

Decisions and Orders

Massachusetts Energy Facilities Siting Board

VOLUME 13

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COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition and Application)
of IDC Bellingham LLC)
for a Certificate)
of Environmental Impact and Public Interest)

EFSB 01-1

FINAL DECISION

Selma Urman
Hearing Officer
October 12, 2001

On the Decision:

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Novicky; and Lorraine Spencer
Intervenors

-and-

Box Pond Association, Inc.; Concerned Citizens of
Bellingham, Inc.; and Joan Eckert, c/o Francis
Cresti
Interested Persons

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The Energy Facilities Siting Board ("Siting Board") hereby grants the Petition and grants the Application of IDC Bellingham LLC for a Certificate of Environmental Impact and Public Interest, with respect to Five Special Permits granted by the Town of Bellingham Zoning Board of Appeals.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K½ - 69O½, IDC Bellingham LLC ("IDC" or "Company") has petitioned the Siting Board for a Certificate of Environmental Impact and Public Interest ("Certificate") with respect to Five Special Permits issued by the Town of Bellingham Zoning Board of Appeals ("Zoning Board") in connection with IDC's proposed electric generating facility ("facility") in the Town of Bellingham ("Bellingham"). If issued as requested, the Certificate would have the effect of granting IDC the Five Special Permits with the conditions as modified by the May 25, 2001 agreement between the Town of Bellingham Board of Selectmen ("Town"), the Zoning Board, and IDC.¹ The Certificate also would render moot the first count of an appeal filed in the Norfolk Superior Court and the Land Court by opponents of the Special Permits pursuant to G.L. c. 40A, § 17, seeking to void the issuance of the Special Permits ("Opponents' Appeal").²

A. Procedural History

On December 21, 1999, the Siting Board conditionally approved the petition of IDC to construct a natural gas-fired combined-cycle electric generating facility with a net nominal electrical output of 700 MW. IDC Bellingham LLC, 9 DOMSB 225 (1999) ("Final Decision"). On March 3, 2000, IDC submitted a Compliance Filing indicating, inter alia, that it would change

¹ For a description of the May 25, 2001 agreement between the Town, the Zoning Board and the Company, see Section I. A, below.

² The Opponents' Appeal includes a second count seeking declaratory relief based on the plaintiffs' allegation that the May 1997 rezoning of the locus of the facility is invalid (Exh. IDC-2, App. F, Tab 70). This claim is not the subject of the instant proceeding. There is no record evidence that the pendency of this claim would preclude the construction of the facility should a Certificate issue.

its turbine vendor from Siemens Westinghouse to General Electric, and that the facility's output would be reduced from 700 MW to 525 MW. On September 12, 2000, the Siting Board issued a Final Decision on Compliance approving the reconfigured facility. IDC Bellingham LLC-Compliance, 11 DOMSB 27 (2000) ("IDC Compliance Decision"). A consolidated appeal of the Final Decision and the IDC Compliance Decision is pending before the Supreme Judicial Court. See Box Pond Association, Inc. v. EFSB et al, No. SJC-08452. On September 24, 2001, the Siting Board approved with conditions a project change filed by the Company on June 6, 2001. IDC Bellingham LLC, EFSB 97-5B (2001) ("IDC Project Change Decision").³

On May 5, 2000, IDC filed with the Zoning Board five applications seeking Special Permits under the Town of Bellingham Zoning By-Laws ("Zoning By-Laws"). IDC's first Special Permit Application sought permission to construct certain structures in excess of the height restrictions set forth in §§ 1500 and 2610 of the Zoning By-Laws (Exh. IDC-2, App. A, Tab 1). The Company filed its second Special Permit Application in accordance with § 3240 of the Zoning By-Laws, which requires any major new stationary source of air pollution to obtain a Special Permit pursuant to Zoning By-Laws § 3290 (id., App. A, Tab 2). The Company filed its third Special Permit Application in accordance with the provisions of § 2400 of the Zoning By-Laws, which requires a Special Permit for any project that will use temporary structures and will provide parking for more than three light commercial vehicles or more than one heavy commercial vehicle (id., App. A, Tab 3). The Company filed its fourth Special Permit Application in accordance with §§ 3232 and 3234 of the Zoning By-Laws, which require a Special Permit for certain exterior lighting (id., App. A, Tab 4). The Company filed its fifth Special Permit Application in accordance with § 3250 of the Zoning By-Laws, which requires an applicant to obtain a Special Permit for the use of certain hazardous materials (id., App. A, Tab 5).

On January 3, 2001, the Zoning Board granted the Five Special Permits with a total of 23 conditions (hereinafter referred to individually as "Special Permit 1"; "Special Permit 2"; "Special Permit 3"; "Special Permit 4"; "Special Permit 5", and collectively, as "Special

³ The Final Decision, IDC Compliance Decision and the IDC Project Change Decision are collectively referred to as the "facility decisions" or "facility proceedings".

Permits"). On January 23, 2001, the Opponents' Appeal was filed in Norfolk Superior Court and the Land Court pursuant to G.L. c. 40A, § 17 and G.L. c. 231 (Exh. IDC-1, App. E, Tabs 65-69).⁴

On February 9, 2001, pursuant to G.L. c. 164, §§ 69K½-69O½ and 980 CMR 6.02, IDC filed its Initial Petition for a Certificate of Environmental Impact and Public Interest based upon the Opponents' Appeal of the Special Permits, and upon three of the conditions incorporated in the Special Permits.

On February 15, 2001, the Chairman of the Siting Board issued a decision on IDC's Initial Petition holding that, in accordance with 980 CMR 6.02(4), the Siting Board would defer a decision on the merits of the Petition, and instead would adjudicate concurrently both the merits of the Petition and the merits of the Company's Application for a Certificate ("Application"). IDC Bellingham LLC, EFSB 01-1, Procedural Order Re Initial Petition for Certificate of Environmental Impact and Public Interest (February 15, 2001) ("February 15, 2001 Procedural Order") at 2. Pursuant to G.L. c. 164, § 69L½, IDC filed its Application on April 3, 2001.

Pursuant to G.L. c. 30A, § 10, the Town and the Zoning Board filed a joint petition for leave to intervene in the certificate proceeding. In addition, the following groups and individuals filed a petition for leave to intervene as individuals, pursuant to G.L. c. 30A, § 10, and filed collectively, pursuant to G. L.c. 164, § 10A: (1) Box Pond Association, Inc. ("BPA"); (2) Concerned Citizens of Bellingham, Inc. ("CCOB"); (3) Maurice Durand; (4) Joan Eckert; (5) Debra Ferullo; (6) Kenneth Hamwey; (7) Donald Keller; (8) Robert W. Loftus, Jr.; (9) Jerry Novicky; and (10) Lorraine Spencer.

The Hearing Officer granted the joint petition of the Town and the Zoning Board and the individual petitions of Maurice Durand, Debra Ferullo, Kenneth Hamwey, Donald Keller, Robert W. Loftus, Jr., Jerry Novicky, and Lorraine Spencer (collectively, "Intervenors"). The Hearing Officer denied the individual petitions to intervene of BPA, CCOB and Joan Eckert and the collective petition to intervene filed pursuant to G.L. c. 30A, § 10A. The Hearing Officer, however, granted BPA, CCOB and Joan Eckert status as interested persons in the proceeding.

⁴ The following are the plaintiffs to the Opponents' Appeal: Maurice Durand; Jerry Novicky; Lorraine Spencer; Brian Sutherland; Donald Keller; Debra Ferullo; Robert Loftus, Jr.; and Kenneth Hamwey.

On June 5, 2001, the Town, the Zoning Board and the Company (collectively, the "Settling Parties") submitted an Amended Joint Motion to Revise the Proposed Certificate Conditions and for the Town and the Zoning Board to Withdraw as a Party to the Proceeding ("Amended Joint Motion"). The Settling Parties also requested that the Town and the Zoning Board be excused from responding to any information or discovery requests issued in the proceeding (Amended Joint Motion at 3). On June 7, 2001, the Hearing Officer granted the Amended Joint Motion, thereby allowing the Town and the Zoning Board to withdraw from the proceeding, and to be excused from responding to any information or discovery requests issued in the proceeding. IDC Bellingham LLC, EFSB 01-1 (Hearing Officer Ruling, June 7, 2001, at 2).

An adjudicatory hearing was held on June 27, 2001. IDC presented the testimony of two witnesses: Donald C. DiCristofaro, Vice President of Environmental Affairs for IDC; and Stephen R. Pritchard, Vice President for Project Development for IDC. The record includes approximately 82 exhibits, consisting primarily of the Company's responses to information requests issued by the Siting Board and the Intervenor. On July 2, 2001, the Hearing Officer issued two briefing questions for the parties to address. On July 16, 2001, the Company and the Intervenor filed briefs; on July 23, 2001, the Company and the Intervenor filed reply briefs.

B. Special Permits

The Company maintains that three conditions incorporated in the Special Permits, Conditions 20, 22(a), and 23, are burdensome, inconsistent with the Company's other resource permits, and/or constitute the raising and imposition of a non-regulatory condition (Exh. IDC-1, at 9).

Condition 20 of the Special Permits provides that the Company shall abide by an agreement with the Massachusetts Department of Environmental Protection ("MDEP") to evaluate zero ammonia technology ("ZAT") within the first five years of operation, except that the Company shall exclude acquisition costs of ZAT equipment in any such evaluation ("ZAT Condition") (id., App. E, Tab 65, at 23).

Condition 22(a) of the Special Permits provides that the facility be designed with at least

four concrete walls around the transformers and CCW coolers, and that the walls be at least 10 feet higher than the transformers ("Transformer Condition") (id.).

Condition 23 of the Special Permits provides that the Company must enter into a Payment in Lieu of Taxes Agreement with the Town ("PILOT Agreement") on or before July 1, 2001, and that the obligations of the agreement must be at least equal to those in existing agreements between Bellingham and industries of a similar nature ("PILOT Condition") (id., App. E, Tab 65, at 25).

As stated in Section I.A, above, on May 25, 2001, the Settling Parties entered into a Settlement Agreement. Pursuant to this Settlement Agreement, the Settling Parties requested that the Siting Board grant the Company leave to amend its Application to reflect the jointly proposed modifications to the three conditions as follows:

The modified version of Condition 20 ("Modified Condition 20" or "Modified ZAT Condition") would provide that if MDEP requires the Company to re-evaluate ZAT, then the Company shall abide by MDEP's evaluation requirements. In addition, Modified Condition 20 would require IDC to actively oppose any installation of ZAT that would cause the Company to exceed the maximum limits on water use set forth in the Water Agreement, the Final Decision and the IDC Compliance Decision ("Modified ZAT Condition") (Exh. IDC-2-S).

The modified version of Condition 22(a) ("Modified Condition 22(a)" or "Modified Transformer Condition") would require the transformers and CCW coolers to have concrete walls on at least four sides that are 10 feet higher than the transformers or CCW coolers, or, in the alternative, equivalent noise mitigation that results in maximum noise levels generated from the facility which do not exceed: (1) the MDEP limit of an increase of 10 decibels, A-weighted ("dBA") from new noise sources; (2) the 65-dBA limit set forth in the Town of Bellingham noise ordinance; (3) a 45-dBA steady state noise limit for residential receptors; and (4) a 40-dBA limit at the closest residence during normal operation of the facility. Modified Condition 22(a) further would provide that, should IDC construct higher walls to satisfy the Modified Transformer Condition, any necessary and related facility layout changes would be deemed approved without requiring further action by the Siting Board or the Zoning Board (id.).

The modified version of Condition 23 ("Modified Condition 23" or "Modified PILOT

Condition") would require IDC to make a good faith effort to meet with the Town to negotiate a PILOT Agreement. Modified Condition 23 further would provide that if the parties do not reach an agreement by July 1, 2001, the failure to reach an agreement shall not constitute grounds for violation of the Certificate/ Special Permit (id.).

C. Jurisdiction

The Company's Initial Petition is reviewable pursuant to G.L. c. 164, § 69K½, which provides that any applicant proposing to construct or operate a generating 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, § 69L½, which requires any applicant seeking a Certificate pursuant to § 69K½ to file with the Siting Board an Application containing the information specified in § 69L½.

IDC'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.

II. THE INITIAL PETITION

A. Standard of Review

Any person who proposes to construct or operate a generating facility in the Commonwealth may seek a Certificate from the Siting Board. G.L. c. 164, § 69K½. 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 one or more of the seven grounds for a Petition set forth in G.L. c. 164 § 69K½; and (2) the Siting Board determines that, on the merits, at least one of the grounds asserted constitutes a valid basis for granting the Initial Petition. Id.⁵

⁵ Within seven days of the filing of an Initial Petition for a Certificate, the Siting Board must decide whether to hold a hearing on the merits of the grounds asserted in the
(continued...)

B. The Company's Initial Petition

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

IDC asserted that under G.L. c. 164, § 69K½ (vi), the facility cannot be constructed due to delays caused by the Opponents' Appeal to the Land Court pursuant to G.L. c. 40A, § 17 of the Zoning Board's issuance of Five Special Permits. The Company also asserted, pursuant to G.L. c. 164, § 69K½, ¶ 2, that the ZAT, PILOT, and Transformer Conditions of the Special Permits are burdensome and have a substantial impact on the responsibilities of the Siting Board (Exh. IDC-1, at 1-2). In addition, the Company asserted pursuant to G.L. c. 164, § 69K½ (iii), that the ZAT and PILOT Conditions are inconsistent with IDC's other resource permits for the facility. Finally, IDC asserted, pursuant to G.L. c. 164, § 69K½ (iv), that the ZAT and PILOT Conditions are the result of the Zoning Board's improper consideration and imposition of non-regulatory conditions (*id.* at 10-16). The Siting Board addresses each of these grounds below. In addition, the Siting Board addresses the Intervenor's contention that the Siting Board should require an applicant for a Certificate to demonstrate that it has exhausted its administrative remedies prior to seeking relief from the Siting Board.

1. Delay Caused by Appeal

G.L. c. 164, § 69K½ (vi) provides that the Siting Board shall grant an Initial Petition if it finds that "the facility cannot be constructed because of delays caused by the appeal of any approval, consent, permit, or certificate." Pursuant to G.L. c. 164, § 69H, the Siting Board's responsibility in this proceeding is to implement the provisions of G.L. c. 164, §§ 69H-69Q "so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost."

IDC stated that, pursuant to G.L. c. 40A, § 11, the Five Special Permits cannot take effect

⁵

(...continued)

Petition, or to accept an Application for a Certificate and to defer a 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 IDC's Initial Petition until the hearing on the Company's Application. February 15, 2001 Procedural Order at 2.

until the Opponents' Appeal regarding the Special Permits has been dismissed or denied (Exh. IDC-1, at 10). IDC further stated that until the resolution of the Opponents' Appeal, a building permit for construction of the facility cannot be issued, and that, accordingly, there will be a substantial delay in the project's schedule (*id.*).⁶ IDC therefore requested the Siting Board to consider the Company's Petition for a Certificate pursuant to G.L.c. 164, § 69K½ (vi) (*id.*).

At the evidentiary hearing in this matter, counsel for the Intervenor argued that, to have its Initial Petition granted pursuant to G.L. c. 164, § 69K ½ (vi), IDC must demonstrate that it would never be able to construct the facility unless the Initial Petition were granted (Tr. at 36). Since the Siting Board has not previously had occasion to review an Initial Petition based on this provision of G.L. c. 164, § 69K½, the Hearing Officer asked the parties to address on brief the nature of the evidence that is required to demonstrate that an approved generating facility cannot be built due to delays caused by the appeal of any approval, consent, permit, or certificate.

The Intervenor argued that G.L. c. 164, § 69K½ (vi) may only be invoked if an Applicant can demonstrate that "appeal of a permit effectively *precludes* the construction of the facility; it does not apply when an appeal merely *delays* construction"(emphasis supplied) (Intervenor Brief at 2). The Intervenor stated that the Siting Board should exercise its authority to use this provision only under extraordinary circumstances, such as a delay that would result in loss of financing for the project (*id.*).

The Intervenor also stated that granting an Initial Petition pursuant to G.L. c. 164, § 69K½ (vi) "effectively repeals" G.L. c. 40A, § 17 by denying appellate rights for opponents of power plants (*id.* at 3-4).⁷ The Intervenor asserted that this result would violate a fundamental rule of statutory interpretation: "We assume, as we must, that the Legislature was aware of

⁶ The Company stated that other steps required for the project, including selection of and negotiation with an engineering, procurement and construction ("EPC") contractor and making a compliance filing with the Siting Board, would have been initiated to allow construction to begin soon after issuance of a building permit, but that these steps could not proceed given the uncertainty as to when a building permit can be issued (Exh. BP-2-6).

⁷ G.L. c. 40A, § 17 provides for the judicial review of decisions of a zoning board of appeals.

existing statutes... and that if possible a statute is to be interpreted in harmony with prior enactments to give rise to a consistent body of law" (*id.* at 4, citing Jancey v. School Committee of Everett, 421 Mass. 482, 496 (1995)).

The Intervenor further argued that even if a delay were sufficient cause to invoke the provision, the Company has not shown that the pending Land Court action has caused a delay (Intervenor Brief at 2). As an example, the Intervenor claimed IDC cannot commence construction until it has received a final air plan approval from MDEP (*id.* at 6, citing 310 CMR 7.02(2)(a); 310 CMR 7.00).⁸ The Intervenor concluded that since IDC has yet to obtain permits from several other state agencies, has not selected a contractor, and has not formulated its detailed design work, the Company cannot claim that the Land Court Appeal is the sole cause of any construction delays (*id.* at 6-7). The Intervenor suggested that, at most, the Land Court Appeal exposes the Company to risk, and that this risk is not sufficient to set in motion the Siting Board's authority to override other permit processes (*id.* at 7).

IDC asserted that it is permitted to invoke G.L. c. 164, § 69K½ (vi) because it is legally prohibited from commencing construction of the facility due to the pendency of the Opponent's Appeal, and argued that the Siting Board must grant the Company's Initial Petition on this basis (Company Brief at 8-9).

IDC disputed the Intervenor's contention that, in order to invoke G.L. c. 164, § 69K½ (vi), the Siting Board must find that a facility could never be built because of delays associated with an appeal of a permit, stating that this interpretation is inconsistent with the clear language and intent of G.L. c. 164, § 69K½ (vi) (*id.* at 10). IDC maintained that if the Legislature had intended such a result, it would have drafted the statute differently (*id.*). IDC asserted that the clear language of the statute addresses a delay in the construction process (*id.* at 10, citing Stop & Shop Supermarket Co. v. Urstadt Biddle Properties, Inc., 433 Mass. 285, 289 (2001); Massachusetts Comm. College Council v. Labor Relations Comm'n., 402 Mass. 352, 354

⁸ The Siting Board notes that on August 20, 2001, MDEP issued its conditional air plan approval for the facility. The conditional air plan approval is MDEP's pre-construction air quality approval. See 310 CMR 7.00; 310 CMR 7.02. Therefore, any argument raised by the Intervenor regarding an outstanding air plan approval is moot.

(1988)).

The Company also disputed the Intervenor's alternative interpretation that the Siting Board may use this section as a basis for granting an Initial Petition only if it finds that an appeal is the sole reason that an applicant cannot begin construction (*id.* at 13). IDC maintained that if this were the Legislature's intent, it could have drafted the statute differently by wording it as, "construction is delayed solely because of an appeal" (emphasis supplied) (Company Brief at 12). The Company noted that under this interpretation, an opponent to a facility need only file multiple appeals to overcome any Certificate application (*id.*). The Company averred that the Legislature, in enacting the 1997 Siting Board statute to encourage the construction of new generation plants, did not intend such an outcome (*id.*). IDC asserted it would be contrary to prudent business practice for power plant developers to expend significant sums of money in an uncertain climate, and it would inhibit the development of needed generating facilities (*id.*). The Company maintained that the interpretation of the statute proffered by the Intervenor oversimplifies the generating facility development process by characterizing it as a linear process, rather than a process where there is coordination of multiple parallel and serial activities (*id.* at 14, citing Tr. at 20, 22, 29, 30, 35).

The Company also disputed the Intervenor's argument that the Certificate statute effectively repeals G.L. c. 40A, § 17 (Company Reply Brief at 4). IDC submitted that, in authorizing a Certificate petition based on appeals, the Legislature knowingly carved out an exception to G.L. c. 40A, § 17, as it had done earlier for G.L. c. 40A, § 3, which allows a public service corporation to petition the Department of Telecommunications and Energy for exemption from local zoning ordinances (*id.*). IDC concluded that allowing the Siting Board to grant an Initial Petition when construction of a generating facility is delayed by a zoning appeal is not only in harmony with G.L. c. 164, § 69H, but also in harmony with G.L. c. 40A, § 3 (*id.* at 4, citing *Jancey v. School Committee of Everett*, 421 Mass. 482, 496 (1995)).

The Company argued that G.L. c. 164, § 69K½ specifically limits the entities that can apply for a Certificate, and sets forth clear standards that an applicant must meet to obtain a Certificate (Company Reply Brief at 3). IDC maintained that it is consistent with this statutory mandate for the Siting Board to grant an Initial Petition when the construction of a project is

delayed because of an appeal (id.).

The Siting Board recognizes that the duty of statutory interpretation lies with the courts. However, since this is an issue of first impression, the Siting Board must address the statutory question that is at issue in this proceeding. Three interpretations of the G.L. c. 164, § 69K½ (vi) have been presented by the parties: (1) that § 69K½ (vi) applies only when an applicant can demonstrate that a facility could never be constructed because of the delay caused by an appeal; (2) that § 69K½ (vi) applies when, but for the filing of an appeal, a generating facility could be constructed; and (3) that § 69K½ (vi) applies when a permit is required for a project, and full appellate review would result in delays in the project's construction.

Each of these interpretations sets forth a possible reading of the language of G.L. c. 164, § 69K½ (vi); however, only the final interpretation appears to be consistent both with the procedural requirements of G.L. c. 164, § 69O½, which contemplates adjudication of a Certificate request within a six month period, and with the Legislature's presumed intent in amending this section of the statute to address delays caused by an appeal of a permit.

Under the first interpretation, an applicant could not file an Initial Petition unless it could demonstrate that the delay caused by the appeal would be fatal to the project. The application then would be subject to the six month review process and potential delays resulting from an appeal of the Certificate, thereby jeopardizing the construction or completion of the project. The Siting Board finds that this interpretation would effectively preclude any applicant from seeking a Certificate pursuant to G.L. c. 164, § 69K½ (vi), a result which the Legislature could not have intended when it amended the statute in 1997, and which conflicts with the Siting Board's mandate to provide a reliable energy supply for the Commonwealth.

The second interpretation of § 69K½ would require an applicant to wait until it has received all outstanding permits prior to filing an Initial Petition for a Certificate. This interpretation would also seal the fate of a project. Under this "but for" test, a Certificate petition would fail in the instance where more than one permit is appealed by a project opponent. Moreover, requiring an applicant to obtain all outstanding permits ignores the possibility that other permitting bodies may choose to defer action until the appeal is resolved. Adoption of this interpretation thus also would be in conflict with our understanding of the Legislature's purpose

in enacting this statute, which is to address rather than to prolong delays caused by the appeal of a permit. In addition, it would conflict with the Siting Board's mandate to provide a reliable energy supply for the Commonwealth.

The third interpretation of § 69K½ allows the adjudication of an Application for a Certificate to proceed in parallel with an applicant's pursuit of other permits. Given the length of the Certificate process at the Siting Board, and the possibility of appellate review, this interpretation of G.L. c. 164, § 69K½ (vi) is consistent with the Legislature's clear intent to address delays caused by the appeal of a permit and with the Siting Board's mandate.⁹

Accordingly, the Siting Board finds that in order to satisfy the requirements of G.L. c. 164, § 69K½ (vi), an applicant must demonstrate that it is prevented from commencing or continuing construction of a generating facility due to delays caused by the pendency of an appeal of an approval, consent, permit, or certificate. However, not every appeal that results in a delay of facility construction will satisfy the requirements of this section. The Siting Board will, at a minimum, look to the nature and timing of the appeal, and the length of delay in construction that would result from the pendency of an appeal.

IDC has shown that pending the resolution of the Opponents' Appeal of the Special Permits in the Company's favor, it is precluded from obtaining a building permit to commence construction of the approved facility and is not able to effectively complete other steps required for construction, including completion of an EPC contract and a compliance filing with the Siting Board. Although the precise timing of the issuance of a decision from the Land Court on the Opponents' Appeal cannot be ascertained, we note that the Opponents' Appeal was filed on January 23, 2001, and there is no evidence in this proceeding that the Land Court has issued a decision. Moreover, parties to the Land Court proceeding would have the opportunity to appeal the decision. The Siting Board finds that this showing is sufficient to demonstrate that the

⁹ The Siting Board does not agree with the Intervenor's contention that granting a petition pursuant to G.L. c. 164, § 69k½ (vi) effectively repeals G.L. c. 40A § 17. Instead we conclude that this statute can be interpreted in harmony with prior enactments of the Legislature by assuming that the Legislature intentionally carved out a limited exception to G.L. c. 40A, § 17 in order to address delays in the construction of critical energy infrastructure.

facility cannot be built due to the delay caused by the appeal, and is sufficient to carry out our interpretation of the Legislature's purpose in enacting this provision. Based on the above, the Siting Board finds that the Company has stated a valid ground for granting an Initial Petition in accordance with G.L. c. 164, § 69K½ (vi).

2. A Burdensome Condition

General Law c. 164, § 69K½, ¶ 2, 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 Company has asserted that the ZAT, Transformer, and PILOT Conditions of the Special Permits are burdensome. The Siting Board considers each of the conditions below.

a. The ZAT Condition

Condition 20 of the Special Permits implicitly assumes that MDEP, in issuing its Conditional Air Quality Permit for the facility, would follow its recent practice of requiring new generators, after five years of operation, to evaluate the costs and benefits of replacing their existing NO_x control equipment with ZAT. On August 20, 2001, subsequent to the evidentiary hearing in this matter, MDEP issued its Conditional Air Quality Permit. The Conditional Air Quality Permit contains no requirement that IDC evaluate ZAT for the facility within the first five years of operation (see Exh. EFSB-38, at 7-8). The Siting Board, therefore, finds that the requirement in the ZAT Condition of the Special Permits that the Company adhere to an agreement with MDEP to evaluate ZAT equipment within the first five years of operation of the facility, except for cost considerations, is moot. Accordingly, the Siting Board finds that the ZAT Condition does not constitute a burdensome condition which has a substantial impact on the responsibilities of the Siting Board. Moreover, the Siting Board finds that issues in this proceeding associated with the ZAT Condition and the Modified ZAT Condition have been rendered moot in light of the issuance of the Conditional Air Quality Permit.

b. The Transformer Condition

IDC maintained that the cost associated with implementing the Transformer Condition would outweigh the benefits of the Condition (Exh. IDC-1, at 15). Specifically, IDC indicated that it can achieve the requirement for a noise increase of no more than 5 dBA set forth in the Final Decision at a cost of approximately \$300,000, while it estimates implementation of the Transformer Condition to be in excess of \$1,700,000 (Exhs. EFSB-5; EFSB-6; EFSB-7). The Company stated that the Siting Board required IDC to increase noise at residential receptor R-4 by no more than 5 dBA, but left the design of noise mitigation sufficient to achieve this level to the Company (Exh. IDC-1, at 16).

The Intervenor alleged that IDC has failed to demonstrate that the Transformer Condition has a substantial impact on the responsibilities of the Siting Board (Intervenor Brief at 10). The Intervenor contended that the Company's showing of a burden rests on the testimony of the Company's witnesses that implementation of the Transformer Condition would result in a design change (*id.* at 11, *citing* Exh. IDC/SRP-1, at 6). According to the Intervenor, projects such as the facility routinely undergo design changes after obtaining Siting Board approval, since the Siting Board issues its decision prior to the issuance of other permits that may require design changes (*id.* at 11).

The Siting Board notes that a need for design changes is not sufficient to show that the Transformer Condition is a burdensome condition which has a substantial impact on the responsibilities of the Siting Board. The Company, however, has presented evidence regarding the cost of implementing of the Transformer Condition and has alleged that similar levels of noise reduction could be achieved at a significantly lower cost. A condition that requires significant incremental expenditure on environmental mitigation may be burdensome, and may have a substantial impact on the responsibility of the Siting Board to ensure a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Based on the evidence in this case, the Siting Board finds that the incremental expenditure for IDC to implement the Transformer Condition does not represent the least cost means to achieve the desired level of noise mitigation. Accordingly, the Siting Board finds that the Company has stated a valid ground for the granting of its Initial Petition, in accordance with G.L.

c. 164, § 69K ½, ¶ 2.

c. The PILOT Condition

IDC argued that since the Company has no control over the Town's willingness to negotiate or enter into a PILOT agreement, the PILOT Condition is burdensome and has a substantial impact on the responsibilities of the Siting Board (Exh. IDC-1, at 12). The Company argued that pursuant to this condition, failure to execute a PILOT agreement by July 1, 2001 would preclude IDC from constructing the facility (*id.* at 13).

The Intervenor asserted that the Company has failed to present a valid argument to support its contention that the PILOT Condition constitutes a burdensome condition with a substantial impact on the responsibilities of the Siting Board (Intervenor Brief at 9). According to the Intervenor, this condition merely sets a time limit for the Company to fulfill an obligation executed with the Town of Bellingham in the Wastewater Services Agreement¹⁰ (*id.* at 10, *citing* Exh. BP-22, Tr. at 123).

The Siting Board notes that to its knowledge, the Company and the Town had not entered into a PILOT Agreement as of the July 1, 2001 deadline set forth in the PILOT Condition. As a result, the PILOT Condition prohibits the construction of the facility. The Siting Board finds that, in light of its approval of the construction of the facility in the Final Decision, the PILOT Condition is a burdensome condition which has a substantial impact on the responsibility of the Siting Board to provide a reliable energy supply for the Commonwealth. Based on the above, the Siting Board finds that the Company has stated a valid ground for granting an Initial Petition in accordance with G.L. c. 164, § 69K ½, ¶ 2.

3. Inconsistency with Other Resource Use Permits

General Law c. 164, § 69K ½ (iii) provides that the Siting Board must grant an Initial Petition if "an applicant believes there are inconsistencies among resource use permits issued by

¹⁰ On April 5, 1999, the Company and the Town entered into a Wastewater Services Agreement that provides, *inter alia*, that the agreement is subject to and conditioned upon the execution of a payment in lieu of taxes agreement (Exh. IDC-1, App. A, Tab 16, at 3).

state or local agencies." IDC asserted that the ZAT and Transformer Conditions are inconsistent with the Final Decision and the IDC Compliance Decision and that the Transformer Condition is inconsistent with these Siting Board decisions, as well as with MDEP's draft air permit provisions (Exh. IDC-1, at 21-22). Since the Siting Board has found that the ZAT Condition is now moot, the Siting Board addresses the Transformer Condition only.

The Company stated that the Transformer Condition is inconsistent with the Final Decision and the IDC Compliance Decision with respect to project layout and noise impacts and noise mitigation (Exh. IDC-1, at 15). IDC stated that implementation of the height requirements around the transformer would result in height changes in some other facility structures, and is therefore inconsistent with the project configuration approved by the Siting Board (*id.* at 15-16, citing Final Decision at 315; IDC Compliance Decision at 67). IDC also made the argument that the Siting Board left to the Company the specific design of mitigation measures for achieving an increase in noise levels of no more than 5dBA at Residential Receptor 4 (Exh. IDC-1, at 16).

The Intervenors argued that the Transformer Condition is not inconsistent with the Final Decision and the IDC Compliance Decision (Intervenors Brief at 11). According to the Intervenors, the Company can comply with both the Transformer Condition and Siting Board's Final Decision (*id.*).

The Siting Board found in the Final Decision at 360 that with the implementation of additional noise mitigation that would limit L_{90} noise increases at receptor R-4 to 5dBA, the environmental impacts of the facility would be minimized with respect to noise. Further, the Siting Board found in IDC Compliance Decision at 67, that the noise impacts of the reconfigured facility would be less than those of the facility in its originally approved configuration. On its face, the requirement of the Transformer Condition that the Company build walls surrounding the transformer that are 10 feet or higher than the transformer itself is not inconsistent with the Final Decision or the IDC Compliance Decision. Further, in this proceeding, the Company failed to provide sufficient evidence that implementation of the Transformer Condition would require specific changes to the design of the project layout that are inconsistent with the design assumptions upon which the Siting Board relied the facility proceedings. Consequently, the Siting Board finds that the Company has not stated a valid ground for the granting of an Initial

Petition pursuant to G.L. 164, § 69K½ (iv).

4. Improper Consideration and Imposition of Non-Regulatory Condition

General Laws c. 164, § 69K½ (iv) 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 such state or local agencies, such as, but not limited to, aesthetics and recreation." IDC asserts that the Zoning Board lacked the authority to impose both the ZAT and PILOT Conditions (Exh. IDC-1, at 11, 13). Based on our determination that the ZAT Condition is moot, we address the PILOT Condition only.

IDC asserted that the Zoning Board lacks the authority to impose the PILOT Condition and therefore IDC may seek a Certificate pursuant to G.L. c. 164, § 69K½ (iv) (*id.* at 11). In support of its position, the Company argued that issues related to IDC's tax obligations are beyond the Zoning Board's jurisdiction, which is limited to granting and conditioning special permits pursuant to G.L. c. 40A, § 9 (*id.* at 11, *citing Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 536-537 (1956)). In addition, the Company argued that the Zoning Board lacks the authority to impose conditions in the Special Permits, the performance of which is beyond the Company's control (*id.* at 11-12, *citing V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth*, 30 Mass. App. Ct. 530 (1991) ("It is unreasonable [for the Zoning Board] to impose a condition the performance of which lies entirely beyond the applicant's power")).

In addition, IDC contended that the PILOT Condition is invalid because it "sets an imprecise standard, delegates to another Town agency the Zoning Board's zoning authority, and postpones for future action the satisfaction of the condition" (*id.* at 12, *citing Weld v. Board of Appeals of Gloucester*, 345 Mass. 376 (1963); *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 624 (1986)). IDC argued that a determination of whether an agency has imposed a non-regulatory condition is a question of law (Company Reply Brief at 6, *citing Berkshire Power Development*, 8 DOMSB 274, at 290, n.12 (1999)) ("*Berkshire Decision*").

The Intervenor argued that the PILOT Condition is a regulatory condition that ensures compliance with § 1530 of the Zoning By-Laws, which requires the Zoning Board to evaluate the

"social, economic, or community needs which are served by the proposal" as well as the "potential fiscal impact" of the facility (Intervenors Brief at 8). The Intervenors asserted that the Zoning Board considered these criteria and that Bellingham will receive millions of dollars in tax revenues from the facility (id. at 8, citing Exh. IDC-2-S, App. F, Tab 73(A)).

The Siting Board has stated that an applicant may seek a Certificate pursuant to G.L. c. 164, § 69K½ (iv) where an agency has required an applicant to comply with a particular condition or take other specific action which the agency lacks the legal authority to require. Berkshire Decision at 286 to 290, n.12 (1999). While § 1530 of the Zoning By-Laws requires consideration of the potential fiscal impact of and economic need for a project in evaluating an application for a Special Permit, it does not provide express authority for the Zoning Board to determine the terms of any fiscal agreement that an applicant enters into with the Town. Thus, the Zoning board's authority to impose the PILOT Condition is at least questionable. Under G.L. c.164, § 69K½ (iv), an applicant is required to show only a reasonable belief that an agency lacks the authority to impose a condition in order to seek an Initial Petition pursuant to this subsection of the statute. Here, the Siting Board finds that the Company provided a reasonable basis for alleging that the Zoning Board improperly considered a non-regulatory condition. Consequently, the Siting Board finds that the Company has stated a valid ground for the granting of an Initial Petition pursuant to G.L. c. 164, § 69K½ (iv).

5. Exhaustion of Administrative Remedies

The Intervenors argued on brief that, pursuant to 980 CMR 6.02, the Company should be required to exhaust its administrative remedies prior to petitioning for a Certificate (Intervenors Brief at 14). Specifically, the Intervenors stated that the Company has not petitioned the Zoning Board to amend the Special Permits or to modify the conditions contained in the Five Special Permits, and should be required to do so, prior to seeking a Certificate (id.). The Intervenors argued that requiring applicants to exhaust their administrative remedies before seeking relief from the Siting Board would encourage developers to resolve problems without litigation, and reduce the need for the Siting Board to resolve local disputes (id. at 14).

IDC argued that the Company has satisfied the requirements of 980 CMR 6.02, since it

filed its Initial Petition only after the Opponents' Appeal had been filed (Company Brief at 26). Moreover, the Company stated that the Chairman of the Siting Board determined that the Company has satisfied the applicable procedural requirements for filing an Initial Petition (Company Reply Brief at 10, citing February 15, 2001 Procedural Order at 2).

