**Petition of Moraga Storage, LLC** **EFSB 25-07**
**Pursuant to G.L. c. 40A § 3 for an Exemption**
**From the Zoning By-law of the Town of**
**Oakham, MA**

# REPLY BRIEF OF SEVEN
# OAKHAM RESIDENT REPRESENTED INTERVENOR PARTIES

## Introduction

The Initial Brief of Moraga Storage, LLC ("Moraga" or the "Company") is essentially a rehash of its original Petition that ignores most of the evidence and questions raised by the EFSB and other parties as if a hearing never took place, its experts and witnesses were never cross-examined and discovery requests were never made or responded to.[1] As set forth in the Initial Brief of Represented Intervenors Parties ("RPI") Moraga did not nearly meet its burden to show why its Petition should be granted. It failed to present substantial evidence in the record to establish that it conducted a good faith, reasonable alternative site evaluation; failed to complete the necessary filings and consultation with the Conservation Commission, the Health Department, Transportation and Public Safety officials and other municipal agencies and boards prior to and during the hearing; and failed to respond adequately or at all to the numerous requests for information made prior to and in the course of the hearing as well to questions raised in cross examination of its witnesses and experts at the hearing.

The result of the Company's deliberate strategy to delay, avoid and mislead is a record devoid of even the barest facts establishing that this is an appropriate site for a BESS. Indeed, the opposite is true. The record reflects that the proposed BESS will result in significant environmental, safety, noise and traffic impacts to neighboring residents, school children and

[1] See attached Appendix

destruction of the rural character of a very small town during both construction and operation of this major industrial facility. For the reasons set forth in our Initial Brief and herein, RPI request the EFSB to deny Moraga's Petition.

## I. THE COMPANY RELIES ON PRECEDENT THAT ACTUALLY SUPPORTS INTERVENORS' POSITION THAT THE COMPANY'S SITE SELECTION PROCESS WAS LEGALLY FLAWED AND WHOLLY INADEQUATE

The Company brief argues that even though their petition provided four unacceptable potential sites for BESS site selection, it has satisfied Massachusetts law by the *quantity* alone (four sites) regardless of their *quality or suitability*. On site selection, the Company in its Initial Brief (at p. 18) relies on the EFSB decision in *Martarano v. Department of Public Utilities*, 401 Mass. 257, 265 (1987), to instead now claim that Moraga does not need to select an acceptable site among four bad alternative sites that Moraga chose to present. Ignoring suitability of sites proposed is not proper site selection, and moreover, the *Martarano* precedent on which the Company relies is entirely inapplicable for reasons stated below. .

The *Martorano* case involved adding a new compressor station to increase underground natural gas pipeline compression that physically could only be located at one of the very few locations where the large pipeline of the wholesale interstate gas pipeline of one company happened to cross the smaller pipeline of the Massachusetts LDC retail gas company. Initially in that case the applicant only identified one such possible viable location. However, during the lengthy EFSB hearing the hearing was adjourned in order for the EFSB to be presented with four possible viable sites where those pipes crossed.

In contrast to *Martarano* in which there were only four possible available sites identified where the pipes crossed, in this case the record revealed, and the Company did not disagree, that in Massachusetts alone, there would be approximately 220,000 possible

sites/locations where a BESS facility could interconnect with a high voltage transmission line. Tr. pp. 98-100. That number doubles to approximately 440,000 sites/locations in Massachusetts if one utilizes the possibility to connect from either side of a high voltage transmission line. Id. . Among these hundreds of thousands of potential viable BESS sites, the Company chose none that would meet state BESS siting criteria, including sites located in Massachusetts, Worcester County, and even within an approximate 12-mile radius of Oakham. . Tr. pp. 84-89, 156-158. Instead, the Company selected four sites that do not satisfy state siting criteria, including having proper zoning. Tr. p. 146-147. Also, the Massachusetts DOER, the sister energy regulatory agency of the Commonwealth, specifically requests of qualified applicants, whether there is co-location. See Exhibit RPI-2, sec. 3.5, discussed in Initial Brief, 11.

