

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition and Application)
of Colonial Gas Company d/b/a)
KeySpan Energy Delivery New England)
for a Certificate of Environmental Impact)
and Public Interest)

EFSB 06-1

FINAL DECISION

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Presiding Officer
June 22, 2007

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The Energy Facilities Siting Board (“Siting Board”) hereby grants in part and denies in part the Initial Petition and the Application of Colonial Gas Company d/b/a KeySpan Energy Delivery New England for a Certificate of Environmental Impact and Public Interest for the construction of approximately 4.9 miles of new natural gas distribution pipeline on Cape Cod.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K-69O, Colonial Gas Company d/b/a KeySpan Energy Delivery New England (“KeySpan” or “Company”) has filed an Initial Petition and an Application with the Siting Board seeking a Certificate of Environmental Impact and Public Interest (“Certificate”) in connection with the denial by the Cape Cod Commission (“Commission”) of KeySpan’s application for Development of Regional Impact (“DRI”) approval for construction of approximately 13.1 miles of natural gas pipeline in the Towns of Barnstable, Sandwich, Yarmouth, Dennis and Harwich (“project” or “proposed pipeline”). The Certificate, appended to this Decision as Attachment A, has the effect of granting DRI approval for construction of the first section of the proposed pipeline, approximately 12,000 feet in length, in the Town of Yarmouth.

A. Jurisdiction

The Company’s Initial Petition is reviewable pursuant to G.L. c. 164, § 69K, which provides that any applicant proposing to construct or operate a jurisdictional energy facility may petition the Siting Board for a Certificate with respect to that facility. Likewise, the Company’s Application is reviewable by the Siting Board pursuant to G.L. c. 164, § 69L, which requires any applicant seeking a Certificate pursuant to § 69K to file with the Siting Board an Application containing the information specified in § 69L. KeySpan’s Initial Petition for a Certificate and its Application for a Certificate each is reviewed by the Siting Board consistent with the Siting Board’s mandate set forth in G.L. c. 164, § 69H, which requires the Siting Board to implement the energy policies in its statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

B. Procedural History

1. Previous Proceedings

On May 17, 2006, the Siting Board approved the petition of KeySpan, pursuant to G.L. c. 164, § 69J, to construct the 13.1-mile pipeline, on the route selected by the Company (“primary route”) (Exh. EFSB-1).¹ Pursuant to the Cape Cod Commission Act, the proposed pipeline also requires DRI approval from the Commission.² On March 17, 2006, KeySpan filed with the Commission an application seeking Master Plan approval of the entire pipeline, and specific DRI approval for the first 12,000 feet of the pipeline, referred to by the Company as Phase I of the Middle Segment (“Phase I”) (Exh. KEY-2(D) at 1-9).³ On August 10, 2006, the Commission denied both the Company’s request for Master Plan approval of the 13.1-mile pipeline and its request for specific approval of Phase I (Exh. KEY-1(H)) (“DRI denial”).⁴

¹ The proceeding in which the Siting Board approved the proposed pipeline was EFSB 05-2, Colonial Gas Company d/b/a KeySpan Energy Delivery New England (May 17, 2006). The proceeding is referred to in this decision as the “underlying EFSB proceeding” and the Siting Board’s decision in the proceeding is referred to as the Final Decision.

² See Sections 12 and 13 of the Cape Cod Commission Act, c. 716 of the Acts of 1989, as amended. See also Exh. KEY-1(H) at 1, 21.

³ KeySpan intends to construct the 13.1-mile pipeline in three separate segments, beginning with the Middle Segment. The Middle Segment, approximately 4.9 miles in length, would be constructed in two phases (Exh. KEY-3, at 2). Phase I, approximately 12,000 feet in length and located entirely within Yarmouth, was initially designed for operation in the 2006-2007 heating season (*id.* at 2-3). The Company provided an anticipated construction date of 2008 for the remainder of the Middle Segment, Phase II, which would be located in Yarmouth, Dennis, and Harwich (Exhs. EFSB-KEY-7; EFSB-KEY-9). Section I.C, below, contains more details regarding construction of the Middle Segment.

⁴ Under the Master Plan approach, agreed to by the Commission, KeySpan presented in its initial DRI filing the general alignment for the entire pipeline project, but provided detailed engineering drawings of, and sought specific approval for, the first 12,000 feet of the Middle Segment only (Exhs. KEY-1(E) at 1; KEY-2(D) at 1-9). As the Company scheduled the construction of future sections of the project, it would have provided detailed engineering drawings to the Commission for those sections (*id.*). The Commission intended to conduct additional public hearings in the town or towns where each section was to be constructed, to allow for public comment on the engineering plans (continued...)

2. Current Proceeding

a. Scope of the Proceeding

In its Application for a Certificate, the Company requested an override from the Siting Board for both Phase I and Phase II of the Middle Segment (Exhs. KEY-2, at 4; KEY-2(D) at 1-9).⁵ However, in its application to the Commission for DRI approval, the Company requested specific approval for Phase I only. The Company provided detailed engineering drawings to the Commission for Phase I only, and the Commission conducted a public hearing for Phase I only (Exh. KEY-2(D) at 1-9). The Commission testified during hearings that, as part of the Master Plan approval process, it would have conducted additional public hearings for the later phases of the pipeline project, including a separate public hearing for review of Phase II of the Middle Segment (Tr. 3, at 448-450). Accordingly, since the Company requested, and the Commission conducted, full DRI review for Phase I of the Middle Segment only, the Siting Board will not consider an override for Phase II in this proceeding.⁶

b. Adjudication

A request for a Certificate of Environmental Impact and Public Necessity requires two

⁴ (...continued)
for those sections (id.; Tr. 3, at 448-451). It is unclear whether the Master Plan review will be followed going forward, in light of the Commission's DRI decision, which denied specific approval for Phase I and denied Master Plan approval for the project as a whole.

⁵ If granted by the Siting Board, a Certificate has the effect of "overriding" a state or local permitting decision identified by a project proponent as preventing construction or operation of an energy facility jurisdictional to the Siting Board. See G.L. c. 164, § 69K. Thus, a request for a Certificate is commonly referred to as a request for an override. "Certificate" and "override" are used interchangeably in this Decision.

⁶ As discussed below, KeySpan requested in its Initial Petition and Application: (1) an override of the Commission's DRI denial for the Middle Segment; and (2) the issuance by the Siting Board of eight additional local permits required for construction of the Middle Segment. KeySpan's request for issuance of the eight additional permits has been dismissed for lack of jurisdiction. Accordingly, as a further limitation on the scope of this proceeding, the Siting Board's review does not include consideration of the Company's request for issuance of the eight additional permits. See Section I.B.3.a, below.

separate, sequential, filings. First an applicant must file an Initial Petition. In its Initial Petition, the applicant must assert at least one of the seven statutory grounds on which an override request may be based. See G.L. c. 164, § 69K. KeySpan commenced this proceeding on September 6, 2006, by filing an Initial Petition with the Siting Board. If the Initial Petition is not denied, an applicant then files an Application for a Certificate.⁷ See G.L. c. 164, § 69L. KeySpan filed an Application for a Certificate, and a Notice of Adjudication and Hearing, on October 12, 2006. On January 8, 2007, the Company filed a Supplemental Notice of Adjudication and Hearing, and on January 17, 2007, filed an Amended Application.⁸ In its Amended Application, KeySpan sought from the Siting Board: (1) an override of the Commission's DRI denial with respect to the entire Middle Segment, and (2) the issuance of eight additional local permits required for construction of the Middle Segment ("eight additional approvals").⁹

The Siting Board and the parties conducted several rounds of written discovery beginning in late fall, 2006, and continuing through spring, 2007. Approximately 250 exhibits were

⁷ Within seven days of the filing of an Initial Petition for a Certificate, the Siting Board must decide either to hold a hearing on the merits of the grounds asserted in the Petition, or to accept an Application for a Certificate and to defer decision on the merits of the Petition until the hearing on the Application. 980 CMR § 6.02(4). In this case, the Siting Board deferred its review of the merits of KeySpan's Initial Petition until the hearing on the Company's Application. See *Determination on Initial Petition for Certificate of Environmental Impact and Public Interest* (September 18, 2006).

⁸ A Supplemental Notice of Adjudication and an Amended Application were required because the presiding officer determined that KeySpan's original Notice and Application did not provide adequate notice to the public that the Company was asking the Siting Board not only to grant an override of the Commission's DRI Decision, but to issue the eight additional local permits as well. See Letter from Presiding Officer to counsel for KeySpan, December 21, 2006. Discussion of the Company's "Application" is based on the Amended Application.

⁹ The eight local permits sought by KeySpan include three street opening permits (one each from the Public Works departments in the Towns of Dennis, Yarmouth and Harwich), two Conservation Commission approvals (Dennis and Yarmouth Conservation Commissions), one special permit (Dennis Zoning Board of Appeals), an Historic Commission approval (South Dennis Historic Commission) and a Scenic Roads approval (Dennis Board of Selectmen). Only the two Yarmouth permits are needed for construction of Phase I (Tr. 1, at 161).

entered into the record, consisting primarily of responses by the Company and the Commission to information requests and record requests issued by Siting Board staff and the parties. In November, 2006, the Company submitted prefiled direct testimony of three witnesses: Walter F. Fromm, Manager, Project Engineering, for KeySpan; Theodore Poe, Jr., Manager, Energy Planning, for KeySpan; and Theodore A. Barten, Managing Principal, Epsilon Associates, Inc., the Company's environmental and engineering consultants. In early December, 2006, the Commission submitted the prefiled direct testimony of four witnesses: Margo Fenn, Executive Director of the Commission; Phil Dascombe, Planner for the Commission; Leslie Richardson, Economic Development Officer for the Commission; and Lev Malakoff, Senior Transportation Engineer for the Commission. In late December, 2006, the Towns submitted the prefiled direct testimony of two witnesses: Laurence F. Keegan, Jr., and Michael E. Martel, engineering consultants with Weston & Sampson and Associates.

Adjudicatory hearings began on March 20, 2007, continuing on March 22, 26, and 30, 2007.¹⁰ Briefing questions were issued to the parties on March 28, 2007. The parties filed initial briefs on April 25, 2007, and reply briefs on May 2, 2007.

3. Intervenor Motions

Two parties were granted intervenor status in the proceeding: the Towns of Yarmouth, Dennis, and Harwich, jointly ("Towns"), and the Commission. During the course of the proceeding, the intervenors filed three motions, each of which raised a question of first impression with respect to the nature and scope of the Siting Board's review under the override statute. Rulings on all three motions were issued on May 10, 2007, and are summarized below.

a. Motions for Partial Dismissal of the Application

On November 28, 2006, the Commission filed a motion seeking dismissal of that portion of the Company's Application requesting issuance of the eight local permits. On December 1,

¹⁰ Hearings originally were scheduled to begin in January 2007. Hearings were moved to March 2007, to allow for compliance by KeySpan with notice requirements for the Company's Supplemental Notice and Amended Application. See n. 7, above.

2006, the Towns filed a similar motion. The intervenors asserted that, pursuant to the override statute and its implementing regulations, an override Petition may not be filed until a final decision has been issued by the state or local agency whose action is being challenged.

See 980 CMR § 6.02(1). On May 10, 2007, the presiding officer ruled that the issuance of a final agency decision is a jurisdictional prerequisite to the filing of an override Petition, and granted the intervenors' motions for partial dismissal. *Ruling on Motions for Partial Dismissal by the Cape Cod Commission and the Towns of Yarmouth and Dennis* (May 10, 2007).¹¹

b. Motion to Dismiss Amended Application

On January 31, 2007, the Commission filed a motion to dismiss the Company's Amended Application, on the ground that the Commission's DRI Decision is not a final agency decision. In its Initial Brief, filed on April 25, 2007, the Commission subsequently reversed its position, asserting that the DRI Decision was a final agency decision. On March 2, 2007, the presiding officer issued a memorandum ruling denying the Commission's motion to dismiss, and indicating that a written ruling on the motion would follow. On May 10, 2007, the presiding officer ruled that the DRI Decision was a final agency decision, and denied the Commission's motion to dismiss the Company's Application. *Ruling on Cape Cod Commission Motion to Dismiss KeySpan's Amended Application* (May 10, 2007).

c. Motion to Limit Evidence to Commission Record

In oral objections during hearing, and in their briefs, the Towns and the Commission asserted that the Siting Board's review of factual findings made by the Commission in its DRI Decision should be limited to the record of the DRI proceeding. The intervenors' position is based on 980 CMR § 6.03, which provides, in relevant part, that when the Siting Board is reviewing "adjudicatory findings of fact" contained in a final agency decision, the Board's review of those findings shall be limited to the record presented before the agency. On May 10,

¹¹ On May 17, 2007, KeySpan filed a motion for reconsideration of this ruling. The Commission and the Towns filed opposition to the motion. In a ruling issued on June 15, 2007, the Company's motion for reconsideration was denied.