The Siting Board reiterates the Chairman's determination in the February 15, 2001 Procedural Order that the Company has satisfied the procedural requirements for filing an Initial Petition. While the Siting Board encourages applicants to make every effort to resolve local issues on a local level before (and indeed after) filing a Petition for a Certificate, we will not go beyond our statute to impose a requirement that applicants exhaust their administrative remedies prior to such a filing.

C. Decision

The Siting Board shall grant an Initial Petition for a Certificate provided that (1) the petitioner asserts in its Initial Petition one or more 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, § 69K½ 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, § 69K½.

In Section II. B, above, the Siting Board has found that 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. In Sections II. B.1, II. B. 2b and 2c, and II.B. 4, above, the Siting Board also has found that IDC has stated three substantively valid grounds for the granting of the Company's Initial Petition. Any of these grounds would be sufficient, pursuant to G.L. c. 164, § 69K½, 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, § 69O½, the Siting Board must make four findings to support the

issuance of a Certificate for a generating facility. First, the Siting Board must determine that the issues raised by the agency, or agencies, whose actions are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in the Certificate proceeding itself. Berkshire Decision 8 DOMSB at 291.

The Siting Board's decision also must include the Board's "findings and opinions" with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health, and public safety; (2) the extent to which construction and operation of the generating facility will fail to conform with existing state or local laws, and, if the facility will not conform in some respect, the reasonableness of exempting it from conformance, consistent with the implementation of the energy policies in the Siting statute; and (3) the public interest or convenience requiring construction and operation of the generating facility. Id.

B. The Issues

In this proceeding, IDC has requested that the Siting Board issue a Certificate granting the Five Special Permits as they were issued by the Zoning Board, with modifications that provide relief from three conditions that the Company claims are burdensome, are inconsistent with its other resource use permits, or are based on the improper consideration and imposition of non-regulatory conditions. Thus, the Siting Board must (1) identify the issues raised by the Zoning Board in issuing the Five Special Permits and in imposing the three contested conditions; (2) determine which of those issues are within the appropriate scope of the proceeding;¹¹ and (3) determine whether the issues that are properly before the Siting Board have been comprehensively addressed either in the facility proceedings or in this proceeding.

¹¹ The Siting Board does not interpret G.L. c. 164, § 69O½ as requiring that all issues raised by an agency, without exception, be comprehensively addressed in a Certificate proceeding. Where an agency raises issues that are not within the Siting Board's jurisdiction to determine, are not properly within the scope of a Certificate proceeding, or otherwise are not properly before the Board, G.L. c. 164, § 69K½ does not require that such issues be comprehensively addressed. Berkshire Decision 8 DOMSB at 292, n.13.

1. Scope of Issues Raised by the Agency

Because the parties to this proceeding differ in their understanding of the scope of "issues raised by the agency," the Siting Board addresses this matter before examining the issues raised.

a. Intervenors' Position

The Intervenors stated that "it is not clear precisely what are the 'issues raised' as they apply to this proceeding" (Intervenors Brief at 12). However, the Intervenors suggested that, because the Special Permits were granted, the "issues raised" should encompass all the topics addressed in the Special Permits (id.). The Intervenors listed a number of topics addressed in the Special Permits which the Siting Board did not address in the facility proceedings, including property loss compensation, assignment of rights, demolition obligations, and payments in lieu of taxes (id. at 13).

b. Company's Position

IDC argued that the "issues" that the Siting Board must comprehensively address are the issues raised by the Zoning Board and that, for the purpose of this proceeding, these issues fall into two broad categories: (1) IDC's requests for Five Special Permits; and (2) the three disputed conditions (Company Brief at 29). The Company noted that the Five Special Permits relate to air quality, the height of certain project components, the use of temporary structures, parking and lighting plans, and the storage of hazardous materials, while the three disputed conditions relate to the use of ZAT, the use of transformer walls for noise mitigation, and the negotiation of a PILOT Agreement (id.). The Company argued that substantive aspects of the PILOT Condition are not within the Siting Board's jurisdiction (id.). The Company then discussed the degree to which the Siting Board has addressed the following issues: (1) air quality, including the use of ZAT; (2) noise, including noise mitigation; (3) the project's site plans and visual impacts, including the height and location of project components; (4) the use of temporary structures during construction, and the project's parking and lighting plans; and (5) the storage of hazardous materials (id. at 30 to 47).

In response to the Intervenor's arguments, the Company first argued that the Siting Board is not required to review every comment or issue raised in the Zoning Board proceedings, and noted that the Intervenor seeks to have the Siting Board review even those conditions with which the Company has explicitly agreed to comply (Company Reply Brief at 8).

IDC also argued, citing the Berkshire Decision, that the Siting Board must address only issues "properly within the scope of the Certificate proceeding" (*id.*). The Company maintained that each of the issues that the Intervenor characterizes as "not previously addressed" is either beyond the scope of the Siting Board's jurisdiction or outside the scope of this proceeding (*id.* at 10). Specifically, the Company asserted that determinations of property value are outside of the scope of the Siting Board's statutory mandate, citing a hearing officer ruling in the Berkshire Power proceeding noting that the Siting Board has generally declined to exercise jurisdiction over property value impacts (*id.* at 9). The Company argued that the Siting Board's review of the PILOT Condition is limited to determining whether the condition constitutes a burdensome condition in accordance with G.L. c. 164, § 69K½, and whether the Zoning Board acted outside its authority in imposing the condition. The Company noted that the Siting Board has held that it is not empowered to interpret or enforce the conditions incorporated in permits issued by other agencies (*id.* at 9, citing Berkshire Decision at 297-298).

IDC asserted that the assignment of rights is outside the Siting Board's jurisdiction, which is limited to a review of issues directly related to the potential environmental, health or safety impacts of granting a proposed Certificate (*id.* at 9-10, citing Berkshire Decision, Hearing Officer Procedural Order at 9, March 26, 1999; Hearing Officer Procedural Order at 5-6, May 25, 1999). Finally, the Company stated the Siting Board's jurisdiction does not extend to demolition obligations, since the Siting Board's mandate pertains to issues related to the construction and operation of a generating facility, not to its decommissioning (*id.* at 10).

c. Analysis

In defining the appropriate scope for its review of an application for a Certificate, the Siting Board looks to the language of its statute. G.L. c. 164, § 69O½ first directs the Siting Board to issue a Certificate only if it determines that the issues raised by the agency, or agencies,

requiring construction of the facility, without considering the effect of the proposed Certificate on these matters. Consequently, to provide an evidentiary basis for its decision, the Siting Board must consider the subject matter of each permit or other authorization to be issued as part of the requested Certificate, and develop a record to support the three required findings.

Thus, where a Certificate is requested based on a challenge to all or some portion of an agency's action, the Siting Board must determine whether the issues raised by the agency in support of the challenged action have been comprehensively addressed, either in the facility proceedings or in the Certificate proceeding. In addition, if the Certificate would reiterate some portion of the agency's action, the Siting Board must determine that it has addressed the subject matter of the permit, either in the facility proceeding or in the Certificate proceeding, to the extent necessary to determine the environmental protection, public health, and public safety implications of the permit. When a Certificate is requested to implement an agency approval following appeal of that approval, the Siting Board must determine that it has addressed the subject matter of the approval, either in the facility proceedings or in the Certificate proceeding, to the extent necessary to determine the environmental protection, public health, and public safety implications of the permit. The Siting Board recognizes that certain state and local permits may appropriately address subjects that are not relevant to the scope of the Siting Board's inquiry in a Certificate proceeding. The Siting Board need not address such subjects in order to develop an adequate evidentiary foundation for its decision.

2. Determination of Issues Raised

In this proceeding, IDC has requested a Certificate granting the Five Special Permits as they were issued by the Zoning Board, with modifications that provide relief from three conditions that the Company claims are burdensome, are inconsistent with its other resource use permits, and/or are based on the improper consideration and imposition of non-regulatory conditions. Consistent with our analysis above, the Siting Board must determine that the issues raised by the Zoning Board in support of the three challenged conditions have been comprehensively addressed, either in the facility proceedings or in the Certificate proceeding. In addition, the Siting Board must determine that it has addressed the subject matter of the Five

Special Permits, either in the facility proceedings or in the Certificate proceeding, to the extent necessary to determine the environmental protection, public health, and public safety implications of the permits and to the extent necessary to determine conformance with existing state and local laws. Finally, the Siting Board must include in its decision findings and conclusions with respect to the public interest or convenience requiring construction and operation of the generating facility.

a. Issues Raised by the Agency in Support of the Conditions

The Siting Board turns first to determining the issues raised by the Zoning Board in support of the three contested conditions. Consistent with established principles of due process, in attempting to identify the issues that were raised by an agency in establishing certain permit conditions, the Siting Board looks to the required written statement of reasons set forth in the agency's final decision in the permit proceeding, rather than to issues that may subsequently be raised by the agency in other documents or other forums. See, e.g., G.L. c. 30A, § 11.¹³ Thus, if the agency's final decision includes a statement of reasons, the Siting Board's inquiry into the "issues raised" for purposes of the Board's review under G.L. c. 164, § 69O½ is complete. Berkshire Decision, 8 DOMSB at 292.

In those cases where the agency in question has not issued a statement of reasons contemporaneous with its final decision, the Siting Board may seek other contemporaneous indicators of the bases for the agency's action. Thus, for example, in the absence of a statement of reasons, the Siting Board may look to the official record of the proceeding in which the agency considered and acted upon the permit at issue. Id. at 292-293. Finally, in the absence of any contemporaneous indicator of the bases for the agency's decision, the Siting Board may consider statements made by the agency after the agency's final decision was issued. These ex post facto statements are, however, the least reliable source of information regarding the concerns that

¹³ The Siting Board notes that the requirements of G.L. c. 30A, the State Administrative Procedure Act, apply only to state agencies. G.L. c. 30A, § 1. Accordingly, not every agency whose actions may be the subject of a Certificate proceeding will have issued a written statement of reasons.

formed the basis for the agency's final decision, since it may not be possible to discern from them which issues were in fact raised by the agency during the permit proceeding, and which issues have arisen or been added since the proceeding was concluded. Id. at 293.

i. ZAT Condition

Condition 20 of each of the Special Permits states that:

... IDC shall abide by an agreement with the MDEP to evaluate these ZATs within the first five years of operation; provided, however, that IDC, while making any such evaluation, shall exclude the acquisition costs of any such ZAT equipment to be installed at the plant.

(Exh. IDC- 2, App. E, Tab 65, at 23).

Condition 20 implicitly assumes that the MDEP, in issuing its Conditional Air Quality Permit for the facility, would follow its practice in several recent permits of requiring new generators, after five years of operation, to evaluate the costs and benefits of replacing their existing NO_x control equipment with ZAT. Final Decision at 270; see also e.g. Southern Energy Kendall Decision, 11 DOMSB at 293 (2000); Brockton Power Decision, 10 DOMSB at 190 (2000). As noted in Section I.B.1, above, during the pendency of this proceeding, the MDEP issued its Conditional Air Quality Permit for the IDC Bellingham facility. That permit does not require a re-evaluation of ZAT at any time during the life of the facility; instead, it requires the facility to achieve a NO_x concentration of 1.5 parts per million by volume, dry ("ppmvd") in its stack emissions.

Because MDEP has not required the Company to re-evaluate ZAT within the first five years of operation, all issues regarding the assumptions to be used in such an evaluation are moot. The Siting Board determines that there are no remaining issues to be addressed with respect to the ZAT Condition. The Siting Board further determines that, because Condition 20 has been rendered moot by the terms of the Conditional Air Quality permit, Condition 20 should be omitted from any Certificate issued as a result of this proceeding.

ii. Transformer Condition

Condition 22 (a) of each of the Special Permits states that:

Transformers and CCW coolers shall have concrete walls on at least four sides, ten (10) feet higher than said transformers.
(Exh. IDC-2, App. E, Tab 65, at 23).

The Special Permits include this requirement as one of an extensive set of noise mitigation measures, but do not describe the purpose of this specific measure (id.). Further, the transcripts of the Zoning Board hearings contain no reference to the height of the transformer walls (id. at App. E, Tabs 59 to 64). The Special Permits state that the noise impacts resulting from the operation of the facility would: (1) be well below the MDEP's 10 dBA limit on increases from new sources; (2) be well below the 65 dBA limit set in the Town of Bellingham's noise ordinance; and (3) meet the 45 dBA steady-state noise limit for residential receptors in a new Bellingham By-Law not applicable to the facility (id. at App. E, Tab 65, at 19). The Special Permits note that the maximum allowable noise from the facility during normal operation would be 40 dBA at the nearest existing residence (id.).

Because Condition 22(a) of the Special Permits was imposed as part of a general noise mitigation package, the Siting Board concludes that the issue raised by this condition is the minimization of noise generated by the facility. The noise impacts of the facility are within the Siting Board's jurisdiction, and are clearly relevant to an evaluation of the compatibility of the generating facility with considerations of environmental protection, public health and safety and the extent to which construction and operation of the facility will fail to conform with existing state and local laws, ordinances, by-laws, rules and regulations. Consequently, in Section III.B.3.f, below, the Siting Board addresses the noise impacts of the facility, and considers Condition 22(a) in that context.

iii. PILOT Condition

Condition 23 of each of the Special Permits states that:

The Applicant shall, on or before July 1, 2001, execute and enter into a Payment in Lieu of Tax Agreement, the obligation of which will be at least equal to agreements existing with the Town of Bellingham and industries of a similar nature.
(Exh. IDC-2, App. E, Tab 65, at 25).

In evaluating the social, economic, or community needs served by the proposal, the

Zoning Board in the Special Permits indicates that Bellingham will receive millions of dollars in annual tax revenues from the facility through a PILOT Agreement to be signed and executed by the parties prior to the issuance of any occupancy permits (*id.* at 12). The Special Permits also reference tax revenues (although not the PILOT Agreement) in evaluating the potential fiscal impact of the facility (*id.* at 19). The Special Permits do not provide an explanation for the July 1, 2001 date referenced in Condition 23.

Because the PILOT Agreement is discussed in the context of social, economic and community needs and potential fiscal impacts, the Siting Board concludes that the issues raised by the PILOT Agreement are primarily those of local economics. Such issues are not clearly relevant to the evaluation of the compatibility of the generating facility with considerations of environmental protection, public health and safety, and do not properly fall under the Siting Board's jurisdiction. Moreover, there is no indication in the record of the Zoning Board's purpose in imposing the July 21, 2001 deadline for the PILOT Agreement. The Siting Board therefore confines its analysis of Condition 23 in Section III.B.3.g, below, to the question of whether the condition constitutes a burdensome condition in accordance with G.L. c. 164, § 69K½, and whether the Zoning Board acted outside its authority in imposing the condition.

b. Subject Matter of the Special Permits

The Siting Board turns next to the subject matter of the Five Special Permits issued by the Zoning Board. The Five Special Permits address, respectively, building and structure height, air quality, temporary structures and parking, exterior lighting, and the storage and use of hazardous materials. Each of these subjects is relevant to an analysis of whether the facility is compatible with considerations of environmental protection, public health, and public safety and the extent to which construction and operation will fail to conform with existing state and local laws, ordinances, by laws, rules and regulations. Thus, these issues are properly within the scope of this proceeding. Consequently, in Sections III.B.3.a, b, c, d, and e below, the Siting Board addresses the issues of building and structure height, air quality, temporary structures and parking, exterior lighting, and the use, storage, and disposal of hazardous materials as they relate to the facility.

3. Evaluation of Issues Raised

a. Building Heights

IDC's request for Special Permit 1 relates to § 2610 of the Zoning By-Laws, which governs the height of buildings and structures (Exhs. IDC-2, App. A, Tab 1, at 2, 3; EFSB-37, Att. at 16, 17). Section 2610(b) of the Zoning By-Laws states that a structure or projection not used for human habitation, which is not otherwise permitted under the height restrictions set forth in § 2600, may be authorized by special permit from the Zoning Board, upon determination by the Zoning Board that the proposed height is functionally important for the use, and that the structure or projection and its use will not result in threats to health, safety, or visual compatibility with the surroundings (Exhs. IDC-2, App. E, Tab 65, at 9, 10; EFSB-37, Att. at 17). IDC sought this special permit because several facility structures would be in excess of otherwise applicable height restrictions, including: the dual-flue stack (225 feet high plus any necessary aircraft lighting); the air-cooled condenser (114 feet high, including pipes); the turbine building (90 feet high with lights at 98 feet and roof steam drums with vents 107 feet above grade); a water tank (no more than 46 feet high); and three electric transmission towers (80 feet high) (Exh. IDC-2, App. A, Tab 1, at 3, and App. E, Tab 65, at 1, 9, and Tab 68, at 2, 5).

In Special Permit 1, the Zoning Board found that the structures that exceed Bellingham's height limitations are needed to support the project's function in an environmentally sound and efficient manner, and that the heights of these structures are functionally important (*id.*, App. E, Tab 65, at 10). The Zoning Board cited a visual analysis which indicated that the stack would not be visible, or would be minimally visible, from most potential viewing locations (*id.*, Tab 65, at 10). The Special Permit noted that the Federal Aviation Administration ("FAA") had determined that there would be no hazard to air navigation from either a 190-foot stack, a 225-foot stack, or a 260-foot construction crane, and the Zoning Board concluded that structures allowed by the Special Permit would not pose a threat to health or safety (*id.*, App. E, Tab 65, at 8-10). The Zoning Board found that increasing the stack height from 190 feet to 225 feet would reduce modeled nitrogen dioxide concentrations, and specifically allowed and required the taller

stack height of 225 feet (id., App. E, Tab 65, at 10).¹⁴

The Special Permit states that the applicant presented information that the project was "specifically designed to . . . minimally intrude on the surrounding neighborhood character and social structure" (id., App. E, Tab 65 at 8). The Zoning Board found that the project is in harmony with the general purpose and intent of the Zoning By-Laws, which permit electrical generating facilities in Industrial Districts (id., App. E, Tab 65, at 10). Accordingly, the Zoning Board voted to grant Special Permit 1 (id., App. E, Tab 65, at 20).¹⁵

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 1 would allow construction of the facility with buildings as described in the original Special Permit 1, at the heights described in Special Permit 1, and with a stack height of 225 feet (id. at 1).

In the facility proceedings, the Siting Board's review of building and structure heights focused on visual impacts. The Siting Board evaluated the visual impacts of the facility with a 190-foot stack in the Final Decision at 292-300. In the Final Decision at 298, the Siting Board noted that the facility would be somewhat screened from view as a result of its proposed wooded buffer. The Company indicated that the upper portions of the approved 190-foot stack together with other high elements of the facility, such as the air-cooled condenser or the heat recovery steam generator ("HRSG"), would be visible from a few viewshed locations, but that from remaining viewshed locations, including most residential locations, facility views would be screened or be limited to portions of the stack. Final Decision at 293-294. The Siting Board directed the Company, in Condition C of the Final Decision, to provide reasonable off-site mitigation of visual impacts to screen views of the facility, as requested by property owners or municipal officials. Id. at 299-300, 360. The Siting Board found that, with implementation of Condition C, the visual impacts of the facility would be minimized. Id. at 300.

The Siting Board specifically addressed the visual impacts of a 225-foot stack in the

¹⁴ Condition 6 of Special Permits 1 and 2 requires that the stack be 225 feet high (Exh. IDC-2, App. E, Tab 65 at 21, Tab 66, at 7).

¹⁵ Modification of the height requirement appears in Special Permit 4, the special permit for lighting (Exh. IDC-2, App. E, Tab 68, at 5).

project change proceeding. IDC Project Change Decision at 6-9. In the IDC Project Change Decision at 8, the Siting Board noted that visual impacts would be "more pronounced . . . from numerous viewpoints" with a 225-foot stack, and modified Condition C to require that the Company provide, as requested by property owners and municipal officials, the option of at least one tree with a minimum height of 14 feet where needed to screen views of the facility. The Siting Board found that, with implementation of Condition C, as modified, the visual impacts of the facility would be minimized. Id.

Special Permit 1 describes the heights of several buildings and structures that were not specifically addressed by the Siting Board in the facility proceedings. These structures are shorter than the air-cooled condenser, and thus would be less visible from surrounding areas. Wooded areas around the facility generally would screen these other buildings. The record indicates that the FAA has determined that the 225-foot stack would not pose a hazard to air navigation. No other issues related to building height have been raised by the Zoning Board or by parties in this proceeding. Consequently, the Siting Board finds that construction of the facility, with buildings and structures extending to the heights described above, is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to building height.

b. Air Quality

IDC's request for Special Permit 2 relates to § 3240 of the Zoning By-Laws, which requires that a special permit be obtained for any use that would be classified as a major stationary new source under United States Environmental Protection Agency ("USEPA") regulations; subject to MDEP regulations under 310 CMR 7.00; or subject to § 112 of the Clean Air Act due to emissions of asbestos, benzene, beryllium, mercury, vinyl chloride, or radionuclides (Exhs. IDC-2, App. A, Tab 2, at 2; EFSB-37, Att. at 23). IDC stated that the facility is classified as a major new stationary source of air pollution, and that it is subject to permitting under 310 CMR 7.00, but that it is not subject to § 112 of the Clean Air Act (Exh. IDC-2, App. A, Tab 2, at 2).

In Special Permit 2, the Zoning Board found that facility emissions would be well below significant impact levels ("SILs") for criteria pollutants and below both Threshold Effects Exposure Limits ("TELS") and Allowable Ambient Levels ("AALs") for noncriteria pollutants (*id.*, App. E, Tab 66, at 3). The Zoning Board also reviewed modeling of cumulative ambient air impacts from multiple sources in the area, and noted in the Special Permit the low levels of hazardous emissions from gas-fired power plants (*id.*, App. E, Tab 66, at 4). The Special Permit stated that the facility's air emissions would be regulated by MDEP; that the facility is not expected to emit asbestos, benzene, beryllium, vinyl chloride, or radionuclides that facility emissions are not expected to harm the environment or other premises or to jeopardize health or safety; that the facility would incorporate stringent air pollution controls; and that the facility's environmental impacts are in harmony with the general intent of the Zoning By-Laws (*id.*, App. E, Tab 66, at 4-6). Accordingly, the Zoning Board voted to grant Special Permit 2 (*id.*, App. E, Tab 66, at 6).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 2, like the original Special Permit 2, would allow construction of the facility under § 3240 of the Zoning By-Laws (and under provisions for special permits in §§ 1500 and 3290) (*id.* at 1). With the exception of the Modified ZAT Condition, which we have found to be moot, the Proposed Special Permits do not differ from the original Five Special Permits with respect to air quality (*see* Exhs. IDC-2, App. E, Tab 65, at 20-25; IDC-2-S).

The Siting Board extensively reviewed the air quality impacts of the facility in two of the facility proceedings. *See Final Decision* at 260-275; *IDC Compliance Decision* at 44-52. The Siting Board found that combined concentrations would be below ambient air quality standards for criteria pollutants, except ozone, and that impacts would be below TELs and AALs for non-criteria pollutants. *Final Decision* at 268-269, 346-349. The Siting Board reviewed the cumulative impact of emissions from the facility and other existing and proposed sources, and concluded that the IDC project would contribute less than one percent of the cumulative concentrations of nitrogen dioxide, sulfur dioxide, fine particulates, and carbon monoxide at the point(s) of maximum cumulative pollutant impact within 10 kilometers of the facility. *Id.* at 269. The Siting Board considered the use of zero ammonia technologies for nitrogen oxides control,

but did not find sufficient evidence in the record to support requiring such a technology. Id. at 269-270. The Siting Board also reviewed the cumulative health impacts of the facility, and determined that the impacts of criteria pollutant emissions would be minimized and that the air toxics emissions from the facility would have no discernable public health impact. Id. at 348-349. The Siting Board found that, with implementation of certain NO_x and CO₂ offset measures, the environmental impacts of the facility would be minimized with respect to air quality. Id. at 275.

In the facility proceedings, the Siting Board found that the air quality impacts of the facility would be minimized. Since the Final Decision was issued, MDEP has issued the Conditional Air Quality Permit for the facility, which further limited emissions, particularly of NO_x, for which the anticipated stack concentration was reduced from 2.0 ppmvd to 1.5 ppmvd. See IDC Project Change Decision at 4. We note that the local air quality impacts of the facility would be further reduced through the use of the higher 225-foot stack. While the Siting Board did not previously evaluate whether the facility would emit asbestos, benzene, beryllium, or vinyl chloride, the Siting Board notes that these substances are not typically emitted by gas-fired power plants and agrees with the Zoning Board's conclusion that these substances would not be emitted. No other issues related to air quality have been raised by the agency or by other parties in this proceeding. Consequently, the Siting Board finds that construction and operation of the facility, which would emit criteria pollutants in quantities that would trigger certain air pollution control requirements, is compatible with considerations of environmental protection, public health, and public safety.

The record shows that the facility has received its Conditional Air Quality Permit from MDEP, which indicates that the project complies with federal and state air regulations (Exh. EFSB-38). The Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to regulated air emissions.

c. Temporary Structures and Parking

IDC's request for Special Permit 3, which addresses temporary structures and parking,

relates to §§ 2210, 2220, and 2400 of the Zoning By-Laws, which, in combination, indicate that a special permit is required for the use of temporary structures and for provision of parking for more than three light commercial vehicles or more than one heavy commercial vehicle (Exhs. IDC-2, App. A, Tab 3, at 2; EFSB-37, Att. at 9-12).¹⁶ IDC requested a special permit for temporary structures and parking during construction of the facility (Exh. IDC-2, App. A, Tab 3, at 1).

In its application for Special Permit 3, the Company stated that there would be trailers, changing rooms, bathrooms, temporary workshops and tool shops on-site during construction of the facility, which is expected to last less than two years (id., App. A, Tab 3, at 2). The Company asserted that these temporary structures would not intrude on the surroundings due to their low height and non-obtrusive appearance, and due to the effective visual screening provided by wooded areas at the periphery of the site (id., App. A, Tab 3, at 3). The Company stated that on-site construction and laydown areas would be established to house commercial vehicles during construction (id.). Finally, the Company stated that two or three station vehicles and no other commercial vehicles would be stored on-site during normal facility operation (id.).

In granting Special Permit 3, the Zoning Board found that the temporary structures at the site would not visually intrude on their surroundings (id., App. E, Tab 67, at 2).¹⁷ The Zoning Board also found that storage of commercial vehicles on-site would be minimized, and that equipment would remain on-site as much as possible (id.). Furthermore, the Zoning Board identified measures that would be taken to minimize the impacts of using heavy equipment, including dust and erosion control measures (id., App. E, Tab 67, at 3). Overall, the Zoning Board concluded that parking, storage, and temporary structures would be in harmony with the general intent of the Zoning By-Laws and voted to grant Special Permit 3 (id., App. E, Tab 67,

¹⁶ Special Permit 3 also indicates that IDC would request that the Bellingham Planning Board reduce the parking requirements for the facility, indicating that the requirements of the Zoning By-Laws exceed what is necessary for the facility (Exh. IDC-2, App. E, Tab 67, at 3).

¹⁷ Special Permit 3 cites low height, "non-obtrusive" appearance, and effective visual screening provided by existing wooded areas as factors making the temporary structures non-intrusive (i.e., as mitigating visual impacts) (Exh. IDC-2, App. E, Tab 67, at 2).

at 3, 4).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 3, like the original Special Permit 3, would allow the use of temporary structures and the on-site parking of construction equipment during construction of the facility (id. at 2). In addition, the Settling Parties proposed a new condition, Condition 24, related to temporary structures and parking (id. at 7). Condition 24 states that:

The Company shall work with the Town of Bellingham Conservation Commission to develop a plan for and to implement the restoration to a vegetative state of areas which are used for temporary structures and parking and other construction activities but which are not used for post-construction operation of the Plant. In the event that the Town of Bellingham Conservation Commission requires trees to be planted in any such restored areas, such trees shall be bagged and burlap nursery stock planted in accordance with the technical specifications of the Town of Bellingham's Scenic Roads By-law in effect as of the date of this decision.

(Exh. IDC-2-S at 7).

With the exception of new Condition 24, the proposed Permits do not differ from the original Special Permits with respect to temporary structures and parking (see Exhs. IDC-2, App. E, Tab 65, at 20-25; IDC-2-S).

In the Final Decision at 335 and in the IDC Compliance Decision at 72, the Siting Board reviewed the on-site land use impacts of the construction of the facility, which was to include -- in addition to the 14.5-acre requirement for the plant footprint -- a temporary land requirement of 12 acres for construction laydown and parking. Most of the remainder of the 156-acre site is wooded and would be retained as conservation land, open space or permanently undeveloped land, providing a buffer from off-site areas in all directions. Final Decision at 334, 338; IDC Compliance Decision at 71-72.

The Final Decision did not directly address the impacts of temporary structures and parking; however, portions of the Final Decision are relevant to such an analysis. For example, the analysis of visual impacts in the Final Decision at 292-295, 298-300 focused on specific elements of the facility likely to be visible in off-site areas, notably the stack and the air-cooled condenser. The Siting Board notes that, given the on-site wooded buffer, other structural features of the project, including temporary structures and parking, would not be readily visible from off-site areas.

Similarly, the Siting Board evaluated the local traffic impacts of the facility, including issues related to the transport of construction equipment and materials. Final Decision at 322-329. The Company committed to schedule deliveries of large equipment and plant components during off-peak traffic periods, and to coordinate such deliveries with local officials. Id. at 326. The Siting Board also reviewed the construction noise impacts of the facility, estimated to be a maximum of 63 dBA at the nearest residence during the excavation and finishing stages of the construction period. Id. at 306, 316. To minimize construction noise, the Company committed to comply with federal regulations limiting truck noise and to ensure that construction equipment manufacturers' normal sound muffling devices are used and kept in good repair during construction. Id.

In the Final Decision at 292-316, 322-329, 333-343, the Siting Board reviewed the land use and visual impacts of constructing the facility, and also evaluated construction period impacts with respect to traffic and noise. The use of temporary structures and parking allowed by Special Permit 3 is consistent with the record developed in the facility proceedings. New Condition 24 further mitigates the possible long-term impacts of parking and the use of temporary structures by providing for the restoration of temporary workspace to a vegetated condition once the facility is in operation. No other issues related to temporary structures and parking at the facility have been raised by the agency or by other parties in this proceeding. Consequently, the Siting Board finds that the use of temporary structures and parking during construction of the facility is compatible with considerations of environmental protection, public health, and public safety. The Siting Board further finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to the use of temporary structures and parking during construction of the facility.

d. Exterior Lighting

IDC's request for Special Permit 4 relates to § 3230 of the Zoning By-Laws, which governs exterior lighting (Exhs. IDC-2, App. A, Tab 4, at 2; EFSB-37, Att. at 21-22). Section 3230 of the Zoning By-Laws states that a special permit is needed for lighting in excess of certain limitations on height and illuminance; a special permit may be granted if the

limitations are inherently infeasible for a particular use and reasonable efforts have been made to avoid glare or light overspill onto residential premises (Exhs. IDC-2, App. E, Tab 68, at 1; EFSB-37, Att. at 21-22). IDC sought this special permit to allow a variety of light fixtures that would exceed the otherwise applicable requirements of the Zoning By-Laws; these include lights on the landings of stairs and on galleries of the air-cooled condenser, lights on water tanks, and aviation lighting as required by the FAA on the stack (Exh. IDC-2, App. A, Tab 4, at 2-4 and App. E, Tab 68, at 1, 2).

In granting Special Permit 4, the Zoning Board found that the lighting proposed by IDC is the minimum required per code for purposes of worker safety, security, and nighttime inspections of outdoor equipment (*id.*, App. E, Tab 68, at 3). The Zoning Board found that the lighting would be directed and hooded in accordance with the Zoning By-Laws (*id.*, App. E, Tab 68, at 3, 4). The Zoning Board also found that reasonable efforts have been made to avoid glare or light overspill onto residential premises (*id.*, App. E, Tab 68, at 4). Accordingly, the Zoning Board voted to grant Special Permit 4 (*id.*, App. E, Tab 68, at 5).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Permit 4, like the original Special Permit 4, would allow implementation of a lighting plan consistent with the plan attached to the Company's Application No. 4 to the Zoning Board (Exhs. IDC-2, App. A, Tab 4, at 3, 4 and Tab 12; IDC-2-S; see also Exhibit A of the attached Certificate). However, Condition 6 of the Five Special Permits is revised to require that the stack lighting be directed downward as much as engineeringly feasible (Exh. IDC-2-S at 3). With the exception of the change to Condition 6, the conditions attached to the proposed special permits do not differ from those attached to the original special permits with respect to exterior lighting.

In its Final Decision at 296-300, the Siting Board considered the impacts of nighttime lighting as part of its analysis of the visual impacts of the facility. The Siting Board noted that the facility would be somewhat screened from view as a result of its proposed wooded buffer, and that the Company would attempt to minimize the visual impact of exterior lighting in its final lighting design by using fixtures that would be oriented downward and hooded, with no unnecessary illumination. *Id.* at 296-298.

Since the Final Decision was issued, IDC has developed a detailed exterior lighting plan

which it submitted to the Zoning Board for review. The record indicates that downward directed lights have been proposed where possible, and that the wooded buffer around the facility should reduce the visibility of exterior lighting at abutting land uses.

The Siting Board notes that facility lighting is generally needed for security and for employee and public safety, and that there are specific public safety benefits associated with aviation lighting on the stack. An upward component to air traffic safety lighting is likely to be essential to its proper public safety function, notwithstanding the engineering feasibility of directing such lighting to limit an upward component. Consequently, the Siting Board finds that the proposed revision to Condition 6 is not compatible with considerations of environmental protection, public health, and public safety.

No other issues related to exterior lighting have been raised by the agency or by other parties in this proceeding. Consequently, the Siting Board finds that construction of the facility, with exterior lighting as described in Special Permit 4, is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to exterior lighting.

e. Hazardous Materials

IDC's request for Special Permit 5 relates to § 3250 of the Zoning By-Laws, which addresses the use and storage of hazardous materials (Exhs. IDC-2, App. A, Tab 5, at 2, 3; EFSB-37, Att. at 23). Section 3250 of the Zoning By-Laws states that a special permit is needed for use(s) involving: (a) manufacturing, under certain conditions; (b) storage of flammable materials in excess of specified quantities, except fuel for onsite use, and (c) transport, use, treatment, storage, or disposal of hazardous waste, under specified conditions (Exh. EFSB-37, Att. at 23). The Company indicated that a nominal 40,000 gallons of 19% aqueous ammonia would be stored on-site in a bulk storage tank (Exh. IDC-2, App. A, Tab 9).

In granting Special Permit 5, the Zoning Board found that storage of hazardous materials at the site is not expected to cause harm or adversely affect the environment, and that there would be very few waste materials arising from construction and operation of the facility (id., App. E,

Tab 69, at 3-4). Special Permit 5 specifically addressed the use of ammonia at the facility, finding that there would be multiple levels of protection against spills of aqueous ammonia from storage, including a secondary containment dike around the primary tank (*id.*, App. E, Tab 69, at 4). The Zoning Board also found that, when compared to other manufacturing processes, the delivery and use of 19% aqueous ammonia on the site would not jeopardize health or safety on-site or offsite, would not harm the environment or other premises, and would not excessively burden the health and safety of residents in the area (*id.*, App. E, Tab 69, at 4-5). Accordingly, the Zoning Board voted to grant Special Permit 5 (*id.*, App. E, Tab 69, at 6).

The Settling Parties jointly proposed a revised set of special permits (Exh. IDC-2-S). Proposed Special Permit 5, like the original Special Permit 5, would allow the storage and use of hazardous materials listed in Att. D of the original special permit application to the Zoning Board (Exhs. IDC-2, App. A, Tab 5 at 3 and Tab 6; IDC-2-S, Exhibit A; see also Exhibit B of the attached Certificate). In addition, the Settling Parties proposed a new condition, Condition 25, addressing the storage and handling of hazardous materials, that would be attached to all Five Special Permits (Exh. IDC-2, at 7). Proposed Condition 25 requires that all chemicals be stored and handled in accordance with the applicable Materials Safety Data Sheets ("MSDS") (Exh. IDC-2-S at 7). With the exception of Condition 25, the conditions attached to the proposed special permits do not differ from those attached to the original Special Permits with respect to use and storage of hazardous materials (see Exhs. IDC-2, App. E, Tab 65, at 20-25; IDC-2-S).

In two of the facility proceedings, the Siting Board reviewed IDC's plans for the storage and handling of hazardous materials, including its use and storage of aqueous ammonia and its emergency response plans. Final Decision at 316-321; IDC Compliance Decision at 67-68. The Siting Board determined that the Company had designed the facility to avert spills of hazardous materials, and that the Company intended to develop emergency procedures and response plans similar to those previously found acceptable by the Siting Board. Final Decision at 321. With respect to the use of aqueous ammonia, the Siting Board noted that the Intervenor had argued that safety risks from the use and storage of ammonia could be eliminated by requiring the use of NO_x control technologies that do not require ammonia, but went on to note that the record did not demonstrate that such technologies were available at the time, and that there were questions

about the water demands of such technologies. Id. at 269, 320-321. The Siting Board concluded that the Company had taken all steps that were feasible to minimize the safety risks of ammonia. Id. at 321.

