 347 Mass. 440 (1964) ("Holyoke") (id., App. C at 4). In that case, the Department of Public Utilities ("DPU") ordered the cancellation of a condition in a private contract between Holyoke Street Railroad and Peter Pan Bus lines that required Peter Pan to pay Holyoke Street Railroad a passenger fee (id.). The Supreme Judicial Court ("Court") held that the DPU has the authority to strike a provision in a private contract if the DPU finds such provision to be not in the public interest (id., App. C at 4, citing Holyoke at 445). Sithe Edgar stated that in reaching its decision, the Court described the DPU's broad authority over the subject matter of the private contract, noting that (1) the legislature had delegated to the DPU general supervision, regulation, jurisdiction and control over the rendering of services by common carriers; and (2) the DPU's enabling statute authorized the DPU to issue certificates and revise those certificate (id. App. C at 4-5). Sithe Edgar also stated that the Court found that the contract was not void as against public policy because it was executed in the context of DPU's certificate proceeding in that the

contract: (1) contemplated submission to the DPU; (2) had been disclosed to the DPU; and (3) most of its terms were included in the DPU certificate (id., App C at 5). Sithe Edgar stated that the Court held that once the DPU amended its certificate and the private contract was inconsistent with the certificate, the private contract was unenforceable (id., App. C at 5, citing Holyoke at 446).

Sithe Edgar asserted that the Holyoke case is applicable here (id., App. C at 6-7). Sithe Edgar argued that as in Holyoke, the Host Agreement/MOA was not void at its inception because it was presented and recognized by the Siting Board during the underlying proceeding and therefore “it was executed under the auspices of the Siting Board proceedings” (id., App. C at 6). Sithe Edgar asserted that if the Siting Board now determines that the public interest requires a change to its Final Decision, the Host Agreement/MOA may not bar such modification (id.). Further, Sithe Edgar asserted that the Siting Board has sole authority to, inter alia, (1) approve, condition or reject a petition to construct a generating facility, and (2) monitor, enforce and modify or amend Siting Board orders and decisions (id., App. C at 1). In support, Sithe Edgar cited to the statutory authority that has been conferred upon the Siting Board under G.L. 164, §§ 69H-69Q and the authority of the Siting Board pursuant to G.L. 25, § 5 to apply to the Supreme Judicial Court to enforce Siting Board orders (id., App. C at 1-2).

Sithe Edgar asserted that the proposed project changes are in the public interest (Sithe Response at 9-11). Sithe Edgar stated that it has demonstrated that public interest requires abrogation of the Host Agreement/MOA because Sithe Edgar has provided quantitative support for its assertion that the facility would result in significant air quality benefits, and because there are reliability benefits that would result if the proposed changes were approved (id. at 10). Sithe Edgar argued that the Siting Board may look to reliability benefits in determining whether the proposed project changes are in the public interest because the only circumstance under which the Siting Board is not permitted to consider need and cost issues is when reviewing a petition to construct filed pursuant to G.L. c. 164, § 69J ¼ (id. at 10). Further, Sithe Edgar argued that to the extent the Town attempts to enforce the Host Agreement/MOA outside and in contravention of the Siting Board proceedings, the Host Agreement/MOA will be unenforceable as against public policy (id.). The Company cited cases to support the proposition that the public interest

in the freedom of contract is sometimes outweighed by public policy interests (Exh. PC-Sithe-1, App. C at 7, citing Beacon Hill Civic Assn. v. Ristorante Toscano, Inc. 422 Mass 318, 312 (1996); Town of Newton v. Rumery, 480 U.S. 386 (1987); Louisville & N.R. Co. v. Mottely, 219 U.S. 467 (1911)).

Sithe Edgar also argued that the Certificate provisions under G.L. c. 164, §§ 69K½-O½ are inapplicable here because these provisions apply only in situations where a state or local agency has acted in its regulatory capacity (Sithe Response at 4-6). Sithe Edgar maintains that the Host Agreement/MOA was not executed pursuant to a Town permitting or licencing proceeding and therefore does not fall within one of the specific situations which the Certificate statute is designed to address (id. at 5).