2007, the presiding officer ruled that the Commission did not make adjudicatory findings of fact in conducting its DRI review of the Company's project. Accordingly, the intervenors' motions to limit the evidence reviewable by the Siting Board in this proceeding were denied. *Ruling on Intervenors' Motion to Limit the Scope of Evidence* (May 10, 2007).

C. Phase I Description

The Company's proposed 13.1-mile pipeline on the primary route was approved in its entirety by the Siting Board in EFSB 05-2 (Exhs. EFSB-1, at 2, 56, 118; EFSB-KEY-9-3). Phase I, approximately 12,000 feet of pipeline in the town of Yarmouth, is the first section of the pipeline that would be constructed by the Company (Exh. KEY-3, at 2).

As described by the Company in the underlying EFSB proceeding case, Phase I on the primary route begins at KeySpan's South Yarmouth liquefied natural gas ("LNG facility"), runs generally easterly through Yarmouth on Whites Path, a short stretch of North Main Street, and Great Western Road (Exhs. EFSB-1, at 56; EFSB-KEY-9-3). The Siting Board's Final Decision stated that, subject to final discussions with local officials, the Phase I pipeline would be installed on the north side of Whites Path, the southwest side of North Main Street, and the south side of Great Western Road in Yarmouth (Exh. EFSB-1, at 56).¹² The pipeline would be constructed primarily within roadway layouts, either in the shoulder or near the edge of pavement (*id.* at 57). The Company would use "stove-pipe" construction methods wherein one to three lengths of pipe are installed at a time, with welding, radiography, and coating work completed within the trench (*id.* at 58). The new pipeline would be 12 inches in diameter and the trench for installation of the pipe would be 4 feet wide and 5 to 6 feet deep (*id.* at 2, 58).

¹² Phase II would continue from the end of Phase I along Great Western and Highbank Roads in Yarmouth; cross the Bass River into Dennis; progress easterly on Highbank Road, Upper County Road, and Great Western Road in Dennis; and then extend northerly on Depot Road in Harwich to its intersection with Main Street (Exhs. EFSB-1, at 56; EFSB-KEY-9-3). The Final Decision also approved the Western and Eastern Segments, also along designated primary routes, respectively in the towns of Sandwich and Barnstable, and in the town of Harwich (Exh. EFSB-1, at 55, 57).

The Final Decision discussed, but did not approve, an alternative route and a hybrid route for the Middle Segment. The alternative route follows an inactive railroad right-of-way from the South Yarmouth LNG facility to Route 134 in Dennis; follows the Cape Cod Rail Trail east of Route 134 to Depot Street in Harwich; and follows Depot Street to its intersection with Main Street in Harwich (Exhs. EFSB-1, at 56- 57; KEY-2(B) at 4-15, fig. 4-6). The hybrid route incorporates the part of the alternative route located west of Route 134; 0.3 miles along Route 134; and the primary route east of Route 134 (Exhs. EFSB-1, at 56- 57; KEY-2(B) at 4-15, fig. 4-6).

II. THE INITIAL PETITION

A. Standard of Review

Any person who proposes to construct or operate a jurisdictional energy facility in the Commonwealth may seek a Certificate from the Siting Board. G.L. c. 164, § 69K. The applicant first must file an Initial Petition for a Certificate. Id. The Siting Board shall grant an Initial Petition if: (1) the applicant asserts at least one of the seven grounds for a Petition set forth in G.L. c. 164 § 69K; and (2) the Siting Board determines that, on the merits, at least one of the asserted grounds constitutes a valid basis for granting the Initial Petition. Id.

B. The Company's Initial Petition

KeySpan asserted in its Initial Petition four of the seven statutory grounds upon which an Initial Petition may be based.

1. Denial Precluding Facility Construction

G.L. c. 164, § 69K provides that the Siting Board must grant an Initial Petition if “the facility cannot be constructed due to any disapprovals, conditions or denials by a state or local agency or body.” Pursuant to the Cape Cod Commission Act, any proposed development project for which an Environmental Impact Report (“EIR”) is required under the Massachusetts Environmental Policy Act (“MEPA”) is deemed to be a development of regional impact (“DRI”) requiring Commission review and approval. See Cape Cod Commission Act, Section 12(h); Cape Cod Commission Enabling Regulations, Section 6. The Company's 13.1-mile proposed

pipeline required the preparation of a Draft EIR and a Final EIR (Exhs. KEY-2(J); KEY-2(K)). The Commission reviewed KeySpan's application for DRI approval, and denied the application ("DRI denial") (Exh. KEY-1 (H)). As the Commission itself has acknowledged, the Commission's DRI decision is a final agency decision denying the Company's DRI application (Commission Initial Brief at 2-3). *See Ruling on Cape Cod Commission Motion to Dismiss KeySpan's Amended Application* (May 10, 2007).

The Company's DRI application was denied by the Commission, and Phase I of the proposed pipeline cannot be constructed without a favorable DRI Decision by the Commission. Accordingly, the Siting Board finds that, in asserting that DRI denial precludes construction of the proposed pipeline, the Company has raised a valid basis for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K.

2. A Burdensome Condition

G.L. c. 164, § 69K provides that the Siting Board must grant an Initial Petition if it finds "that any state or local agency has imposed a burdensome condition or limitation on any license or permit which has a substantial impact on the responsibilities of the board as set forth pursuant to section 69H." The denial of a permit may constitute a burdensome condition or limitation. 980 CMR § 6.02(2)(e).

In its Final Decision in the underlying proceeding, the Siting Board approved construction of the proposed pipeline, including Phase I on the primary route (Exh. EFSB-1). The Company asserts that the Commission's DRI Decision has a substantial impact on the Siting Board's statutory responsibilities because it precludes the construction of an energy facility which the Siting Board has determined is needed to maintain reliable least-cost service to gas customers on Cape Cod (*id.* at 29-30).

The Siting Board has approved KeySpan's proposed pipeline, and has determined that the project is necessary to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost (*id.* at 118). However, the project cannot be constructed or operated without a favorable DRI Decision from the Commission. The Siting Board therefore finds that the Commission's denial of the project has a substantial impact on the Siting Board's primary responsibility under G.L. c. 164, § 69J to

provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Accordingly, the Siting Board finds that, in asserting that DRI denial imposes a burdensome condition, the Company has raised a second valid basis for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K.

3. Inconsistencies Among Resource Use Permits

G.L. c. 164, § 69K provides that the Siting Board must grant an Initial Petition if it finds that “there are inconsistencies among resource use permits issued by . . . state or local agencies.” KeySpan asserts that the Commission’s DRI denial for the project is inconsistent with the Siting Board’s approval of the project in the Final Decision pursuant to G.L. c. 164, § 69J (Exh. KEY-1, at 26). The Towns assert that a final decision issued by the Siting Board should not be considered a “resource use permit” under Section 69K (Towns Initial Brief at 8).

Siting Board approval of a proposed energy facility is the first step in permitting, and conditioning, the use of land, air, water, wetlands, or other natural resources for the generation, transmission or storage of energy. Approval by the Commission of a DRI application authorizes the use of natural resources for the project under review. See Berkshire Power 8 DOMSB at 289. The Commission’s DRI denial is inconsistent with the Siting Board’s approval of the same project. Accordingly, the Siting Board finds that, in asserting that DRI denial results in inconsistencies among resource use permits, the Company has raised a third valid basis for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K.¹³

¹³ On March 20, 2006, the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (“EOEEA”) issued a Certificate on the Final Environmental Report (“FEIR”) for the project, finding that the FEIR adequately and properly complied with the requirements of MEPA (Exh. EFSB-4). The Company asserts that the MEPA Certificate also is a resource use permit, and that the DRI Decision is inconsistent with the Certificate (Exh. EFSB-KEY-1, at 26). The Towns disagree (Towns Initial Brief at 8). As KeySpan has already established three valid bases for its Initial Petition, we do not reach the question of whether a Certificate issued by the Secretary of EOEEA is a “resource use permit” within the meaning of Section 69K.

4. Nonregulatory Issues or Conditions

G.L. c. 164, § 69K provides that the Siting Board must grant an Initial Petition if an applicant believes that “a non-regulatory issue or condition has been raised or imposed by . . . state or local agencies.” A non-regulatory issue or condition “relates to matters not within the jurisdiction of the agency in question.” 980 CMR § 6.02(2)(d). KeySpan asserts that the Commission exceeded its jurisdiction by basing its DRI denial, in part, on the Commission’s evaluation of project need and routing alternatives, matters which the Company asserts are within the exclusive jurisdiction of the Siting Board (Exh. KEY-1, at 26-28).

The Siting Board makes no determination regarding substantive limitations on the authority of the Cape Cod Commission to review energy projects jurisdictional to the Siting Board. It is not necessary in this proceeding to reach that issue, because the Company has asserted three valid bases for its Initial Petition; the assertion of one such basis is sufficient to grant the Petition. Accordingly, the Siting Board makes no finding regarding the Company’s assertion that the Commission’s DRI Decision was based on a non-regulatory issue or condition as provided by G.L. c. 164, § 69K.

C. Decision on the Petition

The Siting Board shall grant an Initial Petition for a Certificate provided that: (1) the petitioner asserts in its Initial Petition at least one of the seven grounds on which Siting Board jurisdiction to grant an Initial Petition may be based, as set forth in G.L. c. 164, § 69K; and (2) the Siting Board finds that at least one of the grounds asserted is a substantively valid basis for the granting of the Initial Petition. G.L. c. 164, § 69K.

As noted in Section II.B, above, the Company asserted in its Initial Petition four of the seven grounds on which Siting Board jurisdiction to consider an Initial Petition may be based. The Siting Board has found that KeySpan has raised three substantively valid bases for the granting of the Company’s Initial Petition. Any one of these grounds alone would be sufficient, pursuant to G.L. c. 164, § 69K, to support the granting of an Initial Petition.

Accordingly, the Siting Board GRANTS the Company’s Initial Petition for a Certificate of Environmental Impact and Public Interest.

III. THE APPLICATION

A. Standard of Review

Pursuant to G.L. c. 164, § 69O, if the Siting Board issues a Certificate for a non-generating facility, the Certificate must include the Siting Board's findings and opinions with respect to the following: (1) the need for the facility to meet the energy requirements of the applicant's market area taking into account wholesale bulk power or gas sales or purchases or other cooperative arrangements with other utilities and energy policies as adopted by the Commonwealth; (2) the compatibility of the facility with considerations of environmental protection, public health, and public safety; (3) the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies in the Siting statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost; and (4) the public interest, convenience and necessity requiring construction and operation of the facility. G.L. c. 164, § 69O. See Berkshire Power Development, Inc., 8 DOMSB 1, at 291 (1999) ("Berkshire Power"); IDC Bellingham, 13 DOMSB 1, at 24 (2001) ("IDC Bellingham").¹⁴

In order to provide a full review of a non-generating facility previously approved by the Siting Board in a proceeding under G.L. c. 164, § 69J, the Siting Board also (1) reviews the decision from the underlying EFSB proceeding and (2) determines the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period. Additionally, the Siting Board verifies that issues raised by the state or local agency or agencies whose actions are the subject of the Application have been addressed in a comprehensive manner by the Board, either in its review of the facility under G.L. c. 164, § 69J

¹⁴ The Siting Board notes that there is no finding of need in Berkshire Power or IDC Bellingham because those proceedings involved generating facilities and pursuant to the 1997 Electric Restructuring Act, the Siting Board no longer reviews the need for generating facilities. See G.L. c. 164, §§ 69J½, 69O½.

and/or in its review under G.L. c.164, § 69K.¹⁵

B. Addressing Issues Raised by the Commission

In this section, the Siting Board: (1) identifies the issues raised by the Commission in denying the Company's DRI application; and (2) determines which of those issues are within the appropriate scope of this proceeding.