The Siting Board also evaluated the solid and hazardous waste impacts of the facility in the underlying case and the compliance case. Final Decision at 291-292; IDC Compliance Decision at 56-57. Hazardous solid wastes generated during operation would include spent lubrication oil filters, empty hazardous waste containers, and depleted catalyst units from the selective catalytic reduction system. Final Decision at 292. As noted in the Final Decision, some solid waste from construction and operation of the facility would be recycled, reclaimed, or reused; the rest would be disposed of at appropriate disposal sites by the Company or its licensed contractor. Id. Disposal would be conducted in a manner consistent with applicable government regulation. Id.

The storage and handling of materials other than ammonia and hazardous waste were not explicitly addressed by the Siting Board in the Final Decision, except with respect to spill control and prevention. The record shows that newly proposed Condition 25 would require that all chemicals be stored and handled in accordance with the applicable MSDS. The Siting Board notes that MSDS contain information on the proper handling and emergency procedures to be used for various chemical products. The proposed additional condition that all chemicals be handled in accordance with applicable MSDS merits adoption, and should address both environmental and public safety concerns. No other specific hazardous material issues have been raised by the agency or by other parties in this proceeding.

Accordingly, the Siting Board finds that the storage and use of hazardous materials, including aqueous ammonia, at the facility is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to storage and use of hazardous materials.

f. The Transformer Condition

Condition 22(a) of the Special Permits required, as one of a set of noise mitigation

measures, that the facility be designed with transformers and CCW coolers having concrete walls on at least four sides, 10 feet higher than said transformers (Exh. IDC-2, App. E, Tab 65 at 23, Tab 66 at 24, Tab 67 at 7, Tab 68 at 8, and Tab 69 at 9). In the Special Permits, the Zoning Board found that development of the project would occur in a central location within the site in order to maintain natural buffers between the project and surrounding land uses (id., App. E, Tab 65, at 16). The Zoning Board found that the noise impacts resulting from the operation of the facility would: (1) be well below the MDEP 10 dBA limit on increases from new noise sources, as detailed in MDEP Policy 90-001; (2) be well below the 65 dBA limit set in the applicable Town of Bellingham noise ordinance; and (3) although not applicable, meet Bellingham's steady-state noise limit of 45 dBA for residential receptors (id., App. E, Tab 65, at 17). The Zoning Board concluded that the project's impact on the neighborhood character and social structures would be minimal (id.).

IDC argued that the facility could be designed to meet Siting Board and MDEP requirements, even without the walls required by Condition 22(a), and that overall noise impacts would be very similar under either design (Exhs. EFSB-25; EFSB-34). The Company estimated the incremental capital cost of noise mitigation to comply with Condition 22(a) as \$1,400,000 (Exh. EFSB-5). In addition, the Company argued that the transformer walls required by Condition 22(a) could reduce the energy efficiency of the transformers, especially in hot weather, might result in a need to spread equipment out across the site, and could restrict access for emergency vehicles (Exhs. EFSB-22; EFSB-23; EFSB-24).

The Company suggested that the Siting Board adopt the Modified Transformer Condition developed by the Settling Parties (Exh. IDC-2-S). The Modified Transformer Condition would allow the Company either to provide concrete walls extending 10 feet above transformers and CCW coolers or to provide equivalent noise mitigation (id. at 5). In addition, the Modified Transformer Condition specifies that maximum plant-generated noise from the facility may not exceed a variety of limits (id.). Finally, the Modified Transformer Condition states that if IDC builds the higher walls, any related and necessary plant layout changes, including height, would be deemed approved without further action by the Siting Board or the Zoning Board (id.).

The Intervenor contended that IDC has admitted it could comply with the original

Condition 22(a); that such compliance would not cause the Company to forego or delay construction of the facility; that the net cost of complying with the condition is \$1,400,000, or less than 2% of the project cost; that complying with the condition would not affect wetlands or stack height; and that there is no evidence that the transformer wall would create an additional adverse visual impact (Intervenors Brief at 11). The Intervenors contended that the original Condition 22(a) would impose a relatively minor expense upon IDC, while reducing sound by 5 dBA (id. at 12).

The Siting Board extensively evaluated the noise impacts of the facility in two of the facility proceedings. Final Decision at 300-316; IDC Compliance Decision at 60-67. The Siting Board did not highlight the transformers or CCW coolers as principal sources of noise from the facility. Id. The Siting Board noted that the Company proposed a variety of noise mitigation technologies to reduce noise from various facility components; these mitigation technologies included noise barrier walls or equivalent on all sides of the main and auxiliary transformers. Id. at 304. Modeling presented to the Siting Board indicated that, with the noise mitigation as proposed by the Company, the level of noise that is exceeded 90% of the time ("L₉₀") would increase by 4 dBA or less at all residential receptors save one, and would increase by 8 dBA at the remaining residential receptor, identified as receptor R-4. Id. at 314. The Siting Board found noise mitigation beyond that proposed by the Company to be cost-effective, and directed the Company to implement additional noise mitigation to limit L₉₀ noise increases to 5 dBA at receptor R-4. Id. at 315. Such mitigation was estimated by the Company to cost \$1,419,800. Id. at 305. The Siting Board found that, with the implementation of such mitigation, the environmental impacts of the facility would be minimized with respect to noise. Id. at 316. In the IDC Compliance Decision at 67, the Siting Board evaluated the change in noise levels associated with the change in facility configuration, and found that the noise impacts of the facility in the compliance configuration would be less than the noise impacts of the facility in the approved configuration.

The record shows that Condition 22(a) would increase the capital costs of the facility by approximately \$1,400,000 and an undetermined operational cost, while providing little incremental relief from noise impacts. While the Intervenors contended that implementation of

Condition 22(a) would result in a 5 dBA reduction in noise, the record does not indicate that total facility noise levels would be 5 dBA lower with Condition 22(a), or any lower at all. Because Condition 22(a) increases the cost of the facility significantly while providing little incremental benefit, the Siting Board finds that Condition 22(a) is burdensome. Further, because Condition 22(a) does not represent the lowest cost means to achieve the desired level of noise mitigation, the Siting Board concludes that Condition 22(a) is at odds with our mandate to implement policies to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Consequently, the Siting Board finds that Condition 22(a) is a burdensome condition which has a substantial impact on the responsibilities of the Siting Board.

The Settling Parties have proposed a Modified Transformer Condition. The Modified Transformer Condition would provide the same level of overall facility noise mitigation as the original Condition 22(a), at a significantly lower cost. Thus the Modified Transformer Condition is generally consistent with the Siting Board's mandate to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

However, the Siting Board notes that the Modified Transformer Condition provides that, if IDC builds the higher walls, any related and necessary plant layout changes would be deemed approved by both the Siting Board and the Zoning Board. While this provision apparently is acceptable to the Zoning Board, it is not acceptable to the Siting Board, as it would relieve the Company of any obligation to report even major changes in project layout to the Siting Board. Without having layout changes specified, the Siting Board would not be able to determine the facility's environmental impacts, and would not be able to determine whether the facility, as modified, would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Our concern can be resolved by omitting the reference to the Siting Board from the Modified Transformer Condition.

Based on the record in this case and the facility proceedings, the Siting Board finds that construction of the facility with noise barrier walls around the main transformers and CCW coolers, or with equivalent noise mitigation, as set forth in the Modified Transformer Condition, is compatible with considerations of environmental protection, public health, and public safety.

Consequently, the Siting Board adopts the Modified Transformer Condition, with the further modification that the reference to the Siting Board be omitted. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to construction of noise barrier walls around the main transformers and CCW coolers, or equivalent noise mitigation.

g. PILOT Condition

Condition 23 of the Special Permits required the Company to enter into a PILOT Agreement on or before July 1, 2001, and stated that the obligations of the Agreement must be at least equal to those contained in agreements existing between the Town of Bellingham and industries of a similar nature (Exh. IDC-2, App. E, Tab 65, at 25). The record contains no evidence that a PILOT Agreement was reached by July 1, 2001.

The Company argued that Condition 23 is burdensome because it is inconsistent with both the Final Decision and the IDC Compliance Decision (Company Brief at 20). IDC states that under the PILOT Condition, if a PILOT Agreement was not executed by July 1, 2001, which it was not, IDC's Special Permits could be void and IDC would be unable to construct the facility (*id.*). Further, IDC asserted that the Zoning Board has no authority to condition IDC's Special Permits on actions the performance of which lies beyond IDC's control (*id.* at 22, *citing*, V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth, 30 Mass. App. Ct. 530 (1991)). Therefore IDC argued that, since IDC has no control over the Town of Bellingham's willingness to negotiate or execute a PILOT Agreement, the Zoning Board did not have the authority to impose Condition 23 (*id.* at 22).

IDC stated that the Settling Parties agreed to modify Condition 23 to state: (1) that IDC shall make good faith efforts to meet and negotiate a PILOT Agreement with Bellingham; and (2) that failure of the parties to reach an agreement by July 1, 2001 shall not constitute grounds for violation of the Special Permits ("Modified PILOT Condition") (Exh. IDC-2(S)). However, IDC stated that the agreement reached by the Settling Parties does not change the fact that the condition currently in effect is Condition 23 as it is worded in the Special Permit (Company Reply Brief at 6).

The Intervenor argued that Condition 23 is not a burdensome condition which has a substantial impact on the responsibilities of the Siting Board (Intervenor Brief at 9-10). The Intervenor asserted that Condition 23 merely places a time limit upon IDC to fulfill an obligation IDC voluntarily incurred by executing a Wastewater Services agreement with Bellingham (*id.*). The Intervenor also asserted that IDC's argument that Condition 23 is not within the Zoning Board's authority must fail because G.L. c. 169, § 69K½ does not empower the Siting Board to decide whether conditions to a permit lie within an agency's jurisdiction (Intervenor Brief at 9). Instead, the Intervenor argued, the Siting Board's authority is limited to determining whether a condition is regulatory in nature (*id.*). The Intervenor asserted that Condition 23 is regulatory in nature because it is designed to ensure compliance with the regulatory criteria that govern the issuance of special permits in the Town of Bellingham and thus, G.L. c. 169, § 69K½ (iv) does not apply (*id.*).

As a preliminary matter, we note that the Siting Board did not review the issue of the PILOT Agreement in the Final Decision. In the Final Decision, the Siting Board, as required by its statutory mandate, reviewed the environmental impacts associated with the facility and determined that the facility would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. In Section III.B, above, the Siting Board determined that the appropriate scope of analysis for Condition 23 is whether it constitutes a burdensome condition and whether the Zoning Board acted outside its authority in requiring the Condition.

The Siting Board notes that on December 21, 1999, it approved the construction of the facility with a net nominal output of 700 MW and that on September 21, 2000 it approved the construction of the facility at a reduced net nominal output of 525 MW. Pursuant to G.L. c. 164, § 69J¼, once a generating facility is approved by the Siting Board, it shall be deemed to contribute to a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Since no information was submitted to indicate otherwise, the Siting Board concludes that a PILOT Agreement was not reached by the July 1, 2001 date specified in Condition 23. Therefore, under the current terms of Condition 23 the facility cannot be constructed. The Siting Board finds that Condition 23, which would preclude

the construction of a generating facility that contributes to a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, is in conflict with the Siting Board's mandate to ensure a reliable energy supply for the Commonwealth. Consequently, the Siting Board finds that Condition 23 is a burdensome condition which has a substantial impact on the responsibilities of the Siting Board as set forth in G.L. c. 164, § 69K½.¹⁸

The Modified PILOT Condition, which was agreed to by IDC, the Town of Bellingham and the Zoning Board, allows for construction of the facility even though the Settling Parties did not execute a PILOT Agreement by July 1, 2001. The proposed modification removes the burdensome aspects of original Condition 23 and allows negotiations regarding the PILOT Agreement to continue.

The Siting Board notes that the PILOT Agreement, when negotiated, will address issues of local economics (including, primarily, the annual revenues to be paid by IDC to Bellingham). These issues are far removed from matters of environmental impacts, public health, and public safety. Therefore, the Siting Board need not make a finding pursuant to G.L. c. 164, § 69O½ regarding the bearing of the Modified PILOT Condition on the facility's compatibility with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the Modified PILOT Condition has no bearing on whether the facility would conform to local or state laws, ordinances, by-laws, rules, or regulations.

C. Findings

Pursuant to G.L. c. 164, § 69O½, the Siting Board must make four findings to support the issuance of a Certificate of Environmental Impact and Public Interest for a generating facility. First, the Siting Board must determine that the issues raised by the agency or agencies whose permits or approvals are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in

¹⁸ Because the Siting Board has found that original Condition 23 is a burdensome condition which has a substantial impact on the responsibilities of the Board, the Siting Board need not reach the issue of whether original Condition 23 is a non-regulatory condition.

the Certificate proceeding itself. The Siting Board also must address: (1) the compatibility of the generating facility with considerations of environmental protection, public health and public safety; (2) the extent to which construction and operation of the generating facility will fail to conform with existing state and local laws, rules and regulations and the reasonableness of exempting it from conformance, consistent with the implementation of the energy policies in G.L. c. 164; and (3) the public interest or convenience requiring construction and operation of the generating facility.

In this section, the Siting Board addresses each of these four statutory requirements, based on its analysis in Sections III.B. 3, above..

1. Issues Raised by the Agency

In Section III. B. , above, the Siting Board found that it must determine that the issues raised by the Zoning Board in support of the three challenged conditions have been comprehensively addressed either in the underlying facility proceedings or the Certificate proceeding. In addition, the Siting Board found that it must determine that it has addressed the subject matter of the Five Special Permits either in the underlying facility proceedings or in the Certificate proceeding.

With respect to the issues raised in support of the three contested conditions, the Siting Board determined that in light of the MDEP's issuance of the Conditional Air Quality Permit, the ZAT Condition has been rendered moot, with no remaining issues to be addressed. The Siting Board also determined that since the Transformer Condition was imposed as a part of a general noise mitigation package, the issue raised by this condition is the minimization of noise generated by the facility. Regarding the PILOT Condition, the Siting Board determined that substantive issues related to the PILOT Condition are beyond the scope of the Siting Board's statutory authority, and that the Siting Board's inquiry is limited to the issue of whether the condition constitutes a burdensome condition in accordance with G.L. c. 164, § 69K½, and whether Zoning Board acted outside its authority in requiring the condition.

In Sections III.B.3.(a-f), above, the Siting Board reviewed the subject matter of each of the Five Special Permits as well as the issues raised by the Transformer Condition, in light of its

findings in the facility proceedings. For ease of review, we summarize each below.

a. Building Height

In the Final Decision, the Siting Board reviewed building and structure height, and focused its inquiry on the visual impacts of a 190 foot stack. Final Decision at 292-300. The Siting Board found that with implementation of Condition C, to require reasonable off-site mitigation of visual impacts, the visual impacts of the facility would be minimized. Id. at 300. In the IDC Project Change Decision, the Siting Board reviewed the visual impacts of a 225 foot stack, and revised Condition C to offer the option of larger trees. The Siting Board found that with the implementation of Condition C, as revised, the visual impacts of the facility would be minimized. IDC Project Change Decision at 6-9. In this proceeding, the Siting Board reviewed the heights of several buildings that were not previously addressed, and found that the surrounding wooded areas would generally screen these buildings. Consequently, the Siting Board finds that it has comprehensively addressed issues related to building heights either in its prior approval of the facility or in this proceeding.

b. Air Quality

The Siting Board extensively reviewed air quality impacts of the facility in the facility proceedings, and found that with implementation of certain NO_x and CO₂ offset measures, the facility's air quality would be minimized and that air toxic emissions from the facility would have no discernable public health impact. Final Decision at 348-349. Since the Final Decision, MDEP issued its Conditional Air Quality Permit for the facility, which reduced anticipated emissions. In this proceeding, we noted that the local air quality impacts of the facility would be further reduced by the use of a 225-foot stack. We also noted that, while the Siting Board did not previously evaluate issues related to the emission of asbestos, benzene, beryllium, or vinyl chloride, we concur with the Zoning Board's conclusion that these substances would not be emitted from the facility. Consequently, the Siting Board finds that it has comprehensively addressed issues related to air quality either in its prior approval of the facility or in this proceeding.

c. Exterior Lighting

In the Final Decision, the Siting Board evaluated the impacts of nighttime lighting in its analysis of the visual impacts of the facility. Id. at 296-300. In this proceeding, the Siting Board reviewed the need for facility lighting, and the public safety benefits associated with lighting in general, and particularly aviation lighting on the stack. The Siting Board found that an upward component to air traffic safety lighting is likely to be essential to its proper public safety function, and concluded that the proposed revision to Condition 6 of the Special Permits is not compatible with considerations of environmental protection, public health, and public safety. Consequently, the Siting Board finds that it has comprehensively addressed issues related to exterior lighting either in its prior approval of the facility or in this proceeding.

d. Temporary Structures and Parking

In the Final Decision, the Siting Board reviewed the land use and visual impacts of facility construction, as well as construction period traffic and noise impacts. Id. at 306, 316 and 322-329. In this proceeding, the Siting Board determined that the use of temporary structures and parking allowed pursuant to Special Permit 3 is consistent with our Final Decision. In addition, the Siting Board found that new Condition 24 of the proposed Certificate further mitigates long-term impacts of the use of temporary structures and parking by providing for the restoration of the temporary workspace to a vegetated condition. Consequently, the Siting Board finds that it has comprehensively addressed issues related to temporary structures and parking either in its prior approval or in this proceeding.

e. Hazardous Materials

In the Final Decision and the IDC Compliance Decision, the Siting Board extensively reviewed the Company's plans for storage and handling of hazardous materials, including the use and storage of aqueous ammonia. Final Decision at 316-312; IDC Compliance Decision at 67-68. The Siting Board did not explicitly address in the facility proceedings the storage and handling of materials other than ammonia and hazardous waste, except with respect to spill

control and prevention. In this proceeding, the Siting Board found that the proposed additional Condition 25, which requires all chemicals to be stored and handled in accordance with the applicable MSDS, should address both environmental and public safety concerns. Consequently, the Siting Board finds that it has comprehensively addressed issues related to hazardous materials either in its prior approval of the facility or in this proceeding.

f. Transformer Condition

In Section III. A.2.a (ii), above, the Siting Board found that the issue raised by the Zoning Board in the Transformer Condition is the minimization of noise generated by the facility. In the Final Decision, the Siting Board extensively evaluated the noise impacts of the facility and found that with implementation of noise mitigation that would limit L_{90} noise increases at receptor R-4 to 5 dBA, the environmental impacts of the facility would be minimized with respect to noise. Final Decision at 360. In the IDC Compliance Decision, the Siting Board evaluated the change in noise levels associated with the change in the configuration of the facility, and found that there would be a reduction in noise impacts as a result of the revised configuration. IDC Compliance Decision at 67. In this proceeding, the Siting Board found that construction of noise barrier walls around the main transformers and CCW coolers, or equivalent noise mitigation, as set forth in the Modified Transformer Condition, is generally consistent with the Siting Board's mandate to provide a reliable energy supply at the lowest possible cost. The Siting Board found, however, that it would retain its jurisdiction to review any project changes related to building the higher walls. Consequently, the Siting Board finds that it has comprehensively addressed issues related to noise mitigation either in its prior approval of the facility or in this proceeding.

The Siting Board has considered the issues raised by the Zoning Board, as well as the subject matter of each of the Special Permits and has determined that each issue has been addressed comprehensively, either in the Final Decision, the IDC Compliance Decision, the IDC Project Change Decision, or in this proceeding. Consequently, the Siting Board finds that the issues raised by the agency whose action is at issue in this proceeding have been addressed in a comprehensive manner by the Siting Board, either in its prior approval of the facility, or in this

proceeding. Further, the Siting Board finds that it has addressed the subject matter of each Special Permit to the extent necessary to determine the environmental protection, public health and public safety implications of the permits.

2. Compatibility with Considerations of Environmental Protection, Public Health and Public Safety

Pursuant to G.L. c. 164, § 69O½, the Siting Board must address the compatibility of the generating facility with considerations of environmental protection, public health and public safety in its decision on an Application for a Certificate.

In the Final Decision, the Siting Board conducted a comprehensive review of IDC's proposal to construct a 700 MW natural gas-fired combined-cycle power plan. See Final Decision. The Siting Board comprehensively reviewed the air quality impacts, water quality impacts, visual impacts, noise impacts, traffic impacts, safety impacts, electric and magnetic field impacts and land use impacts of the generating facility as proposed, and concluded that, upon compliance with certain conditions, the generating facility at the site "...would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Id. at 359.

In the IDC Compliance Decision, the Siting Board reviewed the Company's proposed change in turbine vendors with a resulting reduction of output of the facility from 700 MW to 525 MW. The Siting Board found that, with conditions, this change would not alter in any substantive way the Siting Board's analysis of the project's environmental impacts. IDC Compliance Decision at 76.

In the IDC Project Change Decision, the Siting Board reviewed project changes resulting from Zoning Board and MDEP review of the facility including: (1) an increase in the facility stack height from 190 feet to 225 feet; (2) a reduction in the projected emissions of certain criteria pollutants; (3) a change in the air permit limits for ammonia emissions; (4) a reduction in the size of the ammonia storage tank from 40,000 gallons to 29,000 gallons; and (5) a change in departure time for the main construction shift. The Siting Board found that changes related to a decrease in criteria pollutants, a change in the air permit limits for short term ammonia and a

decrease in the size of the ammonia tank did not require further inquiry. The Siting Board also found that upon compliance with revised Conditions C and G, regarding mitigation of visual impacts of the facility stack, and mitigation of traffic impacts of the main construction shift, the Company's plans for the construction of the facility would minimize the environmental impacts of the facility consistent with the minimization of cost associated with the mitigation, control, and reduction of the environmental impacts of the facility. IDC Project Change Decision at 13-15.

In Section III.B.3.(a-f), above, the Siting Board has reviewed the issues related to the environmental, public health and public safety implications of the proposed Certificate and has found that:

- Construction of the facility, with buildings and structures extending to the heights described in the Special Permits, is compatible with considerations of environmental protection, public health, and public safety.
- Construction and operation of the facility, which would emit criteria pollutants in quantities that would trigger certain requirements, is compatible with considerations of environmental protection, public health, and public safety.
- The use of temporary structures and parking during construction of the facility is compatible with considerations of environmental protection, public health, and public safety.
- Construction of the facility, with exterior lighting as described in the Special Permits issued by the Zoning Board, is compatible with considerations of environmental protection, public health and public safety.
- The use and storage of hazardous materials, including aqueous ammonia, at the facility is compatible with considerations of environmental protection, public health, and public safety.

- Construction of the facility with noise barrier walls around the main transformers and CCW coolers, or with equivalent noise mitigation, as set forth in the Modified Transformer Condition, is compatible with considerations of environmental protection, public health and public safety.

Consequently, based on its findings in the Final Decision, the IDC Compliance Decision, the IDC Project Change Decision, and Section III.B.2, above, the Siting Board finds that the construction and operation of the facility, in compliance with the Special Permits issued by the Zoning Board and modified in the attached Certificate are compatible with considerations of environmental protection, public health and safety.

3. Conformance with Existing State and Local Laws

G.L. c. 164, § 69O½ requires the Siting Board to include in its Decision a finding regarding "the extent to which construction and operation of the generating facility will fail to conform with 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]." G.L. c. 164, § 69O½ (ii). In the Final Decision, the Siting Board reviewed the facility's consistency with the policies of the Commonwealth, and found that the facility is consistent with current environmental protection policies of the Commonwealth and with such energy policies of the Commonwealth as have been adopted by the Commonwealth for the specific purpose of guiding the decisions of the Siting Board. Final Decision at 357-358. In Section III. B.3, above, the Siting Board has reviewed the extent to which the construction and operation of the facility, in compliance with the Special Permits issued by the Zoning Board and modified in the attached Certificate, conform with existing state and local laws, and has made the following findings:

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to construction of the facility, with respect to buildings and structure heights.

- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to regulated air emissions.
- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to the use of temporary structures and parking during construction of the facility.
- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to exterior lighting.
- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to storage and use of hazardous materials.
- The record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rule or regulations with respect to construction of noise barrier walls around the main transformers and CCW coolers, or equivalent noise mitigation.

Consequently, the Siting Board finds that the construction and operation the facility in compliance with the Five Special Permits issued by the Zoning Board and modified by the Siting Board in the attached Certificate would conform with existing state and local laws ordinances, by-laws, rules, and regulations.

4. Public Interest or Convenience

Pursuant to G.L. c. 164, § 69O½, the Siting Board must address the public interest or convenience requiring construction and operation of the generating facility in its decision on an application for a Certificate. In the facility proceedings, the Siting Board, after reviewing the site selection process and the environmental impacts of the facility, found that upon compliance with certain conditions, the construction and operation of the facility would "provide a reliable

energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Final Decision at 359; Compliance Decision at 76. The Siting Board also found that, upon compliance with certain conditions, the construction and operation of the facility would "minimize the environmental impacts of the facility consistent with the minimization of cost associated with the mitigation, control, and reduction of the environmental impacts of the proposed generating facility." Project Change Decision at 15.

Accordingly, after reviewing the proposed generating facility and its compatibility with considerations of environmental protection, public health and public safety, the Siting Board finds that the public interest requires the construction and operation of IDC's generating facility.

IV. DECISION

Pursuant to the Siting Board's enabling statute, the Siting Board shall issue a Certificate of Environmental Impact and Public Interest with respect to a generating facility only if the Siting Board determines that the issues raised by the state or local agencies, whose actions are the subject of the petitioner's Application have been comprehensively addressed, either in the Siting Board's approval of the facility under G.L. c. 164, § 69J¼, or in the Siting Board's review of the facility under G.L. c.164, § 69K½. G.L. c 164, § 69O½. In addition, the Siting Board's decision to issue a Certificate must include findings with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health, and public safety; (2) the extent to which the generating facility will not conform to existing state and local laws, ordinances, by-laws, rules, and regulations, and the reasonableness of exempting it from conformance, consistent with the implementation of the energy policies of G.L. c. 164; and (3) the public interest or convenience requiring construction and operation of the generating facility. G.L. c. 164, § 69O½.

In Section III C. 1 above, the Siting Board has found that the issues raised by the agency whose actions are at issue in this proceeding have been comprehensively addressed either in the facility proceeding, the facility compliance proceeding, the facility project change proceeding, or in this proceeding.

In Section III. C. 2 , above, the Siting Board has found that the construction and operation

of the generating facility, in compliance with the Special Permits issued by the Zoning Board, and modified in the attached Certificate, is compatible with considerations of environmental protection, public health, and public safety.

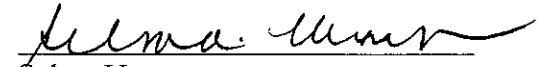
In Section III. C. 3 , above, the Siting Board has found that the construction and operation of the generating facility, in compliance with the Special Permits issued by the Zoning Board, and modified by the Siting Board in the attached Certificate, would conform with existing state and local laws, ordinances, by-laws, rules, and regulations.

In Section III. C. 4 , above, the Siting Board has found that the public interest requires the construction and operation of IDC's generating facility, with the modified and revised conditions of the Special Permits.

Accordingly, the Siting Board GRANTS the Company's Application for a Certificate of Environmental Impact and Public Interest with respect to the issuance of Five Special Permits with conditions as modified in the attached Certificate. The Siting Board also issues a Certificate of Environmental Impact and Public Interest, a copy of which is attached hereto as Attachment A and is part of the Siting Board's Final Decision in this proceeding.

In accordance with G.L. c. 164, § 69K½, this Certificate shall be enforced by the Town of Bellingham Zoning Board of Appeals and Building Inspector as if directly granted by the Zoning Board.

The Company shall file this Certificate with the Town of Bellingham Building Inspector and Town Clerk.


Selma Urman
Hearing Officer

Dated this 12th day of October, 2001.

COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

_____)
Application of IDC Bellingham LLC for a)
Certificate of Environmental Impact and)
Public Interest)
_____)

EFSB 01-1

**CERTIFICATE OF ENVIRONMENTAL IMPACT
AND PUBLIC INTEREST AND SPECIAL PERMITS**

Pursuant to its authority under G.L. c. 164, §§ 69K½-O½, the Energy Facilities Siting Board hereby (1) issues a Certificate of Environmental Impact and Public Interest ("Certificate") as provided by G.L. c. 164, §§ 69K½, and (2) grants Five Special Permits pursuant to the Town of Bellingham's Zoning By-Laws ("Zoning By-Laws") to IDC Bellingham LLC ("Company").

The Five Special Permits are granted to the Company relative to its proposed electric generating facility to be located in an Industrial District at the corner of Depot Street and Box Pond Road in Bellingham, Massachusetts ("Project"). The Special Permits granted are as follows:

1. A Special Permit under Zoning By-Laws Sections 1500 and 2610 to construct and use certain structures, as hereafter described, in excess of otherwise applicable height restrictions. The structures exempted from the Zoning By-Laws' height restrictions are: One dual-flue 225-foot high stack; one air-cooled condenser with the top of the distribution piping 114 feet above grade; one multi-leveled combustion turbine/steam turbine/heat recovery steam generator building with a maximum roof height of 90 feet; two high-pressure steam drums, two intermediate pressure steam drums, and two low pressure steam drums with relief vents 107 feet above grade surrounded by steam drum walkways and lighting fixtures 98 feet above grade and installed on the 90-foot high roofs; one raw water/fire water storage tank no more than 46 feet above grade; and three 80-foot high 345-kilovolt support structures.
2. A Special Permit under Zoning By-Laws Sections 1500, 3240, and 3290 regarding Air Quality.
3. A Special Permit under Zoning By-Laws Sections 1500, 2200, and 2400 for the use of temporary structures and parking for more than three light commercial vehicles or more than one heavy commercial vehicle during construction of the Project.

4. A Special Permit under Zoning By-Laws Sections 1500, 3232, 3234 and 3290 to implement a lighting plan consistent with Exhibit A attached hereto and incorporated herein.
5. A Special Permit under Zoning By-Laws Sections 1500, 3250 and 3290 for the storage and use of the hazardous materials listed in Exhibit B attached hereto and incorporated herein.

This Certificate and the Special Permits are issued subject to the following conditions:

1. A work schedule, consistent with Exhibit C attached hereto and incorporated herein, shall be followed during the construction phase of the Project. Any modification of the work schedule by the Company shall be approved by the Town of Bellingham Zoning Board of Appeals ("Zoning Board") after a public hearing, with notice to all parties.

2. At the point in time when the Project is deemed to have operated for its useful life and the Company or its successors has determined it is no longer prudent to staff and maintain the Project, the Company shall cause the Project to be demolished and the land returned to a clean, graded, and seeded condition, all in accordance with a fully executed Decommissioning Fund, described in Paragraph 3 hereafter, executed prior to the issuance of any occupancy permits.

3. On the first July 1 after the Project commences "commercial operation" (as defined in the Water Agreement), and on the same day each year thereafter for a period of 20 years, the Company shall deposit \$35,000 into an interest-bearing escrow account in a Massachusetts bank in the name of the Town of Bellingham and subject to its sole control. If the Company complies with the above Project demolition obligation, at the end of the Project's useful life as determined by the Company, the balance in the escrow account, including all accrued interest, shall be released to the Company upon successful demolition and land restoration as determined by the Zoning Board. In the event the Company does not commence compliance with the above-described demolition and restoration within 60 days after receipt of written notice from the Zoning Board to commence, all monies in the escrow account, including accrued interest, shall be utilized by the Town of Bellingham for demolition and restoration. Any balance remaining after such demolition and restoration by the Town of Bellingham shall be refunded to the Company.

4. The Company shall maintain the Project site and any utility easement routes in a clean and orderly condition, and shall routinely perform landscape care and Project painting, and shall keep the site generally free of litter.

5. Once in commercial operation, construction related facilities and equipment shall be removed from the site as quickly as practically possible.

6. The stack shall be 225 feet high (design specifics to be determined by the Company) and stack lighting or marking requirements shall be no more than that required by the Federal Aviation Administration ("FAA").

7. Location of the steam turbine, gas turbine, HRSG, air-cooled condenser and switching yard on the site shall be substantially similar to those locations shown on Exhibit D attached hereto and incorporated herein (the Site Plan), except as may be modified with the Town of Bellingham Building Inspector's approval.

8. No obnoxious, offensive, or dangerous odors or like emissions from the Project shall be reasonably detectable beyond the Project property line. Any related complaints shall be promptly investigated by the Company. The nature of the complaint, status of the investigations, and resolution shall be reported in writing to the Town of Bellingham's Health Agent within seven days of a complaint, and corrective action taken as appropriate.

9. The Company shall use reasonable efforts to minimize noises during construction, startup and acceptance testing. The Town of Bellingham Building Inspector and Health Agent shall be notified at least 48 hours prior to any blasting.

10. The Company shall have the right to assign the Special Permits to another entity subject to the written consent of the Zoning Board, which consent shall not be unreasonably withheld, provided that such entity has demonstrated successful technical and operational experience and financial capability to undertake the obligations of the Special Permits.

11. The Company shall make an immediate report of any significant incident at the Project to the Town of Bellingham Health Agent and Board of Selectmen.

12. A responsible Project official shall be designated by the Company as the operation's community contact on a daily available basis. This individual shall be responsible for resolving citizen and municipal complaints and inquiries.

13. The Company shall obtain all permits required by law from all other governmental agencies, necessary to construct the Project.

14. Prior to the commencement of construction, the Company shall cause the following two parcels of land to be placed under a permanent conservation restriction running in favor of the Town of Bellingham or the Town of Mendon or a not-for-profit conservation organization in the case of the Mendon parcel:

- (a) Lot 2 as shown on the Subdivision Plan; and
- (b) The Mendon Parcel.

15. Land within 300 feet of the current westerly right-of-way line of Depot Street; land within 200 feet of the current northerly and/or northeasterly right-of-way lines of Box Pond Road and Box Pond Drive shall be maintained as "Buffer Land." Such Buffer Land may include and overlap minimum front and side yards required under Section 2600 of the Zoning By-Laws. All Buffer Land is subject to the following conditions:

- (a) Front and side yards within Buffer Land may be landscaped in conformance with the Zoning By-Laws;
- (b) Perimeter, security and safety fences may be erected on Buffer Land;
- (c) Reasonable access roads and drives and water lines, gas lines, electric lines, other utility lines, water wells, water well pumps and pump houses (not to exceed a footprint of 1,500 square feet and a height of 20 feet) and storm drainage lines, catch basins and manholes, may be erected and maintained on or under Buffer Land;
- (d) No buildings or structures may be installed or maintained on or under Buffer Land except as set forth in Items 15(a) through 15(c), above.

16. Prior to the commencement of construction of the Project, the Company shall work with and, where necessary, provide appropriate training to the Town of Bellingham Fire Department, the Police Department, the Department of Public Works and the Local Emergency Planning Committee ("LEPC") to develop a final construction Emergency Response Plan; prior to the commencement of operation of the Project, the Company shall work with and, where necessary, provide appropriate training to the Town of Bellingham Fire Department, the Police Department, the Department of Public Works, and the LEPC to develop a final operations Emergency Response Plan; and shall work with and, where necessary, provide appropriate training to the Town of Bellingham Conservation Commission, Fire Department, Department of Public Works, and the LEPC to develop a final Spill Prevention, Control and Countermeasure Plan – which plans shall address all applicable items set forth in Exhibit E attached hereto and incorporated herein.

17. Prior to the commencement of construction, the Company shall work with the Town of Bellingham Police Department to develop a traffic mitigation plan which plans shall address all applicable items set forth in Exhibit E attached hereto and incorporated herein.

18. All exterior building colors and landscape materials shall be non-reflective (dark) and subject to the prior written approval of the Town of Bellingham Planning Board, which shall not be unreasonably withheld or delayed.

19. Prior to the commencement of operation of the Project, the Company shall have
 (i) received the approval, which approval shall not be unreasonably withheld or delayed, of the Town of Bellingham LEPC for the inventory of equipment described in Exhibit F hereto; and
 (ii) paid its appropriate share of the costs to purchase equipment set forth in such inventory.

20. No condition 20

21. On the first July 1 after the Project commences "commercial operation" (as defined in the Water Agreement), and on every July 1 thereafter for the next nine years, the Company shall provide \$50,000 in funds to the Town of Bellingham as a Property Value Loss Compensation Program or a Neighborhood Improvement Fund to be expended or used in the sole discretion of

the Town of Bellingham's Board of Selectmen. To qualify for same, a party must be a Bellingham residential property owner and accept the Bellingham assessed value of property for tax purposes or provide a Licensed Appraiser whose opinion includes an analysis of sales of existing homes in comparable residential areas, performed within six months of this agreement. Further, the neighborhood improvements must be in the Town of Bellingham, and within a one-mile radius of the center of the project site.

