

COMMONWEALTH OF MASSACHUSETTS  
Energy Facilities Siting Board  
Park City Wind LLC, EFSB 20-01/D.P.U. 20-56/20-57  
Siting Board Staff Proposed Amendments to the Tentative Decision  
December 8, 2023

Page	Line	Change
3	7	Insert “RR-EFSB-52 (S2); RR-EFSB-52 (S2), Att. 1;” to string cite.
11	10	Insert “and a motion to reopen the record. On November 27, 2023, the Company filed an opposition to the Town’s petition to intervene and motion to reopen the record” after “petition to intervene. <u>See Section XII</u> , for a ruling on the petition and motion.”
13	14	Insert after “timely written comments from”: “PCW, Eversource, and Jaqueline Johnson. In addition, the Siting Board received a public comment from Mark Askelson as an individual, and a comment from the Town of Barnstable.”
24	12	Replace “2020” with “2022”.
24	20	Insert “Superseding Order of Conditions for work proposed in Edgartown waters by MassDEP on May 16, 2023 (Company Supplemental Brief at 10, <u>citing</u> Exh. PCW-19).”
45	27	Insert “approximately” after “specifically”.
79	10-11	Replace “The Company will develop a Piping Plover Protection Plan to be approved by NHESP.” with “The Company has developed a Piping Plover Protection Plan, which was approved by NHESP in its April 1, 2022 Determination that the Project would not result in a “take” of any protected species, provided that the Company follows provisions in its Piping Plover Protection Plan.”
82	7	Insert “Work requiring longer continuous duration than normal construction hours allow, such as conduit pull-in operations, is exempted from this requirement.” before “Should the Company...”
82	11	Insert “If the Company and municipal officials are not able to agree on whether such extended construction hours or days should occur, the Company may request prior authorization from the Siting Board and shall provide the Town of Barnstable with a copy of any such request and authorization.” at the end of the paragraph.
87	25	Insert new paragraph: “Given the public interest in the potential health and safety risks from magnetic fields, the Siting Board directs the Company to provide a compliance filing, within the first 180 days of commercial operation, demonstrating that the actual magnetic fields at the Craigville Beach landfall site are consistent with the modeled results it has presented in this proceeding. For this Condition, “commercial operation” shall mean the

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		date when the PCW Energy Facility is installed and capable of delivering approximately 800 MW of energy.”
102	25	Replace “1.4” with “1.3”.
103	1	Add “and south of Route 6 for the “sending pit” for the Grid Interconnection’s Route 6 crossing” after “transmission circuits”.
103	1	Replace “RR-EFSB-52(S)” with “RR-EFSB-52(S2)”.
103	4	Replace “3,700” with “approximately 8,500”.
103	9	Replace “214-001” with “214-011”.
111	8	Replace “The Siting Board directs the Company to submit a copy of the final TMP(s) to the Siting Board and all other parties when available, but no less than four weeks prior to the commencement of construction, and to publish the TMP(s) on the Company’s Project website.” with “In any area where construction is planned, the Siting Board directs the Company to submit a copy of the final TMP(s) covering that area to the Siting Board and all other parties when available, but no less than four weeks prior to the commencement of construction, and to publish the TMP(s) on the Company’s Project website.”
114	5	Insert “If the Company and municipal officials are not able to agree on whether such extended construction hours or days should occur, the Company may request prior authorization from the Siting Board and shall provide the Town of Barnstable with a copy of any such request and authorization.” after “... of such permission.”
114	18-19	Replace “As stated above, approximately 1.4 acres of tree clearing is also necessary on Parcel 214-001 (Exh. VW-1, at 5-34; RR-EFSB-52 (S); see also Section VI.E.2.a.i).” with “As stated above, approximately 1.3 acres of tree clearing is also necessary on Parcel 214-001 and south of Route 6 for the “sending pit” for the Grid Interconnection’s Route 6 crossing (Exh. VW-1, at 5-34; RR-EFSB-52(S2); <u>see also</u> Section VI.E.2.a.i).”
122	13-14	Replace “The barrier would be three-sided, and 35 feet high (Exhs. VW-7, at 2-47; EFSB-V-12 (S)).” with “The barrier would be three-sided, 35 feet high along the western edge, and 30 feet high on the northern and southern ends (Exhs. VW-7, at 2-47; EFSB-V-12 (S)).”
124	7	Insert “According to PCW, the four main transformers and other major equipment, such as iron core reactors, at the Onshore Substation would contain a total of approximately 125,000 gallons of dielectric fluid (Exh. VW-7, at 12-56).” at the beginning of the paragraph.
124	7-13	Replace “The Company stated that it would equip major Substation components that use dielectric fluids, including transformers and iron core reactors, with full-volume (110 percent) containment sumps (Company Brief at 173, citing Exhs. VW-1, at 1-18; VW-7, at 2-48; VW-11, at 1-12). At the Town’s request, the Company committed to adding an additional margin to accommodate stormwater from an extreme precipitation event, i.e., the