Finally, Sithe Edgar asserted that the project changes are consistent with a reasonable interpretation of the Host Agreement/MOA (id. at 2-4).

2. Town of Weymouth

Weymouth asserted that the Holyoke case is far different from the present proceeding and therefore cannot be relied upon to override the Host Agreement/MOA (Weymouth Memorandum at 10). Most importantly, Weymouth asserted, Sithe Edgar is seeking abrogation of a public contract designed to protect public health, safety and environment, whereas the Holyoke case involved a private contract between two companies seeking to work out financial arrangements (id.). Further, Weymouth asserted that in the Holyoke case, unlike here, the DPU had specifically reserved the power to later void the agreement as a condition to its original approval (id.). In the present case Weymouth asserted, the Siting Board was never asked to approve the Host Agreement/MOA, has not done so, and did not condition the Final Decision on its reservation of the right to abrogate the agreements at a later date (id.).²⁷

Further, Weymouth argued that Sithe Edgar has not demonstrated that the public interest requires abrogation of the Host Agreement/MOA (id. at 11- 16). Weymouth asserted that the

²⁷ Weymouth also argued that the New England Telephone & Telegraph v. Brockton case presents a very different factual scenario in that the contract at issue in that case was deemed to be void due to its effort to usurp authority that had been statutorily conferred upon the DPU's predecessor agency (id. at 10).

purported air quality benefits of the proposed project changes are the same benefits Sithe Edgar presented the Siting Board in the underlying case (id. at 13). Further, Weymouth suggested that for the Siting Board to accept Sithe Edgar's reliability argument, the Siting Board would have to assume that there is a need for the facility and would have to consider cost issues (id. at 13). Weymouth argued that the Siting Board is prohibited by G.L. c. 164, §§ 69H and 69J¹/₄ from considering the need for a proposed facility and the cost of such facilities as part of its review of a petition to construct and therefore the Siting Board cannot consider such issues here (id. at 13-14).

The Town of Weymouth suggested that G.L. c. 164, §§ 69K¹/₂-O¹/₂ outlines the only statutory procedure under which local requirements applicable to the siting, construction and operation of electric generating facilities can be abrogated (id. at 10-11). Therefore, according to Weymouth, since Sithe Edgar is not seeking relief pursuant to G.L. c. 164, §§ 69K¹/₂-O¹/₂ and has not filed a petition that meets the application requirements of these statutory provisions, the Siting Board lacks jurisdiction to consider Sithe Edgar's claims until such a petition is filed (id. at 11).²⁸

Weymouth stated that it agrees with Sithe Edgar that most of the requested changes are consistent with Sithe Edgar's obligations to the Town and can be approved (id. at 12). Weymouth stated that "the Town asks only that all second shift construction occur indoors, that steam blows occur only between the hours of 7:00 a.m. and 6:00 p.m., that Sithe comply with the Town's noise Bylaw and that work shift parking be provided only as represented in the DEIR" (id. at 12-13).

Finally, Weymouth noted that an abrogation of the Host Agreement/MOA would "create a dangerous precedent" in that a host community would no longer be assured that its agreements

²⁸ In addition, Weymouth argues that the five month delay that Sithe Edgar asserts would result if no project changes were allowed would unlikely be sufficient to allow Sithe Edgar to prevail in an override proceeding under G.L. c. 164, § 69K¹/₂ (Weymouth Memorandum at 12.). In support, Weymouth states that in a previous Certificate case the Siting Board held that the Board may override a condition that prevents commencement of construction and imposes a requirement where the same result could be achieved in a more cost effective manner (id., citing IDC Bellingham LLC Certificate Decision, EFSB 01-1 (2001)).

with a developer would be enforceable (id. 17).

3. J. Gary Peters

Mr. Peters stated that the Siting Board has the authority to review the proposed project changes but must do so with consideration of the Host Agreement/MOA (Peters' Memorandum at 1-3). Specifically, Mr. Peters asserted that the Host Agreement/MOA were created to protect and address the concerns of the Town, including but not limited to noise issues (id. at 2-3). Accordingly, Mr. Peters suggested that the proper application of the Holyoke case would be for the Siting Board to consider the Host Agreement/MOA as "beneficiary public interest" (id. at 3). Such consideration, according to Mr. Peters, would result in the Siting Board denying the proposed project changes (id.).