22. The Plant shall be designed with the following noise mitigation measures:

- (a) Transformers and CCW coolers shall have (1) concrete walls on at least four sides that are ten (10) feet higher than said transformers or CCW coolers, respectively; or, in the alternative, (2) equivalent noise mitigation, such that the maximum plant-generated noise from IDC's facility shall not exceed (i) the Massachusetts DEP ten-decibel limit on increases from new noise sources, as detailed in DEP Policy 90-001; (ii) the 65-decibel limit set in the applicable Town of Bellingham noise ordinance; (iii) a 45-decibel steady-state noise limit for residential receptors in the Town; and (iv) a 40-decibel limit at the closest residence in existence on the date of this decision (or at any location beyond the distance to such residence) during normal operation of IDC's plant. If IDC builds higher walls in accordance with this condition, any related and necessary plant layout changes, including height, are deemed approved without further action by the Zoning Board.
- (b) Building doors shall be kept closed at all times except for when they are being used for specific entry or exit. Doors shall be acoustically designed for adequate noise reduction.
- (c) All ventilation openings to the turbine building and any buildings or enclosures designed and installed for sound attenuation shall be equipped with state-of-the-art¹ sound attenuation mufflers or baffles, or equivalent.
- (d) Gas turbines, steam turbines and the HRSGs shall be contained within a structure specifically designed to attenuate sound. The walls of these structures shall be made of state-of-the-art sound attenuation material to minimize sound that could be emitted from these sources. The gas turbine intakes shall be equipped with at least twelve feet of silencer, or equivalent.
- (e) All on-site gas supply lines shall be buried under ground, contained within state-of-the-art acoustically treated structures, or specifically constructed with state-of-

¹ State-of-the-art sound abatement means and measures shall mean for purposes of this decision the use of means and measures that will provide the best sound abatement for the equipment, process or source noted herein as recognized by current engineering principles and practices at the time of construction necessary to meet the requirements of the permit. Means and measures of sound abatement shall be considered equivalent if they provide noise reductions which differ by no more than 2 dBA at the equivalent distance.

the-art sound attenuation materials to prevent these sources from causing excessive noise, a pure tone or tonal sound audible off property.

- (f) All high pressure steam lines shall be buried under ground, contained with state-of-the-art acoustically treated structures, or specifically constructed with state-of-the-art sound attenuation materials.
 - (i) The main steam lines from the heat recovery steam generators to the steam turbine buildings will be enclosed or acoustically treated.
 - (ii) The natural gas pipelines from the gas compressor building to the gas turbines will be buried, enclosed, or acoustically treated.
- (g) HRSG design shall include a silencer with gas turbine exhaust duct cladding and state-of-the-art noise attenuation cladding as necessary. HRSG high-pressure feedwater and recirculation pump design shall include pumps enclosed in a building with sound attenuating cladding. The HRSG shall also be enclosed by state-of-the-art sound attenuation walls and roofing.
- (h) Turbine exhausts shall be equipped with state-of-the-art sound attenuating mufflers.
- (i) All steam release vents (normal and emergency) shall be fitted with sound abatement mufflers prior to the initial testing and start up.
 - (i) Non-emergency steam releases shall be conducted only during daylight hours.
 - (ii) The Company shall notify the Town of Bellingham Board of Health and Police Department before such non-emergency releases are to be conducted.
- (j) The air-cooled condenser shall be designed and constructed with state-of-the-art noise attenuation features using low noise fans and motors as appropriate.
- (k) Perimeter berms, noise abatement walls and other sound minimization features may be employed as necessary to minimize sound levels from the Plant.
- (l) The maximum allowable Plant-generated noise during normal operation will be 40 dBA at the closest residence in existence on the date of this decision.

23. The Company shall make good faith efforts to meet with the Town of Bellingham, negotiate, execute and enter into a Payment in Lieu of Tax Agreement ("PILOT") on or before July 1, 2001, the obligations of which will be at least equal to existing agreements between the Town of Bellingham and industries of a similar nature. If a PILOT agreement has not been executed by July 1, 2001 despite the Company's efforts, such failure shall not be considered grounds for a violation of these Special Permits.

24. The Company shall work with the Town of Bellingham Conservation Commission to develop a plan for and to implement the restoration to a vegetative state of areas which are used for temporary structures and parking and other construction activities but which are not used for post-construction operation of the Plant. In the event the Town of Bellingham Conservation Commission requires trees to be planted in any such restored areas, such trees shall be bagged and burlap nursery stock planted in accordance with the technical specifications of the Town of Bellingham's Scenic Roads By-Law in effect as of the date of this decision.

25. All chemicals shall be stored and handled in accordance with the applicable Materials Safety Data Sheets ("MSDS").

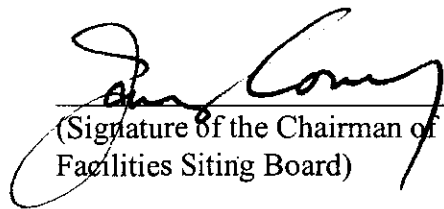
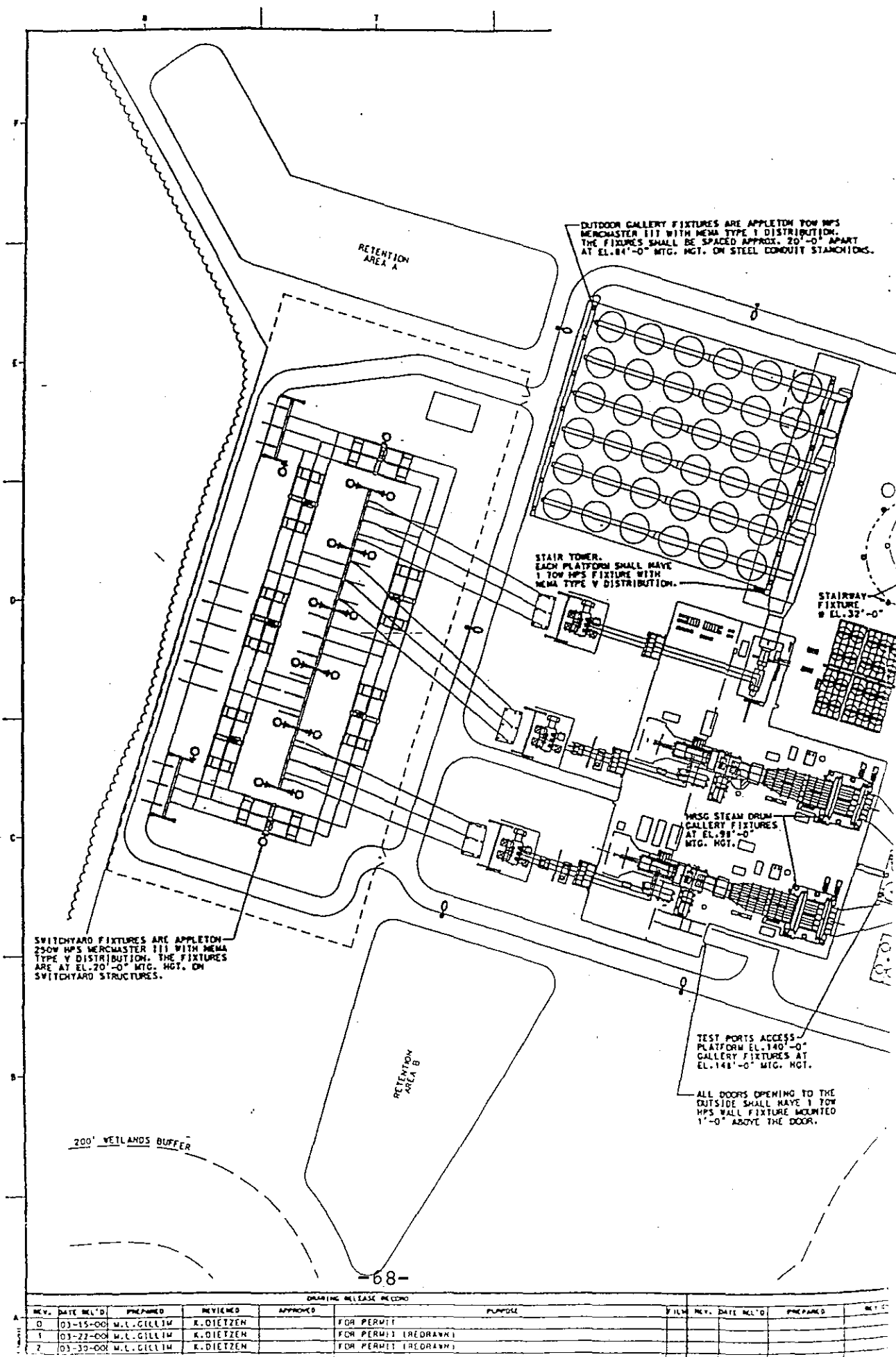

(Signature of the Chairman of the Energy
Facilities Siting Board)

Exhibit A





TOWN OF BELLINGHAM FIXTURE LIMITATIONS	WHERE USED
FIXTURE TYPE 1 NO CUT OFF LUMINAIRE MAX. 20'-0" MOUNTING HEIGHT MAX. OFF-SITE OVER SPILL=0.3FC	SWITCHYARD STAIR TOWER (TOP FIXTURE APPROX EL.16'-0") LOWER FIXTURE APPROX EL.38'-0")
FIXTURE TYPE 2 30° CUTOFF LUMINAIRE MAX. 20'-0" MOUNTING HEIGHT MAX. OFF-SITE OVER SPILL=1.0FC	AIR COOLED CONDENSER GALLERIES LARGE TANKS & STAIRS TEST PORTS ACCESS PLATFORM HARG STEAM DRUM GALLERIES ON ROOF DOOR WAYS
FIXTURE TYPE 3 LESS THAN 30° CUTOFF MAX. 40'-0" MOUNTING HEIGHT MAX. OFF-SITE OVER SPILL=3.0FC	ROADWAY LIGHTING

[illegible]

IDC
BELLINGHAM POWER PROJECT
GENERAL ARRANGEMENT
OUTDOOR LIGHTING
2 x 2 x 1 GE TFA
COMBINED CYCLE UNIT

GA-1E

Table D-1 Material Stored/Used During Operation

Storage: The following provides a representative list of the chemicals that are expected to be stored on site along with the representative quantities for a facility of this size.

PRODUCT	CONTAINS	USE	NOMINAL QUANTITY	STORAGE METHOD
Aqueous Ammonia (19% solution)	Ammonia	NOx emission control in SCR	40,000 gallons	bulk storage tank
Ammonium Hydroxide (35% solution)	Ammonia	pH control for HRSGs	6 x 55 gallons	55-gallon drums
HRSG/Feedwater Treatment Chemical	Morpholine	pH control for HRSGs	400 gallons	Porta-Feed tank
	Cyclohexylamine			
HRSG/Feedwater Treatment Chemical	Sodium Hydroxide	HRSG treatment	400 gallons	Porta-Feed tank
HRSG/Feedwater Treatment Chemical	Hydroquinone	oxygen scavenger	400 gallons	Porta-Feed tank
Sulfuric Acid	Sulfuric Acid	demin. water system regeneration	*	bulk storage tank
Caustic	Sodium Hydroxide	demin. water system regeneration	*	bulk storage tank
Anti-freeze	Ethylene Glycol	closed loop cooling water system	2 x 55 gallons	55-gallon drums
Parts Cleaner	solvents	maintenance - cleaning/degreasing parts	30 gallons	self-contained unit
Diesel Fuel	diesel fuel	emergency fire pump diesel engine	350 gallons	one (1) storage tank
Compressor Cleaning Products	various detergents	CT compressor cleaning	2 x 55 gallons	55-gallon drums
Oxygen	Oxygen	maintenance (welding, etc.)	350 ft ³ per cylinder	cylinders
Acetylene	Acetylene	maintenance (welding, etc.)	350 ft ³ per cylinder	cylinders
Carbon Dioxide	Carbon Dioxide	maintenance (welding, etc.)	350 ft ³ per cylinder	cylinders
		generator purging	350 ft ³ per cylinder	cylinders
Hydrogen	Hydrogen	generator cooling	53,000 ft ³	hydrogen tube truck
Biocides, Greases, Hydraulic Fluids, Lab Chemicals, Paints, Solvents, etc.	various	various	small quantities in original containers	appropriate lockers, etc.

* Not determined. Initial operation will use portable demineralizers; future operation may include the installation of a permanent system requiring storage tanks for sulfuric acid and caustic.

Process Equipment: The following materials are contained within the operating equipment and are not kept on site as spares. They may periodically be cleaned, "topped off" and/or completely changed out over the life of the plant.

PRODUCT	CONTAINS	USE	NOMINAL QUANTITY	STORAGE METHOD
Step-Up Transformers' insulating oil	transformer oil	transformer insulation and cooling	47,200 gallons	in equipment
Auxiliary Transformer insulating oil	transformer oil	transformer insulation and cooling	3,900 gallons	in equipment
Lube oils (turbines, pumps, motors, gears, etc.)	various lube oils	equipment lubrication and cooling	22,500 gallons	in equipment
Hydraulic oil	hydraulic oil	steam turbine hydraulic control system	1,500 gallons	in equipment
Closed Loop Cooling Water	ethylene glycol	cooling for plant equipment	1,000 gallons	in equipment
Hydrogen	hydrogen	cooling for CT and ST generators	4,400 std. cubic ft.	in equipment

Table D-2 Material Stored/Used During Construction

The following provides a representative list of the chemicals that are expected to be stored on site along with the representative quantities for a facility of this size.

<u>PRODUCT</u>	<u>USE</u>	<u>NOMINAL QUANTITY</u>	<u>USED DURING CONSTR.</u>	<u>STORAGE METHOD</u>
Diesel Fuel	construction equipment	500 gallons	4,000 gallons per mo.	500 gallons tank; delivery trucks
Gasoline	construction equipment and vehicles	delivery truck	900 gallons per mo.	delivery truck
Lubricating Greases	construction equipment; plant equipment	(up to) 5 gallon containers	40 lbs. per mo.	original containers
Hydraulic Fluids	constr. equipment; initial charge, hydraulic control system	5 x 55 gallon containers	90 gallons per mo.	55-gallon drums
Lubricating Oils	construction equipment; plant equipment	5 x 55 gallon containers	80 gallons per mo.	55-gallon drums
Transformer Oil	initial charge, step-up/aux. transformers		52,000 gallons	tanker truck
Oxygen	maintenance (welding, etc.)	350 ft ³ per cylinder	20 cylinders per mo.	cylinders
Acetylene	maintenance (welding, etc.)	350 ft ³ per cylinder	20 cylinders per mo.	cylinders
Nitrogen	generator cooling	350 ft ³ per cylinder	85 cylinders	cylinders
Paints	facility, structures and equipment painting	(up to) 5 gallon containers	1,000 - 3,000 Gallons	original containers
Solvents	maintenance and cleaning	(up to) 5 gallon containers	5 gallons per mo.	original containers

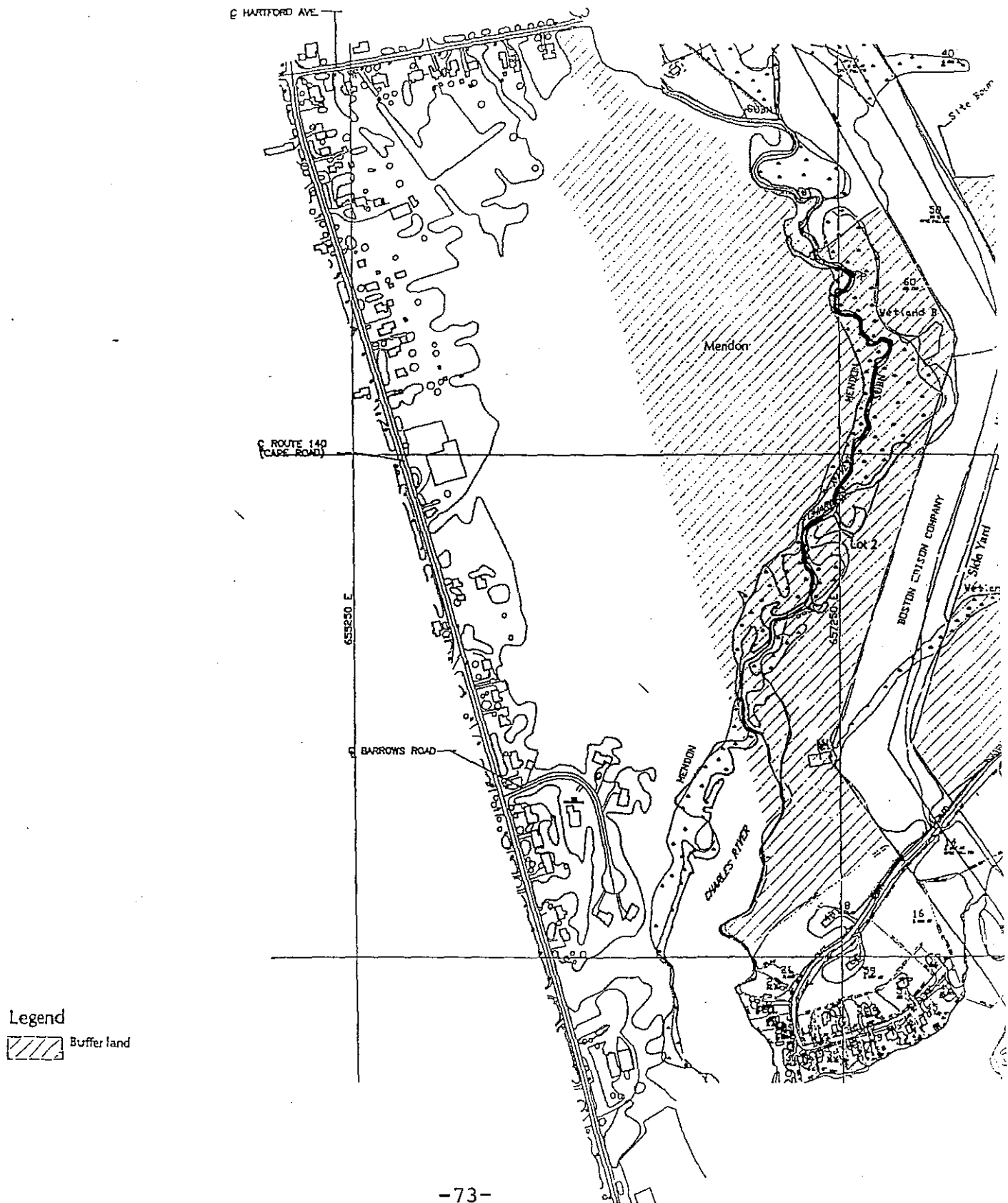
EXHIBIT "A"

It is anticipated that first year construction activities will occur in the daytime hours over a normal single day shift of 7:00 a.m. to 5:30 p.m., when heavy earthworks, civil construction and superstructure developments will take place.

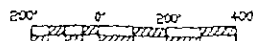
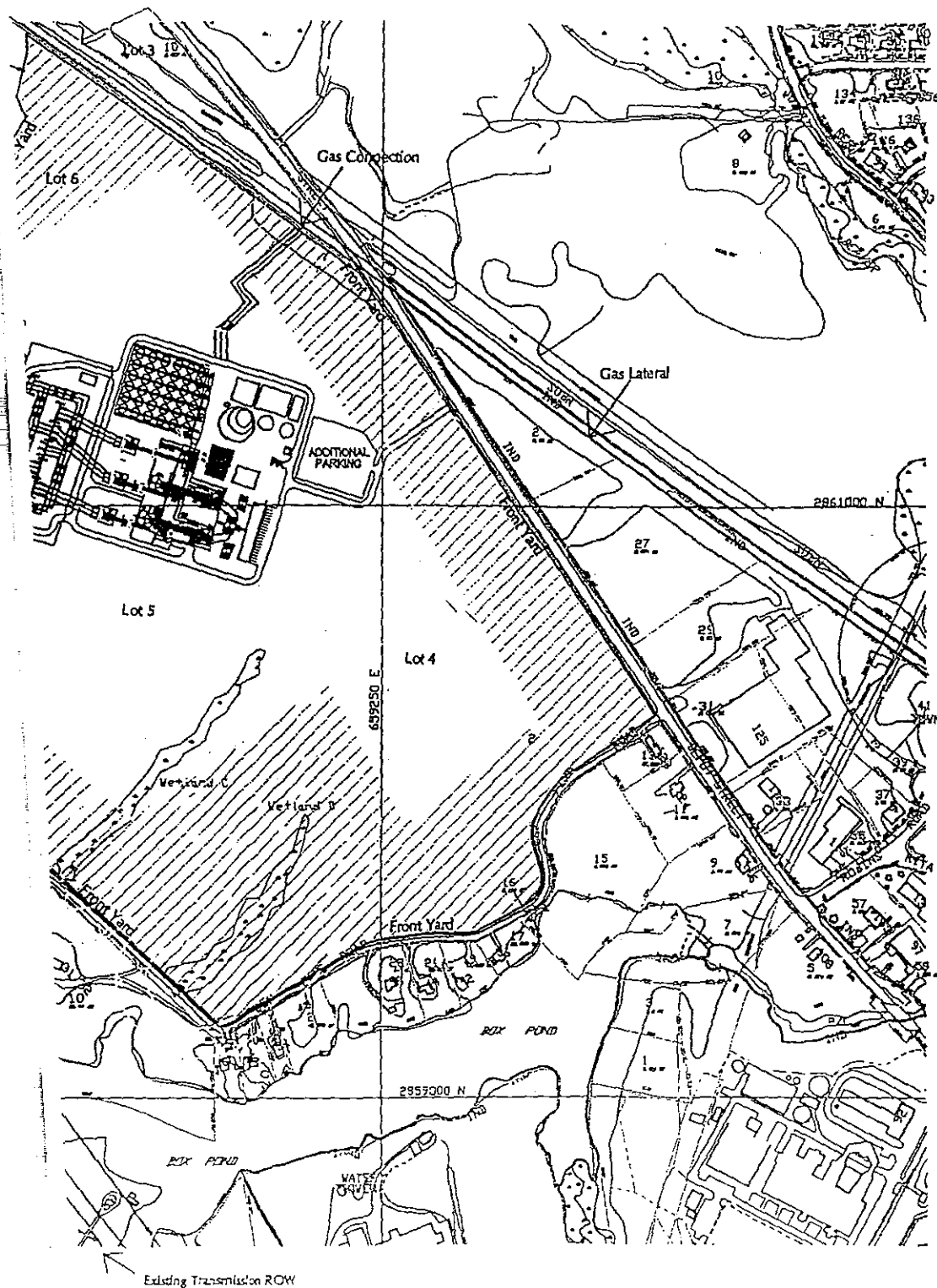
During the months 12 through 17, the mechanical and electrical trades will commence and a two shift pattern may be adopted. At this stage, the scheduled work will be performed within completed building structures. This work will include piping, cabling, combustion and steam turbine erection and generator construction. The Heat Recovery Steam Generator, which is an external structure will progress outdoors. The first shift of the two shift program will commence at 6:00 a.m. and finish at 4:00 p.m. The second shift will occur from 4:00 p.m. to midnight.

A normal working week of Monday through Friday is anticipated over the first 16 months. However, there may be some weekend work during the latter stages of the construction and erection schedule. Moreover, there will be occasional 24-hour work necessary (e.g. for the pouring of heavy concrete foundations). This requirement for non-stop working will be kept to an absolute minimum and should it be necessary, the Town will be advised and all abutters informed in advance.

From month 16 through to completion at 20.5 months, a 24-hour schedule will be required. By this time, all major construction activities will have been completed and the number of trades people remaining on the site will be minimal. All work, apart from landscaping and external finishing, will be undertaken 24 hours a day within the physically completed power plant areas.



DRAWING RELEASE RECORD						DUAL					
REV.	DATE REL'D.	PREPARED	REVIEWED	APPROVED	PURPOSE	FILM	REV.	DATE REL'D.	PREPARED	REVIEWED	APPROVED
								11/30/99	G.R. KILAWA		
								12/21/99	G.R. KILAWA		
								1/18/00	G.R. KILAWA		



NO.	REVISION	DATE

SCALE
PROJECT NUMBER
10406-004

Figure B-2
IDC Bellingham
525 MW
-74- Site Layout

Drawing No.		REV.
SHEET		OF

~~for its various capital expenditures, municipal projects, and municipal improvements. In addition, the Town will receive millions of dollars in annual tax revenue from a facility that will use few town services, through a payment in lieu of Tax Agreement which is to be signed and executed by the parties prior to the issuance of any occupancy permits. The highly stable tax base created by the Project will help to support Bellingham schools. The Project will provide hundreds of construction jobs, many for people in Bellingham. The Project will provide jobs for plant operators and economic benefits for town suppliers and vendors. All of this will add to the social, economic, and community welfare of the Town and the Commonwealth.~~

(b) Traffic flow and safety.

The Project has been sited and designed such that traffic impacts will be minimized. Traffic volume data for existing traffic conditions and modeled future traffic conditions, with and without the Project, were presented (Attachment J to the Special Permit Application). The traffic analysis examined the expected traffic flows and impacts that would result from the temporary construction phase and on-going operation of the Power Plant. The existing peak commuter traffic periods in the vicinity of the site are between 8 a.m. to 9 a.m. and between 5 p.m. to 6 p.m. The construction work force will primarily arrive between 6 a.m. and 7 a.m., and depart between 2:30 p.m. and 3:30 p.m. Moreover, at the Board's request, the Applicant has agreed to comply with the same work schedule limitations as the Board previously approved for the ANP Bellingham Energy Company Work Schedule - Application No. 1, Exhibit "A" (attached hereto). The traffic analysis demonstrates that there will be minimal changes in Level of Service ("LOS") classification at the Hartford Avenue/Depot Street intersection as a result of either the temporary construction phase or on-going operation of the Project, assuming the use of a traffic control officer during the temporary construction period. The Applicant has committed to provide the necessary traffic control officers during construction at its sole expense.

The Applicant has committed to work with the Town of Bellingham to develop and implement a traffic mitigation plan that addresses scheduling and any necessary roadway construction or improvements. This plan will: (1) to the extent practicable, address scheduling of arrivals and departures of construction-related traffic, including construction labor, deliveries of materials, equipment, and plant components, so as to avoid daily peak travel periods in affected areas; (2) include steps to minimize traffic impacts associated with any roadway modifications, or other improvements, that may be required to allow delivery of large plant components; (3) include steps to minimize conflict with school bus schedules; (4) include the provision of a traffic control officer at the Hartford Avenue/Depot Street intersection during peak on-site construction; (5) include an arrival schedule of between 6:00 a.m. to 7:00 a.m. and a departure schedule of between 2:30 p.m. and 3:30 p.m. for construction workers; and (6) establish protocols allowing the Applicant to work with the appropriate municipal authorities to identify and implement

necessary traffic control measures, in addition to the traffic control officer at Hartford Avenue/Depot Street, needed to mitigate traffic impacts at the entrance to the Project site and the Depot Street/North Main Street intersection.

Once the Project is fully operational, approximately 28 employees will be on site over a typical 24-hour period and will have insignificant impacts on local traffic conditions.

To insure safety, the Project will comply with all federal, state, and local regulations in its design, construction, and operation activities. The Project will be designed with fail-safe and redundant control system surveillance and tripping schemes capable of shutting down the facility if necessary, and the Project will have perimeter fencing with continuously monitored security access gates. When operational, the Project will be equipped with automatic gates and remote-monitored television cameras, and the control room will be staffed 24 hours-per-day, 365 days-per-year. The Power Plant design includes a complete fire protection system, including a normal and an emergency fire system pump.

Aqueous ammonia as a 19% solution (19 percent ammonia in water) will be transported to the site and will be stored onsite in a 29,000 gallon tank surrounded by a 110 percent capacity secondary containment concrete dike. A tertiary containment building will fully enclose the aqueous ammonia storage tank and dike. The aqueous ammonia tank will be equipped with a level gauge that will monitor the level of aqueous ammonia and will trigger an alarm in the event that amounts fall to an unacceptable level. The transfer of aqueous ammonia from delivery vehicles will occur within a bermed, impervious unloading area for spill containment. A worst-case offsite consequence analysis has been conducted and was submitted as part of Attachment H to the Special Permit Application. For a worst-case spill, the maximum concentration will occur on Plant property even during the limited response period and will be well below the ammonia toxic endpoint level (i.e., the concentration level safe for all persons to breathe), therefore, there will be no off-site impacts.

The aqueous ammonia (as a 19% solution) will be delivered in tanker trucks with a capacity of 6,500 to 7,000 gallons at an average of one truckload a week. The trucks are designed to withstand impacts from a similarly sized truck. The delivery schedule will be reviewed with town public safety officials and will be set to avoid deliveries during the peak travel hours.

A draft Emergency Response Plan ("ERP") for the Facility was developed and submitted to the state as part of the above-mentioned MEPA review. An updated draft ERP for the Power Plant was submitted to the Board on October 5, 2000. The Applicant will develop a final facility-specific ERP for both the temporary construction period and ongoing operations and a Spill Prevention, Control and Countermeasure Plan ("SPCC") to

address all onsite emergencies in coordination with local public safety officials including the Bellingham Fire Department, the Bellingham Police Department and the Local Emergency Planning Committee ("LEPC"). The final ERPs and SPCC will not be completed until detailed design and construction planning for the proposed project begins.

(c) Adequacy of utilities and public services.

The site is ideally located for an electric generating facility due to the onsite availability of a major natural gas pipeline and major electric transmission line.

The Power Plant will be interconnected with the existing 345 kv transmission line located on the western side of the site.

A major interstate natural gas transmission line easement passes through the northeast corner of the site. Two existing lateral rights-of-way leave the main line about 800 feet north of the point where the main passes under Depot Street. The two rights-of-way run in a northwesterly direction toward Milford.

The Applicant has entered into an agreement with the Town of Bellingham to purchase up to 55,000 gallons per day ("gpd") of water for use in the operation of the Plant and for potable water.* This will require the installation of a short section of water pipeline from the Town's 12-inch water main on Depot Street to the Power Plant's water supply connection, including backflow preventers and a water meter. The Town of Bellingham Water Management permits for withdrawal volumes are more than sufficient to meet the Town's and Project's needs. In the event a water supply emergency, as defined by Town By-Laws, is declared, the Applicant is contractually obligated to reduce daily water consumption to an amount not to exceed 14,000 gpd.

* however, not to exceed 27,000 gpd averaged annually.

The agreement also provides that the Applicant shall have the right to discharge up to 20,000 gpd of wastewater from the operation of the Power Plant commencing at and after such time as the Town's wastewater system becomes able to accommodate such discharge subject to an infrastructure connection to the site and allotted capacity. For initial operations, the Project will utilize portable demineralizers to provide the necessary water treatment for process water. The portable demineralizers will be regenerated off site and therefore will eliminate the on-site creation of regeneration wastewater. The approximate 500 gpd of wastewater that will be generated will be trucked to nearby wastewater treatment facilities. The Applicant prefers to begin operations utilizing portable demineralizers to establish actual operating parameters from which they may design a permanent water treatment system. Ultimately, the Applicant may install fixed, onsite demineralizers to provide the necessary water treatment for process water. These permanent demineralizers will be regenerated onsite and will result in small discharges of wastewater to the Power Plant's sewer connection, if and when available.

With respect to other Town services, the Applicant will work with the Bellingham LEPC to conduct an inventory of the equipment available and the ability of Bellingham and cooperating communities to respond to operational emergencies at the Project either alone, or in conjunction with a simultaneous emergency at another major commercial or industrial facility in the area. Based on the inventory agreed upon by the LEPC, the Applicant will provide to the Town and to other towns that would provide emergency assistance to Bellingham, an appropriate share of the costs to purchase the equipment based on the number of other industrial uses that could place similar demands on communities' emergency response capabilities of the equipment and/or resources necessary to handle such an event. Moreover, the Applicant has agreed to provide and pay for initial Incident Command training for the Bellingham Police Department and Plant Familiarization Training for both the Bellingham Police and Fire Departments.

Only 28 operations workers from the Town and region will be required, so there will be little impact on the school system. While the Project will yield an \$8,000,000 grant to the Town and significant tax revenues, the Project will have minimal impact on town services.

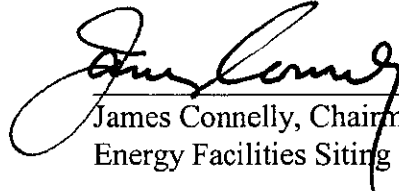
Thus, the utilities and other public services required for the Project are clearly adequate.

(d) Neighborhood character and social structures.

The Project site is a currently vacant, 115-acre parcel, located approximately one mile northwest of Bellingham center. The limits of the overall Project site, including buffer zones, are roughly defined by Depot Street and the existing railroad along the east and northeast side, land now or formerly owned by Richard and Mildred Hazard along the north boundary, Box Pond Road/Box Pond Drive along the south and southeast boundary, and the Boston Edison transmission corridor parcel on the western side. Of this area, only approximately 38 acres will be impacted by construction and of that only approximately 14.5 acres will be impacted by the final Project footprint. The approximately 25 acre parcel known as Lot 2 on the Subdivision Plan, located between the Charles River/Town of Mendon line and the Boston Edison parcel, and the approximately 65 acre parcel as shown on Figure B-2 attached to the Special Permit Application and in the Town of Mendon abutting the Charles River immediately west of Lot 2 on the Subdivision Plan (the "Mendon Parcel") will be purchased by the Applicant and placed under a permanent conservation restriction.

The Project will include a new separate entrance directly off of Depot Street and will have no traffic impacts on Box Pond Road or Box Pond Drive. Due to the significant amount of conservation land and buffer land that the Applicant has committed to maintain, the Project will have a minimum adverse impact on land and house values along Box Pond Road and Box Pond Drive.

APPROVED by the Energy Facilities Siting Board at its meeting of October 12, 2001, by the members and designees present and voting: James Connelly (Chairman, DTE/EFSB); Deirdre K. Manning (Commissioner, DTE); W. Robert Keating (Commissioner, DTE); David L. O'Connor, Commissioner, Division of Energy Resources; Joseph Donovan (for Elizabeth Ames, Director of Economic Development); and Sonia Hamel (for Robert Durand, Secretary of Environmental Affairs).



James Connelly, Chairman
Energy Facilities Siting Board

Dated this 12th day of October, 2001.

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Massachusetts General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

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

EFSB 98-7A

FINAL DECISION
PROJECT CHANGE

Selma Urman
Hearing Officer
November 30, 2001

On the Decision:
Diedre Matthews
Jolette Westbrook
William Febiger

APPEARANCES:

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Interested Person

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FOR: New England Power Company and

Massachusetts Electric Company

Interested Persons

J. Gary Peters

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Weymouth, Massachusetts 02191

Interested Person

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

I. INTRODUCTION

A. Background

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

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

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

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

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

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

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

B. The Company's Filing

1. Requested Project Changes

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

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

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

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

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

increase in the number of day shift workers from 600 to 900 workers and an increase in the number of night shift workers from 300 to 400 workers (id.). On October 5, 2001, Sithe Edgar submitted a traffic study in support of its notice of project change.⁷

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

2. Memorandum of Law

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

C. Procedural History

On October 17, 2001, the Hearing Officer issued a memorandum seeking legal analysis

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

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

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

from intervenors and interested persons, as well as the Town of Weymouth,¹⁰ on the issue of the Siting Board's jurisdiction to approve the requested project changes. On October 31, 2001, J. Gary Peters, and the Town of Weymouth filed memoranda of law.¹¹ On November 8, 2001, the Company filed its response to the memoranda of law submitted by J. Gary Peters and the Town of Weymouth. On November 15, 2001, the Town of Weymouth filed a response to the November 8, 2001 response of the Company.

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

D. Scope of Review

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

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

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

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

substantive way either the assumptions or conclusions reached in its analysis of the project's environmental impacts in the underlying proceeding. Id.; see also IDC Bellingham LLC Decision on Compliance, 11 DOMSB 27, at 38-39 (2000).

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

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

II. ANALYSIS OF PROJECT CHANGES

A Purpose of Project Changes

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

by September 13, 2002 (Exh. PC-EFSB-1). The Company indicated that a close-to-ten hour shift was needed to attract sufficient skilled labor for the project at a time when numerous other projects are under construction in the greater Boston area, noting that Sithe Edgar already has had to recruit labor for the project from out-of-state and from Canada (Exh. PC-EFSB-14).

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

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

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

efficient compared to many existing generators, it would be dispatched toward the middle of the supply curve, which would tend to lower the energy clearing price during many hours of the year (id.).