Page	Line	Change
		Probable Maximum Precipitation event of 30 inches of rain as defined by the Town (Company Brief at 173, citing Exhs. VW-1, at 1-18 to 1-19; VW-7, at 2-48).” with “The Company stated that it would equip each major Substation component that uses dielectric fluids with its own full-volume (110 percent) containment sumps (Exh. VW-7, at 12-56; Company Brief at 173, <u>citing</u> Exhs. VW-1, at 1-18; VW-7, at 2-48; VW-11, at 1-12). At the Town’s request, the Company committed to adding an additional margin to accommodate stormwater from an extreme precipitation event, <u>i.e.</u> , the Probable Maximum Precipitation event of 30 inches of rain as defined by the Town’s consulting engineers (Exh. VW-7, at 12-56; Company Brief at 173, <u>citing</u> Exhs. VW-1, at 1-18 to 1-19; VW-7, at 2-48).”
124	13	Insert “Furthermore, each individual containment area would be routed through the Company’s drain system, which will include an oil-absorbing inhibition device and oil water separator, before being directed to an underground infiltration system (Exh. VW-1, at 1-18).” before “The Company also committed...”
124	18-20	Delete the sentence: “Furthermore, the Company’s drain system, which would be connected to each individual containment area, will include an oil-absorbing inhibition device and oil water separator (Exh. VW-1, at 1-18).”
132	3	Insert “if PCW elects to use foams for fire suppression at the Onshore Substation,” after “... harm to the environment,”
133	14	Insert “Onshore Substation” after “... re-grading the”.
151	6	Insert “For this Condition R, “commercial operation” shall mean the date when the PCW Energy Facility is installed and capable of delivering approximately 800 MW of energy.” after “... presented in this proceeding.”
151	6-11	Replace “In addition, to gain earlier visibility of the steps being taken by the Company to achieve this result, the Siting Board further directs the Company to provide a pre-construction compliance filing documenting the noise profiles of the Onshore Substation equipment types listed in Exh. VW-7, 7-12, Table 7-3, when the equipment is procured, and any additional noise mitigation measures, such as additional or taller sound walls, that the Company intends to take as a result.” with “In addition, to gain earlier visibility of the steps being taken by the Company to achieve this result, the Siting Board further directs the Company to provide a pre-construction compliance filing documenting (a) the noise profiles of the Onshore Substation equipment types listed in Exh. VW-7, 7-12, Table 7-3, when the relevant information from the equipment supplier is made available to Park City Wind, and (b) any additional noise mitigation measures, such as additional or taller sound walls, that the Company intends to take as a result.”
201	4	Insert “in the public ways” after “installation of the Onshore Cables”.
201	9	Insert “in the public ways” after “installation of the Onshore Cables”.
201	9	Insert “The Siting Board grants individual zoning exemptions to the three locations of the Onshore Cables that are not in the public ways: (1) the