In sum the Company's site selection process here is exactly the opposite of the process utilized in the *Martarano* case on which the Company relies. Here the Company:

- Chose 4 non-viable sites and then argued that the Oakham site wasn't any worse than the other sites
- Admitted on the record that it never considered any other site than these four from among thousands of viable sites
- Its site selection procedure was so limited and non-rigorous that described each site and the reasons for choosing or not choosing it in half a page or less.
- Admitted on the record that it never considered any of the Massachusetts DOER criteria for BESS site selection in choosing these four unacceptable sites
- Did not disagree that every other BESS site selected as fulfilling the Commonwealth's BESS target goals in the DOER 2025 auction was properly sited in an industrial zone at a previously used energy generation or energy storage facility
- Admitted that the math seemed correct that other potential BESS sites with reasonable access to a high-voltage transmission line included: :

- hundreds of thousands of such potential sites in Massachusetts
- a large number of such sites in Worcester County
- numerous potentially better sites with co-location with either renewable energy projects, existing substations, and/or power generation facilities, none of which it considered. Tr. pp. 84,101-102, 111, 146-147, 156-158.

## II. THE COMPANY'S REQUIRED PRODUCTIVE COLLABORATION AND WORK WITH THE TOWN IS DEFICIENT ON THE RECORD

### A. Absence of any substantive or complete applications for zoning and other local permits and approvals prior to or after it filed its Petition

The Company's Initial Brief now claims that: "Moreover, the Company has conducted community outreach and attempted to coordinate with the Town to minimize local impacts. Thus, the Siting Board should determine that the benefits of the Project, combined with its minimal local impacts, support a zoning exemption." Company Brief, at 19. This claim is inaccurate and is contradicted by the record where company representatives admitted that for strategic reasons they did not apply or consult with Town officials before or after filing their Petition because they all along decided to make such applications and consultations after the hearing was over and close to the date set by the Presiding Officer for the EFSB to make a decision. See Initial Brief of RPI, 35, 44. On close study, he list of purported contacts in Moraga's Petition, Table 10.1, were not meetings but emails not followed up on and informal approaches to Town officials. Notably Moraga's list omitted the applications for permits in 2022 and 2023 for a sham online auto auction and a Planning Board Meeting in February 2024. At that Meeting, an official of the property owner, Zovl, party to the land control agreement with Moraga's parent, Rhynland, testified--just a year before Rhynland filed its Petition and less than a year before it hosted a public meeting in Barre about the project--that the Company did not plan to proceed with such a project and, when informed that it would have been barred by a Town bylaw, stated that they

would never violate the law. Initial Brief, p. 6. This is hardly an example of constructively providing the required "past and current productive relationships with host communities" See Massachusetts DOER Section 7.9 standards and criteria for qualified BESS to satisfy Commonwealth goals, IRP-2 at 38.

The Company claims that "The Company will work collaboratively with the Oakham Fire Department to finalize these documents, including providing annual training for firefighters." Company Brief p. 32. Rhynland will be nowhere to be found if there is a safety or runaway fire issue related to this BESS location. Rhynland is a New York company, not a Massachusetts company. Moraga is only a special purpose operating shell with no employees that aren't Rhynland employees of the parent New York company. There will be no Rhynland or Moraga employees stationed at the Oakham facility. In the event of a safety emergency as has occurred at some BESS facilities in the U.S., it will be of no help for Rhynland to be in email or phone contact from New York. The Oakham Fire Department Chief testified that his voluntary fire department has no ability to handle a BESS runaway fire event. There are no pressurized fire hydrants in Oakham. The record documents that large trucks may not be able to access the Site without encroaching on private property or going off the road. [2] Intervenors Initial Brief at 46.

The maximum amount of insurance coverage that Moraga will carry for any accident events was specified by the Company to be an umbrella coverage of $10 million. Tr. p. 1073, lines 8-10. This is the only assurance provided by Moraga. Tr. p. 1073, lines 17-21. Rhynland is not taking responsibility as the operator of this site; it has created Moraga as a limited liability

[2] The Company's project representative admitted that the access road it has been using since it entered into the land control agreement in 2002 crosses over part of James and Danielle Stevens' property without an easement or permission.

company to operate only this site. Tr. p. 1076, lines 2-6. $10 million is not sufficient to cover any significant BESS accident with the facility sited in the middle of a residential development and forested land that could spread a fire.

A 180 MW BESS with a substation would include an investment of approximately $250,000,000, where a fire or failure event at the BESS would create a loss of just that BESS equipment alone far exceeding and exhausting a $10 million insurance policy. This would leave nothing to compensate for damage to any of the 640 houses, personal property, and other properties in Oakham. If a BESS facility were ever sited at this property proximate to residential houses in Oakham, the owner and operator should provide a separate letter of credit backed by a viable large financial institution against any future losses that could be caused by a BESS accident to real and personal properties in the Town.