1. Issues Raised by the Commission

In its denial of KeySpan's DRI application, the Commission took issue with several aspects of the project and with KeySpan's presentation of the project. The Commission expressed concern about impacts of Phase I of the Middle Segment on "community character," mentioning specifically "disruption" of a neighborhood and "inconvenience" caused by construction, and expressed concern about traffic impacts as well (Exh. KEY-2(O) at 18). The Commission expressed concern about locating a high-pressure distribution pipeline in residential and commercial areas (*id.* at 18). The Commission expressed concern about detriments to historical resources in the South Dennis Historic District since Phase II of the Middle Segment would likely go through that area if the primary route were selected for Phase I (*id.* at 18).¹⁶

¹⁵ The Siting Board recognizes that the requirement to address "the issues raised" by the agency whose decision is the subject of an override proceeding appears only in G.L. c. 164, § 69O½, which governs override proceedings involving generating facilities. This requirement does not appear in G.L. c. 164, § 69O, the counterpart to Section 69O½ governing override proceedings involving non-generating facilities. However, it is appropriate to consider the concerns of the involved permitting agency or agencies in an override proceeding, irrespective of the type of energy facility involved. *See Ruling on Towns Motion to Strike or in the Alternative for an Extension of Time to File Rebuttal Testimony* at 3-4 (December 5, 2006).

¹⁶ As stated in Section I.A.2.a, above, the Siting Board is considering an override for Phase I only. However, Phase II is relevant for route selection purposes. Selection of the primary route for Phase I leads away from use of the alternative or hybrid route for Phase II, as Phase I includes a length of pipeline beyond the divergence of the primary and alternative (and hybrid) routes. Similarly, beginning construction on the alternative route would lead away from use of the primary route for Phase II (Exh. KEY-2(O) at 18, (continued...))

The Commission noted that KeySpan had declined to exercise the option for a joint review by the Commission and MEPA, a process which would have enabled voting members of the Commission to review alternative routes for the project, in accordance with Commission procedures (Exh. KEY-2(O) at 12-13; Tr. 3, at 440-441). The Commission stated that the lack of sufficient time for the Commission to explore route alternatives was a result of KeySpan's declining to apply for joint review (Exh. KEY-2(O) at 13).

With respect to route selection and related construction impact differences, the Commission stated that KeySpan submitted insufficient information to the Commission about alternative routes (*id.* at 12-13). Furthermore, the Commission found that there might be other less detrimental alternatives to the primary route and that these alternative routes "were unable to be explored" through the Commission's process (*id.* at 12). The Commission noted information indicating that the alternative route would impact fewer residences, would be shorter and disturb less acreage, would cross less wellhead protection area, and affect less traffic than the primary route (Exh. KEY-2(O) at 18). While acknowledging some relative merits of the primary route, the Commission stated that KeySpan did not provide a persuasive argument that the primary route has the lowest environmental impacts of any route (*id.* at 18, 19).

The Commission asserted that KeySpan was at fault for failing to address immediate needs as part of their long-range planning for gas supply to the area (*id.* at 13). The Commission stated that it found insufficient verifiable evidence submitted for the DRI application to corroborate KeySpan's statements as to the need for enhanced gas supplies (*id.*). The Commission stated that the probable detriments of the primary route outweigh the benefit of supplying natural gas (*id.* at 18).

2. Commission Issues Within Scope of the Proceeding

The substantive issues raised by the Commission, related to questions of facility need,

¹⁶

(...continued)

finding M7; *see* Exh. EFSB-KEY-1, at fig. 1-2). Therefore, the Siting Board recognizes that, in the context of route selection, it is necessary to consider the entire Middle Segment.

route selection, impacts on the human and natural environment, and safety, are relevant to the findings the Siting Board is required to make in its decision on KeySpan's Application for a Certificate pursuant to G.L. c. 164, § 69O. These issues also are relevant to the Siting Board's mandate under G.L. c. 164, § 69H to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Accordingly, these issues are appropriate for Siting Board review in this proceeding. These substantive issues have been reviewed by the Siting Board in the underlying EFSB proceeding and/or in the present proceeding as follows:

- Need for the facility was evaluated in the facility proceeding (Exh. EFSB-1, at 8-15). Analysis of the need for the facility is updated below in Section III.C.1.
- Alternate routes were evaluated in the facility proceeding (id. at 32-54, 74-105). Updates relevant to route selection are described below in Section III.C.2.
- Historic/prehistoric resource preservation was evaluated in the facility proceeding (id. at 80-89). Section III.C.2, below, addresses updates on archaeological issues specific to the alternative route.
- Traffic issues were evaluated in the facility proceeding (id. at 89-97). Traffic issues are considered again in Section III.C.2, below.
- Neighborhood disruption in the form of noise from construction was evaluated in the facility proceeding (id. at 89-97). Neighborhood disruption in the form of inconvenience to motorists is considered as a traffic impact.
- Safety was evaluated in the facility proceeding (id. at 42, 87-88, 90, 101-103); certain safety issues are expanded upon below in Section III.C.2.

The Commission raised two issues relating to the applicant's cooperation with particular review procedures that could have widened the scope of the Commission's review: (1) whether KeySpan should have or should not have applied for joint review by the Commission and MEPA; and (2) whether or when KeySpan was asked to provide the Commission with more information about the alternative route. The Commission also raised an issue of the applicant's "fault" for circumstances affecting project need. These procedural issues, in and of themselves, are not appropriately before the Siting Board because they do not pertain to any of the required

findings in G.L. c. 164, § 69O or to the Siting Board's general mandate under G.L. c. 164, § 69J.¹⁷

C. Need, Project Impacts, Cost, and Reliability

This section discusses both the findings of the underlying EFSB proceeding and new information acquired in this proceeding, with respect to need for the facility; project impacts (environmental, health, and safety); cost; and reliability.

1. Need for the Facility

Pursuant to G.L. c. 164, § 69O, the Siting Board must address the need for the pipeline facility in its decision on KeySpan's Application for a Certificate. In the Final Decision, the Siting Board reviewed in detail the need for additional peak-hour flow capability on the Company's Cape Cod system (see Exh. EFSB-1, at 5-16). The Siting Board reviewed the need for the proposed facility and concluded that:

KeySpan has demonstrated a need for additional gas resources: (1) to ensure continued gas delivery to the eastern extremities of KeySpan's distribution system on Cape Cod at a minimum operating pressure of 10 psig, and to the regulator outlets serving those extremities at a minimum operating pressure of 60 psig; and (2) to avoid operating the Company's LNG facilities in excess of its operating criteria. The Company has demonstrated that bringing additional energy resources to the Company's Cape Cod distribution system would allow it to

¹⁷ The Commission stated that KeySpan provided inadequate information on the alternative route. However, the evidence available to the Siting Board suggests that the Commission had the opportunity to review additional materials, had the Commission sought to perform such a review. Mr. Philip Dascombe, a witness for the Commission, stated that when interest in the alternative route was expressed, factual information about the route was not forthcoming from KeySpan (Tr. 3, at 537). However, Mr. Dascombe did not recall whether KeySpan had refused to provide any specific requested information (Tr. 3, at 574). Ms. Margo Fenn, a witness for the Commission, stated that KeySpan did not provide in its DRI application any information regarding alternative locations for the project (Exh. CCC-MF at 3). On cross-examination, Ms. Fenn stated that the Commission did request and receive information on alternative routes and that she was aware of no information on alternatives that KeySpan refused to provide (Tr. 3, at 469-480).

operate its LNG facilities without exceeding injection rates of 120 MMBtu/hr at KeySpan's Wareham facility, 1150 MMBtu/hr at the South Yarmouth facility, and 45 MMBtu/hr each at portable facilities in Chatham and Eastham. (Exh. EFSB-1, at 14).

In the present proceeding, KeySpan stated that it updated its Cape Cod supply and demand forecast in 2005 and again in 2006 (Exh. EFSB-KEY-6). The Company stated that its current demand forecast, predicting faster growth in gas flow, is close to the "High Growth" case the Company presented in EFSB 05-2 (id.; Tr. 1, at 58). The Company explained that its load forecast is based on an independent consultant's economics-based forecast of population and business growth, and that this economics-based forecast predicts accelerated growth on Cape Cod (Tr. 1, at 61-62). Instead of a 2.1 percent average annual rate of growth from 2005-2006 to 2011-2012, the Company now anticipates a 2.9 percent average growth rate (id. at 88).

The Company stated that it had added capacity to its distribution system, using stop gap measures to help maintain minimum distribution-system pressures in 2006/2007 (Exh. EFSB-12; Tr. 1, at 69). Beginning in November 2006, the Company constructed 4300 feet of 12-inch diameter pipeline along Route 6A downstream of the Stony Brook regulator in Brewster, to move gas easterly to Orleans and Eastham (Exh. EFSB-12; Tr. 1, at 69-70). The Company stated that it had also identified operational stop gap measures, but that these were not put into effect because weather-induced demand never reached extreme levels in the winter of 2006/2007 (Exhs. EFSB-KEY-12; EFSB-KEY-18(b); Tr. 1, at 73-74). If necessary, it would add more capacity to its distribution system, using expanded stop gap measures, to maintain pressure in 2007/2008 (Exh. RR-KEY-3; Tr. 4, at 670, 718, 761).

Anticipating an increased rate of growth in demand and incorporating the Company's new distribution pipeline in Brewster, KeySpan updated its forecast of gas flow and pressures on Cape Cod. Resulting pressures KeySpan calculated for the extremities of its system are shown below in Table 1 for selected years.

Table 1. Changes in KeySpan’s Predicted Gas Flow and Pressures for Cape Cod

Date and Forecast	Peak Hour Flow (mcfh)	Length of new pipe in Brewster (ft)	Chatham LNG (mcfh)	Pressure, Eastham (psig)	Pressure, Chatham (psig)	Pressure, Dennis (psig)	Pressure, Harwich (psig)
2006/07 (per 2004 forecast), baseline	5896	0	218	16	35	0	0
2007/08 (per 2004 forecast), baseline	6016	0	250	0	18	0	0
2011/12 (per 2004 forecast), baseline	6470	0	250	0	0	0	0
2007/08 (per 2006 forecast), baseline	6201	4300	250	0	0	0	0
2011/12 (per 2006 forecast), baseline	6936	4300	250	0	0	0	0
2007/08 (per 2006 forecast), with Phase I	6201	4300	155	27	31	10	28
2011/12 (per 2006 forecast), with project	6936	4300	45	22	12	15	42

Exh. EFSB-KEY-6C; Tr. 1, at 71-72.

The Siting Board recognized in the underlying EFSB proceeding that a minimum pressure of 10 pounds per square inch, gauge (“psig”) is needed at the extremities of the Company’s low-pressure distribution system (Exh. EFSB-1, at 11, 14). The Siting Board also recognized KeySpan’s goal of reducing reliance on portable LNG injection sites at Eastham and Chatham (*id.* at 13, 14). Table 1 shows that, using both 2004 and updated 2006 forecasts, modeled pressures at the extremities of the Company’s system are below the required 10 psig under forecast peak flow conditions beginning in winter 2007/2008, in the absence of enhanced supplies. With the project and assuming the updated 2006 forecast, required pressures would be

achieved from 2007/08 through 2011/12 while reducing reliance on the Chatham LNG facility (Exh. EFSB-KEY-6C).

In the Final Decision, the Siting Board noted a need for added peak-hour flow capability of 961 million British thermal units per hour (“MMBtu/hr”) by the 2008/2009 heating season (Exh. EFSB-1, at 14). The Company stated that the forecasted need for the 2008/2009 season has increased to an added peak-hour flow capacity of 1031 MMBtu/hr (Tr. 1, at 89).

KeySpan indicated it would again use stop gap measures that it would need to implement before or during the 2007/2008 heating season, in the event that it is not authorized to construct Phase I (id. at 71-76). Expanding on its stop gap plan for 2006/2007, the Company would construct an additional 7500 feet of pipeline in Brewster in advance of the heating season, and prepare to open regulator stations and truck gas to its outlying stations as required (id.).