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		Craigville Beach landing site; (2) 2 Short Beach Road; and (3) a 0.2 mile segment within the Eversource ROW 343).” at the end of the paragraph.
207	4	Remove the phrase “for the Onshore Substation”.
207	5-9	Delete the sentence “With respect to the Onshore Cables, the Siting Board has concluded that exemptions from local zoning are not necessary for construction and operation of the Onshore Cables from landfall to the Onshore Substation within the meaning of G.L. c. 40A, § 3. Accordingly, the Siting Board denies the Company’s requests for a comprehensive exemption from the Barnstable Zoning Ordinance as it relates to the installation of the Onshore Cables.”
207	9	Insert new footnote at the end of the paragraph: “The grant of individual and comprehensive zoning exemptions do not apply to the property at 6 Shootflying Hill Road. The Company has not provided the notice and hearing required under the Zoning Statutes, G.L. c. 40A, §§ 3, 11. <u>See Vineyard Wind 1 LLC, D.P.U. 21-08, at 3 n.4 (2021) (Siting Board could not grant zoning exemptions without compliance with procedural and substantive requirements of the zoning statute).</u> ”
207	19-20	Replace “, and [DENIES] the Company’s request for a comprehensive zoning exemption for the Onshore Cables” with “in public ways”
211	17	Replace “for the Onshore Substation.” with “. The grant of individual and comprehensive zoning exemptions do not apply to 6 Shootflying Hill Road.”
212	21	Insert “Work requiring longer continuous duration than normal construction hours allow, such as conduit pull-in operations, is exempted from this requirement.” before “Should the Company...”
212	26	Insert “If the Company and municipal officials are not able to agree on whether such extended construction hours or days should occur, the Company may request prior authorization from the Siting Board and shall provide the Town of Barnstable with a copy of any such request and authorization.” at the end of the paragraph.
212	21	Insert new Condition: “Given the public interest in the potential health and safety risks from magnetic fields, the Siting Board directs the Company to provide a compliance filing, within the first 180 days of commercial operation, demonstrating that the actual magnetic fields at the Craigville Beach landfall site are consistent with the modeled results it has presented in this proceeding. For this Condition, “commercial operation” shall mean the date when the PCW Energy Facility is installed and capable of delivering approximately 800 MW of energy.”
213	1-4	Replace “The Siting Board directs the Company to submit a copy of the final TMP(s) to the Siting Board and all other parties when available, but no less than four weeks prior to the commencement of construction, and to publish the TMP(s) on the Company’s Project website.” with “In any area where construction is planned, the Siting Board directs the Company to submit a copy of the final TMP(s) covering that area to the Siting Board and all other parties when available, but no less than four weeks prior to the

Page	Line	Change
		commencement of construction, and to publish the TMP(s) on the Company's Project website."
213	19	Insert "If the Company and municipal officials are not able to agree on whether such extended construction hours or days should occur, the Company may request prior authorization from the Siting Board and shall provide the Town of Barnstable with a copy of any such request and authorization." after "... of such permission."
214	3	Insert "if PCW elects to use foams for fire suppression at the Onshore Substation," after "... harm to the environment,"
214	8	Insert "Onshore Substation" after "... re-grading the".
214	14	Insert "For this Condition R, "commercial operation" shall mean the date when the PCW Energy Facility is installed and capable of delivering approximately 800 MW of energy." after "... presented in this proceeding."
214	14-19	Replace "In addition, to gain earlier visibility of the steps being taken by the Company to achieve this result, the Siting Board further directs the Company to provide a pre-construction compliance filing documenting the noise profiles of the Onshore Substation equipment types listed in Exh. VW-7, 7-12, Table 7-3, when the equipment is procured, and any additional noise mitigation measures, such as additional or taller sound walls, that the Company intends to take as a result." with "In addition, to gain earlier visibility of the steps being taken by the Company to achieve this result, the Siting Board further directs the Company to provide a pre-construction compliance filing documenting (a) the noise profiles of the Onshore Substation equipment types listed in Exh. VW-7, 7-12, Table 7-3, when the relevant information from the equipment supplier is made available to Park City Wind, and (b) any additional noise mitigation measures, such as additional or taller sound walls, that the Company intends to take as a result."
215	3	Insert Section titled "XII: Ruling on Town of Barnstable Petition to Intervene and Motion to Reopen the Record" before "XII. Decision". <u>See attached</u> for the text of the new Section XII.
215	3	Replace "XII. Decision" with "XIII. Decision"