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

B. Noise

1. Final Decision

In the Final Decision at 92, the Siting Board reviewed Sithe Edgar's plans for minimizing and mitigating construction noise. The Siting Board noted the proximity of the proposed facility to a sizable residential area (45 to 50 residences within approximately 1100 feet of the facility footprint), and concluded that neighborhood concerns relating to construction noise impacts could arise. Final Decision at 95. The Siting Board recognized that the Company planned to limit the noisiest construction activities to daytime hours, but expressed a concern that additional measures might be warranted to minimize construction impacts. Id. at 95-96. The Siting Board therefore required Sithe Edgar to develop a construction noise mitigation plan, consistent with

the construction protocols entered into with Weymouth, that would limit noisier construction during evening and weekend hours consistent with safe construction practices, and would incorporate measures such as temporary noise barriers and advance community notification procedures on an as-needed basis ("Condition A"). Id. at 96.

2. Compliance Filing

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

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

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

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

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

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

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

3. Project Change

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

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

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

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

community (id.).

Sithe Edgar stated that night shift activities would include welding and fabrication,¹⁸ cable pulling, electrical work, rigging, assembly and alignment of pipes, flushing of pipes, instrumentation and control work, painting, and material movement to support these activities (id.). The Company indicated that most of these activities are manual activities that would be performed inside building structures and that would not cause excessive noise (id.). The Company indicated that fabrication might initially occur either in temporary enclosures or in the boiler building, but would be moved to the warehouse buildings once these were complete (id.). The Company noted that the potential for nighttime noises would be greatest on those occasions when it is necessary to use an outdoor crane to lift heavy materials but that as reasonably possible any such activities will be limited to areas inside project structures or to the west of project structures (i.e., on the side away from nearest residences) to provide acoustical shielding (id.). The Company stated that no night shift work would take place beyond a line running approximately 340 to 600 feet north of Monatiquot Street (Exh. PC-EFSB-2a).

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

The Company provided a list of noise mitigation measures intended as a supplement to the Noise Mitigation Plan (Exh. PC-Sithe-1, App. B). Measures specifically intended to reduce the noise impacts of the night shift included: installing temporary shrouds or curtains around noisy activities that can be confined; eliminating back-up beepers in favor of flaggers during the night shift; and instructing the workforce to turn off vehicles and equipment when they are not in use (id.). The list of noise mitigation measures also called for night shift workers to park on the

¹⁸ The Company noted that slagging, defined as removing excess metal from surfaces as part of the welding process, would take place on the night shift if it did not create excessive noise; however, slag that required "aggressive removal" would be scheduled for the day shift (Exh. PC-EFSB-3).

North Parcel, located on the opposite side of Route 3A from the immediate neighborhood, before using parking on the South Parcel (id.). The Company provided a map showing the anticipated location of day- and night-shift parking (Exh. PC-EFSB-2(a)). The Company stated that, in addition to the areas shown on the map, the laydown area on the North Parcel would be converted to parking spaces, creating sufficient parking on the North Parcel to accommodate all night shift vehicles (Exh. PC-EFSB-17).

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

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

Sithe Edgar initially proposed to conduct steam blows between 7:00 a.m. and 8:00 p.m., Monday through Saturday, with orderly completion of steam blows initiated prior to 8:00 p.m. allowed to extend beyond 8:00 p.m. (Exh. PC-Sithe-1, App. B). However, in response to concerns expressed by the Town of Weymouth, Sithe Edgar agreed not to begin steam blows after 6:00 p.m. (Exh. PC-EFSB-16). Sithe Edgar indicated that steam blows are done to clean plant piping of construction debris, and may last from two or three minutes (intermittent steam

blows) to two or three hours (continuous steam blows) (Exhs. PC-EFSB-6; EFSB-N-20). The Company indicated that the steam blow period for each of the two Edgar Station units would last approximately a week, with a week between each period (Exh. PC-EFSB-6). The Company stated that it would mitigate the noise associated with the steam blows by use of water injection for continuous steam blows, and by the use of a silencer for intermittent steam blows (id.; Exh. EFSB-N-20).

4. Positions of the Parties

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

5. Analysis and Findings

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

anticipated in the compliance filing.¹⁹

The Siting Board notes that, as a general rule, it is important to minimize nighttime construction noise at sites which, like Edgar Station, are in close proximity to a residential neighborhood. In this particular instance, noise control also is critical because night work is being undertaken on at least two other projects being staged from Edgar Station: the MHD bridge replacement project and the MWRA Braintree-Weymouth Relief Facilities project. The Siting Board recognizes that Sithe Edgar is not responsible for, and has no control over, noise from the MHD and MWRA construction projects. However, it is clear from Sithe Edgar's noise complaint summary that the neighborhood already has experienced incidents of unacceptable late night noise from a variety of sources; consequently, Sithe Edgar should proceed with night construction in a manner that does not add in any significant way to this noise.

Sithe Edgar's current proposal gives significant attention to noise control issues. Most of the tasks proposed for the night shift are relatively quiet, do not involve the use of noisy equipment, and would take place within enclosed spaces that would provide reasonable noise mitigation. The Company's noise mitigation proposal seeks to address vehicle noises associated with the second shift by directing construction worker parking away from the neighborhood and calling for flagging or other appropriate safety measures, rather than back-up beepers. Further, the Company proposes to minimize the noise impacts of night shift work by confining such work behind a line well into the Edgar Station property. Aside from accidental noise (e.g., dropping a large pipe), the greatest potential for disruptive noise would be outdoor movement of material (and workers) to support the indoor craft work. The Company has highlighted the use of an outdoor crane as particularly noisy; however, the noise associated with the transfer of materials around the property late at night could be disruptive. The Siting Board recognizes that it may be logistically difficult to have all the materials needed for a 400 worker, 10-hour shift in place in an enclosed structure prior to the beginning of the shift. The Siting Board anticipates that the

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

Company will make every effort to put as much of the necessary material as possible in place during the day shift; nonetheless, some movement of materials from storage areas on the Sithe Edgar property to the night shift work areas and some use of outdoor cranes may be necessary during the night shift. However, disturbance to neighbors could be minimized if such activity were limited to truly occasional occurrences in any individual night shift, and did not include any constant or continuously repetitive noisy outdoor operations extending as a part of ongoing construction work during that shift. In addition, late-night disturbances could be reduced if such activity were limited to the early evening hours whenever possible. Consequently, the Siting Board directs the Company to limit material movements and use of outdoor cranes on the night shift to occasional occurrences during the shift and to the hours prior to 11:00 p.m. to the fullest extent possible. When this is not possible, and when any use beyond the above limits of an outdoor crane or other particularly noisy equipment is required, the Company should provide advance written notice to affected neighbors and to the Town.

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

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

The Siting Board also directs the Company for the duration of night construction to

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

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

"... in light of the Company's plans to employ a regular second shift during construction ... it is critical that the Company maintain open lines of communication with the neighborhood immediately adjacent to Edgar Station...."

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

The Company has agreed to limit steam blows, a particularly noisy aspect of the testing process, by beginning them between 7:00 a.m. and 6:00 p.m. These restrictions, combined with the use of water injection and silencers to reduce the noise levels associated with steam blows, should limit the impact of steam blows on the neighborhood. However, the Siting Board notes that continuous steam blows may last up to three hours. Thus, a continuous steam blow which is begun shortly before 6:00 p.m. could be heard until 9:00 p.m. This outcome would be inconsistent with the spirit of the mitigation proposed by the Company. The Siting Board

therefore directs the Company to schedule continuous steam blows in a manner that allows completion by 6:00 p.m. or shortly thereafter if the steam blow proceeds according to plan. The Siting Board also notes that under the proposed schedule, the two weeks of steam blows likely would take place sometime during the summer months, when extended outdoor activity in the neighborhood is likely. Consistent with the commitment made as part of its compliance filing, the Company should make an effort to schedule any necessary Saturday steam blows so that the associated loud noises occur between 9:30 a.m. and 4:30 p.m.

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

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

C. Traffic

1. Final Decision

In the Final Decision at 106-114, the Siting Board reviewed Sithe Edgar's analysis of

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

construction traffic impacts at three major intersections near the project site: the Washington Street/Southern Artery intersection, the Washington/Baker/South Street intersection, and the Bridge/Neck/Green Street intersection. The Company's analysis assumed a peak day shift workforce of 685 people arriving at the site by 7:00 a.m., and leaving between 3:30 and 4:30 p.m. Final Decision at 107-108. Based on the Company's analysis, the Siting Board determined that, absent construction traffic, the Washington/Baker/South Street intersection and the Bridge/Neck/Green Street intersection both operated at level of service ("LOS") B,²¹ while the Washington Street/Southern Artery intersection operated at LOS D during the early morning peak hour and LOS C during the afternoon peak hour. Id. at 112. The Siting Board determined that construction traffic would increase overall wait times at all three intersections, with a maximum wait time increase of 10.1 seconds in the eastbound direction at the Washington Street/Southern Artery intersection, but that overall intersection LOS would remain unchanged. Id.²²

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

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

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

potential mitigation, when construction began ("Condition K"). Id. at 114.²³

2. Compliance Filing

On June 2, 2000, Sithe Edgar filed a letter in compliance with Condition K ("June 2nd Letter"). In the June 2nd Letter, the Company described a final construction schedule involving: (1) a regular day shift running from 7:00 a.m. to 3:30 p.m.; (2) an extended day shift running from 7:00 a.m. to 5:30 p.m. for about 50 workers during the first six months of construction; and (3) a 300-worker second shift running from 4:30 p.m. to midnight, beginning after six months (id. at 2-4). The June 2nd Letter also: (1) addressed the status of the Washington/Baker/South Street traffic improvements and the Fore River Bridge opening schedule; (2) discussed the costs and benefits of shuttle bus service and subsidized public transit fares; and (3) provided the comments of the City of Quincy's Director of Traffic and Parking on the need for police officer control at the Washington/Baker/South Street intersection during peak construction (id. at 2, 5-13). Siting Board staff undertook a review of the June 2nd Letter and determined that, with the Company's agreement to contact Quincy prior to peak construction regarding the deployment of a police officer at the Washington/Baker/South Street intersection, the Company had satisfied the requirements of Condition K (Exh. PC-Sithe-6).

3. Project Change

Sithe Edgar provided a traffic study analyzing construction traffic impacts at two major intersections near the project site -- the Washington/Baker/South Street intersection, and the Bridge/Neck/Green Street intersection -- assuming a day shift of 900 workers running from 7:00 a.m. to 5:00 p.m., and an evening shift of 400 workers running from 5:30 p.m. to 2:00 a.m. (Exh. PC-EFSB-4). The traffic study incorporated information from traffic counts conducted in July 2001, when a day shift of approximately 700 workers was in place at the Sithe Edgar site (id. at 1-2). The traffic study found that the morning peak commuter hour in the vicinity of the Sithe Edgar site occurs between 7:45 a.m. and 8:45 a.m., while the evening peak commuter hour

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

occurs between 5:00 p.m. and 6:00 p.m. Traffic counts taken at the site indicated that approximately 0.82 vehicles per employee arrived at the site during the busiest one hour period in the morning, and that approximately 0.90 vehicles per employee left the site during the busiest evening period (id. at 2). The traffic counts also indicated that approximately half of the construction traffic approaches Edgar Station from the north, while the other half approaches from the south (id. at 2). This information was used to estimate the number and distribution of vehicle trips likely to be generated by an expanded first shift and a 400-worker second shift (id. at 2).

The analysis of the Washington/Baker/South Street intersection in Quincy was based on new traffic counts taken at the intersection in July 2001, when a day shift of approximately 700 workers was in place (Exh. PC-EFSB-4, at 1). The analysis demonstrates that this intersection currently operates at LOS A between 6:00 a.m. and 7:00 a.m., when most of the day shift workers arrive, and that the intersection would continue at LOS A with the proposed shift schedule (id. at Exh. 8). During the evening peak construction hour, which overlaps with the evening peak commuting hour, the intersection currently operates at LOS E, with a delay of 57.1 seconds; the proposed shift change would increase the delay to 79.0 seconds (id.). The Company noted that the City of Quincy has just completed installation of a new traffic signal at the Washington/Baker/South Street intersection, and that construction of a new northbound left turn lane should be complete by Thanksgiving (id. at 4 to 5; Exh. PC-EFSB-12). The Company's analysis indicates that, once these improvements are in place, the intersection would operate at LOS D during the evening peak hour, with a delay of 37.7 seconds assuming the current shift schedule, and a delay of 44.9 seconds assuming the proposed shift schedule (Exh. PC-EFSB-4 at Exh. 8). The Company noted that it has agreed to fund police officer control at this intersection, but that the decision to deploy a traffic officer rests with the Quincy traffic engineer (Exh. EFSB-NT-15). The Company indicated that the Quincy traffic engineer has not regularly requested a police detail at this intersection, except during the reconstruction of the intersection (Exh. PC-EFSB-12).

The Company did not conduct new traffic counts at the Bridge/Neck/Green Street intersection; instead, it used baseline traffic data from the traffic study presented in the Draft

Environmental Impact Report for the proposed project (Exhs. PC-EFSB-4 at 5; PC-EFSB-20).²⁴ The Company asserted that these counts likely were conservative, since the Harbor Light Mall, located on Route 3A (Bridge Street), approximately ¼ mile southeast of the Bridge/Neck/Green Street intersection, had closed since the earlier traffic counts were taken (Exhs. PC-EFSB-4 at 5; PC-EFSB-19). The Company added current levels of construction traffic to the baseline traffic counts in order to approximate July 2001 traffic patterns (Exh. PC-EFSB-4 at 5, Exh. 9). The Company's analysis indicated that the Bridge/Neck/Green Street intersection would operate at LOS B during the evening peak hour, with delays of 10.6 seconds assuming no construction traffic, 16.3 seconds assuming the current shift schedule, and 17.7 seconds assuming the proposed shift schedule (Exh. PC-EFSB-4, at exh. 9).

4. Analysis and Findings

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

Sithe Edgar has presented an analysis of construction traffic impacts at the Washington/Baker/South Street intersection in Quincy and at the Bridge/Neck/Green Street intersection in Weymouth, given the proposed shift schedule. This analysis incorporates up-to-date information regarding the number of vehicle trips per construction worker and the geographic distribution of trips to and from the Sithe Edgar site. The traffic analysis demonstrates that construction workers arriving for the day shift would have no significant

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

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

impact on traffic conditions, primarily because the day shift begins at 7:00, well in advance of the 7:45 a.m. to 8:45 a.m. morning peak commuting period. The analysis also demonstrates that traffic conditions at the Bridge/Neck/Green Street intersection in Weymouth would remain at LOS "B" regardless of the level of construction traffic, with average evening peak hour delays increasing from an estimated 10.6 seconds with no construction traffic to 17.7 seconds with implementation of the proposed shift schedule.

However, evening peak traffic conditions at the Washington/Baker/South Street intersection appear to be significantly worse than anticipated in the Final Decision. The Company's analysis, based on recent traffic counts taken while a day shift of approximately 700 workers was in place, indicates that this intersection operates at LOS E during the evening peak period, with an average delay of 57.1 seconds. Because the Company's traffic analysis uses current traffic levels as a baseline, it is not possible to determine how significantly traffic conditions at this intersection have been affected by the existing construction traffic. However, it is reasonable to assume that the approximately 300 construction worker vehicles traveling northbound during the peak commuting hour contribute measurably to the lengthy delays at this intersection. The increased northbound traffic from the expanded day shift, plus the arriving night shift workers, would increase average delays at this intersection to 79.0 seconds.

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

of Quincy regarding this intersection for the duration of project construction.

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

D. Conclusions

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

III. HOST AGREEMENT/MEMORANDUM OF AGREEMENT

A. Sithe's Request

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

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

B. Positions

1. Sithe Edgar

Sithe Edgar asserted that the Siting Board has the authority to determine the appropriate construction conditions for the project regardless of the Host Agreement/MOA (*id.* App. C at 1). In support, Sithe Edgar cited Holyoke Street Railroad v. Department of Public Utilities, 347 Mass. 440 (1964) ("Holyoke") (*id.*, App. C at 4). In that case, the Department of Public Utilities ("DPU") ordered the cancellation of a condition in a private contract between Holyoke Street Railroad and Peter Pan Bus lines that required Peter Pan to pay Holyoke Street Railroad a passenger fee (*id.*). The Supreme Judicial Court ("Court") held that the DPU has the authority to strike a provision in a private contract if the DPU finds such provision to be not in the public interest (*id.*, App. C at 4, *citing* Holyoke at 445). Sithe Edgar stated that in reaching its decision, the Court described the DPU's broad authority over the subject matter of the private contract, noting that (1) the legislature had delegated to the DPU general supervision, regulation, jurisdiction and control over the rendering of services by common carriers; and (2) the DPU's enabling statute authorized the DPU to issue certificates and revise those certificate (*id.* App. C at 4-5). Sithe Edgar also stated that the Court found that the contract was not void as against public policy because it was executed in the context of DPU's certificate proceeding in that the contract: (1) contemplated submission to the DPU; (2) had been disclosed to the DPU; and (3) most of its terms were included in the DPU certificate (*id.*, App C at 5). Sithe Edgar stated that the Court held that once the DPU amended its certificate and the private contract was inconsistent with the certificate, the private contract was unenforceable (*id.*, App. C at 5, *citing* Holyoke at 446).

Sithe Edgar asserted that the Holyoke case is applicable here (*id.*, App. C at 6-7). Sithe Edgar argued that as in Holyoke, the Host Agreement/MOA was not void at its inception because it was presented and recognized by the Siting Board during the underlying proceeding and therefore "it was executed under the auspices of the Siting Board proceedings" (*id.*, App. C at 6). Sithe Edgar asserted that if the Siting Board now determines that the public interest requires a change to its Final Decision, the Host Agreement/MOA may not bar such modification (*id.*). Further, Sithe Edgar asserted that the Siting Board has sole authority to, *inter alia*, (1) approve,

condition or reject a petition to construct a generating facility, and (2) monitor, enforce and modify or amend Siting Board orders and decisions (*id.*, App. C at 1). In support, Sithe Edgar cited to the statutory authority that has been conferred upon the Siting Board under G.L. 164, §§ 69H-69Q and the authority of the Siting Board pursuant to G.L. 25, § 5 to apply to the Supreme Judicial Court to enforce Siting Board orders (*id.*, App. C at 1-2).

Sithe Edgar asserted that the proposed project changes are in the public interest (Sithe Response at 9-11). Sithe Edgar stated that it has demonstrated that public interest requires abrogation of the Host Agreement/MOA because Sithe Edgar has provided quantitative support for its assertion that the facility would result in significant air quality benefits, and because there are reliability benefits that would result if the proposed changes were approved (*id.* at 10). Sithe Edgar argued that the Siting Board may look to reliability benefits in determining whether the proposed project changes are in the public interest because the only circumstance under which the Siting Board is not permitted to consider need and cost issues is when reviewing a petition to construct filed pursuant to G.L. c. 164, § 69J ¼ (*id.* at 10). Further, Sithe Edgar argued that to the extent the Town attempts to enforce the Host Agreement/MOA outside and in contravention of the Siting Board proceedings, the Host Agreement/MOA will be unenforceable as against public policy (*id.*). The Company cited cases to support the proposition that the public interest in the freedom of contract is sometimes outweighed by public policy interests (Exh. PC-Sithe-1, App. C at 7, citing Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass 318, 312 (1996); Town of Newton v. Rumery, 480 U.S. 386 (1987); Louisville & N.R. Co. v. Mottely, 219 U.S. 467 (1911)).

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

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

2. Town of Weymouth

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

Further, Weymouth argued that Sithe Edgar has not demonstrated that the public interest requires abrogation of the Host Agreement/MOA (*id.* at 11- 16). Weymouth asserted that the purported air quality benefits of the proposed project changes are the same benefits Sithe Edgar presented the Siting Board in the underlying case (*id.* at 13). Further, Weymouth suggested that for the Siting Board to accept Sithe Edgar's reliability argument, the Siting Board would have to assume that there is a need for the facility and would have to consider cost issues (*id.* at 13). Weymouth argued that the Siting Board is prohibited by G.L. c. 164, §§ 69H and 69J¼ from considering the need for a proposed facility and the cost of such facilities as part of its review of a petition to construct and therefore the Siting Board cannot consider such issues here (*id.* at 13- 14).

The Town of Weymouth suggested that G.L. c. 164, §§ 69K½-O½ outlines the only statutory procedure under which local requirements applicable to the siting, construction and operation of electric generating facilities can be abrogated (*id.* at 10-11). Therefore, according to Weymouth, since Sithe Edgar is not seeking relief pursuant to G.L. c. 164, §§ 69K½-O½ and has

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

not filed a petition that meets the application requirements of these statutory provisions, the Siting Board lacks jurisdiction to consider Sithe Edgar's claims until such a petition is filed (id. at 11).²⁸

Weymouth stated that it agrees with Sithe Edgar that most of the requested changes are consistent with Sithe Edgar's obligations to the Town and can be approved (id. at 12).

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

Finally, Weymouth noted that an abrogation of the Host Agreement/MOA would "create a dangerous precedent" in that a host community would no longer be assured that its agreements with a developer would be enforceable (id. 17).

3. J. Gary Peters

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

²⁸ In addition, Weymouth argues that the five month delay that Sithe Edgar asserts would result if no project changes were allowed would unlikely be sufficient to allow Sithe Edgar to prevail in an override proceeding under G.L. c. 164, § 69K½ (Weymouth Memorandum at 12.). In support, Weymouth states that in a previous Certificate case the Siting Board held that the Board may override a condition that prevents commencement of construction and imposes a requirement where the same result could be achieved in a more cost effective manner (id., citing IDC Bellingham LLC Certificate Decision, EFSB 01-1 (2001)).

4. Analysis and Findings

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

The Siting Board sees no necessary conflict between the proposed changes and the terms of the Host Agreement/MOA. The Host Agreement/MOA clearly provides for a second shift running until 2:00 a.m. for construction inside "the new buildings". This is the work that Sithe Edgar states that it intends to accomplish on the second shift. A reasonable interpretation of the Host Agreement/MOA also could allow for a minimal amount of outdoor activity to logistically support the indoor shift. Our conditions in Section II.B, above, limit this logistical support to that which cannot be accomplished on the day shift, and confine it, when at all possible, to the hours before 11 p.m. The Siting Board concludes that second shift construction consistent with Sithe Edgar's presentation in this matter, and as conditioned in this decision, could be consistent with the Host Agreement/MOA.

Some claim of conflict might yet, of course, arise. However, any future claim of a necessary and irresolvable conflict between the conditional approval lawfully granted today by the Siting Board, in accordance with its statutory authority, and other conditions that may be said to arise out of a parallel agreement between the current petitioner and the Town, must, if

accompanied by a further claim that the parallel agreement either superseded or somehow limited today's Board actions, labor under the heavy burden of contrary and authoritative caselaw.

Beacon Hill Association v. Ristorante Toscano, Inc., 422 Mass. 318, 324 (1996), citing Dessau v. Holmes, 187 Mass. 486, 488 (1905). The Legislature has "declared public policy" in energy facilities siting and has vested the carrying out of that public policy in the Siting Board. The dominant purposes of that policy cannot be superseded by any parallel accord to the contrary. Id. Such an accord "cannot be permitted to defeat the purpose of any proper subsequent exercise of the [Board's] powers." Holyoke Street Railway v. Department of Public Utilities, 347 Mass. 440, 446 (1964). The principle for which Ristorante Toscano stands is long established, dating from the late 19th Century. Wall v. Metropolitan Stock Exchange, 168 Mass. 282, 284 (1897); Corey v. Griffin, 181 Mass. 229, 233 (1902). That long-established principle would apply here, too.²⁹

IV. DECISION

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

The Siting Board found that further inquiry was warranted to evaluate the noise and traffic impacts that may result from a change in shift schedules, and from an increase in the

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

number of on-site workers. The Siting Board also determined that the requested legal relief required further inquiry. After conducting such inquiry, in Sections II. B. and II.C. above, the Siting Board found that, with the implementation of Conditions N through S, below, the noise impacts of the proposed facility would be minimized.

Condition N:

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

Condition O:

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

Condition P:

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

Condition Q:

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

enters commercial operation. The Company shall hold a public meeting shortly after the distribution of each informational memo to respond to questions or concerns raised by the memo.

Condition R:

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

Condition S:

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

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

Condition T:

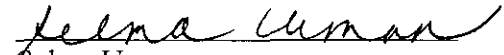
The Siting Board directs the Company to continue its coordination with the City of Quincy regarding the Washington/Baker/South Street intersection for the duration of project construction.

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

Findings in this decision are based upon the project change information provided by the Company examined in light of findings the Siting Board made in the Final Decision. Since the project changes outlined in this decision pertain to the facility approved by the Siting Board in

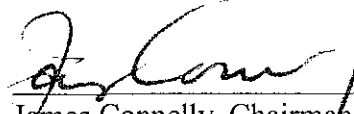
the underlying proceedings, the Company must construct and operate its facility in conformance with its proposal presented in the underlying proceeding and in earlier compliance and project change filings; the only additional modifications permitted are those set forth in this decision.

The Siting Board requires the Company to notify the Siting Board of any changes other than minor variations to the proposal so that the Siting Board may decide whether to inquire further into a particular issue. The Company is obligated to provide the Siting Board with sufficient information on changes to the proposed project to enable the Siting Board to make these determinations.


Selma Urman
Hearing Officer

Dated this 30th day of November, 2001.

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


James Connelly, Chairman
Energy Facilities Siting Board

Dated this 29th day of November, 2001.

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Massachusetts General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of)
Sithe Mystic Development LLC for Approval)
to Construct a Bulk Generating Facility in)
in the City of Everett, Massachusetts)
_____)

EFSB 98-8A

FINAL DECISION
PROJECT CHANGE

Selma Urman
Hearing Officer
November 30, 2001

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

I. INTRODUCTION

On September 30, 1999, the Energy Facilities Siting Board ("Siting Board") conditionally approved the petition of Sithe Mystic Development LLC ("Sithe Mystic" or "Company") to construct a natural gas-fired, combined-cycle electric generating facility with a net nominal electrical output of 1550 megawatts ("MW") in the City of Everett, Massachusetts ("Everett" or "City"). Sithe Mystic Development LLC, 9 DOMSB 101,111 (1999) ("Final Decision").

On March 2, 2000, Sithe Mystic filed with the Siting Board a notification of project change with respect to its decision to use different construction worker parking areas from those approved in the Final Decision ("March 2000 Filing"). On March 20, 2000 the Company provided the Siting Board with responses to information requests issued to the Company.¹ On March 30, 2000, the Siting Board notified the Company that the change proposed by Sithe Mystic did not require further inquiry (March 30, 2000 Letter at 2).

On August 27, 2001, Sithe Mystic provided the Siting Board with notice of additional changes to the proposed project ("August 27 Filing").² The changes included: (1) a change in the arrival time for the day construction shift ("day shift") from 6:30 a.m. to 6:00 a.m.³ and a change in the departure time for the day shift from 3:00 p.m. to 4:30 p.m.; (2) an increase in the

¹ The Siting Board hereby marks for identification and moves into the record as Exh. PC-T-1, Exh. PC-T-2, Exh. PC-T-3, and Exh. PC-T-4, the Company's four March 20, 2000 responses to information requests issued by the Siting Board on March 15, 2000.

² The August 27 Filing consisted of the following documents, each of which is hereby marked for identification and moved into the record in this matter: (1) a seven-page letter dated August 27, 2001 signed by John A. DeTore regarding proposed changes to the Sithe Mystic project and attachments (Exh. PC-Sithe-1); and (2) an August 8, 2001 traffic analysis document entitled "Traffic Impact Study" (Exh. PC-Sithe-2).

³ In the underlying decision the arrival time was 7:00 a.m.; in the March 2000 Filing, the arrival time was changed to 6:30 a.m.

number of on-site day shift workers from approximately 1100 workers to 1350 workers at peak;⁴ and (3) changes in construction worker parking, including the use of a satellite parking area at the Mystic Mall in Chelsea and associated shuttle bus service, rather than a ballpark near Mystic Station (Exhs. PC-Sithe-1, at 3; PC-EFSB-2). The Company also informed the Siting Board as an additional change that it was not providing shuttle bus service from the Sullivan Square MBTA Station, as required by Condition F of the Final Decision (Exh. PC-Sithe-1, at 5). Finally, the Company also informed the Siting Board of the time (5:30 p.m. to 3:00 a.m.) and size (600 workers) of its second shift (Exh. PC-Sithe-1, at 1).⁵

II. PROCEDURAL HISTORY

In its August 27 Filing, Sithe Mystic provided a Traffic Impact Study ("2001 Traffic Study") dated August 8, 2001. On October 10, 2001, Sithe Mystic submitted responses to Siting Board staff information requests ("October 10 Filing").⁶ Sithe Mystic submitted supplemental information request responses on October 25, 2001 ("October 25 Filing").⁷ On October 18, 2001, all parties were given an opportunity to issue information requests or submit comments

⁴ The August 27 Filing stated that the number of on-site day shift workers would increase from 1100 to 1400 and night shift workers would increase from 600 to approximately 1200 (Exh. PC-Sithe-1, at 4). However, in a filing dated October 10, 2001, the Company subsequently revised its estimates in response to Siting Board information requests, stating that the estimates of the number of on-site workers are lower than the projected estimates in the August 27 Filing and the 2001 Traffic Study (Exh. PC-EFSB-2).

⁵ In the underlying proceeding, the Company had indicated that, for much of the construction period, it would operate a "significant" second shift of either eight or ten hours, beginning immediately after the first shift; however, details of the second shift were not developed in the underlying proceeding (Exh. EFSB-N-9).

⁶ The October 10 Filing consisted of the Company's response to nine information requests, each of which is hereby marked for identification and moved into the record in this matter as Exhs. PC-EFSB-1 through PC-EFSB-9.

⁷ The October 25 Filing consisted of supplemental responses to Exhs. PC-EFSB-3a, PC-EFSB-5, and PC-EFSB-9. These documents are marked for identification and moved into the record as Exhs. PC-EFSB-3a(S), PC-EFSB-5(S), and PC-EFSB-9(S).

with respect to the proposed project changes. No information requests or comments were filed by any party.

III. SCOPE OF REVIEW

In its approvals of the Sithe Mystic project, the Siting Board required Sithe Mystic to notify it of any changes other than minor variations to the proposal as presented to the Siting Board, so that it might decide whether to inquire further into such issues. Final Decision at 207. The standard of review to determine whether further inquiry is warranted was articulated by the Siting Board in the Berkshire Power Decision on Compliance (“Berkshire Compliance Decision”) 7 DOMSB 423, at 437 (1997). In the Berkshire Compliance Decision, the Siting Board declined to make further inquiry regarding certain project changes if the change did not alter in any substantive way either the assumptions or conclusions reached in its analysis of the project’s environmental impacts in the underlying proceeding. Id. at 437; see also IDC Bellingham LLC Compliance Decision, 11 DOMSB 27, at 38-39 (2000).

The Siting Board notes that the Company’s decision to use a satellite parking area and associated shuttle bus service from the Mystic Mall in Chelsea, rather than to provide shuttle service to and from the Sullivan Square MBTA stop, may be in conflict with Condition F of the Final Decision, which called for shuttle service to and from the Sullivan Square stop and/or other public transit stops likely to be used by Mystic Station construction workers. Final Decision at 206-207. The Siting Board finds that further inquiry is necessary to resolve the conflict between Condition F and the Company’s current proposal, as well as to determine whether additional mitigation is needed to minimize the traffic impacts of the expanded day shift and the night shift. The Siting Board undertakes this further inquiry in Section IV.A, below.

In addition, the Siting Board notes that, while the Company proposed the use of a second shift during the underlying proceeding, and addressed the possibility of noise impacts from nighttime construction worker parking in the review of the March 2000 Filing, the Siting Board has not previously addressed detailed plans for night construction and related noise impacts, now proposed to include the use of a regular shift of 600 construction workers. The Siting Board finds that further inquiry is necessary to determine whether additional mitigation is needed to

minimize the noise impacts of the night shift. The Siting Board undertakes this further inquiry in Section IV.B, below.

IV. ENVIRONMENTAL IMPACTS

A. Traffic Impacts

1. Final Decision

In the underlying proceeding, the Company anticipated using a main construction shift running from 7:00 a.m. to 3:00 p.m., with a maximum construction-related workforce of 1078. Final Decision at 171. The Company indicated that, during a major portion of the project, it would use a 10-hour construction shift running from 7:00 a.m. to 5:30 p.m., and conduct significant second shift work using an eight- or ten-hour second shift from mid-2000 until project completion (Exh. EFSB-N-9). Further, in the underlying proceeding, the Company indicated that limited weekend work would be expected during the start-up and commissioning phase of the project (*id.*). The Company provided an analysis of the impacts of first-shift construction traffic, assuming that 50% of afternoon construction-related traffic would occur during the afternoon commuter peak period. Final Decision at 171-172.

The Company proposed to mitigate construction traffic impacts by: (1) optimizing signal timing at the three Route 99 intersections to maximize traffic flow, and manually controlling Route 99 traffic signals when beneficial; (2) using uniformed traffic-control police as necessary at each intersection; (3) encouraging workers' use of public transportation; (4) encouraging carpools among Company employees and subcontractors and providing preferred parking to those who carpool; (5) delivering large equipment by barge and rail as much as possible; and (6) scheduling deliveries during off-peak hours to the extent practicable. *Id.* at 174.⁸ The Siting Board found that, with the implementation of the proposed mitigation, traffic conditions would

⁸ In addition, the Company proposed specific mitigation associated with the use of the parking area off Route 99. Final Decision at 174. In its March 2000 Filing, the Company indicated that this area would not be used for construction worker parking (March 2000 Filing at 2).

be Level of Service ("LOS")⁹ C or better except at the Route 99/Beecham Street intersection, which would operate at LOS E during the morning peak traffic hour, and LOS D during the afternoon peak traffic hour. Id. at 176. The Siting Board found that, with implementation of the proposed mitigation and a condition concerning the provision of shuttle service between the Sullivan Square MBTA stop (and/or any other public transit stops likely to be used by Mystic Station construction workers) and the Mystic Station site,¹⁰ the environmental impacts of the proposed facility would be minimized with respect to traffic. Id. at 177.

2. March 2000 Project Change

In its March 2000 Filing, Sithe Mystic informed the Siting Board that the Route 99 parking area was unavailable, and proposed that construction workers park at property owned by Boston Gas Company ("Boston Gas") at the corner of Rover Street and Robin Street ("Boston Gas lot"), and on a ballpark located at the corner of Dexter Street and Robin Street (March 2000 Filing at 2). The Company also stated that the regular day shift would start at 6:30 a.m. and end at 3:00 p.m. (March 2000 Filing at 2). The Company provided a revised traffic analysis which assumed the new schedule and parking locations (id.). The Company stated that it would mitigate construction traffic impacts by: (1) striping a southbound left turn lane on Route 99 at the Dexter Street intersection; (2) providing uniformed traffic officer control at the Rover Street/Robin Street intersection to facilitate vehicle and pedestrian traffic; (3) re-routing all traffic to Route 99 through the Route 99/Dexter Street intersection, rather than through the Route 99/Beacham Street intersection or the Beacham Street/Rover Street intersection; (4) requiring workers to enter and exit the Boston Gas/ballpark areas from specific exits; and (5) scheduling construction shifts to occur outside normal commuting peak hours (March 2000 Filing at 3; Exh.

⁹ The Company stated that LOS is a measure of the efficiency of the traffic operations at a certain location. The Company stated that traffic conditions on roadways and intersections are represented by the letters A through F on the LOS scale, where A represents a "free flow" condition with minimal delays, and F represents "forced flow" or breakdown conditions characterized by erratic vehicle movements. Final Decision at 173.

¹⁰ A second condition concerning pedestrian safety in relation to the parking area across Route 99 is no longer applicable (March 2000 Filing at 2).

PC-T-2). After reviewing the information provided by Sithe Mystic, the Siting Board found that the change in parking areas did not require further inquiry (March 30, 2000 Letter).

3. August 2001 Project Change

In its August 2001 Filing, Sithe Mystic proposed the use of two construction shifts: a day shift of approximately 1350 workers, running from 6:00 a.m. to 4:30 p.m., and a night shift of approximately 600 workers, running from 5:30 p.m. to 3:00 a.m. (Exhs. PC-Sithe-1, at 3; PC-EFSB-2). The Company stated that approximately 680 day shift workers in 475 cars currently park at the Boston Gas lot, while the remaining day shift workers use a satellite parking area located at the Mystic Mall in Chelsea (Exh. PC-EFSB-2). The Company anticipated that additional day shift workers would park at the Mystic Mall, and that the entire night shift would park at the Boston Gas lot unless overflow parking at the Mystic Mall proved necessary (*id.*).