In the Final Decision, the Siting Board found that there is a need for additional energy resources to maintain reliable gas service to customers of KeySpan’s Cape Cod distribution system (Exh. EFSB-1, at 14, 15). Updated information provided by the Company indicates that there remains a need for additional energy resources to maintain reliable gas service to customers of KeySpan’s Cape Cod distribution system. The information indicates that additional energy resources may be needed as soon as the 2007/2008 heating season. Stop gap measures might postpone the time at which such a need becomes critical, but the stop gap measures have a number of potential problems with respect to reliability and entail added costs, as described in Sections III.C.3 and III.C.4, below. Based on its findings in the Final Decision and the updated discussion above, the Siting Board finds that there is a need for the additional gas resources that the proposed pipeline would provide.

2. Project Impacts

Pursuant to G.L. c. 164, § 69O, the Siting Board must address the compatibility of the pipeline facility with considerations of environmental protection, public health and public safety in its decision on KeySpan’s Application for a Certificate.

a. Project Impacts in the Underlying EFSB Proceeding

In the Final Decision, which addressed all three segments of the proposed pipeline, the Siting Board reviewed KeySpan's proposal to construct the Middle Segment along both the primary route and the alternative route selected by the Company.¹⁸ The review in the Final Decision supported requisite findings therein for the Siting Board's project approval, including: (1) that the proposed energy facility would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost; and (2) that plans for construction of the proposed energy facility are consistent with current health, environmental protection and resource use and development policies as adopted by the Commonwealth.

Regarding project impacts, the Final Decision reviewed the impacts of the Middle Segment on wetlands and water resources, land use and land resources, the South Dennis Historic District, and noise and traffic (Exh. EFSB-1, at 74-99). These Middle Segment impacts include pipeline construction and operation impacts that relate to the requirement, in this proceeding, that the Siting Board determine whether the Middle Segment Phase I is compatible with considerations of environmental protection, public health, and public safety.

(1) Wetlands and Water Resources

The Final Decision noted that the primary route on the Middle Segment is along roads and not in wetland areas, would cross the Bass River at an existing bridge location, and that the

¹⁸ The Siting Board's review also included the Company's hybrid route; however, the analysis and findings in the Final Decision were focused on the primary and alternative routes. Analysis of the hybrid route was limited to highlighting its environmental impact, cost and reliability characteristics in instances where there appeared to be significantly different trade-offs between that route and the primary route, as compared to the trade-offs identified between the alternative route and the primary route. As described in Section III.C.2.b, below, it now appears based on new information that the hybrid route is more viable than the original alternative route, and therefore the Siting Board's updated analysis and findings with regard to route selection more fully address the hybrid route. However, to allow a degree of continuity from the underlying case to this proceeding with respect to route selection analysis, the original alternative route is also included as part of the updated analysis and findings herein.

Company would implement erosion control, sedimentation control, and spill prevention procedures that would minimize water resource impacts (Exh. EFSB-1, at 78).¹⁹ The Final Decision stated that other than the bridge crossings, neither route would be constructed in wetlands resource areas (id.). The Siting Board directed the Company to refrain from all refueling and equipment-maintenance activities that have the potential for fluid spills, when vehicles are within Wellhead Protection Areas identified by the Massachusetts Department of Environmental Protection (id.). The Final Decision noted that in-water construction work may be required (id.). With the identified mitigation and implementation of the above condition, the Siting Board found that the wetlands and water resources impacts of the proposed pipeline along the Middle Segment primary route would be minimized (id.).

(2) Land Use and Land Resources

The Final Decision noted that the land resources impacts of the proposed pipeline along the primary route would be temporary and minimal due to the placement of the pipeline under and directly adjacent to streets and because the Company stated that it would assess the potential for damage to trees on the route with a professional arborist and local tree wardens (Exh. EFSB-1, at 84). The Final Decision noted that pipelines are generally compatible with roads from a land use perspective, and that roads and road shoulders have relatively little in the way of land resources such as undisturbed archaeological resources, vegetation, and valuable upland habitat (id. at 86). The Siting Board directed the Company to take all reasonable precautions to avoid damage to trees, to minimize damage to plantings, fences, stone walls, and other landscaping features, and to repair or replace any damaged landscaping features, with the agreement of their owner(s) (id. at 84-85). The Siting Board found that with identified mitigation and implementation of the above condition, the land resources impacts of the proposed pipeline along the Middle Segment primary route would be minimized (id. at 85).

¹⁹ Wetlands impacts for Phase I are regulated under the Massachusetts Wetlands Protection Act and also under the Town of Yarmouth Wetland By-Law.

(3) South Dennis Historic District

The Final Decision recognized the merit of preserving the historic qualities of the South Dennis area (Exh. EFSB-1, at 88). The Final Decision noted that in most locations in the South Dennis Historic District, the only permanent visible features of the proposed pipeline, if constructed on the primary route, would be pipeline safety markers mounted flush with the pavement surface (id.). The Final Decision noted further that the Company would not cut down trees in the Historic District along the primary route (id.). To further protect historic resources, the Siting Board, in approving the use of the primary route, directed the Company: (1) to consult with the South Dennis Historic District Commission prior to finalizing construction plans for the district; and (2) in consultation with the South Dennis Historic District Commission, to restore vegetation and any fences or other structures that are disturbed in the South Dennis Historic District due to construction of the proposed pipeline (id.). For the primary route, the Siting Board found that with the identified mitigation and implementation of the above condition, impacts of the proposed pipeline to the South Dennis Historic District would be minimized (id. at 88-89).

(4) Noise and Traffic

The Final Decision noted that construction impacts of the proposed pipeline, including the noise impacts, would be temporary (Exh. EFSB-1, at 94). The Siting Board directed the Company to limit construction work on the Middle Segment to the hours from 7:00 a.m. to 6:00 p.m. unless otherwise authorized by the affected municipality (id.). With respect to traffic, the Final Decision noted that pipeline on the primary route would be installed on the road shoulder where practical, and otherwise along the edge of pavement, but that on Highbank Road, pipeline installation would be within the travel lane (id.). The Final Decision noted that the Company will follow D.T.E. (now D.P.U.) Road Restoration Standards (id.). Also, the Final Decision noted that the Company would use four inches of asphalt to repave in-street trenches and would repair any repaved areas deviating from the existing road surface by more than 0.25 inch (id.).

The Final Decision noted that the Company has committed to finalizing engineering plans for the proposed pipeline in consultation with the affected municipalities (id. at 96). The Final Decision also noted that the Company has committed to mitigate traffic impacts during construction in accordance with traffic management plans to be approved by each municipality, including site-specific traffic management plans the Company expects to prepare at key intersections (id.). Further, the Company has committed to avoid work between Memorial Day and Labor Day (id.). Also, the Final Decision noted that the Company would need to obtain road opening permits from the municipalities, which gives the Towns of Yarmouth, Dennis, and Harwich the opportunity to limit work to reasonable dates and hours (id.). Therefore, the Siting Board directed the Company to provide the municipalities, at least 60 days prior to commencement of construction, with substantially completed engineering plans, and substantially completed traffic management plans including all site-specific traffic management plans, for review and comment (id. at 97). The Siting Board also required that KeySpan use full-width repaving to restore Highbank Road in Dennis following construction of the proposed pipeline, at the request of the Town of Dennis (id. at 96).

With the condition limiting hours of construction, the Siting Board found that the noise impacts of the proposed pipeline along the Middle Segment primary route would be minimized (id. at 94). With additional conditions described above, the Siting Board also found that traffic impacts along the Middle Segment primary route would be minimized (id. at 97).

(5) Safety

The Final Decision discussed a number of issues that have safety aspects. The Final Decision discussed possible third-party disruption of the pipeline, citing the Company's assertion that there is no meaningful difference between route alternatives with respect to the potential for third-party disruption (Exh. EFSB-1, at 42, 102),²⁰ an issue potentially relevant to safety as well as reliability. The Final Decision also discussed traffic impacts (id. at 89-97),

²⁰ In the underlying EFSB proceeding, KeySpan also suggested that the overall risk from third-party disruption would be relatively minor, regardless of the route selected (Exh. KEY-7, at 226).

which are relevant to safety and convenience. As noted above, the Siting Board found that traffic impacts along the Middle Segment primary route would be minimized (id. at 97).

The Final Decision also discussed required safety markers (id. at 87-88); exposed excavation (id. at 90); and the ability to shut off sections of pipe for maintenance work (id. at 101), each of which is potentially relevant to safety, but made no specific safety findings with regard to these topics.

(6) Route Comparison

The Final Decision compared the primary and alternative routes with respect to their potential impacts. For the Middle Segment, impacts were grouped into four broad categories: (1) wetlands and water resources; (2) land use and land resources; (3) the South Dennis Historic District; and (4) noise and traffic.

With respect to wetlands and water resources, the Final Decision noted that both the primary and alternative routes would cross the Bass River at existing bridge locations and that both routes cross bridges that may require in-water construction work (Exh. EFSB-1, at 78). Along the primary route, the pipeline would be installed below pavement up to the bridge span and then, continuing in a straight line, hung underneath the bridge in an existing pipe chase (id. at 79). The railroad embankment on the alternative route is narrower than the road on the primary route, so work would be close to wetlands areas where the railbed crosses wetlands, including in areas next to the Bass River; a new structure would likely be required to support the pipeline between the railroad bridge abutments; and there are large rocks on the facing of the embankment, which may complicate construction (id.). The Final Decision noted that in-water work could be necessary to recondition the abutments of the railroad bridge (id.). However, because engineering design had not been developed, the record in the underlying EFSB proceeding was insufficient to determine which river crossing would likely have greater impacts on wetlands or water resources (id.). However, considering wetlands, surface water, and groundwater impacts together, the Siting Board found that, on the Middle Segment, the primary route would be preferable to the alternative route with respect to wetlands and water resources impacts (id.).

With respect to land use and land resources, the Final Decision indicated that, due to the need to clear vegetation from the alternative route, the primary route would be advantageous with respect to impacts to vegetation and upland habitat, in comparison to the alternative route, noting, however, that because some of the old rail right-of-way may be cleared in some future year even without the project, the differential impact of much of the clearing of the alternative route might exist only for a few years (id. at 85-86). The Final Decision stated that no significant differences between the Middle Segment routes had been identified relative to impacts on rare species or archaeological resources (id. at 86). The Siting Board found that, on the Middle Segment, the primary route would be preferable to the alternative route with respect to land use and land resources impacts (id.).

With respect to the South Dennis Historic District, the Final Decision stated that more care may be necessitated on the part of the Company during construction along the primary route, relative to the alternative route, to avoid historical features located close to the construction zone, because the primary route would pass closer to recognized historical features within the district (id. at 89). The Siting Board noted that, as a result of the tight working space along the primary route, there remains some possibility of unanticipated impacts, but indicated that the only expected permanent impact to the South Dennis Historic District would be pipeline markers embedded into the street surface (id.). The Siting Board found that the alternative route for the Middle Segment would be preferable to the primary route with respect to potential impacts to the South Dennis Historic District (id.).

With respect to traffic and noise, the Final Decision noted that no comparison had been made between sound levels from street excavation that would be experienced by abutters to the primary route, and sound levels from that would be experienced by abutters to the alternative route, who would be subject to noise from tree clearing and soil excavation but not from pavement cutting (id. at 97). However, the Final Decision noted that the primary route is close to a larger number of residences than the alternative route, which would likely cause the total amount of construction noise impacts to neighbors to be greater along the primary route (id.). Based on the lower number of nearby residents, the Siting Board identified the alternative route as preferable with respect to noise impacts (id.). The Final Decision stated the alternative route would include less construction in heavily traveled roadways than the primary route, so the

alternative route would be preferable with respect to traffic impacts, as well (id.). The Siting Board found that the alternative route for the Middle Segment would be preferable to the primary route with respect to potential traffic and noise impacts (id. at 94, 97).

The Final Decision considered these various impacts and concluded that the “advantages of the primary route with respect to expected land use and land resources impacts and potential wetlands and water resources impacts are balanced by the advantages of the alternative route with respect to expected noise and traffic impacts and potential impacts to the South Dennis Historic District” (id. at 99). Therefore, the Siting Board found that, for the Middle Segment, the primary and alternative routes would be comparable with respect to environmental impacts (id.).

b. Updates on Project Impacts

(1) Alternative Route Right-of-Way Updates

The alternative route would follow a former rail bed, part of which has been converted to use as a rail trail for bicycle and other recreational use, and part of which may be converted in the future (Exh. EFSB-1, at 81-82). KeySpan stated in the override proceeding that the existing rail trail east of Route 134 has been reconstructed, after removal of tree roots and installation of a root barrier (Exh. EFSB-KEY-8). The Company asserted that additional vegetation removal would still be needed and that the reconstruction work makes this area undesirable for construction vehicle access to the right-of-way (id.). The Company stated that, because this portion of the rail trail has recently been improved, the Massachusetts Department of Conservation and Recreation (“DCR”) now maintains that this part of the route is an undesirable location for the proposed pipeline (id.). As a result, the parties generally agreed that the primary route should best be compared not to the originally designated noticed alternative route, but instead to a hybrid route consisting of the rail right-of-way west of Route 134, 0.3 miles along Route 134, plus the primary route east of Route 134 (Tr. 1 at 111-115, 131; Tr. 2, at 249-250).