4. Analysis and Findings

In Section II, above, the Siting Board approved with conditions project changes that would allow Sithe Edgar to extend its second shift from midnight until 2:00 a.m., to expand its day shift from 600 to 900 workers, and to expand its night shift from 300 to 400 workers. The Siting Board notes that, in approving these changes, it applied a standard of review that reflects its statutory mandate to ensure "a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost". As part of this determination, it exercised its statutory authority under Chapter 164 to accomplish what, in its view of the record evidence, the broad public interest in the reliability of electric power supply requires. G.L. c. 164, §69 H. It is clearly consistent with the Siting Board's mandate, and in the public interest, to bring on-line new, efficient generating capacity, such as that proposed at Edgar Station, in order to supplement and, to a certain extent, displace the existing older generating fleet. In the case of the Sithe Edgar facility, there also would appear to be a public interest in completing the project in a timely fashion so as to allow the MWRA Braintree-Weymouth Sewer Relief project to go forward on schedule.

The Siting Board sees no necessary conflict between the proposed changes and the terms of the Host Agreement/MOA. The Host Agreement/MOA clearly provides for a second shift running until 2:00 a.m. for construction inside "the new buildings". This is the work that Sithe

Edgar states that it intends to accomplish on the second shift. A reasonable interpretation of the Host Agreement/MOA also could allow for a minimal amount of outdoor activity to logistically support the indoor shift. Our conditions in Section II.B, above, limit this logistical support to that which cannot be accomplished on the day shift, and confine it, when at all possible, to the hours before 11 p.m. The Siting Board concludes that second shift construction consistent with Sithe Edgar's presentation in this matter, and as conditioned in this decision, could be consistent with the Host Agreement/MOA.

Some claim of conflict might yet, of course, arise. However, any future claim of a necessary and irresolvable conflict between the conditional approval lawfully granted today by the Siting Board, in accordance with its statutory authority, and other conditions that may be said to arise out of a parallel agreement between the current petitioner and the Town, must, if accompanied by a further claim that the parallel agreement either superseded or somehow limited today's Board actions, labor under the heavy burden of contrary and authoritative caselaw. Beacon Hill Association v. Ristorante Toscano, Inc., 422 Mass. 318, 324 (1996), citing Dessau v. Holmes, 187 Mass. 486, 488 (1905). The Legislature has "declared public policy" in energy facilities siting and has vested the carrying out of that public policy in the Siting Board. The dominant purposes of that policy cannot be superseded by any parallel accord to the contrary. Id. Such an accord "cannot be permitted to defeat the purpose of any proper subsequent exercise of the [Board's] powers." Holyoke Street Railway v. Department of Public Utilities, 347 Mass. 440, 446 (1964). The principle for which Ristorante Toscano stands is long established, dating from the late 19th Century. Wall v. Metropolitan Stock Exchange, 168 Mass. 282, 284 (1897); Corey v. Griffin, 181 Mass. 229, 233 (1902). That long-established principle would apply here, too.²⁹

²⁹ Parties to this proceeding and the Town of Weymouth have presented argument as to whether the Siting Board has the authority to alter contractual agreements outside of a proceeding brought pursuant to G.L. c. 164, §§ 69K½-O½, the provision allowing for the issuance of a Certificate of Environmental Impact and Public Interest. The Siting Board is of the opinion that these provisions were established to resolve conflicts when a state or local agency has acted in the exercise of its regulatory authority. Here, the Host Agreement/MOA does not appear to result from any specific exercise of Weymouth's regulatory authority, but rather appears to function as a Settlement Agreement between

(continued...)