## XII. RULING ON TOWN OF BARNSTABLE TO INTERVENE AND MOTION TO REOPEN THE RECORD

### A. Procedural History

On October 3, 2023, the Presiding Officer sent all parties a copy of a press release he had just received. It had been issued by Avangrid, PCW's parent company; and it stated that Avangrid would terminate the Power Purchase Agreements ("PPAs") that it had entered with the Connecticut Electric Distribution Companies ("EDCs") (see RR-EFSB-90(S)). The Project had been committed to selling its energy to Connecticut EDCs pursuant to these PPAs. The Presiding Officer offered all parties an opportunity to file supplemental briefs "addressing the effect of the termination of the PPAs, if any, on the issues to be decided by the Siting Board in this matter." PCW filed a supplemental brief on October 13, 2023, in which it asserted that termination of the PPAs does not affect the adjudication of this proceeding. No other party filed a supplemental brief.

On November 17, 2023, the Presiding Officer issued a "Save the Date" notification to all parties that indicated that the Siting Board anticipated a Board meeting for December 11, 2023. The Presiding Officer issued a Tentative Decision ("TD") to Board members and the parties on Wednesday, November 22, 2023. After notice of the Board meeting was posted online, the Siting Board received many additional emails, primarily from Barnstable residents, opposing the Project. A meeting of the Siting Board to consider the TD is scheduled for December 11, 2023.

On November 20, 2023, the Town of Barnstable filed a document containing: (1) a petition to intervene as a party in this proceeding; and (2) a motion to reopen the proceeding to take additional evidence ("Barnstable Petition"). On November 27, 2023, the Company filed an opposition that objects to both the intervention and the reopening of the record ("PCW Opposition"). No other party filed a document relating to Barnstable's Petition.

For the reasons below, the Siting Board denies both the petition to intervene and the motion to reopen the record.

### B. Town Of Barnstable's Late-Filed Petition to Intervene

#### 1. Standard of Review

When assessing a late-filed petition to intervene, the Siting Board first examines whether there is good cause for the late filing of the petition before reaching the issue of whether the

petitioner is substantially and specifically affected by the proceeding. Exelon West Medway, LLC and Exelon West Medway II, LLC, EFSB 15-1/D.P.U. 15-25, at 4 (Presiding Officer ruling on the late-filed motion of the Town of Franklin to intervene) (April 26, 2016) (“Exelon West Medway”), citing NSTAR Electric Grid Company d/b/a Eversource Energy and New England Power Company d/b/a National Grid, EFSB 15-04/D.P.U. 15-140/15-141, at 3 (Presiding Officer ruling on Petition of ISO New England for Leave to Intervene Out of Time as a Party) (December 10, 2015). The Siting Board also looks to the Department’s standards for assessing late-filed petitions. Exelon West Medway at 4, n.3. The Department balances the extent of participation against the need to conduct the proceeding in a complete, efficient, and orderly fashion. Exelon West Medway at 4, n.3. In conducting this balancing, the Department has considered: (1) the extent of the delay; (2) the effect of the late participation on the ongoing proceeding; and (3) the explanation for the tardiness. Exelon West Medway at 4, n.3, citing Western Massachusetts Electric Company, D.P.U. 92-8C-A at 5 (1993), NYNEX, D.P.U. 94-50, at 3 (1994).