KeySpan stated that the rail right-of-way west of Route 134 has been partially cleared by the Towns to accommodate survey work for the bike trail being pursued for this area, so that there is generally a 15-foot wide clearing along the right-of-way (Exhs. EFSB-KEY-8; CCC-KEY-11). The Company indicated that pipeline construction would require at least 10 feet

of additional clearing (id.). The Company asserted that the conclusion of the Siting Board in EFSB 05-2 that “construction on the alternative route would involve considerable clearing of existing trees” (Final Decision at 86) is still true (Exhs. EFSB-KEY-8; CCC-KEY-11).

The Siting Board notes that, due to the undesirability expressed by DCR of constructing along the recently rebuilt rail trail east of Route 134, the hybrid route now appears more feasible as an alternative route than the Company’s original alternative route. However, because it provides continuity with our analysis and findings in the underlying decision, our analysis here includes comparison of the primary route to both the original alternative route and the hybrid route as part of determining whether selection of the primary route is compatible with considerations of environmental protection, public health, and public safety.

The record shows that, given a reduction in the amount of tree clearing on the alternative route, the advantage of the primary route over the original alternative route is smaller; the advantage over the hybrid route is smaller still because the hybrid route avoids all vegetation clearing along the existing bike trail. Some advantage remains, however, and the Siting Board reaffirms its finding in the Final Decision that the primary route has fewer vegetation impacts than the hybrid route and the original alternative route.

(2) New Wetlands Impacts Information

KeySpan stated that construction of a pipe bridge at the old railroad bridge on the alternative (and hybrid) route would require extensive shoreline work within wetland resource areas (Exhs. EFSB-KEY-1; EFSB-KEY-8). The Company would drive or vibrate into place sheet piling in the intertidal area along the edges of the railroad embankments in order to stabilize the railroad bed and support foundations for the pipe bridge (Tr. 1, at 98-103). Witnesses for the Towns concurred with the need for sheet piling to stabilize the railroad embankments (Tr. 2, at 280-288).

The Final Decision stated that the Bass River crossing on the primary route would be within an existing duct bank on the underside of an existing road bridge (Exh. EFSB-1, at 79). When the Final Decision was prepared, evidence of the nature and extent of required in-water work for the pipe bridge on the alternative route was not sufficient to determine which river crossing would have less wetland impact (id.). However, in this proceeding, KeySpan has

provided more specificity with regard to wetland impacts from construction work to reinforce the existing railroad grade. The record shows that intertidal structural work on the river crossing for the alternative route or the hybrid route would have greater impacts on wetlands than stringing pipe underneath the existing bridge on the Bass River crossing on the primary route. Therefore, the wetland impacts from the river crossing would be less for the primary route. Both the hybrid and alternative routes cross the Bass River at the same location. Accordingly, and consistent with the Final Decision, the Siting Board finds that the primary route is preferable to the hybrid route and the original alternative route with respect to wetlands and water resources impacts.

(3) New Protected Species Information

KeySpan stated that the Massachusetts Natural Heritage and Endangered Species Program (“NHESP”) updated its atlas of priority and estimated habitats after issuance of the Final Decision (Exh. EFSB-KEY-1, at 5). The Company stated that previously mapped area along the alternative route immediately east of the Bass River had been reduced, but new areas of estimated and priority habitat were added elsewhere along the alternative route for 6300 feet and 7500 feet, respectively (id.; Exh. EFSB-KEY-8; Tr. 1, at 92). According to the Company, the species at issue would be Commons’ panic-grass, bristly foxtail grass, and eastern box turtle (Exh. EFSB-KEY-1, at 5). The Company indicated that for the two plant species, field surveys would be conducted in seasons when the plants are visible, then plans to avoid, transplant or otherwise mitigate damage to plants would be prepared (id.). The Company indicated that standard procedures for eastern box turtles, including installation of fences and relocation of turtles, would mitigate turtle damage (id.). The primary route, in contrast, follows existing roadways (Exh. EFSB-1, at 86).

Rare species impacts was considered an element of land resources impacts in the Final Decision. The Final Decision stated that no significant differences between routes were found relative to impacts on rare species (Exh. EFSB-1, at 86). In this proceeding, the likely presence of rare species along the alternative route has been identified. While impacts on rare species can be largely mitigated on the alternative route, the primary route would have no such impacts. Therefore, the primary route is advantageous from the perspective of rare species impacts. The addition of this information does not cause the Siting Board to change its bottom-line finding

that the primary route would be preferable to the hybrid route and the original alternative route with respect to land use and land resources impacts.

(4) New Archaeological Resources Information

In the underlying EFSB proceeding, a preliminary sensitivity assessment found both the primary and alternative routes of the Middle Segment to be sensitive for containing previously unidentified archaeological resources (Exh. KEY-1(A) at 5-35). KeySpan stated that its cultural resources consultant, Public Archaeology Laboratory, told the Company that use of the alternative or hybrid route would require an intensive field survey of archaeological resources including as many as 450 test pits to survey the work area (Exh. EFSB-KEY-1, at 6). According to the Company, this field survey and subsequent lab and report work would take eight to ten weeks to complete (id.). The Company added that if potentially significant archaeological resources were located, more detailed field examinations would typically then be required, possibly leading to an effort to fully recover all potentially significant archaeological resources in the area (id.).

The Massachusetts Historical Commission (“MHC”) provided comments to MEPA on February 8, 2006, which was subsequent to closing of the evidentiary record in the underlying EFSB proceeding. In the letter, the MHC stated that the primary route for the Middle Segment is unlikely to affect significant historic and archaeological resources (Exh. KEY-2(D) at Tab C). In contrast, the MHC stated that nearly four miles of the alternative route on the Middle Segment are considered to be of moderate to high sensitivity for archaeological resources (Exh. EFSB-KEY-1, at 6; Tr. 1, at 115-116; Tr. 4, at 631-632). The letter requested that the Company consider avoiding areas outside of paved town rights-of-way that are assigned a moderate to high archaeological sensitivity (Exh. KEY-2(D) at Tab C). The Certificate of the Secretary of Environmental Affairs on the Final Environmental Impact Report reiterates this concern (id.).

While the estimate of 450 test pits along a few miles of railroad bed seems excessive, there is no evidence in the record to establish a correct figure. The Company stated that it was unable for confidentiality reasons to respond to intervenor requests to provide full supporting documentation for these assertions of the archaeological work that it claims would be required

(see Tr. 4, at 796-804). Thus, while there is a possibility that the hunt for archaeological artifacts could add scheduling burdens to the use of the alternative or hybrid route, there is insufficient support for concluding that use of the alternative or hybrid route would create significantly more impacts on archaeological resources than was envisioned by the Siting Board in the Final Decision, where archaeological resource impacts were considered an element of land resources impacts. Still, based on the MHC's request that the Company avoid areas outside of paved town rights-of-way that are assigned a moderate to high archaeological sensitivity, the primary route is advantageous from the perspective of archaeological resources. As with rare species impacts, the addition of this information does not cause the Siting Board to change its bottom-line finding that the primary route would be preferable to the hybrid route and the original alternative route with respect to land use and land resources impacts. Accordingly, and consistent with the Final Decision, the Siting Board finds that the primary route is preferable to the hybrid route and the original alternative route with respect to land use and land resources impacts.

(5) Traffic Impacts Updates

KeySpan stated that the principal construction issue that may affect residences and businesses on the primary route is the potential for traffic congestion and the maintenance of access and egress (Exhs. EFSB-KEY-10; CCC-KEY-23). The Company provided the traffic management plan for Phase I of the Middle Segment along the primary route and stated that a plan for Phase II would likely be developed in late summer of 2007 (Exh. EFSB-KEY-10(1); Tr. 1, at 29-31). The Company reiterated that construction would not be scheduled during the high season from Memorial Day to Labor Day (Exh. CCC-KEY-29; Tr. 1, at 29). The Company also stated that businesses on Whites Path are not retail businesses and that construction in the commercial area along Whites Path would be on the side of the road opposite to the businesses (Exh. CCC-KEY-29; Tr. 3, at 603).²¹ The Company stated that traffic management measures would be used to maintain at least one lane of traffic at all points in order to limit traffic

²¹ On the Middle Segment, Phase II of the primary route does involve construction that would cross business driveways, since there are businesses on both sides of Great Western Road in Dennis, but in Phase I, construction is opposite businesses.

congestion (Exh. EFSB-KEY-10; Tr. 1, at 28). However, the Company indicated that, on the request of the Town of Yarmouth, a detour would be created for work at the intersection of Whites Path and North Main Street in Yarmouth if traffic backs up at that location (Exh. EFSB-KEY-10(1); Tr. 1, at 32-34). The traffic management plan states that steel plate access to driveways will be maintained (Exh. EFSB-KEY-10(1)). Ms. Leslie Richardson, witness for the Commission, stated that it is a reasonable conclusion that businesses would be disturbed by construction (Tr. 3, at 521). With the minor exception of the Town of Yarmouth's requested detour at the intersection of Whites Path and North Main Street, traffic impacts are similar to those evaluated in the Final Decision. Accordingly, and consistent with its finding in the Final Decision that the alternative route is preferable to the primary route with respect to traffic impacts, the Siting Board finds that the hybrid route and the original alternative route are preferable to the primary route with respect to traffic impacts.

(6) Pipeline Safety Updates

In the underlying EFSB proceeding, KeySpan maintained that there are no meaningful differences between Middle Segment route alternatives with respect to the potential for third-party disruption (Exh. EFSB-1, at 42). However, in the present proceeding, KeySpan's engineer indicated that potential third-party damage to pipelines is of less concern in areas without water or sewer mains or street drainage, such as along the existing railroad corridor, compared to in-street locations (Tr. 2, at 386-391). Notwithstanding this difference, the Siting Board notes that gas mains are present under streets throughout much of Massachusetts and that federal pipeline safety standards, the Dig-Safe program and other precautions help maintain the general safety of the public. Therefore, based on the Final Decision and the record in this proceeding, the Siting Board finds that the primary, hybrid, and original alternative routes are comparable with respect to pipeline safety.

c. Summary of Project Impacts

Based on the above evaluation, there are several minor changes in the relative impacts of the primary versus alternative Middle Segment routes. However, there is no overriding change from the Final Decision in the comparison of the potential impacts of the routes. The amount of

tree clearing on the hybrid or alternative route would be less than described in the Final Decision. On the other hand, new, more specific information on construction now clarifies that the river crossing for the alternative or hybrid route would have more wetlands impacts than the river crossing for the primary route. In the Final Decision, considering land use and land resources impacts, wetlands and water resources impacts, noise and traffic impacts, and potential impacts to the South Dennis Historic District, the Siting Board found that the primary and alternative routes for the Middle Segment would be comparable with respect to environmental impacts. While some details have changed, the Siting Board finds in this proceeding that the primary, hybrid, and alternative routes are comparable with respect to their potential impacts, including impacts on the environment, public health, and public safety.

In the Final Decision, the Siting Board found that for the Middle Segment, environmental impacts would be minimized. No change to this finding is indicated by the new information discussed in Section III.C.2.b, above. Accordingly, the Siting Board finds that construction and operation of Phase I, as described by KeySpan and in compliance with the conditions specified in the Final Decision, would minimize potential project impacts.