During the hearing, Company witnesses would not answer whether Rhynland, Moraga and/or Segue, would commit to an irrevocable letter of credit to provide a surety bond for damage and loss that could result from an accident at this site. If EFSB were to decide to approve this Petition, we request that they add a mandatory requirement for the owner to provide an irrevocable Letter of Credit for $100 million dedicated only to cover third party claims for any losses incurred from such a BESS facility during and a reasonable time after the date it ceases operation and completes required de-commissioning and cleanup.

## III. THE COMPANY DID NOT MONITOR NOISE LEVELS AT KEY POINTS ON THE ABUTTERS' PROPERTY LINES SHARED WITH THE BESS FACILITY AND WAS DEFICIENT IN OTHER RESPECTS

The record reflects that the Company and its noise engineer failed to:

-calculate noise at shared property lines of the BESS site and abutting existing homes;

-take account over time as batteries degrade, become less efficient producing substantially more heat that will require more fan operation, increasing noise exponentially over time;

-take account that his noise calculation only reflects the lesser 9 dBA of additional noise in the first year before batteries begin to degrade producing more heat requiring more fan operation to cool, and thus more noise at the property lines shared with immediately adjacent homes, Tr. p. 1058-1063.

The Company Brief states that the Company will think about these greater noise impacts that could exceed maximum state standards later when the EFSB is no longer involved, no public record is open, and no more focus is set on what they so far overlooked. Intervenors Initial Br. at 38-42. That simply is too little too late. Both state and federal law require the Company to sustain its burden to create an adequate record to justify the EFSB overriding local zoning, especially where it is the only one of the 351 municipalities in Massachusetts in which the Attorney General approved its current zoning laws regarding BESS.

The Company stated that it couldn't supply these higher noise levels over time because it didn't know how and the fan noise data had been supplied by Tesla. The Company did not address the additional noise from transformers and there is nothing in the record to support the limited noise data the Company's noise witness did supply. Id.

The Company's Initial brief fails to address construction noise impacts that could last for at least an 18-month plus period. It's not enough for the Company to state that it calculates it can hold noise dBA increases in the middle of the night or early morning to + 9 dBA at some residential and community receptors (homes, schools), because it leaves open the possibility that

noise will be greater during the day at locations closer to the BESS and community shared properly lines. *See* Tr. p. 198 (9 dBA and 10 dBA sound increases at some residences). Moreover, the State's maximum 10 dBA noise increase limit may be particularly appropriate in industrial zones, whereas on a case-by-case basis a lesser noise maximum is appropriate in quiet existing residential neighborhoods. Also the Company had no answer for the Town's concerns about excessive noise occurring during school days nor at times of the year when the trees have no leaves to buffer some of the noise.

The record is not adequate to allow the EFSB to exercise preemption here with respect to State or local noise requirements..

## IV. Adverse Environmental and Safety Impacts Not Analyzed or Rebutted

1. Failure to comply with the requirements of MEPA.

Even a cursory review of the Massachusetts Environmental Policy Act ("MEPA"), MGL c. 30, §§ 61 through 62L and the regulations promulgated thereunder at 301CMF 11.00 et seq., demonstrates that MEPA requirements for filing of an environmental notice form or an environmental impact report likely apply to this project. Also, every project that requires a state permit or state funding is required to notify the EEOA no more than 10 days after filing its petition for such actions. M.G.L. sec. 30, 62A. Yet the Company apparently never formally applied to the EEOA for a determination of applicability.[3]

[3] The Company's response to RR-Oakham-5 indicates only that it exchanged some emails with the EEOA staff and had a consultation meeting, but never closed the loop whether a MEPA filing was required.

MEPA and its regulations apply to any projects that could impact the environment and that require either state assistance or a permit. There are certain categorical inclusions that on their face would seem to apply here, including without limitation:

a. 301 CMR 11.03 (1)(b)1 Direct alteration of 25 of more acres of land. The project reportedly will disturb at least 18 acres, if not more once its plans are finalized or it expands, and the Company has land control over the full 42.9 acres.

b. Id., (b)2. Creation of 5 or more acres of impervious area. The pad on which the battery storage packs and transformers will sit is at least 6 acres and construction and other activities will take place on another 12 acres. Further, it appears that there will be a paved area under at least the battery packs, transformers and transmission substation.