## 2. Positions of the Parties

### a. Town of Barnstable

The Town suggests that the Board adopt a “good cause” standard for allowing late intervention (Barnstable Petition at 3, n.1). Barnstable asserts that the HCA requires the Company to notify the Town of any “facts, circumstances, information, or developments that a reasonable observer would deem material to the Town’s or PCW’s interests” (Barnstable Petition at 3). The Town asserts that it relied on this comprehensive duty to disclose in deciding not to intervene by the October 28, 2020, deadline (Barnstable Petition at 3). Barnstable now argues, however, that “the passage of time and the project’s current status present three reasons that demonstrate good cause for the Board to allow intervention” (Barnstable Petition at 3). These three reasons are:

- i. The termination of the PPAs (Barnstable Petition at 4). This termination, the Town argues, will cause a delay in construction that will have “significant negative impacts” on the Town (Barnstable Petition at 4).

- ii. PCW's failure to notify the Town of a "material change" in the use of 2 Short Beach Road, Centerville (Barnstable Petition at 5). Barnstable asserts that PCW failed to notify the Town of changes to its "staging and drilling plans" (Barnstable Petition at 5). The Town asserts that its Town Manager first learned of the "changes" in June of 2023 (Barnstable Petition at 5).
- iii. The issuance of a permit to the Town under the Massachusetts Endangered Species Act ("MESA") (Barnstable Petition at 6). The Town argues that this permit bans the take of endangered species and "established management obligations of the Town" (Barnstable Petition at 6). Therefore, Barnstable argues, "[t]he Board should consider whether PCW's MESA and other permits and its proposed construction activities may cause a violation of the Town's MESA permit" (Barnstable Petition at 6).

b. Park City Wind

In its Opposition, PCW asserts that "[t]he extent of the Town's delay [in filing a motion to intervene] is egregious" (PCW Opposition at 5). Although the deadline to file a motion to intervene was October 28, 2020, the Town waited an additional three years to file such a motion (PCW Opposition at 5). PCW notes that the Siting Board has previously denied a motion to intervene late on the grounds that a delay of six months after the close of the intervention period as unreasonable (PCW Opposition at 5, 6, citing Exelon West Medway at 6). Furthermore, PCW cites to NSTAR Electric Company, EFSB 15-03/D.P.U. 15-64/15-65 (Ruling on Petition of Town of Winchester for Leave to Intervene Out of Time) (April 11, 2016) ("NSTAR Ruling"). In the NSTAR Ruling, the Siting Board denied the Town of Winchester's 10-month late petition to intervene due to the "considerable delay that is likely to occur as a result of allowing a new intervenor at such a date" (PCW Opposition at 5, citing NSTAR Ruling).

PCW argues that "nothing in Barnstable's Petition justifies the Town's extraordinary delay or the [Petition's] disruptive and highly prejudicial timing" (PCW Opposition at 2). PCW also asserts that allowing Barnstable's Petition might make it impossible for the Company to bid the Project into "one or more of the solicitations issued or to be issued by Massachusetts, Connecticut, and Rhode Island" (PCW Opposition at 6). Furthermore, the Company argues that allowing this motion would be bad precedent (PCW Opposition at 7). Allowing the Petition would "encourage future opponents of projects before the Siting Board to deliberately choose not to intervene and participate in proceedings, but rather to wait until the eve of a decision when an intervention would be most disruptive, regardless of its merits" (PCW Opposition at 7).



Regarding Barnstable's reasons for intervention, the Company states that: (1) the existence of PPAs is not a prerequisite for Siting Board approval; (2) the alleged "negative impacts" feared by the Town are logistical and outside the Board's scope of review; (3) PCW's plans for 2 Short Beach Road "have been publicly available for over three years"; and (4) PCW has already obtained MESA approval; the Town's separate efforts to obtain a MESA determination are irrelevant (PCW Opposition at 8-13).

### 3. Analysis and Findings

This proceeding started approximately three and one-half years ago, and the intervention deadline was over three years ago. Therefore, Barnstable's request to intervene at such a late date is highly unusual. Further, allowing intervention at this time, long after the proceeding is complete and on the eve of the Board meeting, is clearly prejudicial to the parties and the efficient conduct of this proceeding. Further, the Town does not provide an adequate reason for waiting so long to request intervention.