IV. DECISION

Consistent with the Siting Board's directive to Sithe Edgar to inform the Siting Board of any changes to Site Edgar's proposed project, other than minor variations, Sithe Edgar has informed the Siting Board of two such changes – a change in the arrival and departure times of construction workers and an increase in the number of on-site construction workers. Sithe Edgar also has requested that the Siting Board grant certain legal relief with respect to the Host Agreement and the MOA.

The Siting Board found that further inquiry was warranted to evaluate the noise and traffic impacts that may result from a change in shift schedules, and from an increase in the number of on-site workers. The Siting Board also determined that the requested legal relief required further inquiry. After conducting such inquiry, in Sections II. B. and II.C. above, the Siting Board found that, with the implementation of Conditions N through S, below, the noise impacts of the proposed facility would be minimized.

Condition N:

The Siting Board directs the Company to limit material movements and use of outdoor cranes on the night shift to occasional occurrences during the shift and to the hours prior to 11:00 p.m. to the fullest extent possible. When this is not possible, and when any use beyond the above limits of an outdoor crane or other particularly noisy equipment is required, the Company should provide advance written notice to affected neighbors and to the Town.

Condition O:

The Siting Board directs the Company to distribute the Noise Monitor's direct telephone number to local residents, and to require its contractors to cooperate with the Noise Monitor in resolving noise complaints as they are received.

Condition P:

The Siting Board directs the Company for the duration of night construction to provide it with a monthly summary of noise complaints received and the resolution thereof, so that

the Siting Board can take further action to minimize construction noise impacts if circumstances warrant.

Condition Q:

The Siting Board directs the Company to circulate, at least once a month and more frequently if necessary, an informational memo to the 70 area households referenced in the Company's compliance filing. The informational memo should describe the nature of day- and night-shift work to be undertaken in the following month, describe the nature and, if applicable, the resolution of any complaints that have been received, provide advance notice of unusual activity (delivery of large components by street, steam blows, etc.), and provide day- and night-shift contact information. Circulation of this informational memo should continue through construction and testing until Edgar Station enters commercial operation. The Company shall hold a public meeting shortly after the distribution of each informational memo to respond to questions or concerns raised by the memo.

Condition R:

The Siting Board directs the Company to schedule continuous steam blows in a manner that allows completion by 6:00 p.m. or shortly thereafter if the steam blow proceeds according to plan.

Condition S:

The Siting Board directs the Company to revise the noise mitigation protocol submitted in this proceeding to reflect the Siting Board's directives, above, as well as the Company's commitment with respect to the timing of steam blows, and to distribute the revised noise mitigation protocol to its contractors and subcontractors as appropriate.

The Siting Board found that, with the implementation of Condition T, below, the traffic impacts of the proposed facility would be minimized.

Condition T:

The Siting Board directs the Company to continue its coordination with the City of Quincy regarding the Washington/Baker/South Street intersection for the duration of

project construction.

Accordingly, the Siting Board finds that, upon compliance with Conditions N through T, as set forth in Sections II.B and II.C, above, the Company's plans for the construction of the proposed facility would minimize the environmental impacts of the proposed facility consistent with the minimization of costs associated with the mitigation, control, and reduction of the environmental impacts of the proposed generating facility.

Findings in this decision are based upon the project change information provided by the Company examined in light of findings the Siting Board made in the Final Decision. Since the project changes outlined in this decision pertain to the facility approved by the Siting Board in the underlying proceedings, the Company must construct and operate its facility in conformance with its proposal presented in the underlying proceeding and in earlier compliance and project change filings; the only additional modifications permitted are those set forth in this decision.

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.

Selma Urman
Hearing Officer

Dated this 30th day of November, 2001.

APPROVED by the Energy Facilities Siting Board at its meeting of November 29, 2001, by the members and designees present and voting: James Connelly (Chairman, DTE/EFSB); Deirdre K. Manning (Commissioner, DTE); W. Robert Keating (Commissioner, DTE); David L. O'Connor, Commissioner, Division of Energy Resources; Joseph Donovan (for Elizabeth Ames, Director of Economic Development); and Sonia Hamel (for Robert Durand, Secretary of Environmental Affairs).

James Connelly, Chairman
Energy Facilities Siting Board

Dated this 29th day of November, 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).