c. Id. (b)3Disposition or change in use of land subject to Art. 97, MA Constitution. The Site was formerly used as a auto body salvage and storage operation that was closed in about 2017. Much of the land is undisturbed wetlands, forests or undeveloped land that is zoned agricultural, but will be rezoned industrial if the project is approved.

d. Id. (b)5 Conversion of land held for conservation, agricultural, or protected watershed purposes. The Site is part of a Surface Water Protection Area of the Ware River Watershed, which is hydrogeologically connected to the Quabbin Reservoir.

e. 301 CMR (2) Affecting state listed species habitat. Vernal pool habitus have been certified by the State in the area of the Site's development.

f. Id. (3)Wetlands and waterways disturbance. The Project entails excavation of large amounts of soil in bordering vegetated wetlands.

g. Id. (4) Alteration of bordering or isolated vegetative wetlands. The project entails clearing of a protected area for the project equipment, including substantial soil excavation.

**h.** Id. (b) 3 Dredging of 10,000 or more cubic yards of material.–The project may have to dredge wetlands or waterways.

**i.** 301 C.M.R. (4). Transportation impacts. Generation of 3000 or more new auto trips per day. Development of new or modified roadways. This vast construction project might trigger one of more of these criteria.

The Company failed to comply with any of the above MEPA criteria or even check if they were applicable, which doomed the Petition from the start because it ensured there would be an inadequate record of environmental impacts on which to base an EFSB decision.

2. Failure to apply for required local and State permits and approvals.

Moraga also deferred development of facts related to environmental impacts by its decision not to apply for applicable permits to the Town Conservation Commission, the State Office of Waterways and Management, the DCR and other local and State departments until well after the hearing concluded and shortly before the EFSB intends to render its decision. The Company made this irresponsible decision after first applying to the Conservation Commission for an Order of Resource Area Delineation, which Order was later determined to be incorrect when a now former Conservation Commissioner, Shawn Seeley, found evidence of vernal pool habitat and wetlands in areas not shown on the Company's expert initial submission. See Town witnesses Seeley's pre-filed testimony and hearing testimony and Philip Warbasse's pre-filed testimony.. Despite this "oversight" the Company maintains in its Initial Brief that there will be no impact on vernal pools or wetlands. Moraga Initial Brief, 42

3. Other

The Company representative refused to commit on cross-examination to take environmental samples outside the 18 acre construction site or to clean up other than selected

debris left from the operation of a former salvage yard anywhere on the whole site, including in the DCR protected area. Notwithstanding this "preference", pursuant to M.G.L. c. 21E, the Company will be an "operator" and if its executes its purchase option, an "owner" strictly liable without fault for investigating and remediating any reportable contamination at the entire 42.9 acre site.

4, Significant safety risks were ignored..

Moraga's safety and fire expert, Shawn Morris, compiled a list of serious BESS incidents around the world (uncontrolled fires, leaking battery packs, water damage from a rainfall event, evacuations due to dispersion of toxic gases (see Exhibit RR-EFSB-9(1)) that demonstrate the significant risks these BESS facilities pose at any location, but especially a rural location like Oakham that lacks even the minimally adequate resources necessary to deal with an accident or incident. Under cross examination he revealed that this table only included recent incidents at Tesla battery facilities but that there have been approximately 30 fires worldwide at battery storage facilities with similar technology. Tr.1349. Based on a review of the Exhibit, cross examination of Mr. Morris and a simple Internet search for pictures of the 6 facilities listed on the Exhibit, there are very significant differences between those locations and the Town of Oakham:

1. The incidents occurred in locales with substantial professional fire-fighting resources;
2. Listed locales all had adequate water supply to fight a significant fire;
3. Evacuation was a reasonable remedy where the fire could not be controlled except by letting it burn;
4. The BESS units were not located adjacent to forests;

5. The BESS units were not located on or adjacent to protected wetlands, waterways and feeder streams and groundwater resources supplying a major drinking water reservoir;
6. The BESS units were either co-located with a utility, an electric power station or in a self-contained area, not in the middle of a dense residential area.

Given the real-life, not theoretical, risk of accidents and incidents with BESS facilities, the EFSB should not impose that risk on a small, resource-poor town in addition to the multiple other reasons why this is not an appropriate location for a BESS.