As described further below, the issues raised by Barnstable are not persuasive. The use of 2 Short Beach Road is already a part of the record and has been for some time. Furthermore, the record includes information regarding the impacts of using that parcel, and those impacts are discussed in the Tentative Decision. The rejection of the PPAs, while relevant, has already been examined in this proceeding and there is a record on this subject. Finally, Barnstable's new MESA permit (for the Town's actions unrelated to this Project) is irrelevant to the Project.

For these reasons, the Siting Board denies the Town of Barnstable's Petition to Intervene.

### C. Town of Barnstable's Motion to Reopen the Record<sup>1</sup>

#### 1. Standard of Review

The Board's procedural regulations permit the reopening of a completed adjudicatory hearing or record only for good cause, and only with respect to evidence that was unavailable at the time of hearing. Specifically, a party seeking to reopen a proceeding must: (1) explain the nature and relevance of the evidence it seeks to present; (2) explain why the evidence was

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<sup>1</sup> Given that the Siting Board has denied Barnstable's petition to intervene, the motion to reopen the record might be deemed to be moot. In the interest of completeness, however, this decision also addresses Barnstable's motion to reopen on the merits.

unavailable while the hearing was still open; and (3) demonstrate clearly that good cause exists for reopening. 980 CMR 1.09(1). To demonstrate good cause clearly, a party must show that the new evidence, if allowed into the record, would be likely to have a significant impact on the Siting Board's decision in the proceeding. NSTAR Electric Company d/b/a Eversource Energy, EFSB 14-04A/D.P.U. 14-153A/14-154A, at 14-25 (2021); NSTAR Electric Company d/b/a Eversource Energy, EFSB 17-02/D.P.U. 17-82/17-83, at 223-232 (2019); Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric Company, EFSB 02-2/D.T.E. 02-53, Hearing Officer Ruling on Motion to Reopen (March 21, 2005) ("Cape Wind Ruling on Reopening"); in accord, Alliance to Protect Nantucket Sound v. Department of Public Utilities, 461 Mass. 190, 194-195 (2011) ("Alliance III"); Box Pond Association v. Energy Facilities Siting Board, 435 Mass. 408, 421-423 (2001) ("Box Pond"). See also NSTAR Electric Company d/b/a Eversource Energy, EFSB 16-02/D.P.U. 16-77, Presiding Officer Ruling on Motion to Reopen Evidentiary Hearings (April 13, 2018) ("Needham-West Roxbury"); NSTAR Electric Company d/b/a Eversource Energy, EFSB 14-04/D.P.U. 14-153/14-154, Presiding Officer Ruling on Four Post-Hearing Evidentiary Motions (November 8, 2017).

Whether to reopen a completed adjudicatory hearing is, in the first instance, a matter of administrative agency discretion. GreenRoots, Inc. v. Energy Facilities Siting Board, 490 Mass. 747, 750 (2022); Town of Sudbury v. Energy Facilities Siting Board, 487 Mass. 737, 745 (2021); Alliance III, 461 Mass. at 190, 193-194. For a number of reasons, including considerations of due process, efficiency, and finality, an agency's discretion to reopen a completed hearing is to be exercised sparingly, with circumspection, and for compelling reasons only. See Alliance III, 461 Mass. at 190, 193-195; Covell v. Department of Social Services, 42 Mass. App. Ct. 427, 433-434 (1997); Stowe v. Bologna, 32 Mass. App. Ct. 612, 616 (1992). This is why, in addition to demonstrating unavailability and relevance, a party seeking to reopen the record in a Siting Board proceeding for the purpose of admitting new evidence must also clearly demonstrate good cause, by showing that the evidence, if admitted, would be likely to have a significant impact on the Siting Board's decision in the proceeding. See 980 CMR 1.09(1); Cape Wind Ruling on Reopening at 12-14; Alliance III, 461 Mass. at 190, 194-195.