3. Cost

With respect to cost, the Siting Board concluded in the Final Decision that:

The record shows that the difference in costs between the two Middle Segment route options would be fairly small, relative to the total cost of the Middle Segment. The record shows that engineering a pipe bridge at the railroad bridge location was not carried out in sufficient detail to obtain an accurate cost estimate for this element of the work. The record also shows that lease costs for the right-of-way would be subject to negotiations and that without going through the negotiation process, it is not possible to accurately estimate this cost. As a result, the uncertainties with respect to the cost of bridge construction, lease costs, and other issues appear to be greater than the cost differential estimated by the Company. The cost savings of a hybrid route, relative to the alternative route, depend on costs to obtain rights to use the existing Rail Trail, which are also unknown. Based on the high uncertainties relative to the calculated cost differential, the Siting Board finds that, on the Middle Segment, the primary route and the alternative route would be comparable with respect to cost (Exh. EFSB-1, at 101).

Subsequent to the underlying EFSB proceeding, the Company developed for the alternative route more detailed designs for both a pipe bridge crossing and a horizontal directional drill (“HDD”) across the Bass River, with associated cost estimates (Exh. EFSB-KEY-1, at 9). According to the Company, a conventional pipe bridge would cost approximately \$670,000 to \$695,000, including permitting and removal of the existing bridge but not including any mitigation that might be required by the South Dennis Historic District (id. at 11). According to the Company, a “soft rock” HDD crossing would be more costly than a pipe bridge by \$155,000 (RR-KEY-3).

KeySpan also identified eleven additional incremental cost items which it asserted would be incurred for the alternative route for the Middle Segment (Exh. EFSB-KEY-1, at 13). According to the Company, these costs would total \$411,000 to \$561,000 (id.). These range from costs for easement negotiations to costs for archaeological surveys and refiling its DRI application with the Commission (id.). A total of \$85,000 to \$135,000 of the total relate to DCR and Article 97 issues (id.). A total of \$106,000 to \$186,000 of the total is for additional archaeological work (id.). Meanwhile, the Company’s cost estimate for the primary route for the Middle Segment has increased by \$135,000 due to the Siting Board’s condition in the Final Decision requiring full-width repaving of 2400 feet of the route in Dennis and an additional \$35,000 for chip-seal coating of about one mile of roadway in Yarmouth, as discussed with the Town of Yarmouth (Exh. EFSB-KEY-1, at 14; RR-KEY-3). Incorporating these changes, the Company provided revised cost estimates for the Middle Segment of \$3,670,000 for the primary route and \$5,281,000 to \$5,436,000 for the alternative route, for a differential of \$1,646,000 to \$1,801,000 between the two routes (Exh. EFSB-KEY-1, at 14). Further, the Company estimated that costs for the hybrid route would be \$5,147,000 with a pipe bridge and \$5,302,000 using soft rock HDD, for differentials from the primary route of \$1,477,000 and \$1,632,000 (RR-KEY-3).²²

²² These cost estimates do not include estimates for a “hard rock” HDD since the substrate on Cape Cod is predominantly sand. See EFSB-KEY-1, at 12-13. The cost estimates also do not include the financial cost of conducting stop gap measures or of moving forward other improvements that the Company states would be necessary to meet peak demand while the hybrid route is delayed for permitting and construction (RR-KEY-3). The Company stated that it would incur an estimated \$1,200,000 to \$1,300,000, for
(continued...)

Mr. Laurence Keegan, Jr., witness for the Towns, challenged several aspects of the Company's cost estimates. In his estimate, the cost differential between the hybrid and the primary routes would be \$284,000 to \$314,000 with the primary route maintaining a cost advantage, later adjusting the differential upwards by an additional \$76,000 (Exh. Y/D-LFK-MM-1; Tr. 2, at 214, 249-252). The Towns' estimate of the differential was narrower than KeySpan's because the Towns added costs for police detail on the primary route (\$190,000), figured lower cost for a pipe bridge (\$400,000 instead of \$670,000 to \$695,000), and estimated lower costs for a variety of smaller cost items (Exh. Y/D-LFK-MM-1; Tr. 2, at 295-302). According to the Company, police detail costs are embedded in its calculations for in-road construction (Tr. 1, at 140; Tr. 3, at 599-602; Tr. 4, at 720-724).

Without attempting to judge the exact cost of crossing the Bass River or a multitude of smaller disputes on cost estimates, it appears that conservatively the primary route costs \$550,000²³ to \$1,632,000 less than the hybrid route. Although this is a fairly wide range, the work-up of costs for bridge construction by the Company and by the Towns provides greater certainty regarding the cost differential between routes than was available in the underlying EFSB proceeding. The Siting Board concludes that with the addition of this new information, the routes can be distinguished with respect to cost – a distinction that could not be made in the underlying EFSB proceeding due to the insufficiency of the cost information that had been developed by the Company at the time of the proceeding. On the basis of the evidence presented, the Siting Board finds that the primary route is preferable to the hybrid route with respect to cost.

²² (...continued)
construction of 3800 feet of 12-inch pipeline in Brewster, several years earlier than would otherwise be required (id.).

²³ The figure of \$550,000 represents the Towns' low estimate of \$284,000, adjusted by additional costs of \$76,000 and \$190,000 described above.

4. Reliability

With respect to reliability, the Final Decision stated that:

The difference in lengths between the primary and alternative routes is not large enough to create a substantial difference in pipeline performance, and the two routes are otherwise similar in physical reliability. The record shows that the Company and its environmental consultants have significant experience in permitting the installation of gas pipelines, including the acquisition of access rights and necessary permits and approvals. In this case, the opinion of the Company and its consultants is that permitting of the proposed pipeline in the roadways along the primary route can be accomplished with reasonable certainty in time to allow construction of the first 12,000 feet of the Middle Segment prior to the peak loads of the 2006/2007 heating season. It is the Company's opinion, supplemented by its consultants, that it is less certain, and perhaps not possible, to obtain rights to build on the railroad right-of-way within the same period of time. In addition, because it would not follow the route of the existing Sagamore Line, the alternative route would require significantly more extensive pipeline construction during 2006 to reach a possible tie-in point in Dennis, as necessary to meet need in winter 2006-2007. The added construction would include not only an additional 4000 to 6000 feet of pipeline to reach a possible tie-in point, compared to the 12,000 feet required for the primary route, but also the completion of the spanning of the Bass River, which would not be required as part of the 12,000 feet to be constructed in 2006 under the primary route. The ability of the project to reliably serve customers for all years of the forecast period is dependent on its being timely constructed. Given the greater certainty with which the proposed work can be completed in a timely fashion, the Siting Board finds that on the Middle Segment, the primary route would be preferable to the alternative route with respect to reliability (Exh. EFSB-1, at 103-104).

KeySpan stated that using the alternative route for Phase I would allow tie-ins for the back into the existing system at 6000 feet and not again until 18,000 feet from the start of the Middle Segment (Exh. EFSB-KEY-1, at 7, fig. 1-2). Based on maps provided by KeySpan, the corresponding points for the hybrid route would be at 6000 feet and not again until approximately 16,000 feet from the start of the Middle Segment (Exhs. KEY-2(B) at fig. 4-3; EFSB-KEY-1, at fig. 1-2). Alternatively, the two ends of the Middle Segment could be built first, postponing the decision of whether to use the primary or hybrid route (See RR-KEY-4; Tr. 1, at 155-159). Construction on the alternative route or the hybrid would require completion of the following tasks, most of which would not be required for the primary route:

- Negotiate lease with Executive Office of Transportation²⁴
- Obtain Article 97 approval from Legislature and Governor (not needed for hybrid)
- Discuss mitigation for use of right-of-way with DCR (not needed for hybrid)
- Engineer details of route including Bass River crossing (HDD or new bridge)
- Complete archaeology field survey
- Complete NHESP surveys
- Seek and obtain Siting Board approval for change in route
- Prepare supplemental EIR
- File Corps of Engineers Section 10 application
- File for Chapter 91 License for Bass River crossing
- Seek and obtain water quality approvals for river crossing (not needed for HDD)
- Seek and obtain approval of Cape Cod Commission
- Consult with South Dennis Historic District
- Obtain Order of Conditions from Conservation Commission
- Obtain street opening permits
- Stabilize and protect existing earthen embankments at Bass River with sheet piling, or clear workspaces for HDD and drill under Bass River
- Construct enough pipeline to tie back to existing system in Dennis

Exhs. EFSB-KEY-1, at 6-8, 10-13; EFSB-KEY-1(4); EFSB-KEY-1(5); RR-KEY-4.

According to the Company, new capacity could possibly but not necessarily be in place for the 2008/2009 winter heating season under this timeline for the alternative (or hybrid) route, if the various approvals are forthcoming (Exhs. EFSB-KEY-1, at 6-8; EFSB-KEY-8; Tr. 1, at 150). For the 2007/2008 heating season, no project capacity would be in place and stop gap

²⁴ According to KeySpan, it is no longer true that approval from Bay Colony Railroad would or might also be needed, because Bay Colony's operating lease expired in 2006 (Tr. 3, at 585-590; Tr. 4, 734).

measures would be put in place (id.).²⁵ Stop gap measures may include construction of 7500 feet of 12-inch diameter, 60 psig gas main along Route 6A in Brewster in the fall of 2007, near-continuous injection of high-cost LNG at the remote station in Chatham and/or Eastham during bad weather, and manually bypassing pressure control mechanisms at the Church Street and Depot Street district regulators in Harwich (Tr. 1, at 79-84). Given the lower control over system pressures, the requirement to maintain personnel at remote locations, and the reliance on roadway conditions in winter, the Company characterized these measures as undesirable from a reliability standpoint (id.).

For the primary route, KeySpan stated that it would have ample time to construct Phase I on the primary route for the now-upcoming heating season if it started construction right after Labor Day, barring an early onset of winter conditions (id. at 165-168). KeySpan indicated that Phase I construction can begin within approximately three months of a DRI approval (Exh. EFSB-KEY-1(4)). The Company indicated that, if a Certificate were issued by May or June 2007, and if the Company can obtain a street-opening permit and Conservation Commission approval from the Town of Yarmouth for the first 12,000 feet of the primary route, construction could begin right after Labor Day and all or most of the first segment of the primary route placed into service for the 2007/2008 heating season (Tr. 1, at 149-150, 165-168). The Company asserted that the primary route has a substantial reliability advantage over the alternative route on this basis (id. at 149-150; Exh. EFSB-KEY-8).

The new information indicates that KeySpan needs three months to get local permitting for the primary route. Therefore, if a DRI approval for Phase I were issued by the Siting Board by June 2007, construction could begin in September 2007. An earlier start is precluded in any event by the required avoidance of construction during the summer months. The new information indicates that new capacity on the alternative route would be available by 2008/2009 at the earliest. The new information indicates that, although stop gap measures could be used for 2007/2008 if the alternative or hybrid route were selected, using the primary route allows the Company's project to be more reliably constructed to meet future needs, including the next

²⁵ The Company stated the adequacy of the stop gap measures depends on the Algonquin gate station at Route 130 in Sandwich being operational this fall (Tr. 1, at 76-77).

heating season and later years, compared to using the alternative or hybrid route. Accordingly, and consistent with its finding in the Final Decision that the primary route would be preferable to the alternative route with respect to reliability, the Siting Board finds that the primary route is preferable to the hybrid route and the original alternative route with respect to reliability.

5. Route Comparison

In the preceding sections, the Siting Board has found: (1) that the construction and operation of the facility on the primary and hybrid routes are comparable with considerations of environmental protection, public health and safety; (2) that the primary route is preferable to the hybrid route with respect to cost; and (3) that the primary route is preferable to the hybrid route and the original alternative route with respect to reliability. Therefore, the Siting Board finds that the primary route would be superior to the hybrid route and the original alternative route with respect to satisfying the Siting Board's mandate under G.L. c. 164, § 69H to provide a reliable energy supply to the Commonwealth with a minimum impact on the environment at the lowest possible cost.

D. Conclusions and Findings

Based on the decision in the underlying EFSB proceeding and new information obtained in this proceeding, the Siting Board has comprehensively addressed the issues germane to the scope of this proceeding, including issues raised by the Commission, in the underlying EFSB proceeding and/or in this proceeding.

Pursuant to G. L. c. 164, § 69O, the Siting Board must make four specific findings to support the issuance of a Certificate of Environmental Impact and Public Interest for a facility, as indicated below.

1. Need for the Facility

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the need for the facility. The Siting Board found in EFSB 05-2 that there is a need for additional energy resources to maintain reliable gas service to customers of KeySpan's Cape Cod distribution system. As noted in Section III.C.1, there remains a need for additional energy

resources to maintain reliable gas service to customers of KeySpan's Cape Cod distribution system as soon as the 2007/2008 heating season. The Siting Board found, in Section III.C.1, above, that there is a need for the additional gas resources that the proposed pipeline would provide. Therefore, the Siting Board finds that Phase I is needed.