## V. THE COMPANY'S PLEDGE OF SUPPORT TO THE TOWN'S SAFETY AND FINANCIAL WELL-BEING IS HOLLOW.

The Company claims that "The Company will work collaboratively with the Oakham Fire Department to finalize these documents, including providing annual training for firefighters." Company Brief p. 32. Rhynland will be nowhere to be found if there is a safety or runaway fire issue related to this BESS location. Rhynland is a New York company, not a Massachusetts company. Moraga is only a special purpose operating shell with no employees that aren't Rhynland employees of the parent New York company. There will be no Rhynland or Moraga employees stationed at the Oakham facility. In the event of a safety emergency as has occurred at some BESS facilities in the U.S., it will be of no help for Rhynland to be in email or phone contact from New York. The Oakham Fire Department Chief testified that his voluntary fire department has no ability to handle a BESS runaway fire event. There are no pressurized fire hydrants in Oakham. The record documents that large trucks cannot access this site. Intervenors Initial Brief at 46.

## VI. ADDITIONAL EVIDENCE OF THE COMPANY'S FAILURE TO FOLLOW REQUIRED PROCEDURES

### A. Improper Procedures

Intervenors adopt by reference and incorporate herein the points in the initial brief filed by Vincent and Barbara Piucci in this proceeding. In Intervenors' initial brief, we noted in detail that the Company had not proceeded systematically through the required legal procedure of working with Oakham officials first to apply providing sufficient information to obtain zoning permits needed, and only resorting to a petition for EFSB state preemption of local Oakham zoning laws after exhausting attempts for necessary local zoning permits. The Piuccis' brief also underscores additional detail on how the Company did not comply:

> "the Company pursued illusory alternative uses after being told about the Town's BESS bylaw. Mr. Warbasse testified that he was the primary contact for Moraga between 2022 and 2024, that he advised the Company three times of the Town's Attorney-General-approved BESS bylaw prohibiting standalone BESS facilities unless tied to large-scale solar projects, and that '[a]fter being told' of that bylaw 'the Company went into a mode of deception,' requesting permits and sending hearing notices for other uses that were never initiated and appeared to him, in hindsight, to be illusory. He further testified that the Company then used that misinformation in its ANRAD filing, seeking wetlands approvals without disclosing that the true purpose was to build a prohibited BESS facility, and that the ANRAD itself failed to accurately depict wetland-related jurisdictional areas on the site. In his words, the Company's initial communications 'were not upfront or forthcoming,' and the Planning Board 'did not receive proper notice" of Moraga's actual intention to build a BESS facility.'"

The Company testified that battery storage facilities are all that they do, and so whatever sites they control or their parent company, Rhynland, controls, everyone knows what is coming is a BESS facility, Tr. p. 1054, lines 14-21, and the current owner knew that. Tr. p. 1054, line 24. More than a year after the Company claims it had site control in Oakham, on February 27, 2024, a representative on behalf of this site in a public hearing before the Oakham Planning Board, stated that the site would be utilized in the future only for auto storage and no BESS was planned

at the site.[4] This February 27, 2024, testimony occurred well after the Company testified that it had control of the site beginning in 2022. Tr. p. 166-167. This does not demonstrate "past and current productive relationships with host communities." *See* Massachusetts DOER Section 7.9 standards and criteria for qualified BESS to satisfy Commonwealth goals; *see also,* IRP-2 at 38, Requirement 7.9.

**B.** Improper Notice of the BESS Project to Abutters

The Initial Brief filed by the Piuccis raised a second mandatory requirement for which there is no evidence on the record: the project developer must send notice to the abutters regarding its project as a prerequisite to filing a petition to the EFSB that would trigger a hearing. The Piuccis' Brief states::

> "While it [a document of record] attests that notice was mailed to the listed parties, it conspicuously omits attaching a copy of the actual notice letter sent. The only documents attached to the affidavit are the newspaper tear sheets and the abutters list. Without the actual notice letter in the record, the Board cannot verify that the mailed notice contained the statutorily required elements, including an accurate description of the subject matter and the nature of the relief requested—particularly in light of sworn testimony from Planning Board Chair Warbasse and abutter James Stevens that Moraga's prior communications described the project as an automobile storage facility, not a 180 MW BESS. The attached abutters list establishes only who was mailed notice, not what they were told. A bare attorney attestation that notice was mailed, unsupported by the actual notice document, is a legal conclusion, not a factual showing, and does not satisfy Moraga's burden to prove compliance with the mandatory notice condition precedent in G.L. c. 40A, §§ 3 and 11."