The Company submitted a revised traffic study based on traffic counts taken in August 2001, while an on-site day shift of approximately 1100 employees¹¹ and a night shift of approximately 600 employees were in place (Exh. PC-Sithe-2, at 1). Based on the new traffic counts, the 2001 Traffic Study concluded that peak traffic periods in the vicinity of Mystic Station occur from 7:45 a.m. to 8:45 a.m., and from 4:00 p.m. to 5:00 p.m. (*id.* at 4). The Company based its traffic analysis on an initial peak work force estimate of 1400 day shift workers and 1170 night shift workers, and used ride sharing and public transit assumptions similar to those used in the underlying case (Exhs. PC-EFSB-2; PC-Sithe-1, at 4). The Company later updated its traffic study to assume that no day shift workers would use public transit, reflecting the current limited public transit use (Exh. PC-EFSB-6).¹²

The 2001 Traffic Study indicated that existing traffic conditions at intersections near Mystic Station ranged from LOS A to LOS C during the morning peak construction period (5:30

¹¹ The Company indicated that an additional 200 of the day shift employees were employed at satellite laydown areas in Charlestown, Lynnfield and Wakefield, for a total project work force of 1300 (Exh. PC-Sithe-1, Att. at 2).

¹² The traffic analysis submitted in the underlying proceeding assumed that one third of craft workers would use public transit (Exh. PC-EFSB-6).

a.m. to 6:30 a.m.), and that the additional day shift workers would increase average delays by 0.3 to 3.3 seconds (Exh. PC-EFSB-8, Modified Table 4). According to the 2001 Traffic Study, existing traffic conditions at intersections along Route 99 and Rover Street (excluding the site driveway) ranged from LOS E to LOS F during the evening peak construction period (4:30 p.m. to 5:30 p.m.); the additional day and night shift traffic resulted in increased average delays of up to 23 seconds (*id.*). The Company noted that the actual number of night shift workers would be significantly lower than the number assumed in the August 2001 traffic analysis, making the August 2001 analysis conservative (Exh. PC-EFSB-6).

Sithe Mystic asserted that traffic conditions in the vicinity of the Mystic Station site (which include traffic from the current day and night shifts) are in many instances much better than had been predicted in the Sithe Mystic proceeding (Exh. PC-Sithe-1, at 4). Sithe Mystic stated that the use of satellite parking at the Mystic Mall has reduced traffic to the construction site by at least 500 cars, alleviating traffic impacts in the vicinity of the site (*id.* at 5-6). However, the Company indicated that construction workers coming to the Mystic Mall via downtown Boston have the option of four routes, two of which involve travel along Route 99 north in the vicinity of Mystic Station (Exh. PC-EFSB-3).

Sithe Mystic stated that a uniformed traffic control officer currently is stationed at the intersection of Robin Street/Rover Street from 4:00 p.m. to 5:00 p.m., significantly improving LOS at that intersection (Exhs. PC-EFSB-8; PC-EFSB-9). In addition, two other uniformed officers are available to Sithe Mystic on an as-needed basis; in the past, officers had been assigned to the Rover Street construction gate and to the Route 99/Dexter Street intersection (Exhs. PC-EFSB-8; PC-EFSB-9). The Company acknowledged that, in some instances, an officer stationed at either the Route 99/Dexter Street or the Route 99/Beacham Street intersection could help reduce delays on one or multiple approaches, but asserted that overall there is limited value in deploying a police officer to intersections along Route 99 (Exh. PC-EFSB-9(S)). Therefore, the Company now defers to the expertise of the Everett Police Department to determine when to deploy the officers (*id.*). Finally, Sithe Mystic asserted that other traffic mitigation methods, such as re-striping or widening roadways, would not be effective for short-term traffic impacts associated with peak construction work (Exh. PC-EFSB-9).

The Company provided a qualitative assessment of traffic impacts in the vicinity of the Mystic Mall resulting from the use of the Mystic Mall for satellite parking (Exhs. PC-EFSB-6; PC-Sithe-2). The Company estimated that 500 to 600 day shift workers currently park at the Mystic Mall parking lot and are transported to the Sithe Mystic site by a private shuttle service that uses buses and vans (Exhs. PC-Sithe-1, at 5; PC-EFSB-6).¹³ Sithe Mystic asserted that the traffic impacts of workers commuting to and from the Mystic Mall are dispersed throughout the roadway network due to the use of various routes by the workers to commute to the parking area (Exh. PC-EFSB-3). The Company noted that the area surrounding the Mystic Mall is primarily industrial in nature, with the nearest residential area located more than 1/4 mile from the construction worker parking area in the rear lot (Exh. PC-EFSB-4).¹⁴ Sithe Mystic stated that its contractor has been in consultation with the Chelsea Police Department, and that the Company has agreed to place a traffic control officer at the Mystic Mall exit to control traffic if necessary (Exh. PC-EFSB-3).

In the Final Decision, the Siting Board required Sithe Mystic to provide shuttle service to the site from the Sullivan Square Station or another MBTA stop likely to be used by project construction workers. Final Decision at 177. In its August 2001 Filing, the Company asserted that since the MBTA already operates a public bus service from the Sullivan Square Station, there would be no benefit to replicating the service (Exh. PC-Sithe-1, at 5). Sithe Mystic also indicated that, early in 2000, the MBTA had refused either to operate a shuttle bus service for Mystic Station construction workers, or to permit a private shuttle bus service to operate out of the Sullivan Square Station (Exh. PC-EFSB-5). The Company indicated that the MBTA's decision was intended to prevent (1) bus equipment from competing for space within the station complex, and (2) any interference with scheduled MBTA bus routes (Exh. PC-EFSB-5(s)). Sithe Mystic stated that one private employer, the R.M. Bradley Company, operates a shuttle service

¹³ Sithe Mystic based its estimate on total trip generation for both the morning and afternoon peak hour on the use of 25 buses and 3 vans to transport the workers (Exh. PC-EFSB-6)

¹⁴ Construction worker parking at the Mystic Mall is confined to the rear lot, in the vicinity of Second and Carter Streets (Exhs. PC-EFSB-3, Att. C; PC-EFSB-3a(S)).

that uses three 20-passenger vans to pick-up and discharge passengers at the public parking area, which is physically segregated from the main station area (id.). The Company provided information showing that the MBTA Orange Line service begins at 5:16 a.m. at both its northern and southern termini, and that the travel time to Sullivan Square Station is approximately 10 minutes, and 23 minutes, respectively (id.). Based on this schedule, the Company argued that, while some construction workers might be able to use public transit to reach the Site Mystic job site by the beginning of the day shift at 6:00 a.m., most would not be able to do so (id.).

4. Analysis

In its petition, Site Mystic proposes to perform construction work at Mystic Station in two shifts: a 1350-person day shift, running from 6:00 a.m. to 4:30 p.m., and a 600-person night shift, extending from 5:30 p.m. to 3:00 a.m. Workers for both shifts would park in the Boston Gas lot near Mystic Station; additional day shift parking (and night shift parking, if necessary) is available at the Mystic Mall in Chelsea. The resultant traffic patterns would differ significantly from those analyzed in the Final Decision for several reasons. First, Site Mystic seeks approval for an extended day shift which runs from 6:00 a.m. to 4:30 p.m., moving the shift change for the project into the peak evening traffic period. In addition, the Company's proposal reflects greater overall vehicle use by construction workers due to: (1) an increased size of the day shift work force; (2) reduced reliance on public transportation for travel by day shift workers; and (3) the modeling of a regular night shift. While motor vehicle travel by workers would increase, the use of remote parking at the Mystic Mall with shuttle transport during the day shift would reduce the impact of travel by day shift workers on traffic near the project site.

Table 1, attached as Appendix 1 to this decision, compares the overall traffic conditions predicted by the 2001 Traffic Study with conditions anticipated by the Company in the underlying petition and in the March 2000 Filing. The 2001 Traffic Study shows that the change in shift schedule provides some benefit to projected morning traffic impacts, as day shift workers now arrive between 5:30 a.m. to 6:30 a.m., well outside of the peak commuter traffic period. Specifically, for the morning peak the anticipated LOS at (1) the Route 99/Dexter Street intersection is now projected to be LOS C, rather than LOS F (without mitigation), as anticipated

in the underlying decision; and (2) the Route 99/Beacham Street intersection is now projected to be LOS C, rather than LOS E, as anticipated in the underlying decision.

However, the current shift timing also has resulted in construction worker traffic coinciding with the afternoon peak commuter traffic period, resulting in delays during the afternoon peak period that offset the improvements in morning peak traffic conditions. The 2001 Study shows that for the afternoon peak, the anticipated overall LOS at every signalized intersection is worse than anticipated in the underlying decision. Specifically, overall (1) the Route 99/Dexter Street intersection is now projected to be LOS F, rather than LOS D; and (2) the Route 99/Beacham Street intersection is now projected to be LOS F, rather than LOS D. Further, while the overall LOS at the Route 99/Beacham Street/McDonalds intersection was projected to improve based on the March 2000 project changes, it is now projected to significantly deteriorate.

In addition, at the unsignalized intersections, the anticipated afternoon peak LOS is projected to worsen overall at both the Robin Street/Rover Street and Robin Street/Beacham Street intersections. Specifically, overall (1) the Robin Street/Rover Street intersection is modeled at LOS F, rather than LOS A as projected in the underlying proceeding;¹⁵ and (2) the Robin Street/Beacham Street intersection is modeled at LOS F, rather than LOS A as projected in the underlying proceeding. Actual conditions at the Robin Street/Rover Street intersection may be better than modeled, due to routine police officer control of the intersection.

Thus, it appears that, during project construction, afternoon peak traffic conditions at almost all intersections would be worse than anticipated in the Final Decision, offsetting improvements in projected morning peak traffic conditions. The Siting Board recognizes that the 2001 Study provides a conservative estimate of traffic conditions under the changed shift schedule, as it assumes an on-site day shift work force of 1400 and an on-site night shift work force of 1170, while the Company now plans a slightly smaller maximum on-site day shift work force of 1350 and a maximum on-site night shift work force of 600. Thus, while project-related

¹⁵ Since Sithe Mystic will not be using the ballpark parking, the impact of construction traffic on Robin Street southbound at Rover Street would be the same as projected in 1998 and be less than was projected based on the March 2000 changes.

impacts on traffic conditions are likely to exceed current levels (which were modeled based on actual traffic counts with an on-site day shift of 1100 workers and an on-site night shift of 570 workers in place), they likely will fall below the projections in the 2001 Traffic Study.

The Siting Board also recognizes that current traffic conditions are influenced not just by construction traffic, but also by an increase in other traffic through the area. Because the Company has used new traffic counts as a baseline for its 2001 Traffic Study, it is difficult to determine the precise effect which construction traffic has had on traffic conditions near Mystic Station. However, it is reasonable to assume that the departure of 475 vehicles from the Boston Gas parking area at the end of the day shift, combined with the arrival of up to 475 vehicles for the beginning of the night shift, has had a significant effect on evening peak hour conditions. While new parking arrangements which incorporate the use of Mystic Mall, and no longer include the use of the ballpark, have served to lessen traffic impacts based on the total number of workers parking near the site, the scheduling of a shift change during the peak traffic hour serves to worsen traffic impacts in the area. In addition, some construction workers using the Mystic Mall lot travel on Route 99 and Dexter Street or Beacham Street, and therefore contribute to the peak traffic conditions.

Overall, a combination of underlying traffic conditions and shift change traffic has resulted in afternoon peak traffic conditions which have in some cases deteriorated to LOS F, which represents forced flow or breakdown conditions with highly unstable operating conditions, with delay times of over 120 seconds. The proposed expansion of the day shift can only cause conditions to deteriorate further. Consequently, in order to minimize construction traffic impacts during the afternoon shift change, the Siting Board directs the Mystic to work with the City of Everett to develop and implement a construction traffic mitigation plan for the area near Mystic Station. This plan should include measures acceptable to the City of Everett to ensure optimum traffic flow at project area intersections; such measures could include mitigation proposed by the Company, including police control at the Robin Street/Rover Street intersection and other congested intersections during the evening peak traffic period; optimization of signal timing or manual control of Route 99 traffic signals; and the promotion of carpooling by Company employees and subcontractors.

Finally, Sithe Mystic has argued that its implementation of satellite parking and shuttle service at the Mystic Mall is an appropriate substitute for the provision of shuttle service from the Sullivan Square MBTA stop (or another public transportation stop), as required by Condition F of the Final Decision. The Siting Board notes that the Company's satellite parking proposal helps achieve the primary goal of Condition F, which was to minimize construction traffic impacts by decreasing the number of motor vehicles traveling on the roadways in the vicinity of Mystic Station. However, in light of those aspects of the project change which serve to increase traffic impacts, as well as the unacceptable existing traffic conditions in the vicinity of Mystic Station, it is critical for Sithe Mystic to pursue aggressive measures to reduce the number of construction workers traveling through the Mystic Station area.

The Siting Board recognizes that Condition F provided for coordination with the MBTA and municipal safety officials, and that Sithe Mystic cannot institute a shuttle service from Sullivan Station without MBTA permission and municipal acceptance. However, it appears from the record that the MBTA rejected a shuttle proposal involving the use of full-size buses, which would have had to enter the main station area. The record also suggests it is possible that the Company could implement a van-based shuttle service similar to the one operated by the R.M. Bradley Company, which may well be acceptable to the MBTA. The record indicates the Company already is using vans as well as buses to provide shuttle service between the Mystic Mall and the project site. The Siting Board acknowledges that the MBTA subway schedule may be restrictive; however, the travel time from the Sullivan Square Station stop to the Sithe Mystic site at this time of the morning is very short, and a reasonable number of workers therefore may be able to use a shuttle service. Consequently, the Siting Board modifies Condition F to read as follows:

In order to minimize traffic impacts, the Siting Board directs the Company, if the MBTA permits, to provide a van-based shuttle service between the Sullivan Square MBTA stop and the Mystic Station site at the beginning and end of the day shift. If the MBTA does not permit use of the shuttle service, the Company should so inform the Siting Board. To the extent the Company may schedule van-based service in compliance with this condition that is used at levels significantly below the capacity of available equipment, the Company may reduce scheduling of van trips or, if warranted after at least two weeks of service, discontinue all van-based shuttle service from Sullivan Station. If shuttle service is discontinued,

the Company shall so inform the Siting Board and document its reasons. The two week service period must encompass a time period that includes peak construction worker staffing. The Company should notify workers of the availability of the shuttle service, indicating that service is subject to evaluation and possible discontinuation based on usership.

The Siting Board finds that, with the implementation of the foregoing condition, the traffic impacts of the proposed facility would be minimized.

B. Noise Impacts

1. Final Decision

In the underlying proceeding, the Company stated that it would minimize construction noise by: (1) limiting all major construction activities to daytime hours to the extent practical; (2) limiting pile driving to daytime hours without exception; and (3) confining steam blows to daytime hours with muffled piping. Final Decision at 164. The Company explained that by limiting major construction activity to daytime hours, it expected that this would significantly reduce the noise impact of the project on nearby communities (Exhs. EFSB-A-7S, Att. at 6-15; EFSB-A-1-S3, at 6-3). The Siting Board noted that the construction practices proposed by the Company would be consistent with approaches to construction noise mitigation that it had reviewed in recent generating facility cases, and found that the environmental impacts of the proposed facility would be minimized with respect to noise. Final Decision at 166.

2. March 2000 Project Change

In March, 2000, Sithe Mystic proposed a change in the location of its construction worker parking (March 2000 Filing). Sithe Mystic indicated that nighttime construction worker parking would be confined to the Boston Gas property (Exh. EFSB-PC-T-4). The Company stated it would re-route all traffic to Route 99 through the Route 99/Dexter Street intersection, rather than through the Route 99/Beacham Street intersection or the Beacham Street/Rover Street intersection (Exh. PC-T-2). The Company noted that the Boston Gas property was not in close proximity to area residences, and concluded that use of the property for construction worker parking would not affect nearby residences either during the day or at night (Exh. EFSB-T-4).

After reviewing the information provided by Sithe Mystic, the Siting Board found that the change in parking areas did not require further inquiry (March 30, 2000 Letter).

3. August 2001 Project Change

Sithe Mystic currently is proposing a two-shift construction schedule, with a day shift running from 6:00 a.m. to 3:00 p.m., and a night shift running from 5:30 p.m. to 3:00 a.m. (Exh. PC-Sithe-1, at 3). The Company stated that approximately 600 construction workers would work the night shift during the peak construction period (Exh. PC-EFSB-2).¹⁶ The Company stated that it has been running a limited second shift since June 2000; the current 600-worker second shift began in August 2001 (Exhs. PC-Sithe-1, at 3; PC-EFSB-1). The Company indicated that it has not received any noise complaints related to the conduct of its night shift (Exhs. PC-Sithe-1, at 3). The Company attributed the lack of complaints to the industrial nature of the area surrounding the site, and the distance between the site and potential sensitive receptors (*id.* at 3-4). The Company also noted that truck and vehicular traffic, airplane overflights, and industrial activity (including the operation of Mystic Station and a nearby scrap metal operation) contribute to existing noise levels (*id.* at 4).

The Company stated that night shift parking would be confined to the Boston Gas parking lot unless it becomes necessary to use the Mystic Mall for parking, and indicated that it has not received any complaints regarding noise from workers departing the Boston Gas lot at 3:00 a.m. (Exh. PC-EFSB-2).

4. Analysis

In its petition, Sithe Mystic proposes to perform construction work at Mystic Station in two shifts: a 1350-person day shift, running from 6:00 a.m. to 4:30 p.m., and a 600-person night shift, extending from 5:30 p.m. to 3:00 a.m. Although the Company proposed significant use of a night shift for the peak construction period through the end of construction (*see* Exh. EFSB-N-9), the issue of night work was not addressed in detail in the Final Decision. The Siting Board

¹⁶ Sithe Mystic stated that, between October 2001 and September 2002, the number of night shift workers would range from 300 to 600 (Exh. PC-EFSB-2).

notes that the explicit size and attributes of the second shift were not specified by the Company at the time of the issuance of the Final Decision or the submission of the March 2000 Filing and that the proposed noise mitigation centered around the limitation of major construction to daytime hours. The Siting Board therefore reviews night time noise issues including consideration of the Company's experience to date.

In the Final Decision, the Siting Board noted that the use of the area in the vicinity of the proposed facility is consistent with industrial zoning in three directions, but that a neighborhood characterized by residential use, with some recreational space, lies to the north of the Mystic Station site. Final Decision at 188. The Company stated that the nearest residence is 350 feet north of the site boundary, and there are no sensitive receptors (excluding residences) located within 1000 feet of the site boundary (Exhs. PC-Sithe-1, at 4; EFSB-L-1). The record shows that in the area to the north of the site there are approximately 32 residences located within 1000 feet of the site boundary (Exh. EFSB-L-1).

In the Final Decision, the Siting Board found that the construction noise impacts from the proposed facility would be minimized, based on the Company's proposal to limit pile driving and steam blows to daytime hours, and to limit major construction to daytime hours to the extent practical. Final Decision at 54-56. Although the site is located in a heavily industrialized area with some nighttime industrial activity, there is a residential neighborhood to the north of the facility. The Siting Board notes that the Company will be directing traffic that departs via Route 99 through the Route 99/Dexter Street intersection, thus preventing late night impacts to the surrounding neighborhood. The record indicates that the Company has, thus far, carried out regular night shift construction work without engendering noise complaints, either with respect to noise from the construction site or with respect to noise from departing construction traffic.

However, full-scale night shift construction has been in place only since August 2001. The nature of second shift construction conducted to date may be different from that undertaken in later stages of the project. Given the 3:00 a.m. ending time for the second shift, it is critical that the Company maintain open lines of communication with the neighborhood to the north of the facility in order to minimize the impacts of construction noise.

Accordingly, the Siting Board directs the Company to develop and implement a mechanism for regular communication with the neighborhood bordered by Dexter Street, Route 99, Robin Road and Beacham Road, regarding construction plans and construction noise at the facility. This regular communication should include, initially, distributing an informational notice describing procedures for reporting noise issues and for inquiring about Company activities which includes phone numbers of the Company's representatives, as well as procedures for the notification of municipal officials and upon request, neighbors, in advance of noisy events and steam blows. Beyond initial notification, regular communication may be accomplished via a regular meeting or a newsletter, or in conjunction with meetings with Town officials. Further, if a structured, documented written mechanism has not been implemented, the Company shall develop procedures for recording noise complaints and a mechanism for investigating and remedying complaints.

Accordingly, the Siting Board finds that, with the implementation of the foregoing condition, the noise impacts of the proposed facility would be minimized.

V. DECISION

Consistent with the Siting Board's directive to Sithe Mystic to inform the Siting Board of any changes to Sithe Mystic's proposed project, other than minor variations, Sithe Mystic has informed the Siting Board of three such changes -- an increase in the number of construction workers on-site, a change in the arrival and departure times of construction workers, and the use of the Mystic Mall parking area, rather than a ballpark in the neighborhood of Mystic Station.

The Siting Board found that further inquiry was warranted to evaluate the traffic and noise impacts that may result from a change in shift schedules. After conducting such inquiry in Sections IV.A, and IV.B above, the Siting Board found that, with the implementation of the following Condition N, and the implementation of Condition F as revised, the traffic impacts of the proposed facility would be minimized.

Condition N:

Consequently, in order to minimize construction traffic impacts during the afternoon shift change, the Siting Board directs the Mystic to work with the City of Everett to develop and implement a construction traffic mitigation plan for the area near Mystic Station. This plan should include measures acceptable to the City of Everett to ensure optimum traffic flow at project area intersections; such measures could include mitigation proposed by the Company, including police control at the Robin Street/Rover Street intersection and other congested intersections during the evening peak traffic period; optimization of signal timing or manual control of Route 99 traffic signals; and the promotion of carpooling by Company employees and subcontractors.

Revised Condition F:

In order to minimize traffic impacts, the Siting Board directs the Company, if the MBTA permits, to provide a van-based shuttle service between the Sullivan Square MBTA stop and the Mystic Station site at the beginning and end of the day shift. If the MBTA does not permit use of the shuttle service, the Company should so inform the Siting Board. To the extent the Company may schedule van-based service in compliance with this condition that is used at levels significantly below the capacity of available equipment, the Company may reduce scheduling of van trips or, if warranted after at least two weeks of service, discontinue all van-based shuttle service from Sullivan Station. If shuttle service is discontinued, the Company shall so inform the Siting Board and document its reasons. The two week service period must encompass a time period that includes peak construction worker staffing. The Company should notify workers of the availability of the shuttle service, indicating that service is subject to evaluation and possible discontinuation based on usership.

The Siting Board also found that, with the implementation of the following condition, the noise impacts of the proposed facility would be minimized.

Condition O:


The Siting Board directs the Company to develop and implement a mechanism for regular communication with the neighborhood bordered by Dexter Street, Route 99, Robin Road and Beacham Road, regarding construction plans and construction noise at the facility. This regular communication should include initially distributing an informational notice describing procedures for reporting noise issues and for inquiring about Company activities which includes phone numbers of the Company's representatives, as well as procedures for the

notification of municipal officials and upon request, neighbors, in advance of noisy events and steam blows. Beyond initial notification, regular communication may be via a regular meeting or a newsletter, or in conjunction with meetings with Town officials. Further, if a structured, documented written mechanism has not been implemented, the Company shall develop procedures for recording noise complaints and a mechanism for investigating and remedying complaints.

Accordingly, the Siting Board finds that, upon compliance with Condition F as revised, and with Conditions N and O set forth in Sections IV.A and IV.B, above, the Company's plans for the construction of the proposed facility would minimize the environmental impacts of the proposed facility consistent with the minimization of cost associated with the mitigation, control, and reduction of the environmental impacts of the proposed generating facility.

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

The Siting Board requires the Company to notify the Siting Board of any changes other than minor variations to the proposal so that the Siting Board may decide whether to inquire further into a particular issue. The Company is obligated to provide the Siting Board with sufficient information on changes to the proposed project to enable the Siting Board to make these determinations.


Selma Urman
Hearing Officer

Dated this 30th day of November, 2001

APPENDIX 1

	<u>Analysis for Petition</u> 2000 Construction Year Build /Petition ¹		<u>Analysis for March 2000</u> 2000 Construction Year Build w/Boston Gas and Ballpark ²		<u>Analysis for Project Change</u> 2001 Construction Year Build w/project changes ³	
Intersection	Morning Peak 6:30-7:30 a.m	Afternoon Peak 5:00-6:00 p.m	Morning Peak 5:30-6:30 a.m	Afternoon Peak 2:30-3:30 p.m	Morning Peak 5:30-6:30 a.m	Afternoon Peak 4:30-5:30
Signalized Intersection	LOS/Delay (seconds)	LOS/Delay (seconds)	LOS/Delay (seconds)	LOS/Delay (seconds)	LOS/Delay (seconds)	LOS/Delay (seconds)
Route 99 /Dexter	F/>120	D/32	C	D	C/23	F/106
Dexter WB	F/>120	E/49	D	E	C/27	D/40
Rt. 99 NB	B/6	E/42	C	E	B/17	F/>120
Rt. 99 SB	D/33	B/8	C	C	C/26	F/101
Route 99 Beacham/McD	E/42	D/30	B	C	C/25	F/>120
McD EB	C/21	C/18	C	B	C/31	C/32
Beacham WB	F/108	D/32	D	D	D/42	F/104
Rt. 99 NB	E/41	D/40	B	C	B/13	E/80
Rt. 99 SB	D/33	C/17	B	C	C/25	F/>120
Unsignalized Intersections						
Robin/Rover			B*	C*	C/15	F/55*
Robin SB	A/2	A/1	B	D	A/8	A/9
Rover WB	C/15	C/15	C	B	C/15	F/55
Robin/Beacham	/3	/7			C/24	F>120
Robin NB	B/8	C/18	B	B	C/21	F/>120
Exxon SB	C/10	D/23	B	C	C/24	F/59
Beacham EB	A/0	A/0	A	A	A/8	A/8
Beacham WB	A/2	A/2	A	A	A/8	A/9

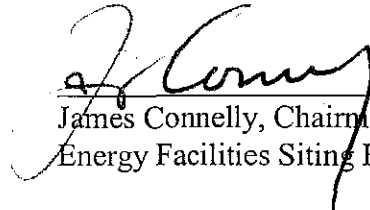
* Without police officer controlling traffic.

¹ August 27 Filing, Appendix C- 1998 Traffic Study at 4-10. Based on information provided by the Company in 1998 in support of the Sithe Mystic project as approved in the Final Decision.

² March 2, 2001 Filing, Attachment 2. Based on information provided by the Company in support of changes in construction parking areas, as proposed in the March 2000 project change

³ Exh. PC-EFSB-8. Based on information provided by the Company in support changes in shift scheduled and number of construction workers, as proposed in the August 27 Filing.

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



James Connelly, Chairman
Energy Facilities Siting Board

Dated this 29th day of November, 2001.

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Massachusetts General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of)
NSTAR Gas Company for Approval)
to Construct a New Underground)
Natural Gas Pipeline in the Cities of)
Cambridge and Somerville, Massachusetts.)

EFSB 00-2

FINAL DECISION

Denise L. Desautels
Hearing Officer
December 14, 2001

On the Decision:
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Amy Barad
John Young

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LIST OF ABBREVIATIONS

Algonquin	Algonquin Gas Transmission Company
<u>ANP Bellingham Decision</u>	<u>ANP Bellingham Energy Company</u> , 7 DOMSB 39 (1998)
August 2000 forecast	updated projections of forecast gas supply and demand, prepared in August 2000 for the period 2000 to 2005
BBtu/yr	billion British thermal units per year
<u>1997 BECo Decision</u>	<u>Boston Edison Company - Hopkinton and Milford</u> , 6 DOMSB 208 (1997)
<u>1999 Berkshire Gas Decision</u>	<u>Berkshire Gas Company</u> , 9 DOMSB 1 (1999)
c.	Chapter
<u>1998 Cabot Power Decision</u>	<u>Cabot Power Corporation</u> , 7 DOMSB 233 (1998)
<u>CELCo Decision</u>	<u>Cambridge Electric Light Company</u> , 12 DOMSB 305 (2001)
CSX	CSX Corporation
Company	NSTAR Gas Company
dBA	decibels, A-weighted
dbh	diameter at breast height
Department	Massachusetts Department of Telecommunications and Energy
Distrigas	Distrigas of Massachusetts Corporation
dt	decatherms
dt/day	decatherms per day
dt/hr	decatherms per hour
EUT	end user transportation
°F	degrees Fahrenheit
f/k/a	formerly known as
1996 Forecast and Supply Plan	<u>Commonwealth Gas Company Long-Range Forecast and Resource Plan</u> , 1996-2001, D.T.E./D.P.U. 96-117 (2000)
G.L.	Massachusetts General Laws
HRSG	heat recovery steam generator

Kendall Station Project	Repowering of Kendall Station generating facility, Cambridge
LNG	liquefied natural gas
MADEP	Massachusetts Department of Environmental Protection
MAOP	maximum allowable operating pressure
MBTA	Massachusetts Bay Transportation Authority
mcf	thousand [standard] cubic feet [of gas]
mcfh	thousand [standard] cubic feet [of gas] per hour
MCP	Massachusetts Contingency Plan, 310 CMR, § 40.0000 <u>et seq.</u>
MDC	Metropolitan District Commission
<u>MECo/NEPCo Decision</u>	<u>Massachusetts Electric Company and New England Power Company</u> , 18 DOMSC 383 (1989)
MHC	Massachusetts Historical Commission
Mirant Kendall	Mirant Kendall, LLC
MIT	Massachusetts Institute of Technology
mmBtu	million British thermal units
mmBtu/hr	million British thermal units per hour
<u>MMWEC Decision</u>	<u>Massachusetts Municipal Wholesale Electric Company</u> , 12 DOMSB 18 (2001)
<u>1998 NEPCo Decision</u>	<u>New England Power Company</u> , 7 DOMSB 333 (1998)
NPDES	National Pollution Discharge Elimination System
NSTAR Gas	NSTAR Gas Company
OHM	oil and hazardous materials
OSHA	U.S. Occupational Safety and Health Administration
psig	pounds per square inch, gauge
<u>SE Kendall Decision</u>	<u>Southern Energy Kendall, LLC</u> , 11 DOMSB 255 (2000)
Siting Board	Massachusetts Energy Facilities Siting Board
Third Street Gate Station	NSTAR Gas gate station at Third Street in Cambridge
USEPA	U.S. Environmental Protection Agency

The Energy Facilities Siting Board hereby APPROVES, subject to two conditions, the petition of NSTAR Gas Company to construct approximately 2.2 miles of 18-inch diameter high-pressure natural gas pipeline from an interconnection with Algonquin Gas Transmission Company in Somerville to NSTAR Gas Company's existing Third Street Gate Station in Cambridge.

I. INTRODUCTION

A. Summary of the Proposed Project

NSTAR Gas Company, f/k/a Commonwealth Gas Company, ("NSTAR Gas" or the "Company") distributes and sells natural gas to local customers in eastern and central Massachusetts (Exhs. NGC-3, at 1-1, 1-2; EFSB-G-1; Tr. 1, at 14). The Company proposes to build a 2.2-mile, 18-inch diameter pipeline ("proposed project" or "proposed pipeline") in Cambridge and Somerville to accommodate an anticipated equipment upgrade project at Kendall Station, a generating facility in Cambridge ("Kendall Station Project") (Exh. NGC-3, at 1-1, 1-2, 3-1).^{1,2}

The proposed pipeline would begin at a point in Somerville at which the existing J-2 lateral pipeline changes ownership from the Algonquin Gas Transmission Company ("Algonquin") to NSTAR Gas and terminate at the existing NSTAR Gas gate station at Third Street in Cambridge ("Third Street Gate Station") (Exh. NGC-3, at 1-1, 3-1, 3-2; Tr. 2, at 259-261). The proposed pipeline would be certified to operate at a pressure of 433 pounds per square inch, gauge ("psig"), consistent with the upstream Algonquin transmission system, and would replace a section of an existing 14-inch pipeline which is certified for a pressure of 329 psig³

¹ NSTAR Gas stated that to provide the higher pressure requested by the Kendall Station Project, it also would install a new 1000-foot service line from the Third Street Gate Station to Kendall Station (Exh. NGC-3, at 1-1 n.1, 1-10). NSTAR Gas stated that the installation of the service line is independent of the proposed project (*id.* at 1-10).

² The Kendall Station Project was approved by the Siting Board on December 15, 2000. Southern Energy Kendall, LLC, 11 DOMSB 255 (2000) ("SE Kendall Decision").

³ NSTAR Gas stated that once the proposed pipeline is operational, the existing 14-inch
(continued...)

(Exh. NGC-3, at 1-1).

NSTAR Gas' preferred route for the pipeline begins at the existing J-22 valve on the J-2 lateral, where ownership changes from Algonquin to NSTAR Gas (id. at 3-1). The J-22 valve is located on the McGrath Highway in Somerville, near its intersection with Medford Street and Highland Avenue (id. at 1-5, 1-11, 5-14). From this intersection, the preferred route follows Medford Street south, and continues past Somerville Avenue, crossing under Massachusetts Bay Transportation Authority ("MBTA") railroad tracks to the Somerville/Cambridge municipal boundary (id. at 1-11, 5-14). Continuing southeast on Gore Street in Cambridge, the preferred route crosses a CSX Corporation ("CSX") railroad track crossing, turns northeast on Rufo Road, eastward through the parking lot of Twin City Mall, and southeast along the Monsignor O'Brien Highway, passing under the MBTA Green Line viaduct at the intersection with Cambridge Street (id. at fig. 1.2-1). The route makes a sharp turn west onto Cambridge Street for a very short distance, then proceeds south on First Street, west on Linskey Way (also referred to as Munroe Street), and south on Third Street to the Third Street Gate Station (id. at 1-5, 1-11).

A variation to the preferred route, for which the Company requests approval should obstacles prevent construction at the Cambridge Street/O'Brien Highway intersection, turns off the O'Brien Highway at its intersection with Gore Street and Second Street, follows Second Street south to Cambridge Street and then Cambridge Street east to First Street, where the variation rejoins the preferred route (id.).

The Company also noticed an alternate route which follows the same path as the preferred route until the intersection of Gore Street and Rufo Road in Cambridge (id. at fig. 1.2-1). At that point, the alternate route continues east on Gore Street, south on Fifth Street, east on Binney Street, and south on Third Street to the Third Street Gate Station (id. at 1-5, 1-14). The preferred and alternate routes are shown in Figure 1 (attached).

³

(...continued)

pipeline, which runs from the Algonquin pipeline to the Third Street Gate Station, would be operated at 60 psig as part of the Company's distribution system, providing additional capacity and reliability to customers in Cambridge and Somerville (Exh. NGC-3, at 3-1 to 3-2).

B. Procedural History

On October 10, 2000, NSTAR Gas filed with the Energy Facilities Siting Board ("Siting Board") its original petition to construct and operate a 16-inch high pressure natural gas pipeline from the J-22 valve to the Third Street Gate Station (Exh. NGC-1). The Siting Board docketed the petition as EFSB 00-2. On February 28, 2001, NSTAR Gas filed an amended petition to reflect the elimination of a proposed variation to its preferred route (Exh. NGC-2). On June 25, 2001, NSTAR Gas filed a second amended petition to reflect an increase in the diameter of the pipeline from 16 to 18 inches (Exh. NGC-3, at 1-1).⁴

In accordance with the direction of the Hearing Officer, NSTAR Gas provided Notice of Public Hearing and Adjudication. The Siting Board conducted two public hearings regarding the proposed project. The first public hearing was conducted on January 4, 2001, in Cambridge. Because some abutters to the proposed routes and route segments who were required to receive notice of the hearing did not receive such notice, and because NSTAR Gas no longer intended to offer for approval a previously noticed variation to the proposed preferred route, a second public hearing was noticed for March 5, 2001. Due to inclement weather, the March 5, 2001 hearing was postponed and subsequently was conducted on March 22, 2001, in Cambridge.

Timely petitions to intervene in this proceeding were filed by the City of Cambridge and Mirant Kendall, LLC.⁵ Timely petitions to participate as interested persons were filed by the Massachusetts Institute of Technology ("MIT"), Mary Ann Donofrio, and Kendall Square, LLC. The Hearing Officer granted intervenor status and interested person status to each petitioner seeking such status. NSTAR Gas Company, EFSB 00-2 (Hearing Officer Ruling, April 13, 2001; Hearing Officer Ruling, April 18, 2001).

Adjudicatory hearings in this proceeding commenced on June 28, 2001, and closed on

⁴ NSTAR Gas stated that it amended its petition in response to a request by Mirant Kendall, LLC to increase peak delivery capability to Kendall Station (Exh. NGC-3, at 1-1).

⁵ On April 13, 2001, intervenor Southern Energy Kendall, LLC informed the Siting Board that it would now be known as Mirant Kendall, LLC ("Mirant Kendall") (Letter of JoAnne A. Pierce, Frank P. Pozniak, Counsel for Mirant Kendall, LLC, dated April 13, 2001).