## 2. Positions of the Parties

### a. Town of Barnstable

Barnstable argues the hearing should be reopened to address four discrete issues: (1) whether to establish performance deadlines to require PCW to demonstrate its ability to timely contribute renewable energy to the regional grid via permits, PPAs, and financing in view of the termination of the PPAs with Connecticut; (2) the increased environmental impacts resulting from (a) PCW's apparent inability to coordinate construction with the Town's sewer work; and (b) PCW's proposed use of 2 Short Beach Road; (3) coordination of conditions in any final decision with the Town's MESA permit; and (4) incorporation of the HCA in the conditions of any final decision (Barnstable Motion at 6-10).

### b. Park City Wind

PCW's Opposition identifies a number of concerns with the motion to reopen.

Regarding the delay that reopening the record would cause, PCW argues that the "timing of the Motion and its request to conduct a third round of hearings could not be more prejudicial to Park City Wind or to the orderly disposition of this proceeding" (PCW Opposition at 5). In support, PCW states that it "intends to re-bid its proposed offshore wind facility, including the Project, into one or more of the solicitations issued or to be issued by Massachusetts, Connecticut, and Rhode Island" (PCW Opposition at 6). If the Project is awarded a contract, then the Company "intends to proceed expeditiously to construction" (PCW Opposition at 6). The Company asserts that it will have an advantage in expedited construction due to "its advanced permitting" which will enable the Project "to deliver clean energy to the region as soon as possible" (PCW Opposition at 6, citing Exh. RR-EFSB-90(S)). Massachusetts, Connecticut, and Rhode Island are, the Company asserts, "soliciting up to 6,000 MW of offshore wind capacity" (PCW Opposition at 6). This solicitation reflects, "an urgent need for additional quantities of offshore wind generation" (PCW Opposition at 6, citing Exh. RR-EFSB-90(S)).

The Company also notes that: "The announcement of the termination of the PPAs and the Siting Board's request that the parties file supplemental briefing on the effects, if any, of the PPA terminations occurred almost two months ago" (PCW Opposition at 7). The Town could have raised its concerns at that time (PCW Opposition at 7). Furthermore, the Company asserts, the existence of PPAs "are not a prerequisite to Siting Board approval" (PCW Opposition at 7).

Regarding the construction schedule for the Project, according to the Company, construction of the Town's sewer system is outside of the jurisdiction of the Siting Board (PCW Opposition at 8, citing Exelon West Medway at 8). Furthermore, the Company asserts that it remains committed to coordinating the construction of the Project with the construction of the Town's sewer system; and the Company's contemplated Project schedule "is consistent with the Town's sewer installation schedule" (PCW Opposition at 8-9). PCW also represents that it has received approvals from both the Cape Cod Commission and the Barnstable Conservation Commission that would allow the Company to begin its work on schedule (PCW Opposition at 9). PCW argues that "[t]his timely collaboration will be facilitated by a prompt ruling" in favor of PCW on the present motion (PCW Opposition at 9).

Regarding the Company's use of 2 Short Beach Road, the Company maintains that its plans for 2 Short Beach Road were provided to the Town and have been publicly available for over three years (PCW Opposition at 10). In support, the Company cites to nine instances in the record at which its intentions for this property were stated (PCW Opposition at 10-11). PCW further asserts that some of the instances – the Analysis supporting the Section 69J Petition, the Zoning Petition, and the ENF – were provided to the Town almost two years before it signed the HCA (PCW Opposition at 11). PCW explained its proposed use of 2 Short Beach Road in: the Notice of Intent filed with the Barnstable Conservation Commission on April 29, 2022; the joint application filed with the MassDEP for a section 401 Water Quality Certificate and a Chapter 91 License, both filed on May 5, 2022; and in the Development of Regional Impact Application submitted to the Cape Cod Commission on June 10, 2022 (PCW Opposition at 10-12). The Company concludes that its proposed use of 2 Short Beach Road "was no secret" and that it has been established for some time (PCW Opposition at 11).

Regarding the Town's MESA permit, PCW represents that it has already obtained the MESA approval necessary for its Project activities (PCW Opposition at 13). That the Town has obtained its own MESA approval is, the Company asserts, not relevant to the Project (PCW Opposition at 13).