In addition to this failure to provide proper notice, we have already noted the Company's failure to apply for a single Town permit or approval for its project (other than the incomplete and inaccurate application for a wetlands delineation order to the Conservation Commission), a

[4] For EFSB access to a taped recording of that Oakham Planning Board hearing and the statement of that representative on behalf of the proposed site, *see RPI's* Initial Brief at 6, FN 1.

basic prerequisite to exhaust all local administrative options before petitioning state agency to take the unusual step to preempt a town's zoning laws. The Company says it will take these prerequisite steps after Oakham's zoning law is preempted, which of course deprives the ESFB of the facts it needs to make a properly grounded decision. .

### C. Contrary Testimony on Required Site Control

This timing issue is critical to any EFSB decision. The Oakham BESS restrictive zoning by-law was legally effective *before* Rhynland obtained any control over the proposed 43 acre BESS site in Oakham. The BESS zoning ordinance in Oakham was enacted and effective in June, 2022. Tr. p. 174. It was subsequently reviewed by Attorney General Healey's office and approved as an appropriate and reasonable zoning by-law for Oakham. This, alone, documents that Oakham is in a unique legal status before the EFSB among all 351 municipalities in Massachusetts.

Under Massachusetts law, precedent holds that once approved by Attorney General Healey, a zoning by-law is fully in force and effective as of the date originally enacted by the town. Therefore, it is unassailable that the Oakham by-law was effective in June, 2022, several months before Rhynland claims to have gained control over the subject site in Oakham in November, 2022. Tr. p. 166-167.

It is a misrepresentation for the Company witnesses to either imply or expressly represent that the Company had control over the proposed site before the effective date of 's Oakham restrictive zoning ordinances.

### D. Failure to Produce the Key Foundational Documentary Evidence on Hearing Record

Moraga failed to produce a copy of the agreement allegedly giving it site control in 2022. This is a total failure to produce a requisite basic showing on the record that is required by the Massachusetts DOER for any BESS facility that is selected as satisfying the Commonwealth's BESS goal. *See* IRP-2, at p. 38.

The only reason stated by the Company when asked multiple times at the hearing during cross-examination by multiple EFSB staff and counsel for different parties, why this particular Oakham site for BESS demonstrated any justification to have the state preempt local zoning laws, was that this site with BESS would contribute to the Massachusetts BESS goal and Clean Peak goal and its 43 acres was large enough to host a 180 Mw BESS facility. In terms of how a BESS facility in Oakham contributes to the environment and public welfare, the Initial Brief of the Company now responds: "Approval of the project will contribute to the Commonwealth's achievement of important energy and environmental policies, such as the Commonwealth's net zero emissions target for 2050. In this way, the Project will protect the health, economy, people, and natural resources of the Commonwealth." Company Brief at 10-11. The Company later tossed in: "The Project intends to advance the Commonwealth's energy goals in part by participating in the Massachusetts Clean Peak Standard ("CPS")." *Id*. at 13.

The Company offered no other justification at all -- in terms of being proximate to a significant nor any renewable solar, wind, or hydroelectric power to store (which is the reason for having a BESS goal). The Town of Oakham's Initial Brief notes:

> "Moreover, the Company stated its plans to collect its energy from the grid at times when the rates are at their lowest, including the middle of the night. This makes sense from a business model standpoint where the goal is to maximize profits when re-selling the energy at peak periods and at peak pricing. But this model bears no connection to the Commonwealth's goals of collecting renewable solar energy, which can only be collected when the sun is shining."

The Oakham site is not zoned industrial and instead is in the middle of a long-established rural residential development. It has no existing substation as do other alternative sites that came up during cross-examination of the Company site selection witness, nor any other relevant criterion to justify its selection. The Company's alleged reasons for choosing this Site has nothing to do with its particular attributes and overwhelmingly apply much more readily to many other sites in the Commonwealth and in New England.

Sweeping generalities, not the actual Massachusetts DOER standards and criteria, are all that the Company could muster to justify this Oakham site location. The Company witness did not disagree that there are perhaps 220,000 alternative sites in Massachusetts abutting an existing high voltage transmission line to consider for BESS, and 440,000 such alternative sites in Massachusetts if one could attach from either side of that line. Tr. pp.98-99.