July 6, 2001. NSTAR Gas presented the testimony of the following witnesses: Robert J. Buffone, Jr., Principal Engineer, NSTAR Gas, who testified as to project description, project need, project approaches, route selection process, and cost of the proposed project; Joseph W. Freeman, Program Director, Earth Tech, who testified as to environmental impacts and comparison of proposed facilities along the preferred and alternative routes; Barbara W. Stamos, Senior Gas Supply Planning Administrator, NSTAR Gas, who testified as to gas forecasting and supply; and David L. Ward, Manager of Gas Control, NSTAR Gas, who testified as to gas supply issues (Exhs. NGC-RBC-1; NGC-JWF-1; NGC-BWS-1; NGC-DLW-1). In addition to testimony from witnesses who submitted prefiled direct testimony, NSTAR Gas offered Robert Connors, Lead Engineer, Asset Management Transmission/Right-of-Way Department, NSTAR Gas, who testified as to property issues (Tr. 1, at 34). No intervenor presented a direct case.

The Hearing Officer entered 233 exhibits, consisting primarily of information request responses and record request responses, into the evidentiary record. On August 20, 2001, NSTAR Gas and the City of Cambridge submitted their respective initial briefs. On August 27, 2001, NSTAR Gas and the City of Cambridge filed their respective reply briefs.

C. Jurisdiction and Scope of Review

NSTAR Gas filed its petition to construct a natural gas pipeline in accordance with 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, and pursuant to G.L. c. 164, § 69J, which requires a project applicant to obtain Siting Board approval for the construction of proposed energy facilities before a construction permit may be issued by another state agency.

As a new pipeline over one mile in length intended for the transmission of natural gas, NSTAR Gas' proposed project falls within the definition of "facility" set forth in G.L. c. 164, § 69G, which provides that a "facility" includes:

a new pipeline for the transmission of gas having a normal operating pressure in excess of 100 pounds per square inch gauge which is greater than one mile in length except restructuring, rebuilding, or relaying of existing transmission lines of the same capacity.

G.L. c. 164, § 69G.

Before approving a petition to construct facilities, the Siting Board requires an applicant to justify its proposal in three phases. G.L. c 164, § 69J. First, the Siting Board requires the applicant to show that additional energy resources are needed (see Section II.A, below). Next, the Siting Board requires the applicant to establish that, on balance, its proposed project is superior to alternative approaches in terms of cost, environmental impact, reliability, and ability to address the identified need (see Section II.B, below). Finally, the Siting Board requires the applicant to show that it has considered a reasonable range of practical facility siting alternatives and that the proposed site for the facility is superior to a noticed alternative site in terms of cost, environmental impact, and reliability of supply (see Section III, below).

II. ANALYSIS OF THE PROPOSED PROJECT

A. Need Analysis

1. Standard of Review

In accordance with G.L. c. 164, § 69H, the Siting Board is charged with the responsibility for implementing 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. G.L. c. 164, § 69H. In carrying out this statutory mandate with respect to proposals to construct natural gas pipelines, the Siting Board evaluates whether there is a need for additional natural gas pipelines in the Commonwealth to meet reliability, economic efficiency, or environmental objectives. See Massachusetts Municipal Wholesale Electric Company, 12 DOMSB 18, at 43 (2001) ("MMWEC Decision"); Berkshire Gas Company, 9 DOMSB 1, at 12 (1999) ("1999 Berkshire Gas Decision"); Massachusetts Electric Company and New England Power Company, 18 DOMSC 383, at 393 (1989) ("MECo/NEPCo Decision").

In evaluating the need for new energy facilities to meet reliability objectives, the Siting Board may evaluate the ability of its existing system to accommodate changes in aggregate demand or supply,⁶ to serve major new loads, or to maintain reliable service in certain

⁶ With respect to changes in demand or supply, the Siting Board has found that new
(continued...)

contingencies. The Siting Board previously has approved proposals to construct gas pipelines to accommodate load growth within a utility's service territory (Boston Gas Company, 17 DOMSC 155 (1988)) and to transport natural gas to generating facilities (MMWEC Decision, 12 DOMSB 18; Berkshire Gas Company, 20 DOMSC 109 (Phase II) (1990); Bay State Gas Company, 21 DOMSC 1 (1990)). In such cases, the proponent must demonstrate that additional energy resources are necessary to meet reliability objectives by establishing that its existing system is inadequate to serve the anticipated load with acceptable reliability.

2. Description of the Existing System

NSTAR Gas stated that it receives natural gas via two interstate transportation systems, one operated by Algonquin and one by the Tennessee Gas Pipeline Company (Exh. NGC-3, at 2-2). The Company also is supplied with liquefied natural gas ("LNG") delivered to Distrigas of Massachusetts Corporation ("Distrigas") and injected at Everett into the Algonquin system (id. at 2-2, 2-3). The Company's Cambridge/Somerville distribution system is served by two Algonquin gate stations -- the Brookford Street Gate Station and the Third Street Gate Station (Exh. EFSB-G-4; Tr. 2, at 257). The Third Street Gate Station is served by the J-2 lateral, a 14-inch pipeline owned in part by Algonquin and in part by NSTAR Gas, which connects the gate station with Algonquin's Mystic Avenue regulator in Medford (Exhs. NGC-3, at 2-5, 2-7;

⁶

(...continued)

capacity is needed where projected future capacity available to the system is found to be inadequate to satisfy projected load and reserve requirements. ANP Blackstone Energy Company, 8 DOMSC 1, at 27 (1999); Cabot Power Corporation, 7 DOMSB 233, at 249 (1998) ("1998 Cabot Power Decision"); New England Electric System, 2 DOMSC 1, at 9 (1977).

EFSB-G-4).^{7,8} The Company indicated that the maximum allowable operating pressure ("MAOP") on the Algonquin system upstream of the Mystic Avenue regulator is 433 psig (Exh. NGC-3, at 2-7). The Algonquin-owned section of the J-2 lateral also has an MAOP of 433 psig, but operates at no more than 329 psig because the NSTAR Gas section of the J-2 lateral has an MAOP of 329 psig (id. at 2-5, 2-7).

The Third Street Gate Station routes gas to distribution mains serving Kendall Station, MIT, the Blackstone Electric Station, and other local NSTAR Gas customers (id. at 2-5; Exh. EFSB-G-4). The Company stated that Kendall Station currently receives interruptible gas transportation service via an 8-inch, 90 psig service line from the Third Street Gate Station (Exhs. NGC-3, at 2-5; EFSB-N-8; Tr. 2, at 269). The Company stated that it delivers gas from the Third Street Gate Station to MIT through a 12-inch, 325 psig line and indicated that it is contractually obligated to provide gas service to MIT at 325 psig (Exh. NGC-3, at 2-5, 2-7). The Company distributes gas to other customers via a second 90 psig line, and additional lines operating at 60 psig, 10 psig, and less than 1 psig (id. at 2-5; Exh. EFSB-G-4). NSTAR Gas stated that sendout from the Third Street Gate Station averaged 24,482 decatherms per day ("dt/day") in year 2000 and typically runs at 2000 decatherms per hour ("dt/hr") (Exhs. EFSB-N-13-1; EFSB-N-14-S).⁹ The Company also noted that its peak recorded sendout levels were 2449 dt/hr (on January 18, 2000), and 51,861 dt/day (Exhs. EFSB-N-13-1; EFSB-N-14-S;

⁷ Algonquin owns the upstream section of the J-2 lateral, consisting of 10,700 feet of 14-inch pipeline between the Mystic Avenue regulator and the J-22 valve (Exhs. NGC-3, at 3-1; EFSB-G-4). NSTAR Gas owns the 9400 foot section of the J-2 lateral which lies between the J-22 valve and the Third Street Gate Station (Exhs. NGC-3, at 3-1; EFSB-G-4). NSTAR Gas indicated that it owns and operates the pressure regulating equipment at Algonquin's Mystic Avenue regulator (Exhs. NGC-3, at 3-2; EFSB-G-4; Tr. 3, at 339).

⁸ The Company stated that Algonquin also has an emergency interconnect off the NSTAR Gas portion of the J-2 lateral, which is used less than once a year to provide Boston Gas Company with gas for its 22 psig distribution system (Exhs. NGC-3, at 2-7; EFSB-G-6; Tr. 1, at 22).

⁹ One decatherm (1 dt) equals one million British thermal units (1 mmBtu). Gas with a volume at standard temperature and pressure of one thousand cubic feet of gas (1 mcf) typically has a heat content of about 1 mmBtu, depending on the gas mixture (Tr. 2, at 262-265).

Tr. 2, at 283). The Company stated that Kendall Station was not drawing gas at the time of peak hourly sendout from the Third Street Gate Station (Tr. 2, at 283; Tr. 3, at 293).

3. Need for Additional Pipeline Capacity

a. Description

NSTAR Gas asserted that it is not able both to provide expanded service to Kendall Station and to serve existing customers in Somerville and Cambridge with its existing facilities (Exh. NGC-3, at 2-2). To document the requirements of its Somerville and Cambridge customers, NSTAR Gas provided a copy of its most recent approved forecast, developed in 1996 and entitled "Long-Range Forecast and Resource Plan, 1996-2001" ("1996 Forecast and Supply Plan") (Exh. EFSB-N-1(a) Att.). See Commonwealth Gas Company Long-Range Forecast and Resource Plan, D.T.E./D.P.U. 96-117 (2000). The Company indicated that it had not anticipated the Kendall Station Project when the 1996 Forecast and Supply Plan was developed (Exh. EFSB-N-1). In its 1996 Forecast and Supply Plan, the Company projected that annual aggregate sales in its Cambridge division would grow from 7451 billion Btu per year ("BBtu/yr") in 1996 to 7865 BBtu/yr in 2001 and concluded that it had adequate resources to serve firm sendout customers in the years 1996 to 2001 (Exh. EFSB-N-1(a) Bulk Att. at 3, 4, 57).¹⁰ During this proceeding, the Company stated that sendout in the area of Third Street in Cambridge has increased significantly due to new construction and industrial growth, indicated that the reliability of the existing distribution system in Somerville and Cambridge could benefit from improvement, and stated that the system is currently constrained from accepting new load in a section of Somerville near the existing 14-inch NSTAR Gas pipeline (Exh. EFSB-N-7).

NSTAR Gas stated that Mirant Kendall has requested gas delivery at a rate of 2300 million Btu per hour ("mmBtu/hr") and a pressure of 430 psig (Exh. NGC-3, at 1-2, 2-2).¹¹ The

¹⁰ NSTAR Gas stated that it evaluates system adequacy for system load conditions at an ambient temperature of -20°F (degrees Fahrenheit) (Exh. NGC-3, at 2-7).

¹¹ The Company provided an April 2001 letter from Mirant Kendall requesting transportation for 2312.5 mmBtu/hr of gas (Exh. RR-EFSB-3 Att.). Subsequently, the Company stated that the maximum connected load at Kendall Station would be 2300 dt/hr (Exh. EFSB-N-5-S). NSTAR Gas indicated that the combustion turbine to be used at Kendall Station has a maximum design flow rate of 1965 dt/hr, while the Heat
(continued...)

Company noted that this rate represents 94% of the historic maximum flow through the Third Street Gate Station (Exh. EFSB-N-13-1-S). The Company indicated that it could not deliver gas at 430 psig to Kendall Station with its existing facilities, since the J-2 lateral currently is limited to 325 or 329 psig (Exhs. NGC-3, at 1-1, 2-2; EFSB-N-11-S).

The Company stated that it has a contractual obligation to provide gas service to MIT at 325 psig but that it is unable to maintain this pressure during periods of peak demand (Exhs. NGC-3, at 2-5, 2-7; EFSB-N-9-S Att.; Tr. 3, at 305). However, the Company indicated that it has generally been able, even during periods of peak demand, to maintain a pressure of at least 300 psig at the Third Street Gate Station and at MIT, 300 psig being the minimum pressure needed to maintain the operation of MIT's compressor (Exhs. NGC-3, at 2-7, 3-5; EFSB-N-11; Tr. 3, at 298, 305-306). The Company stated that under the constraint of maintaining a pressure of 300 psig at MIT, the existing J-2 lateral can accommodate approximately 3000 thousand cubic feet of gas per hour ("mcfh") to the Third Street Gate Station (Exh. EFSB-N-11-S).

In support of its contention that it cannot reliably serve both the repowered Kendall Station and its current customers with existing equipment, NSTAR Gas provided a summary of the results of a system analysis (Exh. EFSB-N-9-S Att.). The Company reported results of four analyses based on different scenarios with respect to upstream pressure, assuming increased gas delivery to Kendall Station via a new service line from the Third Street Gate Station to Kendall Station, without any enhancement of the infrastructure serving the Third Street Gate Station (id.). The four scenarios assume that 213 mcfh would flow to MIT, that 2000 or 2500 mcfh would flow to the repowered Kendall Station, and that an assumed peak-hour flow of 2499 or 2585 mcfh would flow to other customers (id.). The four scenarios variously assume external pressures at the Mystic Avenue regulator of 326.6 psig, 329 psig, 370 psig, and 433 psig (id.). Delivery pressures at Kendall Station would range, under the four scenarios, from 209 psig to 350 psig, with pressures at MIT running about 3 psig higher than those at Kendall Station (id.). The Company interpreted its results as indicating that adding delivery of 2300 dt/hr of gas to Kendall Station to historic peak sendout volumes to other customers would result in delivery

¹¹ (...continued)

Recovery Steam Generator ("HRSG") can consume an additional 335 dt/hr (Exh. NGC-3, at 1-2). The Company anticipates that Mirant Kendall would contract for 1965 mmBtu/hr of firm gas transportation and 335 mmBtu/hr of interruptible transportation (Tr. 2, at 269).

pressures of 209 psig at Kendall Station and 212 psig at MIT (Exhs. NGC-3, at 2-7; EFSB-N-15-S).¹² The Company noted that these pressures would be well below the delivery pressure of 430 psig identified as necessary for the repowered Kendall Station, and also below the delivery pressure of 325 psig required by contract with MIT (Exhs. NGC-3, at 2-7, 3-4; EFSB-N-11; EFSB-N-11-S). The Company's modeling further demonstrated that the inlet pressure at the Third Street Gate Station would be below 300 psig, the minimum pressure the Company believes is required to safely operate the distribution system and maintain reliable gas service to MIT (Exh. EFSB-PA-7).¹³

b. Analysis

In order to meet its statutory mandate, the Siting Board first evaluates whether there is a need for additional energy resources to meet reliability, economic efficiency, or environmental objectives. The Siting Board must find that additional energy resources are needed as a prerequisite to approving a proposed energy facility. MMWEC Decision, 12 DOMSB at 56; 1999 Berkshire Gas Decision, 9 DOMSB at 12; MECo/NEPCo Decision, 18 DOMSC at 396-403.

Here, NSTAR Gas has proposed to increase system capacity by constructing a natural gas pipeline to an existing take station in order to transport additional gas to a repowered Kendall Station, while providing reliable service to its other local customers. The record shows that NSTAR Gas delivers gas to numerous Cambridge-area customers, including Kendall Station and MIT, via the Third Street Gate Station. The Company has modeled peak hour gas flow and delivery pressures at the repowered Kendall Station and at MIT, assuming that no additional capacity is added to the NSTAR Gas delivery system. The Company's modeling demonstrates that, without changes to the existing supply system, deliveries of 2300 mmBtu/hr to the repowered Kendall Station on a peak day would cause delivery pressures at MIT to drop to

¹² The summary of the system modeling indicates that a pressure of 236.6 psig could be maintained at MIT with firm transportation of approximately 2000 mcfh of gas to Kendall Station (Exh. EFSB-N-9-S Att.).

¹³ The Company stated that the J-2 lateral can transport approximately 3000 mcfh of gas and still maintain a pressure of 300 psig at the Third Street Gate Station, assuming an inlet pressure of 325 psig at the Mystic Avenue regulator (Exh. EFSB-N-11-S).

212 psig; if deliveries to the repowered Kendall Station were limited to 2000 mmBtu/hr, peak day delivery pressures at MIT still would drop to approximately 237 psig, well below the minimum pressure needed to keep MIT's equipment on-line. The record thus indicates that the J-2 lateral is not currently capable of supplying the repowered Kendall Station with the requested volumes of gas while maintaining adequate pressure for existing customers served by the Third Street Gate Station.¹⁴

The record also demonstrates that, without changes to the existing supply system, the Company could not deliver the requested volumes to the repowered Kendall Station at the requested pressure of 430 psig, and that delivery pressures could be as low as 209 psig under certain scenarios. While a delivery pressure of 430 psig to the repowered Kendall Station may be desirable, the record indicates that it is not necessary because gas delivered to Kendall Station can be recompressed on-site for use in the Kendall Station turbine. Nonetheless, the low potential delivery pressures to Kendall Station provide additional evidence that system reinforcements are desirable.

Based on the modeled delivery pressures at MIT and at Kendall Station, the Company has established that its existing system is inadequate to serve its anticipated load in the Third Street Gate Station area with acceptable reliability. Consequently, the Siting Board finds that there is a need for additional energy resources in the area of the Third Street Gate Station in Cambridge.

4. Consistency with Long-Range Forecast

G.L. c. 164, § 69J requires that a facility proposed by a gas company required to file a long-range forecast pursuant to G.L. c. 164, § 69I be consistent with that company's most recently approved long-range forecast. G.L. c. 164, § 69J. NSTAR Gas is a gas company required to file a long-range forecast pursuant to G.L. c. 164, § 69I. See G.L. c. 164, §§ 75B, 75H. Consequently, to satisfy the statutory requirement, the Siting Board reviews the consistency of the proposed gas pipeline with the most recent long-range forecast submitted by

¹⁴ The Company also has suggested that its low pressure system in Somerville and Cambridge may be unreliable, and that the proposed project would allow it to provide local distribution of gas in an area of Somerville along the existing 14-inch line. These arguments have not been sufficiently developed in this proceeding to support a finding of need for additional energy resources.

NSTAR Gas.

The Company stated that its most recent forecast filed pursuant to G.L. c. 164, § 69I -- the 1996 Forecast and Supply Plan -- was approved by the Department of Telecommunications and Energy ("Department") in January 2000 (Exh. EFSB-N-1). See Commonwealth Gas Company, Long-Range Forecast and Resource Plan, D.T.E/D.P.U. 96-117 (2000). The Company asserted that it continues to use the methods and process detailed in its Department-approved forecast to prepare updated forecasts and support plans for system development such as the proposed project (NSTAR Gas Initial Brief at 8, citing Tr. 2, at 275).

In support of its contention that the proposed project is consistent with an approved forecast, the Company provided a copy of the 1996 Forecast and Supply Plan, including load projections for the period 1996 to 2001, together with a copy of updated projections prepared in August 2000 for the period 2000 to 2005 ("August 2000 Forecast") (Exhs. EFSB-N-1(a); EFSB-N-1(b); EFSB-N-1-S). The Company explained that its methods for developing load projections in the approved and updated forecasts included use of econometric models to develop multi-variable regression equations, which in turn were used to generate firm and aggregate sales projections (Tr. 2, at 275). The Company stated that it included different load growth scenarios -- high, medium, and low -- as part of the 1996 Forecast and Supply Plan, and that actual growth has been close to the medium-growth scenario (Tr. 3, at 346-348). The Company also noted that, consistent with industry trends toward unbundling of gas supply and transportation, use of its system for end user transportation ("EUT") requirements has been increasing, including conversion of existing customers from firm sales to EUT service; the Company's forecasts track and project EUT as a component of system throughput, distinct from Company sales and sendout (Exhs. EFSB-N-1; EFSB-N-1(a) at 2-3, 62-95; EFSB-N-1(b); EFSB-N-1-S).¹⁵

The Company indicated that system improvements such as the proposed project typically are not addressed as part of a long-range forecast (Tr. 2, at 276-277). However, the Company stated that it used projections from the August 2000 Forecast as a basis for the system analysis used to establish the need for the proposed project and to compare alternative project approaches, and noted that these projections are consistent with the medium-growth scenario presented in the

¹⁵ In the August 2000 Forecast, the Company projected that Cambridge district total throughput, excluding MIT and new Kendall Station load, will increase 13.3% from 9733 BBtu/yr in 2001 to 11,032 BBtu/yr in 2005 (Exh. EFSB-N-1-S).

1996 Forecast and Supply Plan (Exhs. EFSB-N-1; EFSB-N-9; Tr. 3, at 346-348).¹⁶

G.L. c. 164, § 69J requires that a facility proposed by a gas company required to file a long-range forecast pursuant to G.L. c. 164, § 69I be consistent with that company's most recently approved long-range forecast. G.L. c. 164, § 69J. In prior cases where the need for a facility has been premised on an electric or gas company's need to serve load in a localized area, the Siting Board has found the facility to be consistent with a previously approved forecast either if the need for the facility was established in that forecast, or if the localized forecast upon which a showing of need was based was methodologically consistent with that forecast. See Cambridge Electric Light Company, 12 DOMSB 305, at 320 (2001) ("CELCo Decision"); New England Power Company, 7 DOMSB 339, at 357 (1998) ("1998 NEPCo Decision"); Norwood Municipal Light Department, 5 DOMSB 109, at 127 (1997).

Another class of projects, not clearly anticipated by statute, are those projects designed to serve a specific customer or set of customers, rather than to serve load in a specific section of a company's service territory. While the need for such projects generally is unrelated to the issues typically addressed in a long-range forecast, the choice of project approach may affect, either positively or negatively, a company's ability to reliably meet load requirements in the remainder of its service territory.

The Siting Board acknowledges that electric and gas companies may receive requests to serve major new loads, including new generation, at any time during the forecast cycle, and that companies should respond to such requests in a timely fashion, using the best information available at the time of the request. Therefore, when considering a proposed facility designed to serve new generation, the Siting Board will consider the facility to be consistent with a long-range forecast if any issues related to the project's effect on the company's ability to serve load in its service territory are addressed using a forecast that is methodologically consistent with its most recently approved forecast. See CELCo Decision, 12 DOMSB at 320.

Here, the Company has performed a system analysis in order to assess the need for

¹⁶ In its system analysis for the proposed project, the Company evaluated existing and alternative future system configurations based on modeling of system flow rates and pressures for 2001 and 2005; the Company's analysis assumed that peak deliveries to customers other than Kendall Station and MIT would increase by up to 13%, from a year 2001 flow rate of between 2485 and 2585 mcfh to a year 2005 flow rate of between 2794 and 2814 mcfh (Exhs. EFSB-N-9-S; EFSB-N-9-S Att.; EFSB-N-13-2; Tr. 3, at 314).

additional energy resources to meet Mirant Kendall's request for an enhanced gas supply to its repowered Kendall Station, using load data and projections from internal Company forecasts. The Company also used the system analysis to evaluate various approaches to providing this enhanced gas supply, in light of their effect on the Company's ability to reliably serve its customers in Somerville and Cambridge (see Section II.B, below).

With respect to forecast consistency, the Company has provided information about: the methods and results of its most recently approved long-range forecast; the 1996 Forecast and Supply Plan; its analysis to internally update its long-range forecast in August 2000; and its use of the updated long-range forecast to derive load assumptions for its system analysis. The Company has established that its current internal forecasts for its Cambridge district are methodologically consistent with its most recently approved long-range forecast. The Company has further established that the load assumptions in its system analysis for the proposed project are consistent with its current internal forecasts for the Cambridge district. Accordingly, the Siting Board finds that the proposed project is consistent with the Company's most recently approved long-range forecast.

B. Comparison of Proposed Project and Alternative Approaches

1. Standard of Review

G.L. c. 164, § 69H requires the Siting Board to evaluate proposed projects in terms of their consistency with providing a reliable energy supply to the Commonwealth with a minimum impact on the environment at the lowest possible cost. G.L. c. 164, § 69H. In addition, G.L. c. 164, § 69J requires a project proponent to present "alternatives to planned action" which may include: (a) other methods of generating, manufacturing, or storing electricity or natural gas; (b) other sources of electrical power or natural gas; and (c) no additional electric power or natural gas.¹⁷ G.L. c. 164, § 69J.

In implementing its statutory mandate, the Siting Board requires an applicant to show that, on balance, its proposed project is superior to alternate approaches in terms of cost,

¹⁷ G.L. c. 164, § 69J, also requires an applicant to provide a description of "other site locations." G.L. c. 164, § 69J. The Siting Board reviews the applicant's preferred route, as well as other possible routes, in Section III.B, below.

environmental impact, and ability to meet the identified need. CELCo Decision, 12 DOMSB at 321; Boston Edison Company - Hopkinton and Milford, 6 DOMSB 208, at 252 (1997) ("1997 BECo Decision"); Boston Edison Company, 13 DOMSB 63, at 67-68, 73-74 (1985). In addition, the Siting Board requires a petitioner to consider reliability of supply as part of its showing that the proposed project is superior to alternative project approaches. CELCo Decision, 12 DOMSB at 321; 1997 BECo Decision, 6 DOMSB at 253-257; MECo/NEPCo Decision, 18 DOMSB at 404-405.

2. Identification of Project Approaches for Analysis

The Company presented four project approaches for analysis: (1) installation of a new 18-inch line on the NSTAR Gas portion of the J-2 lateral ("proposed project"); (2) upgrade of the existing NSTAR portion of the J-2 lateral to a rating of 433 psig ("Alternative Approach 1"); (3) installation of a new dedicated pipeline from the Mystic Avenue regulator in Medford directly to Kendall Station ("Alternative Approach 2"); and (4) replacement of the entire J-2 lateral (both Algonquin and NSTAR Gas portions) from the Mystic Avenue regulator to the Third Street Gate Station ("Alternative Approach 3") (Exh. NGC-3, at 3-1 to 3-4).¹⁸ The Company indicated that it did not consider the use of compression at the Third Street Gate Station as a possible means to meet the identified need (Exh. EFSB-PA-7).

a. The Proposed Project Approach

NSTAR Gas proposes to construct an approximately 11,775-foot, 18-inch pipeline rated for 433 psig from the J-22 valve in Somerville to the Third Street Gate Station (Exh. NGC-3, at 3-1). This pipeline would operationally replace the existing 14-inch NSTAR Gas portion of the J-2 lateral (id. at 1-1, 4-2). The existing 14-inch pipeline would be retained for use as part of

¹⁸ These four approaches were highlighted by the Company in its comparison of project approaches; these are not necessarily the only approaches considered by the Company. For instance, the Company considered constructing a pipeline from the Brookford take station in western Cambridge, but determined that such a pipeline would pass through highly congested areas in Cambridge without providing additional benefits; consequently, this approach was not considered further (Exh. EFSB-PA-4).

the 60 psig distribution system for Cambridge and Somerville (id. at 3-1, 3-2). In addition, as part of the proposed project, gas-fired gas heaters would be installed at the Third Street Gate Station,¹⁹ and the pressure regulators at Algonquin's Mystic Avenue regulator would be removed (id. at 3-1; Exhs. NGC-2, at 1-10; EFSB-E-29). The Company stated that hydrostatic testing of the new pipe would not be required (Exh. NGC-3, at 3-3).

NSTAR Gas indicated that the proposed project would provide gas to Kendall Station at 304 psig, rather than the requested pressure of 430 psig, so additional compression by the customer would be required at Kendall Station (id. at 3-4; Tr. 2, at 264).²⁰

b. Alternative Approach 1

Alternative Approach 1 would involve upgrading and certifying the existing 14-inch NSTAR Gas segment of the J-2 lateral to 433 psig, to match the certification of the Algonquin segment of the J-2 lateral (id. at 3-2). NSTAR Gas indicated that Alternative Approach 1 would require major rehabilitation of the existing 14-inch pipeline, including replacement of 2662 feet of pipe that has a wall thickness that the Company considers inadequate for the higher pressure (id. at 3-3).

Certification would also require a hydrostatic test of the line (id. at 3-2). To maintain continuity of service to customers during pipeline rehabilitation and hydrostatic testing, estimated to last six to eight weeks, NSTAR Gas would temporarily store and vaporize LNG at the Third Street Gate Station as a substitute source of gas (id. at 3-2, 3-3). NSTAR Gas stated that under Alternative Approach 1, it would remove the pressure regulators at Algonquin's Mystic Avenue

¹⁹ Heating the gas is required to protect equipment from freezing downstream of pressure reducing valves at the Third Street Gate Station (Exh. NGC-3, at 1-10).

²⁰ The Company provided results of its calculations of the pressure that a pipeline from the J-22 valve to the Third Street Gate Station could deliver, assuming three different pipe diameters (Exh. EFSB-PA-5-S). For these calculations, the Company assumed an inlet pressure of 370 psig at the Mystic Avenue regulator, a repowered Kendall Station, and peak demand (id.). The calculations indicated that a 14-inch diameter pipe could deliver a minimum of 200 psig, a 16-inch pipe could deliver a minimum of 292 psig, and an 18-inch pipe could deliver a minimum of 307 psig; the diameter of 18 inches was selected in order to maintain a delivery pressure of at least 300 psig (id.).

regulator following certification of the NSTAR Gas section of the J-2 lateral (id.). The Company indicated that under Alternative Approach 1, gas pressure at MIT could drop as low as 271 psig during peak system sendout; the Company therefore asserted that use of Alternative Approach 1 would compromise MIT's supply situation (Exh. EFSB-N-9-S; Tr. 3, at 322).²¹

c. Alternative Approach 2

Alternative Approach 2 would involve construction of approximately 21,000 feet of 12-inch pipeline from the Mystic Avenue regulator in Medford directly to Kendall Station (Exh. NGC-3, at 3-3).²² The J-2 lateral would continue to move gas to the Third Street Gate Station for the other existing NSTAR Gas customers (Tr. 3, at 332). The Company stated that it would need to obtain additional land area at the existing Mystic Avenue regulator in Medford in order to tie the new pipeline into the Algonquin transportation system (Exh. NGC-3, at 3-3).

d. Alternative Approach 3

Alternative Approach 3 would involve constructing approximately 21,000 feet of 18-inch pipeline from the Mystic Avenue regulator in Medford to the Third Street Gate Station (id. at 3-4).²³ This new pipeline would replace the entire J-2 lateral (id.). The existing 14-inch pipeline would be retained for use as part of the 60 psig distribution system for Somerville and Cambridge (id.).

e. Analysis

NSTAR Gas has identified four approaches to providing additional capacity in the Third Street Gate Station area: the proposed project and Alternative Approaches 1, 2, and 3. The proposed project and Alternative Approaches 2 and 3 each involve the construction of new

²¹ The Company did not indicate whether Alternate Approach 1 could maintain adequate pressure at MIT by dropping interruptible service to the HRSG at peak periods.

²² The pipeline for Alternative Approach 2 would presumably be rated for 433 psig.

²³ The pipeline for Alternative Approach 3 would presumably be rated for 433 psig.

pipeline to replace or supplement a segment or all of the J-2 lateral, while Alternative Approach 1 involves an upgrade of the NSTAR-owned segment of the J-2 lateral.

The record indicates that, while Alternative Approach 1 would allow an increase in the pressure of gas delivered at the Third Street Gate Station, flow would still be limited by the existing pipeline's 14-inch diameter. As a result, Alternative 1 would not permit NSTAR Gas to deliver the requested volumes of gas to the repowered Kendall Station while maintaining adequate delivery pressures at MIT during peak periods. In addition, use of Alternative Approach 1 would require the Company to temporarily store and vaporize LNG at the Third Street Gate Station during the upgrade and testing of the J-2 lateral, whereas gas could continue to flow through the J-2 lateral during construction of the proposed project, Alternative 2, or Alternative 3. Given the significant disadvantages of Alternative Approach 1 with respect to meeting the identified need as well as the necessity for establishing a backup supply during construction, the Siting Board focuses its review on the proposed project, Alternative Approach 2, and Alternative Approach 3.

3. Pipeline Performance

NSTAR Gas asserted that, with supplemental compression at Kendall Station, the proposed project and Alternative Approaches 2 and 3 would meet the identified need (*id.* at 3-6). The Company indicated that the lower the pressure at which the gas is delivered, the more energy Mirant Kendall would need to expend to recompress the gas; the Company indicated that it would therefore be beneficial to provide gas to Kendall Station at the highest possible pressure (Tr. 3, at 296-297). The anticipated performance of each alternative is discussed below.

The Company stated that, assuming a minimum inlet pressure of 370 psig and a minimum requirement of 300 psig at MIT, the proposed pipeline could deliver 5430 mcfh to the Third Gate Street Station (Exh. EFSB-N-11-S; Tr. 2, at 283). NSTAR Gas indicated that, with expected delivery rates, the proposed project would deliver gas to Kendall Station at a minimum pressure of approximately 304 psig; thus, the project would not meet Mirant Kendall's request for delivery of 2300 dt/hr of gas at 430 psig and Mirant Kendall would use on-site compression to

increase the pressure (Exh. NGC-3, at 3-1, 3-2; Tr. 3, at 305).²⁴ NSTAR Gas indicated that the proposed project would then meet Mirant Kendall's needs without diminishing delivery pressure to MIT (id.). The Company said the proposed project also would provide additional capacity capable of supplying other customers with roughly 1000 mcfh more than is currently delivered ("excess capacity"), assuming firm transportation of 1965 mcfh to Kendall Station; the excess capacity of approximately 1000 mcfh compares to a current excess capacity of 551 mcfh without repowering Kendall Station (Tr. 3, at 294). Thus, the proposed project would provide additional energy resources to meet the needs of NSTAR Gas customers (including both Mirant Kendall and MIT) (Exh. NGC-3, at 3-4).

NSTAR Gas indicated that Alternative Approach 2 would provide gas to Kendall Station with a delivery pressure of 331 psig, without compression (id.; Tr. 3, at 325). NSTAR Gas indicated that Mirant Kendall would use supplementary compression to increase gas pressure to 430 psig (Exh. NGC-3, at 3-4). The Company stated that Alternative Approach 2 would bypass the existing system and therefore would have no effect on MIT or other customers (Tr. 3, at 322).²⁵

NSTAR Gas stated that Alternative Approach 3 would provide "slightly higher" delivery pressures at Kendall Station than the proposed project (Exh. NGC-3, at 3-5). The Company

²⁴ The Company's summary of its system analysis study indicates that, with a flow of 2500 mcfh to Kendall Station, pressure ranging from 370 to 433 psig at the Mystic Avenue regulator, and a new 17.25-inch section of the J-2 lateral, MIT could receive 213 mcfh at a delivery pressure that would range from 306 to 380 psig (Exh. EFSB-N-9-S). The modeled pressure of 306 psig at MIT compares to a delivery pressure of 298.2 psig modeled for peak load before Kendall Station is repowered, and compares to MIT's required delivery pressure of 300 or 325 psig (id.; Exh. NGC-3, at 3-4). With expected load growth among customers other than Mirant Kendall and MIT, delivery pressure at MIT would range from 298 to 374 psig by year 2005 (Exh. EFSB-N-9-S Att.; Tr. 2, at 279-281). This range does not remain above the required delivery pressure to MIT of 300 or 325 psig. Nevertheless, the Company claimed that there would be plenty of capacity in the pipeline to serve Somerville and Cambridge for "many years" (Tr. 2, at 279; Tr. 3, at 349).

²⁵ The Company noted that under Alternative Approach 2, there would be two high-pressure pipelines running through the area instead of one; thus, NSTAR Gas would face increased operation and maintenance responsibilities (Tr. 3, at 323).

indicated that Mirant Kendall could use supplementary compression to increase gas pressure to 430 psig (id. at 3-4). The Company indicated that Alternative Approach 3 would represent an increase in capacity for customers other than Mirant Kendall, both relative to existing conditions and relative to the proposed project (id.; Tr. 3, at 326).

Evidence presented by the Company indicates that none of the project alternatives would consistently deliver gas at the pressure and volume requested by Mirant Kendall, without on-site compression. However, each of the project alternatives could deliver the requested volumes of gas to Kendall Station while maintaining service to other NSTAR Gas customers. Among the three project alternatives, Alternative Approaches 2 and 3 would require the least additional compression of gas at Kendall Station and would provide the most additional capacity for future growth of other customers in Somerville and Cambridge. Accordingly, the Siting Board finds that Alternative Approaches 2 and 3 would be superior to the proposed project with respect to reliability.

4. Environmental Impacts

The Company stated that temporary construction impacts along roadways would be greater for Alternative Approaches 2 and 3 than for the proposed approach because of their greater length (approximately 21,000 feet as compared to approximately 11,775 feet) (Exh. NGC-3, at 3-6). In addition, Alternative Approach 2 would require the Company to acquire and develop a parcel of land in Medford for an interconnect with Algonquin (id.).

The Siting Board notes that Alternative Approach 2 would eliminate the need for the approximately 1000-foot service line required with the other approaches. However, even taking into account the service line, the linear footage of construction required for Alternative Approaches 2 and 3 is nearly twice that required for the proposed project. Alternative Approaches 2 and 3 would traverse urban areas similar to those affected by the proposed project, and therefore likely would have similar types of impacts but over a significantly larger area. Consequently, the Siting Board finds that the proposed project would be superior to Alternative Approaches 2 and 3 with respect to environmental impacts.