### 3. Analysis and Findings

In Town of Sudbury v. Energy Facilities Siting Board, 487 Mass. 737 (2021) ("Sudbury"), the Supreme Judicial Court ("SJC") addressed a motion to re-open filed after briefing. In that case, the appellant argued that the Siting Board erred in not requiring the

petitioner to spend further time to update certain cost estimates. Sudbury, 487 Mass. at 749-750. The SJC upheld the Board's decision on the grounds that requiring such updated estimates would cause a delay in the proceedings that were 32 months old. Sudbury, 487 Mass. at 750. The Court held that: "Such a delay could frustrate the board's ability to complete the approval process in a timely manner, and thus leave the Commonwealth's energy needs unaddressed and its residents unprotected." Sudbury 487 Mass. at 750. See also GreenRoots, Inc. v. Energy Facilities Siting Board, 490 Mass. 747 (2022) (SJC upholds Siting Board's decision to decline to re-open record after Final Decision). Clearly reopening the record at this time would extend the proceeding and delay final decision in this matter.

Regarding the evidence that the Town would like to submit in a reopened record, some of the evidence that the Town wishes to introduce may not have been available at the time the hearings were conducted: e.g., the rejection of the PPAs. But that evidence became available some time ago, and the Presiding Officer signaled to the parties that the Siting Board was considering the effect of the PPA terminations. If the Town believed that rejection of the PPAs constituted a significant issue, it could have moved to intervene and to reopen the record at that time. Notwithstanding the Town's failure to do either at the time the PPA terminations were announced, the Siting Board, on its own initiative, sought additional comments from the parties in the proceeding.

Other issues raised in the Town's Motion, such as coordination of the Project construction work and the Town's sewer installation, are governed by the HCA. The Siting Board notes that the HCA is a separate contract between the Town and the Company. If the HCA parties are dissatisfied with performance by either, they would have remedies available for breach of the HCA as a contract, and they might have other legal recourse. See, NSTAR Electric Company, d/b/a Eversource Energy, EFSB 15-04/D.P.U. 15-140/15-141, at 94 (2018) ("The Siting Board notes that an HCA is a private agreement between two parties. The Board traditionally does not incorporate the HCA into a decision nor does the Board enforce the terms of an HCA") (internal citations omitted); Exelon West Medway at 6 ("the HCA is a private agreement between two parties to this proceeding, Exelon and Medway, and therefore, the Siting Board declines to incorporate the full HCA into the Final Decision regarding the Facility, and also declines to assume enforcement responsibilities for the HCA, per se"); see also, Medway Grid LLC, D.P.U. 22-18/22-19, at 16 (2023) ("the Department and Siting Board have stated that

while an HCA is part of the record in a proceeding, and the basis of some of the conditions imposed, the HCA is a private agreement and it is not appropriate to incorporate the HCA into a decision”).

The Siting Board agrees with the Company that the uses of 2 Short Beach Road have been in the record for over three years. Indeed, the Tentative Decision assesses the impacts of the Company’s proposed use of 2 Short Beach Road. Therefore, there is no need for reopening the record now to address those impacts.

The Company has already obtained a MESA permit which outlines its obligations regarding protecting piping plover habitat, including the creation of a Piping Plover Protection Plan. The Town’s MESA permit addresses Town activities, unrelated to the Project. The MESA issue argued by the Town strikes us a minor issue at best, and entirely irrelevant to a decision in this proceeding.

The Town has not addressed the issue of whether the evidence it seeks to introduce would be likely to have a significant effect on the Board’s decision. After reviewing the record and the arguments, the Siting Board concludes that even if it were to reopen the record, the evidence to be presented would not be likely to have a significant effect on the Board’s decision. The Siting Board also agrees with the Company’s argument that reopening the record now might jeopardize the Project’s ability to provide needed wind energy promptly. All these factors lead the Board to conclude that the Siting Board should not use its authority and discretion to reopen the record on the eve of a Siting Board decision. The Siting Board finds that the Town did not demonstrate good cause for its request to reopen the record. For all these reasons, the Siting Board denies the Town’s Motion to Reopen the record.