## VII.THE COMPANY'S PETITION SEEKS A ZONING EXEMPTION BUT THE COMPANY DID NOT PRODUCE SUBSTANTIAL EVIDENCE ON THE RECORD EITHER TO SHOW THAT THE SITE WAS APPROPRIATE FOR A BESS OR THAT THERE WAS A PUBLIC NEED

Throughout its Petition, the hearing, and its Initial Brief, the Company asked only for a zoning exemption from local Oakham zoning. Company Initial Brief at 41-45. The Presiding Officer in his descriptions of the hearing always characterized this hearing as concerning a possible Oakham zoning exemption. The ultimate issue is whether the party with the burden of proof, the Company, put all of the necessary facts into the record? They did not. Here, there are huge gaps left in the record from what the Company did not or refused to provide. These include gaps regarding:

-Site selection

-Noise modelling missing at necessary immediately shared properly lines with existing occupied residential dwellings

-Noise modelling that is totally uninformed by lifecycle battery degradation at the actual exponentially increasing rate, causing BESS efficiency to degrade, which creates substantial additional heat inside the BESS enclosures, which causes 'hot spots' of intense heat and risks in the 2 acres of 180 Tesla 2XL packs

-This additional heat requires and can only be mitigated by more fan cooling to mitigate than 40%, and/or operating them more, any of which makes the noise louder than modelled, particularly when there can be a 5-10 dBA in locations affected by a change in wind direction or velocity.

-Environmental impacts

-Impacts on wetlands and vernal pool habitat

-Impact on the DCR protected land adjacent to the proposed project site

-public health

-safety, including traffic

-impact on drinking water wells

-impact on the waterways that feed the Quabbin Reservoir

-noise

-Public and private nuisance

The RPIs have shown here and in their Initial Brief the failure of the Company to meet its burden of proof for a zoning preemption. Even applying the Company's alleged set of qualifying criteria to this project, arguendo, there still is no basis to grant the Company's Petition based on the record. The Company's Brief asserts:

> "To make a determination regarding substantial public harm, the Department and the Siting Board have articulated relevant factors including, but not limited to, whether: (1) the proposed project contributes to a reliable energy supply for the Commonwealth; (2) the project is time sensitive; (3) the project involves multiple municipalities that could have conflicting zoning provisions that might hinder the uniform development of a large project spanning these communities; (4) the proponent of the project has actively engaged the communities and responsible officials to discuss the applicability of local zoning provisions to the project and any local concerns; and (5) the affected communities do not oppose the issuance of the comprehensive exemption." Company Brief at 46.

None of the above criteria are met on the record before the EFSB.

(1) **<u>Reliable energy supply for the Commonwealth?</u>**

The record demonstrates that there are 400% more BESS proposals proposed in the Commonwealth to date than what is required to meet the Commonwealth's BESS goals on time. All of the other BESS selected by the Commonwealth DOER are located much more appropriate sites than the Oakham site.

(2) **<u>Time sensitive?</u>**

This project is not time sensitive in any manner. Timing for the Commonwealth's goal of 5,000 Mw of BESS in order to store energy generated by wind power and solar facilities has changed substantially since the Moraga petition was filed a year ago. The current federal Administration eliminated federal tax credits and grants for intermittent renewable energy technologies, stopped siting additional offshore wind project off the coast of New England, and issued federal 'stop work' orders for already approved offshore wind projects.

In addition, as of the beginning of 2026, the multi-billion-dollar NECEC Transmission line was completed connecting hydro Canadian hydropower to Massachusetts after previously being blocked by New Hampshire and subsequently by Maine. Governor Healey recently announced the NECEC line will supply Massachusetts with a massive 20% of its electricity. Tr. p. 163. This HydroQuebec power output flowing to Massachusetts seasonally and daily is controlled by dams to match power demand; there is no need for BESS to store this 20% of Massachusetts renewable hydropower.

Therefore, as a result of these recent and seismic events, the Oakham BESS is not time sensitive.

The Rhynland Tyngsborough BESS site already is partially committed for 150 Mw of BESS to meet state goals – it still has 350 Mw of its uncommitted BESS capacity to host the 180 Mw of BESS proposed for Oakham. Tr. pp. 133-136, 178. The Tyngsborough site is a much more appropriate BESS site, now not needing any zoning overrides, on an always industrial site, and more than a mile away from any cluster of residential homes. It was the Company's individual decision to hold back more than two-thirds of the Tyngsborough site from not yet committing to the Commonwealth's goals.

(3) **Multiple municipalities conflicting zoning provisions?**

There are no multiple communities involved here.