2. Compatibility With Environmental Protection, Public Health and Safety

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the compatibility of the facility with considerations of environmental protection, public health and public safety. In Section III.C.1, above, based on its findings in the Final Decision and analysis in Section III.C.1, the Siting Board found that there is a need for the additional gas resources that the proposed pipeline would provide. In Section III.C.2.c, above, the Siting Board found that the primary, hybrid, and alternative routes are comparable with respect to their potential impacts, including impacts on the environment, public health, and public safety. Also in Section III.C.2.c, the Siting Board found that construction and operation of Phase I, as described by KeySpan and in compliance with the conditions specified in the Final Decision, would minimize potential project impacts. Therefore, the Siting Board finds that construction and operation of Phase I on the primary route is compatible with considerations of environmental protection, public health and public safety.

3. Conformance with Laws and Reasonableness of Exemption Thereunder

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies in the Siting statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

The Siting Board acknowledges that the granting of a Certificate in this proceeding would allow the Company to construct a portion of the project, notwithstanding the Commission's DRI denial. The Siting Board recognizes that Phase I of the project may not

comply with the Cape Cod Commission Act.²⁶ The record does not demonstrate any other area of non-conformance with local or state laws, ordinances, by-laws, rule or regulations.

Regarding state and local laws, the Siting Board reviewed in the Final Decision, the environmental impacts of the proposed project in light of related regulatory or other programs of the Commonwealth, including programs related to wetlands protection, groundwater protection, rare and endangered species habitat, historic preservation and scenic roads. The Siting Board found that the proposed project along the primary route would be generally consistent with the identified requirements of all such programs. Final Decision at 118. Consequently, the Siting Board found that the construction of the proposed project is consistent with current health, environmental protection, and land resource and development policies as adopted by the Commonwealth. Id. The additional evidence in Section D, above, includes new information and analysis of environmental impacts under state and local programs, including information relating to Wetlands Protection Act resource areas, NHESP habitat designations, MHC archaeological survey requirements, and Town of Yarmouth traffic management requirements. The record shows that the new information supports the Siting Board's findings in the Final Decision that the proposed project is consistent with Commonwealth policies under those programs.

²⁶ The Commission found that Phase I of the Middle Segment meets the Minimum Performance Standards of the Commission's Regional Policy Plan (Exh. KEY-2(O) at 6, 17, 20; Tr. 3, at 428-429, 445, 470). However, Margo Fenn, a witness for the Commission, testified that the Commission also determines as part of DRI review whether the probable benefit from the proposed development is greater than the probable detriment (Exh. CCC-MF at 4; Tr. 3, at 428-429). Ms. Fenn testified that, unlike the Regional Policy Plan consistency review, this Commission determination is not based on established policies, standards or other criteria (Tr. 3, at 430-431). As reason to deny Phase I, the Commission found that its probable benefits do not outweigh its probable detriments; in supporting analysis and findings the Commission cited detriments including community disruption, safety concerns, traffic impacts and historic district impacts, and also that the Commission had received insufficient information on the alternative route to allow for a comparison to the primary route (id. at 431-432; Exh. KEY-2(O) at 21). Thus, it was not established in the DRI proceeding that the project complies with the Cape Cod Commission Act. Constructing the project without DRI approval therefore would be a violation of the law as interpreted by the Commission. However, the granting of a Certificate by the Siting Board would provide KeySpan with lawful means to construct and operate Phase I of the Middle Segment.

The record also shows with respect to local laws, that absent DRI approval of Phase I of the Middle Segment, two local approvals cannot be pursued or obtained from the Town of Yarmouth. However, if a Certificate is granted, the identified obstacle to pursuit and potential receipt of these two local approvals will be removed. There is no indication in the record that, with this obstacle removed, KeySpan would be unable to obtain required local approvals, or that any non-conformance with the laws or related regulatory provisions applicable for those approvals would exist.

Exempting the Company from the need for DRI approval from the Commission for Phase I would be consistent with, and is necessary to the full implementation of, the Siting Board's findings and decision in the underlying EFSB proceeding. In the underlying EFSB proceeding, the Siting Board found that, upon compliance with specified mitigation measures and conditions, the construction and operation of the pipeline project – including the Middle Segment on the primary route – would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Final Decision at 118.

The record shows that, as reasons for denying DRI approval for Phase I, the Commission relied on its finding that the probable benefits of Phase I would not outweigh its probable detriments. Its supporting analysis and findings cited detriments related to community disruption, safety, traffic and historic impacts, and also cited limitations as to the scope and framework of DRI review it was able to undertake, notably the lack of information as to possible alternative routes with less detriment.

With respect to project benefits, a need for the proposed project was found in the Final Decision, and new information provided in the present proceeding indicates that the project is still needed. The reliability with which the project could be constructed to meet identified need was also addressed in the Final Decision, and relevant new information provided in this proceeding. As indicated below, this reliability information has been evaluated as part of updated analysis of alternative routes.

With respect to project impacts, the Siting Board reviewed in detail both in the Final Decision and as part of updated analysis in Section III.D, above, the land use and land resources impacts, traffic and noise impacts, and South Dennis Historic District impacts of the proposed project – areas that encompass detriments cited by the Commission. Specifically, concerns the

Commission raised with respect to community disruption, traffic and the South Dennis Historic District fall squarely within the scope of corresponding issues the Siting Board reviewed. Of importance to such concerns, the proposed project construction will be based on methods of in-street construction that are common for such projects and are temporary in nature. Conditions such as maintaining one lane of travel at all times, maintaining access to adjoining property, and restoring roadways in accordance with DPU regulations and in certain areas with use of full-roadway repaving will be met. The Commission also cited as a safety concern the presence of high pressure gas pipeline in the built-up area the route traverses. The Siting Board evaluated safety as part of its additional analysis in Section III.D, above, and concluded the placement of the proposed pipeline follows commonplace siting practice and is accompanied by ongoing protections such as applicable Dig-Safe program provisions, and thus will be safe.

In both the Final Decision and as part of updated analysis in this review, the Siting Board reviewed alternative routes for the proposed pipeline. New information did not change the overall project impacts comparison between routes. With respect to reliability, although new information regarding use of stop gap measures has been considered, the Siting Board's review here does not change the conclusion that the primary route would be preferable. Finally, with new cost information, the record now indicates that the cost of the primary route would be less than the alternative or hybrid routes.

Thus, the new information has not altered the view of the Siting Board that the project is needed, that the primary route is preferable to the alternative route, and that project impacts would be minimized, as discussed above in Section III.C. In the absence of a DRI approval, or a Certificate which serves in the place of such an approval, the Company cannot implement the pipeline project as reviewed and approved by the Siting Board in the Final Decision. The Siting Board therefore finds that Phase I may not comply with the Cape Cod Commission Act, but is likely to be in conformance with other state and local laws. The Siting Board further finds that exempting the Company from the need to obtain DRI approval from the Commission for Phase I is reasonable, and would be consistent with the Siting Board's implementation of the energy policies in G.L. c. 164 so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

4. Public Interest or Convenience

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the public interest, convenience and necessity requiring construction and operation of the facility. After conducting an extensive review of the need for the pipeline project, alternative routes, and potential project impacts, the Siting Board found that upon compliance with specific conditions set forth in its Final Decision in EFSB 05-2 that construction and operation of the pipeline project – including the Middle Segment on the primary route – will provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, in keeping with the Siting Board’s statutory obligations under G.L. c. 164, § 69H. Final Decision at 118. Also in the underlying EFSB proceeding, the Siting Board found that the Middle Segment of the project along the primary route would achieve an appropriate balance among conflicting environmental concerns, as well as among environmental impacts, reliability, and cost. Id. at 105. In the present proceeding, therefore, the Siting Board finds that the primary route would be superior to the hybrid route and the original alternative route with respect to satisfying the Siting Board’s mandate under G.L. c. 164, § 69H to provide a reliable energy supply to the Commonwealth with a minimum impact on the environment at the lowest possible cost.

The Siting Board notes the high degree to which customers rely on a continuously available supply of gas. The Siting Board notes the relatively short period during which neighbors would be inconvenienced by pipeline construction. Consistent with its duty to provide a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, the Siting Board concludes that the benefits of supplying natural gas with the project outweigh the impacts of the primary route. The Siting Board finds that the public interest requires the construction and operation of Phase I of the Middle Segment of KeySpan’s proposed pipeline as described in this proceeding.

E. Decision on the Application

Pursuant to G.L. c. 164, § 69O, the Siting Board must include in a Certificate of Environmental Impact and Public Interest for a non-generating energy facility its findings with respect to: (1) the need for the facility to meet the energy requirements of the applicant’s market

area taking into account wholesale bulk power or gas sales or purchases or other cooperative arrangements with other utilities and energy policies as adopted by the Commonwealth; (2) the compatibility of the facility with considerations of environmental protection, public health, and public safety; (3) the extent to which the facility will not conform to existing state and local laws, ordinances, by-laws, rules, and regulations, and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies contained in G.L. c. 164 to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost; and (4) the public interest, convenience and necessity requiring construction and operation of the facility.

In order to provide a full review of a non-generating facility previously approved by the Siting Board in a proceeding under G.L. c. 164, § 69J, the Siting Board also will (1) review the decision from the underlying EFSB proceeding and (2) determine the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period. Additionally, the Siting Board will verify that issues raised by the state or local agencies whose actions are the subject of the Application have been addressed in a comprehensive manner by the Board, either in its review of the facility in the underlying EFSB proceeding and/or in its review under G.L. c.164, § 69K.

In Section I.B, above, the Siting Board determined that it would limit the scope of its review in this proceeding to Phase I of the Middle Segment only.

The Siting Board has comprehensively addressed the issues germane to the scope of this proceeding, including issues raised by the Commission in its review of Phase I, in the underlying EFSB proceeding and/or in Section C of this decision.

In Section III.D.1, above, the Siting Board has found that Phase I is needed.

In Section III.D.2, above, the Siting Board has found that the construction and operation of Phase I is compatible with considerations of environmental protection, public health, and public safety.

In Section III.D.3, above, the Siting Board has found that Phase I may not comply with the Cape Cod Commission Act, but it is likely to be in conformance with other state and local laws; the Siting Board further finds that exempting the Company from the need to obtain DRI approval from the Commission for Phase I is reasonable, and would be consistent with the Siting

Board's implementation of energy policies in G.L. c. 164 so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

In Section III.D.4, above, the Siting Board has found that the public interest, convenience and necessity requires the construction and operation of Phase I.

Accordingly, the Siting Board GRANTS the Company's Application for a Certificate of Environmental Impact and Public Interest with respect to the issuance of DRI approval for Phase I of the Middle Segment, and DENIES the Company's Application for a Certificate with respect to Phase II. The Siting Board also issues a Certificate of Environmental Impact and Public Interest for construction and operation of Phase I, a copy of which is attached hereto as Attachment A and is part of the Siting Board's Final Decision in this proceeding.