(4) **The proponent has actively engaged the communities and responsible officials and any local concerns?**

The record clearly demonstrates that simply has not been done in Oakham.

(5) **The affected communities do not oppose the issuance of the comprehensive exemption?**

Oakham and its citizens do oppose the issuance of this permit, and former Attorney General Healey uniquely approved Oakham's restrictive BESS bylaw.

Conclusion

Massachusetts has requirements regarding the location of major industrial facilities like BESS, including a preference to co-locate them with solar and wind units, to locate them where they will not significantly degrade the environment and to avoid sites in which their presence will unreasonably impact a town, its residents and their normal life activities or create unnecessary risks to health and safety, including by inference a substantial private or public nuisance. The proposed Moraga project has not met its burden to show that its industrial project is appropriate for a small

rural town that is zoned agricultural, that has valuable state protected environmental resources and that is part of the protected watershed of the largest drinking water reservoir serving eastern Massachusetts, the Quabbin. It is no over-statement to claim that of the 150 towns and cities in Massachusetts Moraga chose the least viable and appropriate site for its factory by ignoring hundreds if not thousands of more appropriate sites through an arbitrary site selection process and by ignoring the vehement opposition of the Town and the region. And the EFSB should also recognize the historical sacrifice the Town made to development of a new clean drinking water reservoir for the Commonwealth when it considers whether this Town is an appropriate site for a BESS.

To compound its totally inappropriate choice for its factory, Moraga pushed hard for the EFSB to adopt a 15 month deadline, not required by existing law for making a decision , which put the under-resourced Town and intervenor parties into a mad-dash race to complete pre-hearing discovery, the hearing and briefing in an extremely expedited schedule. Further, Moraga refused as a matter of strategy to consult and work in good faith with Town officials prior to or after filing its Petition to attempt to resolve the Town's reasonable concerns and openly declared that it would not seek necessary zoning or non-zoning approvals until *after* the conclusion of the EFSB hearing and shortly before the date the EFSB was to render a decision on its Petition.

Moraga is responsible for a record that is devoid of substantial evidence supporting its Petition and that is full of questions, not answers to the hard questions posed by the Town and intervenors, and thus did not meet its burden. The EFSB

should reject the Company's  strategy and send Moraga back to the beginning to file a new proceeding.

Respectfully submitted on behalf of the Represented Intervenor Parties

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# APPENDIX TO REPRESENTED INTERVENOR PARTIES' REPLY BRIEF

Appendix of Near-Verbatim Sections of the Company's Petition and the Initial Brief \

1. Purpose and Need: Pages 38-42 of the Petition are almost verbatim to pp. 10-14 of the Initial Brief.
2. Site selection, Sec. V of the Petition and Section II C. 3 of the Initial Brief interestingly are identical on the overall siting criteria but provide different or additional reasons for why some of the alternative sites were eliminated (e.g. Site 2, 0 Wawinet Road, Barre, MA where the Petition stated the site eliminated because it did not contain any previously developed areas, other than farmlands and the existing electric transmission corridor; but in Initial Brief the main reason cited was it would result in disturbance of "Farmland of Statewide Importance")

3. Environmental impacts.
   A, Air impacts. The description of air impacts in the Initial Brief is identical to the description in the Petition, other than a paragraph discussing potential for dispersion of gases that cites to a Massachusetts guidance document that is not helpful to the Company in stating that gas dispersion would only have effects in the "immediate" vicinity of the fire; the Stevens live only ¼ mile from the proposed BESS site.
   B. Wetland impacts. This analysis in the Initial Brief is identical to the Petition, including stating that the Conservation Commission through an ORAD approved the wetlands delineation (p. 28), which is misleading since it is undisputed that the Conservation Commission thereafter determined that the delineation was incorrect and did not depict certain bordering wetlands or vernal pool habitat and will not issue an order until it receives a revised plan.

   4. Traffic impacts . The Petition and Initial Brief descriptions are identical, except for some additional statistics from a traffic study added to the Initial brief that contradicts the statement in the Petition that "[t]raffic impacts due to the construction of the Project …will all be minimal. No delays to local traffic except …when there is an occasional oversized vehicle." The Initial Brief mentions 35-55 round trips by "heavy trucks", without a definition although the clear testimony of both the Company's engineer and its development chief was that during construction and perhaps during operation, the Company would use 70+ foot long tractor trailer trucks of the type used to haul Tesla battery packs, transformers, cranes and other heavy equipment.