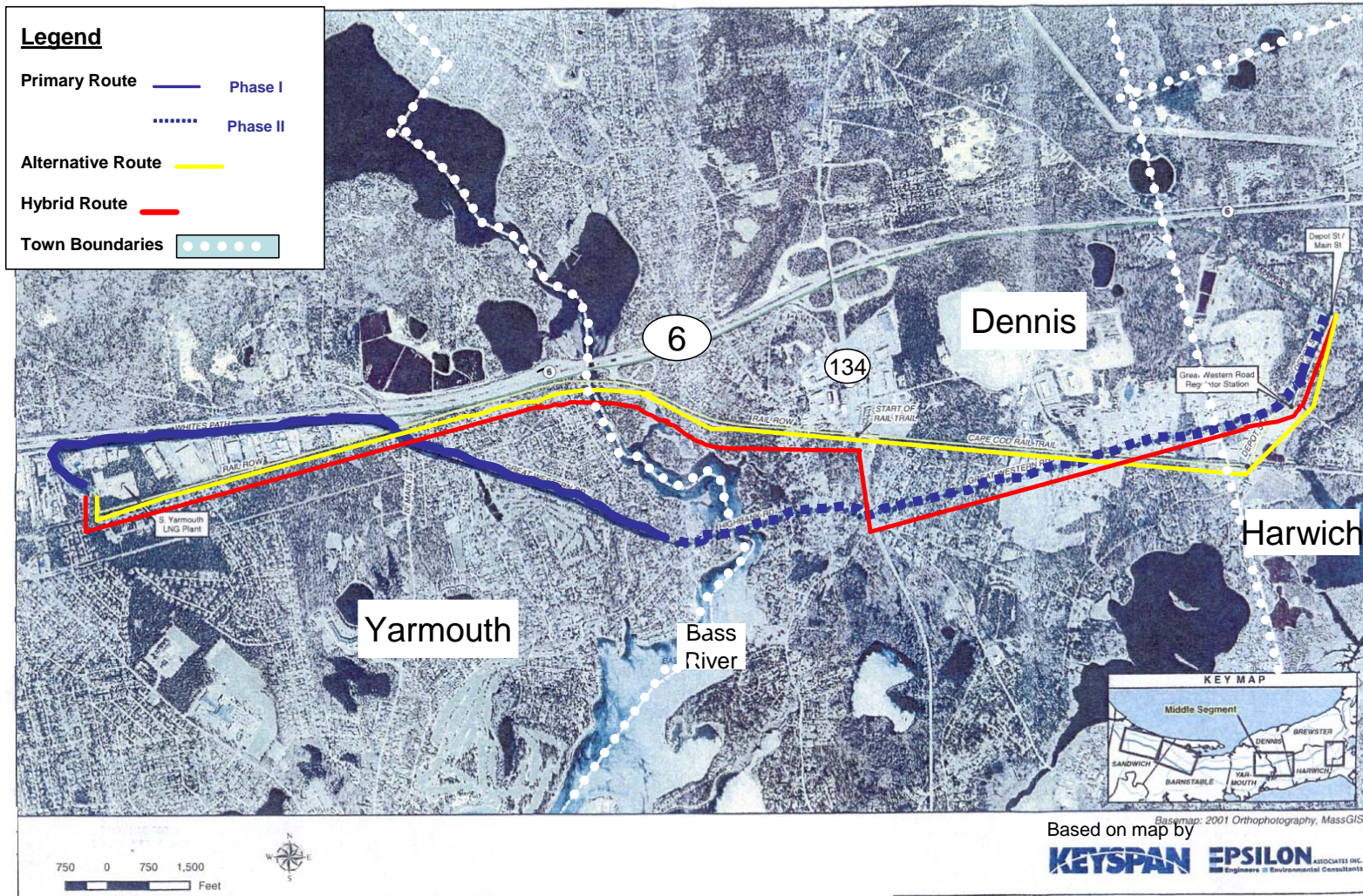
While the Siting Board has not granted KeySpan a Certificate of Environmental Impact and Public Interest with respect to the two remaining permits required for Phase I of the Middle Segment in Yarmouth, *i.e.*, a street opening permit from the Town of Yarmouth Public Works Department and approval from the Yarmouth Conservation Commission for buffer zone work in a wetlands resource area along Great Western Road, KeySpan is directed to file for (no later than June 27, 2007) and seek to obtain those two permits from the respective agencies. KeySpan shall report back to the Siting Board with an update on its efforts to obtain the two local permits within seven (7) days of: (i) completion of those two permit processes; or (ii) the filing of any applicable appeal, but in no event later than August 2, 2007. The Town of Yarmouth may file comments or recommended conditions with the Board on or before August 2, 2007. If KeySpan is unable to obtain either of those two permits, either as a result of a denial, rejection, applicable conditions or undue delay, it may request that the Siting Board supplement its Certificate of Environmental Impact and Public Interest to include such permit or approval within the Certificate. Upon such a filing, the Siting Board may elect whether to conduct additional inquiry into the relevant circumstances and may decide at that time to supplement the Certificate granted herein to include either or both of the two remaining local approvals regarding Phase I of the Middle Segment.

In accordance with G.L. c. 164, § 69K, the attached Certificate shall be enforced by the Cape Cod Commission as if directly granted by the Commission.

M. Kathryn Sedor
Presiding Officer

Dated this 22nd day of June, 2007.

MIDDLE SEGMENT ALTERNATIVES



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6/1/05

COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

_____)
Application of KeySpan Energy Delivery)
New England for a Certificate of)
Environmental Impact and Public Interest)
 _____)

EFSB 06-1

**CERTIFICATE OF ENVIRONMENTAL IMPACT
AND PUBLIC INTEREST IN LIEU OF DRI APPROVAL**

Pursuant to its authority under G.L. c. 164, §§ 69K-O, the Energy Facilities Siting Board hereby (1) approves the Initial Petition and approves in part the Amended Application filed by KeySpan Energy Delivery New England (“applicant”) with the Siting Board in this proceeding (“Approval”); and (2) issues a Certificate of Environmental Impact and Public Interest (“Certificate”) to KeySpan.

This Approval and Certificate (hereinafter “Certificate”) constitutes Attachment A to, and is part of, the Final Decision in EFSB 06-1 (June 22, 2007).

I. NATURE AND SCOPE OF CERTIFICATE

- A. This Certificate is issued by the Energy Facilities Siting Board pursuant to G.L. c. 164, § 69O, in place of the issuance by the Cape Cod Commission of a Development of Regional Impact (“DRI”) approval pursuant to Sections 12 and 13 of the Cape Cod Commission Act, c. 716 of the Acts of 1989, as amended (“DRI approval”).
- B. This Certificate acts in the place of a DRI approval and authorizes the applicant to construct and operate Phase I of the Middle Segment of a proposed 13.1-mile natural gas distribution pipeline on Cape Cod, approximately 12,000 feet in length, as approved by the Siting Board in Colonial Gas Company d/b/a KeySpan Energy Delivery New England, 15 DOMSB 269 (May 17, 2006) (“EFSB 05-2 Final Decision”) and as depicted in the 100% Design Drawings issued February 23, 2006 and attached as Tab D to the applicant’s Cape Cod Commission Development of Regional Impact Application dated March 17, 2006 (“facility”). This Certificate does not extend authorization pursuant to G.L. c. 164, § 69O to construction or operation of Phase II of the Middle Segment, or any portion of the Eastern or Western Segments of the proposed pipeline.

II. CONDITIONS

GENERAL

- G1. Because the issues addressed in this Decision relative to this facility are subject to change over time, construction of the proposed facility must commence within three years of the date of the Decision.
- G2. As a result of the issuance of this Certificate, local development permits may be issued consistent with the effect of issuance by the Cape Cod Commission of a DRI approval for the facility.
- G3. In accordance with G.L. c. 164, § 69K, the Cape Cod Commission shall not require any approval, consent, permit, certificate or condition for the construction, operation or maintenance of the facility. The Cape Cod Commission shall not impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent the construction, operation or maintenance of the facility.
- G4.G This Certificate shall be appealable only by timely appeal of the Final Decision in EFSB 06-1 to the Massachusetts Supreme Judicial Court, in accordance with G.L. c. 25, § 5 and G.L. c. 164, § 69P.

SPECIFIC

- S1. Conditions A, B, D, and E to the EFSB 05-2 Final Decision are incorporated into and are conditions to this Approval and Certificate. A copy of the Conditions to the EFSB 05-2 Final Decision, including Conditions A, B, D, and E is attached hereto as "Certificate Attachment 1".
- S2. The applicant shall cooperate with requests by the Cape Cod Commission for information regarding construction and operation of the facility.
- S3. The applicant shall provide a copy of this Certificate, including Attachment 1, to its general contractor prior to the commencement of construction.

PROJECT CHANGE

- PC1. The applicant has an absolute obligation to construct the facility in conformance with all aspects of the project as presented to and approved by the Siting Board in EFSB 05-2. The applicant is required to notify the Siting Board of any changes other than minor variations to the project so that the Siting Board may decide whether to inquire further into a particular issue. The applicant is obligated to provide the Siting Board with

sufficient information on changes to the project to enable the Siting Board to make these determinations.

Ann Berwick, Chairman
Energy Facilities Siting Board

Attachment 1

CONDITIONS TO THE FINAL DECISION OF THE ENERGY FACILITIES SITING BOARD
IN KEYSPAN ENERGY NEW ENGLAND, EFSB 05-2

Accordingly, the Siting Board APPROVES the proposal of Colonial Gas Company, d/b/a KeySpan Energy Delivery New England, to construct approximately 13.1 miles of natural gas pipeline to augment its existing Sagamore Line on Cape Cod, in the Towns of Sandwich, Barnstable, Yarmouth, Dennis and Harwich, along the primary route, subject to the following conditions:

- A. In order to minimize construction and traffic impacts, the Siting Board directs the Company to provide the municipalities, at least 60 days prior to commencement of construction, with substantially completed engineering plans, and substantially completed traffic management plans including all site-specific traffic management plans, for review and comment. The Company is further directed to file with the Siting Board a copy of each traffic management plan, including each site-specific traffic management plan, when the plan has been finalized.
- B. In order to minimize land use and land resources impacts, the Siting Board directs the Company: (1) to arrange for a professional arborist to conduct an on-site inspection of the construction zone within 6 months before construction begins in an area; (2) based on recommendations by the arborist and, where applicable, tree wardens, to take all reasonable precautions to avoid removing or damaging trees; (3) to minimize damage to shrubbery and other plantings, as well as damage to or removal of fences, stone walls, lampposts, and other landscaping features; (4) to repair or replace any damaged or removed trees, shrubbery, or plantings, in consultation with the arborist and, where applicable, tree wardens, and with the agreement of the owner of damaged or removed vegetation; and (5) to repair or replace any damaged or removed fences, walls, or other landscaping features, with the agreement, as applicable, of the owner of the landscaping feature.
- C. In order to minimize environmental impacts, the Siting Board directs the Company to provide for the repaving of Highbank Road for its full width from the Bass River to Route 134, unless directed by the Town of Dennis not to provide for such full-width repaving. In implementing the required repaving, the Company should: (1) coordinate with the Town regarding specifications the Town may request, and (2) follow the Town's specifications to the greatest extent possible, consistent with other applicable requirements.

- D. In order to minimize noise impacts, the Siting Board directs the Company to limit construction work on the Western, Middle, and Eastern Segments to the hours from 7:00 a.m. to 6:00 p.m. unless otherwise authorized by the affected municipality.
- E. In order to minimize water resources impacts, the Siting Board directs the Company to refrain from all refueling and equipment-maintenance activities that have the potential for fluid spills, when vehicles are within identified Wellhead Protection Areas.
- F. In order to minimize historic resources impacts, the Siting Board directs the Company: (1) to consult with the South Dennis Historic District Commission prior to finalizing construction plans for the district; and (2) in consultation with the South Dennis Historic District Commission, to restore vegetation and any fences or other structures that are disturbed in the South Dennis Historic District due to construction of the proposed pipeline.

In addition, because the issues addressed in this Decision relative to the Company's proposed project are subject to change over time, construction of the proposed project must begin within three years of the date of this Decision.

Also, because of the Company's intention to phase project construction over a number of years, this Decision approves construction of the proposed project over a specific period ending on December 31, 2015. This Decision does not authorize any work after December 31, 2015. If the Company has not completed work by December 31, 2015, and wishes to continue, the Company must first seek a new approval from the Siting Board. The procedure for reviewing a request for a new construction approval will be determined by the Siting Board after receiving such a request.

Further, the Siting Board notes that the findings in this Decision are based upon the record in this case. A project proponent has an absolute obligation to construct and operate its facility in conformance with all aspects of its proposal as presented to the Siting Board. Therefore, the Siting Board requires KeySpan 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. KeySpan 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.

APPROVED, as amended, by the Energy Facilities Siting Board at its meeting of June 20, 2007, by the members and designees present and voting: Ann Berwick (Acting EFSB Chair/Designee for Ian A. Bowles, Secretary of Energy and Environmental Affairs); Greg Bialecki (Designee for Daniel O'Connell, Secretary of Housing and Economic Development; Arleen O'Donnell (Acting Commissioner, Department of Environmental Protection); David L. O'Connor (Commissioner, Division of Energy Resources); Paul J. Hibbard (Chairman, Department of Public Utilities); Tim Woolf (Commissioner, Department of Public Utilities); James M. Knott, Sr. (public member); and Gideon Gradman (public member).

Ann Berwick, Acting Chair
Energy Facilities Siting Board

Dated this 21st day of June, 2007

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).