5. Cost

NSTAR Gas estimated that the cost of the proposed project following the preferred route would be \$5,263,633 (*id.* at 3-7).²⁶ The Company estimated that the costs of Alternative Approaches 2 and 3 would be \$7,559,886 and \$9,365,046, respectively (*id.*). The Company indicated that the higher costs of Alternative Approaches 2 and 3 are due to the longer linear distance of construction, relative to the proposed approach, and the likely need for relatively costly bridge crossings (Exhs. EFSB-PA-3-S; EFSB-PA-6-S). A cost breakout is provided below in Table 1.

TABLE 1: COST COMPARISON AMONG PROJECT APPROACHES

\$ in 000s	Proposed Project	Approach 2	Approach 3
Materials	\$439	\$522	\$763
Construction	\$3845	\$5850	\$7250
Take Station	\$500	\$500	\$500
Contingency	\$478	\$687	\$851
Total Cost Estimate	\$5263	\$7559	\$9365

Source: Exh. NGC-3, at 3-7. Figures rounded to the next lower thousand dollars.

The proposed project involves roughly half the length of pipeline construction required for Alternative Approaches 2 and 3, resulting in a significantly lower project cost. Since Alternative Approach 2 would eliminate the need for the approximately 1000-foot service line required with the other approaches, the costs described by the Company for Alternative Approach 2 may be somewhat overstated relative to the overall construction costs of the other alternatives. Nonetheless, it is likely that the total cost of the proposed project, including the cost of the service line, would be well below that of Alternative Approaches 2 and 3. Consequently, the Siting Board finds that the proposed project would be superior to Alternative Approaches 2

²⁶ The Company indicated that Mirant Kendall is providing the funding for the construction of the pipeline, but that NSTAR Gas will own and maintain the pipeline (Exh. CAM-1-4; Tr. 2, at 261).

and 3 with respect to cost.

6. Conclusions

In the sections above, the Siting Board dismissed Alternative Approach 1, and reviewed three remaining project approaches: the proposed project, Alternative Approach 2, and Alternative Approach 3. The Siting Board found that: (1) Alternative Approaches 2 and 3 would be superior to the proposed project with respect to reliability; (2) the proposed project would be superior to Alternative Approaches 2 and 3 with respect to environmental impacts; and (3) the proposed project would be superior to Alternative Approaches 2 and 3 with respect to cost. The record shows that the proposed project, Alternative Approach 2 and Alternative Approach 3 could provide adequate service to Kendall Station if Mirant Kendall compresses gas it receives. Alternative Approaches 2 and 3 would allow delivery of gas to Kendall Station at a higher pressure, so Mirant Kendall would not need as much supplemental compression as with the proposed project. Also, Alternative Approaches 2 and 3 could have greater system benefits in the long run since there would be more excess capacity available for other customers in the area of the Third Street Gate Station. However, these advantages of Alternative Approaches 2 and 3 are not shown, in the case record, to be critical. Given that any of the three alternatives could, with compression, supply Mirant Kendall's firm demand while continuing reliable service to other customers, the incremental benefits of Alternative Approaches 2 and 3 are limited. Based on the length of pipeline construction required, the proposed project would be expected to have significantly less environmental impact than Alternative Approaches 2 and 3. Also, the record indicates that the cost of the proposed project would be significantly less than Alternative Approaches 2 and 3. The Siting Board concludes that the environmental and cost advantages of the proposed project outweigh the performance advantages of Alternative Approaches 2 and 3. Accordingly, the Siting Board finds that the proposed project would be superior to Alternative Approaches 2 and 3 with respect to providing a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

III. ANALYSIS OF THE PREFERRED AND ALTERNATE FACILITY/ROUTES

The Siting Board has a statutory mandate to implement the policies of G.L. c. 164, §§ 69H-69Q, to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. G.L. c. 164, §§ 69H and J. Further, G.L. c. 164, § 69J, requires the Siting Board to review alternatives to planned projects, including "other site locations." G.L. c. 164, § 69J. In implementing this statutory mandate, the Siting Board requires a petitioner to demonstrate that it examined a reasonable range of practical siting alternatives, and that its proposed facilities are sited at locations that minimize costs and environmental impacts while ensuring supply reliability. CELCo Decision, 12 DOMSB at 323; MMWEC Decision, 12 DOMSB at 116; New England Power Company, 21 DOMSB 325, at 376 (1991).

In Section II.B, above, the Siting Board found that the proposed project would be superior to Alternative Approaches 1, 2, and 3 with respect to providing a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. In Section III.A, below, the Siting Board reviews the Company's site selection process to determine whether NSTAR Gas examined a reasonable range of practical facility siting options. In Section III.B, below, the Siting Board describes the preferred and alternate routes for the proposed project. Finally, in Section III.C, below, the Siting Board evaluates the environmental impacts, cost, and reliability of the preferred and alternate routes in order to determine whether environmental impacts would be minimized and whether an appropriate balance would be achieved among environmental impacts, cost, and reliability.

A. Site Selection

1. Standard of Review

G.L. c. 164, § 69J provides that a petition to construct a proposed facility must include "a description of alternatives to [the applicant's] planned action" including "other site locations." G.L. c. 164, § 69J. In past reviews of alternate site locations identified by an applicant, the Siting Board has required the applicant to demonstrate that it examined a reasonable range of practical siting alternatives. See CELCo Decision, 12 DOMSB at 323; MMWEC Decision, 12 DOMSB at 119; 1998 NEPCo Decision, 7 DOMSB 333, at 374. In order to determine whether an applicant

has considered a reasonable range of practical alternatives, the Siting Board has required the applicant to meet a two-pronged test. First, the applicant must establish that it developed and applied a reasonable set of criteria for identifying and evaluating alternate routes in a manner which ensures that it has not overlooked or eliminated any routes which, on balance, are clearly superior to the proposed route. CELCo Decision, 12 DOMSB at 324; MMWEC Decision, 12 DOMSB at 119; 1998 NEPCo Decision, 7 DOMSB at 374. Second, the applicant must establish that it identified at least two noticed sites or routes with some measure of geographic diversity. CELCo Decision, 12 DOMSB at 324; MMWEC Decision, 12 DOMSB at 119; 1998 NEPCo Decision, 7 DOMSB at 374.

2. Site Selection Process

a. Identification and Screening of Routes

The Company indicated that its site selection process included: development of threshold criteria, including definition of a study area; identification of six route alternatives based on the application of the threshold criteria; development of screening criteria; and ranking of routing options to determine a preferred and an alternate route (Exh. NGC-3, at 4-1 to 4-27).

The Company indicated that the study area for its proposed project consisted generally of East Cambridge and part of Somerville near Union Square.²⁷ The Company asserted that routes extending beyond the identified area would add unnecessary length and/or additional construction difficulties (id. at 4-4; Exh. EFSB-SS-2 Att.; Tr. 1, at 49). The Company listed the following as threshold criteria for identifying possible routes (Exh. NGC-3, at 4-5, 4-6):

- Follow existing utility or transportation corridors or rights-of-way to minimize environmental and community impacts;
- Avoid crossings of private property to the extent possible;
- Avoid residential areas where acceptable alternatives exist;

²⁷ More specifically, the Company defined the study area as land within boundaries defined by the MBTA Lowell line corridor and the Monsignor O'Brien Highway on the northeast; the banks of the Charles River on the southeast; Kendall Station, Main Street, and Broadway on the south; Webster Avenue and Union Square on the west; and the J-22 valve on the north (Exhs. NGC-3, at 4-4; EFSB-SS-2 Att.).

- Avoid streets for which a construction moratorium has been set by the Cities of Cambridge and Somerville;
- Avoid narrow streets where acceptable wider alternatives are available, to maximize the potential to mitigate traffic impacts;
- Avoid streets where congestion of existing underground utilities presents significant difficulties for construction and/or maintenance of facilities;
- Allow long straight segments in preference to numerous turns; and
- Avoid streets where significant on-going or planned work by the cities or other companies could conflict with construction of the interconnect facilities.

The Company stated that identification of cross-country route alternatives was impossible due to the dense development of the area (*id.* at 4-2). The Company indicated that the use of existing railroad rights-of-way would be problematic, stating that it had obtained MBTA and/or CSX specifications requiring deep installation and installation within a separate casing, and indicated such installation would pose problems for any pipe repairs and for maintaining cathodic protection of the pipe (*id.* at 4-4 to 4-5). The Company also cited problems with existing utility congestion on a number of individual streets (*id.* at 4-6).

The Company stated that after examining the study area in light of its threshold criteria, it identified the following six route alternatives (*id.* at 4-7 to 4-14):

- Medford/First: This route would proceed from the J-22 valve along the McGrath Highway, onto Medford Street/Gore Street, onto Gore Street, through the Twin City Mall parking lot, onto the O'Brien Highway, Cambridge Street, First Street, Linskey Way, and Third Street to the Third Street Gate Station.
- Fifth Street: This route would proceed from the J-22 valve along the McGrath Highway, onto Medford Street/Gore Street, onto Gore Street, then onto Fifth Street, Binney Street, and Third Street to the Third Street Gate Station.
- Webster Avenue: This route would proceed from the J-22 valve on the McGrath Highway onto Greenville Street, then onto Monroe Street, Stone Avenue, Columbus Avenue, Bonner Avenue, Prospect Street, Webster Avenue, Columbia Street, Lincoln Street, Webster Avenue, Binney Street, and Third Street to the Third Street Gate Station.
- Portland Street: This route would proceed from the J-22 valve along the McGrath Highway onto Medford Street, then onto Portland Street, Binney Street, and Third Street

to the Third Street Gate Station.

- McGrath/First: This route would proceed from the J-22 valve along the McGrath Highway, continuing along the McGrath Highway and on the O'Brien Highway, and then proceeding on Cambridge Street, First Street, Linskey Way, and Third Street to the Third Street Gate Station.
- Linwood/First: This route would proceed from the J-22 valve along the McGrath Highway, onto Linwood Street, returning to McGrath Highway and continuing on the O'Brien Highway, and then proceeding on Cambridge Street, First Street, Linskey Way, and Third Street to the Third Street Gate Station.

The Company stated that it compared the six route alternatives using thirteen screening criteria, including five technical feasibility criteria, seven community and environmental criteria, and cost (Exh. NGC-3, at 4-14 to 4-26). The Company stated that the technical feasibility criteria were used to assess the potential difficulty of construction and maintenance of the interconnection facilities (id. at 4-16). The Company stated that the community and environmental impact criteria were used to assess the potential effects of the interconnection facilities on the human and natural environment (id. at 4-18).

The Company indicated that, for each of the routes, it developed ratings and scores for each of the screening criteria (id. at 4-23, 4-24). The Company explained that it ranked each route as high, medium, or low for each criterion, and then assigned a score of 2 if the route was high ranking, a score of 1 if the route was medium ranking, and a score of 0 if the route was low ranking (id.).

The Company stated that to derive an overall suitability score, it assigned a weight to each criterion based on the project team's judgment of the relative importance of that criterion (id. at 4-24). Criteria that were considered very important were given a weight of 3, criteria that were considered of moderate importance were given a weight of 2, and criteria that were considered of minor importance were given a weight of 1 (id.). The Company stated that the individual criterion score was then multiplied by the weight to derive the weighted score for each criterion for each route (id.). The Company stated that the weighted scores were then totaled for each route alternative (id.). The criteria used to rank the six routes, with weightings in parentheses, are listed below (id. at 4-14 to 4-24).

Technical Feasibility Criteria

- Length of route (2)
- Degree of congestion in underground utilities along route (3)
- Difficulty of railroad crossing (2)
- Reliability/serviceability (3)
- Difficulty of intersection crossings (3)

Community and Environmental Impact Criteria

- Construction impacts on residences (3)
- Proximity to sensitive receptors (1)
- Construction impacts on the traffic system (2)
- Open space/parkland (1)
- Historical sites (1)
- Hazardous material (2)
- Community acceptance²⁸ (3)

Cost Criterion

- Cost (3)

The Company described how it rated each criterion, weighted the criteria, and combined scores, and it presented overall scores for its screening level route alternatives (Exh. NGC-3, at 4-16 to 4-26). Scoring of alternatives is summarized below in Table 2, while route lengths and costs are presented below in Table 3.

²⁸ The Company indicated that it sought input from various stakeholders and either met or spoke with representatives of: the Cambridge Department of Community Development, the Cambridge Department of Public Works, the Somerville Department of Public Works, the Metropolitan District Commission, the East Cambridge Planning Team, the Association of Cambridge Neighborhoods, the MBTA, and the Sewerage Division of the Massachusetts Water Resources Authority (Exhs. NGC-3, at 4-2; EFSB-SS-4).

TABLE 2: SUMMARY OF WEIGHTED SUBSCORES BY CRITERIA GROUP

Route Name	Technical	Community/ Environmental	Cost	Total Score	Overall Rank
Medford/First	15	22	3	40	#1
Fifth Street	20	11	6	37	#2
Webster Avenue	5	5	3	13	#6
Portland Street	9	9	6	24	#4
McGrath/First	5	18	3	26	#3
Linwood/First	2	18	3	23	#5

Note: Higher scores indicate higher suitability.

Source: Exh. NGC-3, at 4-26.

TABLE 3: ROUTE LENGTHS AND COSTS

Route Name	Length in Feet	Estimated Cost	Ultimate Rank
Medford/First	11,775	\$5,263,633	#1
Fifth Street	8,800	\$4,117,782	#2
Webster Avenue	11,200	\$5,467,982	#6
Portland Street	9,300	\$4,641,217	#4
McGrath/First	10,850	\$5,408,478	#3
Linwood/First	10,550	\$5,305,617	#5

Sources: Exhs. NGC-3, at 4-26; EFSB-SS-5-S at 2.

The Medford/First alternative received the highest overall score, while the Fifth Street alternative received the second-best overall score (Exh. NGC-3, at 4-26). The Fifth Street alternative scored highest among the alternatives for many of the more heavily weighted criteria, but received poor scores for construction impacts on residents and for community acceptance (*id.*). The Company noted that the Webster Avenue route scored low for railroad and road intersection crossings and reliability/serviceability; that the Portland Street route scored low for utility congestion and traffic impacts; and that both the McGrath/First route and the Linwood/First route scored low in technical criteria including utility congestion, railroad

crossing, and reliability/serviceability (id. at 4-27).²⁹ The Company remarked that the particular advantages of the Medford/First route are that it: (1) avoids residential neighborhoods more than some other routes; (2) can largely be constructed using normal trench/backfill/compact methods; (3) lacks exposed lengths of pipeline, thus protecting the cathodic protection system; and (4) would not need to be relocated in the event of bridge construction or bridge maintenance work (Tr. 1, at 107).

In developing its overall rankings, the Company assigned to both the Medford/First route and the McGrath/First route scores of 6 for both residential impacts and for community acceptance, and scores of 0 for traffic impacts (Exh. NGC-3, at 4-26). The Company provided a letter from the City of Somerville disagreeing with the Company's analysis rating the McGrath/First and Medford/First routes equally with respect to residential impacts and traffic impacts, and also disagreeing with top ranking for the Medford/First route with respect to community acceptance (Exh. EFSB-SS-12). In its letter, the City of Somerville endorsed the McGrath/First route, citing the low residential impacts of a route along the McGrath Highway, compared to impacts along Medford Street on the Medford/First route (id.).

Based on the screening described above, the Company selected the Medford/First route and the Fifth Street route as the two routes that would undergo more detailed analysis; as the highest scoring route, the Medford/First route was designated the preferred route, while the Fifth Street route was designated the alternate route (Exhs. NGC-3, at 4-27; EFSB-SS-5).

b. Analysis

NSTAR Gas has developed a set of criteria for identifying and evaluating pipeline routing options that address environmental impacts, land use concerns, community issues, cost, and reliability -- types of criteria that the Siting Board has found to be appropriate for the siting of public utility facilities. See MMWEC Decision, 12 DOMSB at 125; Berkshire Gas Decision, 9 DOMSB at 43-44; New England Power Company, 4 DOMSB 109, 167 (1995).

²⁹ The Company highlighted technical difficulties that it would face in avoiding existing utilities at a railroad crossing on the Linwood/First and McGrath/First routes, indicating further that railroad crossings constituted the most important distinguishing construction issue among the six routes (Tr. 1, at 55-56, 80).

To identify route options for further evaluation, the Company first identified an area that would encompass all viable routing options given the limitations imposed by the locations of the J-22 valve and the Third Street Gate Station. The Company used threshold criteria to identify six routes within this area. The Company then developed a list of 13 community and environmental, technical, and cost criteria, to be used to evaluate these six routing alternatives, and assigned weights to each of these screening criteria based on their relative importance. For each of the identified alternatives, the Company scored the route on each of the 13 screening criteria, then multiplied the unweighted scores by the assigned weights to produce weighted scores. The Company then added the weighted scores to get a total weighted score for each route and ranked the six routes based on the total weighted scores.

The Company's use of a site selection process based on development of weighted scores served to balance the community/environmental impacts, technical issues, and costs of the six routing alternatives and then to rank each route. The Company's allocation of nearly half of overall weight to community/environmental criteria and the remainder to technical and cost criteria was reasonable. The weighting of specific environmental factors appropriately reflected their relative significance; in particular, construction impacts on residences was appropriately stressed. Overall, the Company used a comprehensive, systematic method to compare identified alternatives on the basis of technical feasibility, cost, and environmental and community impacts.

The record indicates that the City of Somerville has disagreed with the Company assessment of the Medford/First route with respect to residential and traffic impacts and community support, and advocated the McGrath/First route. However, the record shows that the McGrath/First route scored poorly on technical criteria of utility congestion, railroad crossing, and reliability/serviceability, and received an overall weighted score of only 26 points, 14 less than the high-ranking Medford/First route. Thus, even if the Company's scoring were revised to reflect Somerville's assessment of community and environmental impact advantages of the McGrath/First route, it is unlikely that this route would outscore the preferred route when all criteria are considered.

Accordingly, the Siting Board finds that the Company has developed and applied a reasonable set of criteria for identifying and evaluating alternate routes in a manner which

ensures that it has not overlooked or eliminated any routes which are, on balance, clearly superior to the proposed project.

3. Geographic Diversity

NSTAR Gas considered six geographically diverse routes between the J-22 valve and the Third Street Gate Station. The six alternate routes completely overlap only in segments proximate to the beginning and ending points of the proposed gas pipeline. Each route is clearly distinct, offering a unique set of environmental, reliability, and cost constraints and advantages within the area designated by the Company as encompassing all viable siting options for its proposed gas pipeline. From the identified routes, the Company has selected two practical routes. Although these two routes overlap in segments, each route offers a unique set of environmental and cost constraints and advantages. Consequently, the Siting Board finds that the Company has identified a range of practical gas pipeline routes with some measure of geographic diversity.

4. Conclusions on Site Selection

The Siting Board has found that the Company has developed and applied a reasonable set of criteria for identifying and evaluating alternate routes in a manner which ensures that it has not overlooked or eliminated any routes which are, on balance, clearly superior to the proposed route. In addition, the Siting Board has found that the Company has identified a range of practical pipeline routes with some measure of geographic diversity. Consequently, the Siting Board finds that NSTAR Gas has demonstrated that it examined a reasonable range of practical siting alternatives.

B. Description of Preferred and Alternate Routes

1. Preferred Route

The Company stated that the preferred route is approximately 11,775 feet long and runs through Somerville and Cambridge (Exh. NGC-3, at 1-11). The preferred route begins at the J-22 valve on the McGrath Highway in Somerville, near its intersection with Medford Street and

Highland Avenue (id. at fig. 1.2-1, 1-11, 5-14). From this intersection, it follows Medford Street south,³⁰ and continues past Somerville Avenue, crossing under the MBTA's Fitchburg line railroad tracks to the Somerville/Cambridge municipal boundary (id. at 1-11, 5-14). Continuing southeast on Gore Street in Cambridge, the preferred route crosses under a CSX railroad track crossing, turns northeast on Rufo Road, runs eastward through the parking lot of Twin City Mall, and then turns southeast along the O'Brien Highway, passing under the MBTA Green Line viaduct at the intersection with Cambridge Street. The route makes a sharp turn west onto Cambridge Street for a very short distance, then proceeds south on First Street, west on Linskey Way, and south on Third Street to the Third Street Gate Station (id. at fig. 1.2-1, 1-11).

NSTAR Gas proposed a variation to the preferred route to be used if obstacles at the Cambridge Street/O'Brien Highway intersection prevent construction there (id. at 1-11). The variation turns off the O'Brien Highway at its intersection with Gore Street and Second Street, follows Second Street south to Cambridge Street and then follows Cambridge Street east to First Street, where the variation rejoins the preferred route (id. at fig. 1.2-1, 1-11). The route variation is 860 feet in length and replaces a 940-foot segment of the preferred route (Exh. RR-EFSB-10). The Company requests that the Siting Board approve both the preferred route and this route variation (Exh. NGC-3, at 1-11).

2. Alternate Route

The Company's alternate route follows the same path as the preferred route from the J-22 valve on the McGrath Highway to the intersection of Gore Street with Rufo Road in Cambridge. At that point, the alternate route continues east on Gore Street, south on Fifth Street, east on Binney Street, and south on Third Street to the Third Street Gate Station (id. at fig. 1.2-1). The Company estimated that the alternate route would be 8800 feet in length (id. at 1-14).

³⁰ For a portion of its length, approximately between Highland Avenue and Somerville Avenue, Medford Street continues along the McGrath Highway as one-way frontage roadways on either side of the elevated highway (Exh. NGC-3, at 5-14). Medford Street becomes Gore Street at the Somerville/Cambridge municipal boundary (id. at fig. 1.2-1). The McGrath Highway becomes the O'Brien Highway at or near the Somerville/Cambridge municipal boundary (id.).

C. Environmental Impacts, Cost, and Reliability of the Preferred and Alternate Facilities

1. Standard of Review

In implementing its statutory mandate to ensure a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, the Siting Board requires a petitioner to show that its proposed facility is sited at a location that minimizes costs and environmental impacts while ensuring a reliable energy supply. To determine whether such a showing is made, the Siting Board requires a petitioner to demonstrate that the proposed site for the facility is superior to the noticed alternatives on the basis of balancing cost, environmental impact, and reliability of supply. MMWEC Decision, 12 DOMSB at 127; 1999 Berkshire Gas Decision, 9 DOMSB at 40; 1997 BECo Decision, 6 DOMSB at 287.

An assessment of all impacts of a proposed facility is necessary to determine whether an appropriate balance is achieved both among conflicting environmental concerns as well as among environmental impacts, cost, and reliability. A facility which achieves that appropriate balance thereby meets the Siting Board's statutory requirement to minimize environmental impacts at the lowest possible cost. MMWEC Decision, 12 DOMSB at 128; 1999 Berkshire Gas Decision, 9 DOMSB at 46; 1997 BECo Decision, 6 DOMSB at 287.

The Siting Board recognizes that an evaluation of the environmental, cost, and reliability trade-offs associated with a particular proposal must be clearly described and consistently applied from one case to the next. Therefore, in order to determine if a petitioner has achieved the proper balance among environmental impacts and among environmental impacts, cost, and reliability, the Siting Board must first determine if the petitioner has provided sufficient information regarding environmental impacts and potential mitigation measures in order to make such a determination. The Siting Board then can determine whether environmental impacts would be minimized. Similarly, the Siting Board must find that the petitioner has provided sufficient cost information in order to determine if the appropriate balance among environmental impacts, cost, and reliability would be achieved. MMWEC Decision, 12 DOMSB at 128; 1998 NEPCo Decision, 7 DOMSB at 384; Commonwealth Electric Company, 5 DOMSB 273, at 337 (1997).

Accordingly, in the sections below, the Siting Board examines the environmental

impacts, reliability, and cost of the proposed facilities along NSTAR Gas' preferred and alternate routes to determine: (1) whether environmental impacts would be minimized; and (2) whether an appropriate balance would be achieved among conflicting environmental impacts as well as among environmental impacts, cost, and reliability. In this examination, the Siting Board compares the preferred and alternate routes to determine which is superior with respect to providing a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

2. Environmental Impacts

In this section, the Siting Board evaluates and compares the environmental impacts of the proposed facilities along the preferred and alternate routes, the proposed mitigation for such impacts, and any options for additional mitigation. The Siting Board then determines whether the environmental impacts of the proposed facilities along the preferred route would be minimized. The subsections below consider impacts to adjacent land uses, traffic disruptions, noise impacts, and potential impacts to land and water resources.

a. Land Use

NSTAR Gas stated that zoning and existing land uses along both routes are similar, but that the preferred route passes through more commercial areas, while the alternate route passes through more residential areas (Exh. NGC-3, at 5-12). The Company estimated land use adjacent to the preferred route as 30% residential, 36% commercial/office, 12% industrial/transportation, 21% mixed residential/commercial/office use, and 1% open space/recreational (Exhs. EFSB-E-2; EFSB-SS-6 Att.). The Company estimated that land use adjacent to the alternate route is 62% residential, 24% commercial/office, and 14% industrial/transportation (*id.*).

The Company stated that, in Cambridge, the preferred route would pass by 12 residential buildings, the preferred route with the variation would pass by 16 residential buildings, and the alternate route would pass by 74 residential buildings (Exh. EFSB-E-3). Most of the additional residential properties along the alternate route are located on Gore and Fifth Streets (Exh. CAM-1-33). In Somerville, where the preferred and alternate routes are identical, the pipeline would

pass by 34 residential buildings (Exh. EFSB-E-3). The Company indicated that properties adjacent to the preferred route variation include one more single-family and three more multi-family residences than the preferred route without the variation (*id.*). Photographs provided by the Company show that most houses along both routes are built close to each other and to the street (Exh. NGC-3, at 5-15 to 5-44). The number and type of residential buildings along the preferred and alternate routes are summarized in Table 4, below.

TABLE 4: ESTIMATED NUMBER OF RESIDENTIAL BUILDINGS

	<u>Cambridge</u>		<u>Somerville</u>	
	Single-Family	Multi-Family	Single-Family	Multi-Family
Preferred Route	4	8 ³¹	6	28
Preferred Route with Variation	5	11	6	28
Alternate Route	8	66	6	28

Source: Exh. EFSB-E-3

NSTAR Gas stated that the principal impacts of the proposed project on neighboring residential properties would be temporary construction noise, temporary loss of on-street parking, and temporarily restricted access to driveways (Exh. CAM-1-33; Tr. 1 at 135-137). The Company stated that it would restore driveway access at night and would identify and provide replacement parking spaces where necessary to mitigate the loss of on-street parking along the route (Exh. CAM-1-33; Tr. at 136). While the Company estimated that construction of the entire pipeline would take at least seven months (Exh. EFSB-E-30), it expected that impacts on individual properties would last no more than several days (Exh. CAM-1-33; Tr. 1, at 137).

The Company stated that no schools, emergency facilities, daycare facilities, or nursing homes are located along either the preferred or the alternate route (Exh. EFSB-SS-14). However, the Company indicated that both the preferred and alternate routes are in close proximity to a

³¹ These include one large apartment building on the north side of the O'Brien Highway and another at the corner of First Street and Binney Street (Exhs. RR-EFSB-17; NGC-3, at 5-9).

City of Cambridge park designated as Gold Star Mother's Park and Gore Field (on Gore Street between Fifth and Sixth Streets), the East Cambridge Health Center (at the corner of Gore Street and Rufo Road), and a Metropolitan District Commission ("MDC") indoor skating rink (at Rufo Road and Gore Street) (id.). The Company also stated that the preferred route runs in close proximity to urban open space along the Lechmere Canal (Exh. NGC-3, at 5-4). The Company stated that pedestrian and vehicular access to businesses at the Twin City Mall and CambridgeSide Galleria would be maintained during construction (Tr. 1, at 139).

The Company stated that the pipeline would be designed and constructed to standards that meet or exceed all applicable federal, state, and industry safety requirements and standards (Exh. NGC-3, at 1-3). In addition, the Company stated it would lay warning tape above the pipeline that would alert future excavators of the gas pipeline buried below (Exh. NGC-3, at 1-3; Tr. 2, at 173). The Company stated that trenches would be backfilled or plated at the end of every working day during the construction period (Exhs. EFSB-E-10; EFSB-E-18).

The record shows that the alternate route passes more than twice as many residential properties as the preferred route. The Siting Board notes that the relative extent of residential units -- a factor with potential bearing on our comparison of residential land use impact -- was not quantified. However, the analysis shows that in Cambridge, the alternate route would affect a residential area extending for several blocks, while the preferred route would affect more limited areas. Accordingly, the Siting Board finds that the preferred route is superior to the alternate route with respect to land use. The record shows that the Company will mitigate the land use impacts of pipeline construction by employing industry-standard safety measures in the design and construction of the pipeline, maintaining access to businesses along the route, and providing mitigation for parking impacts in residential neighborhoods. The Siting Board notes that the land use impacts of the preferred route would be slightly greater if the variation to the preferred route were used, given the residences in proximity to construction along the variation. In order to minimize land use impacts, the Company should use the variation only in the event that unforeseen circumstances prevent the construction of the facilities through the O'Brien Highway/Cambridge Street intersection. Overall, the Siting Board finds that land use impacts of the proposed project along the preferred route would be minimized.

b. Traffic

The Company asserted that, due to the necessity of working in public ways that are sometimes heavily traveled, sometimes narrow, and sometimes congested, construction traffic impacts would be inevitable (NSTAR Gas Initial Brief at 30). However, the Company stated that all traffic impacts would be temporary (Exh. NGC-3, at 5-13).

The Company identified several measures to mitigate traffic impacts during construction, including limitation of work to low-volume traffic hours, provision of pavement markings and other measures to define construction zone traffic flow, identification of detour routes that are most capable of handling traffic flow, maintenance of safe pedestrian flow, accommodation of loading zones and other business functions, notification of abutting residents by leafleting, coordination with other projects to minimize simultaneous construction projects in the same location, and use of police details (Exhs. NGC-3, at 5-45, 5-46; CAM-1-15; Tr. 1, at 136, 138). The Company stated it would develop a traffic management plan in consultation with the Cities of Somerville and Cambridge and the MDC once the final alignment is determined (Exh. NGC-3, at 5-13). The Company stated that the traffic management plan would identify measures to ensure that pedestrian, bicycle, and vehicular flow is maintained along the route during construction (Exh. EFSB-E-32). The Company also stated that replacement parking spaces would be identified and provided "when necessary to mitigate the temporary loss of on-street parking along the route" (Exh. CAM-1-33; Tr. 1, at 137).

The Company also identified working at night as a means to reduce peak hour traffic disruption (Exh. NGC-3, at 5-45). The Company provided a traffic management plan (Exh. RR-EFSB-24-S) that identified four areas where night work might be necessary: on Medford Street between Somerville Avenue and the MBTA overpass; at the Twin City Mall; on the O'Brien Highway southbound between the Twin City Mall entrance drive and Third Street; and on First Street south of Cambridge Street (Exhs. RR-EFSB-24-S at Sheet 3; RR-EFSB-24-S2). These areas are highlighted on Figure 2 (attached).

The Company asserted that traffic impacts along the preferred and alternate routes would be generally similar, although it considered impacts to be slightly less along the alternate route, due to construction complexities at the sharply angled and congested intersection of the O'Brien

Highway and Cambridge Street along the preferred route (Exh. NGC-3, at 5-47).³² The Company estimated that construction at this intersection would take approximately three days to complete (Exh. EFSB-E-24-S), as would construction at the intersection of Cambridge and First Streets (Exh. EFSB-E-24, at 4). Along the alternate route, the Company identified two intersections that also would take approximately three days each to complete: Fifth and Cambridge Streets, and Third and Binney Streets (*id.*). The Company indicated that the alternate route would have a greater impact on residential parking, specifically along Fifth and Gore Streets (Tr. 1, at 135). The Company noted that these streets are only 33 to 34 feet wide (Exh. NGC-3, at 5-37, 5-38, and 5-41).

The Company stated that the O'Brien Highway/Cambridge Street intersection could be avoided by use of the variation to the preferred route (Exhs. NGC-3, at 5-47; EFSB-SS-7-S). However, the Company noted that the City of Cambridge may not approve the location of an additional gas main in Second Street, which is already congested with gas lines and other underground utilities (Exh. RR-EFSB-10). Traffic impacts along the variation would include temporary loss of parking and possible need to alternate traffic from two directions within one lane (Exh. RR-EFSB-10; Tr. 1, at 65).

The City of Cambridge disagreed with the Company's assessment that the alternate route was preferable from a traffic perspective, noting in particular difficulties at the intersection of Binney and Third Streets along the alternate route (Cambridge Reply Brief at 4).³³ The City also questioned the need for night work along the O'Brien Highway, contending that traffic counts on this roadway segment were not high enough to justify night work (*id.*).

The Company has demonstrated that it is considering a broad array of measures to mitigate construction impacts on traffic. However, one of these measures, the scheduling of work at night, represents a trade-off with construction noise impacts. The Company has identified four areas along the preferred route where nighttime work is being considered, one of

³² The Company's route screening analysis reflected a clear preference for the alternate route, as the Fifth Street (alternate) route was scored "high" on traffic impact acceptability and the Medford/First (preferred) route was scored "low" (Exh. EFSB-3, at Table 4.3-2).

³³ The Company indicated that this intersection was congested with utilities (Tr. 1, at 53).

which is common to both the preferred and alternate routes. As further discussed in Section III.C.2.c, below, there is the potential for construction noise to disturb neighborhood residents at all four areas.

The record shows that the alternate route would affect traffic and parking on streets which are narrower and more residential than those along the preferred route. However, compared to the unique portion of the preferred route, the volume of traffic on the unique portion of the alternate route would likely be lower and traffic impacts consequently would be less. Accordingly, the Siting Board finds the alternate route would be slightly superior to the preferred route with respect to traffic impacts.

With respect to the traffic impacts of the preferred route, the Siting Board finds that the Company has identified several measures to mitigate traffic impacts during construction and that the Company's draft traffic management plan addresses the significant traffic issues. The Siting Board recognizes that this plan will be refined in consultation with the Cities of Cambridge and Somerville and with the MDC. Accordingly, the Siting Board finds that with implementation of a traffic management plan acceptable to the Cities of Cambridge and Somerville and the MDC, the traffic impacts of the proposed project along the preferred route would be minimized.

c. Noise

NSTAR Gas stated that the proposed project would create no permanent noise impacts along either the preferred or alternate route or at the Third Street Gate Station, although there would be temporary noise impacts associated with the installation of the pipeline (Exh. EFSB-3, at 5-48). The noisiest construction activities would include saw-cutting of pavement, excavation, and any use of jackhammers (Exh. EFSB-E-6). The Company stated that construction equipment would include backhoes, a front-end loader, tamping equipment, air compressors, dump trucks, and pickup trucks (*id.*). The Company stated that normal sound mufflers would be maintained on construction equipment (Exh. NGC-3, at 5-48). The Company indicated that construction noise at a typical residential street location would occur over the course of a few days (Tr. 1, at 137).

The Company provided the results of a model to simulate the noise from construction,

assuming the operation of two dump trucks, a backhoe and a grader engaged in standard public works construction for excavation and finishing (Exh. CAM-RR-1 Att.). The modeling indicated that average outdoor sound levels would be 93.4 decibels, A-weighted ("dBA") at 20 feet and 89.9 dBA at 30 feet (id.). The Company's modeling indicated that at 50 feet, a reference distance in the Cambridge Noise Control Ordinance, the average sound level would be 85.5 dBA, and the maximum sound level would be 95.0 dBA (id.).

The Company indicated that an apartment building located at the intersection of the McGrath Highway and Medford Street in Somerville, at the beginning of both the preferred and alternate routes, would be the closest residence to the proposed construction work (Exh. EFSB-E-6). The Company estimated that construction could occur within 20 to 25 feet of the outside walls of the nearest apartments in this building (id.). Information provided by the Company shows that elsewhere along the preferred and alternate routes, some additional residences are within 25 to 30 feet of the proposed construction (Exh. RR-EFSB-17).

The Company provided a copy of the Somerville Noise Control Ordinance, which requires use of exhaust mufflers and prohibits construction noise between 7 p.m. and 7 a.m., Monday through Saturday, and at any time on Sunday (Exh. EFSB-G-5 Att.). The Company also provided a copy of the Cambridge Noise Control Ordinance, which prohibits construction noise after 6 p.m., and until 7 a.m. on weekdays and 9 a.m. on weekends and holidays (id.). The Cambridge ordinance prohibits the operation of a construction device for utility street work that produces a noise level in excess of 86 dBA at a distance of 50 feet (id.). The Company committed to comply with the Cambridge Noise Control Ordinance during construction of all facilities in Cambridge, including those portions of the project that are within the jurisdiction of the MDC (Tr. 2, at 197). The Company also committed to include information about construction noise in the notices it would distribute to abutters along the route, including a telephone number residents can use for complaints or questions (Tr. 2, at 189; Tr. 3, at 392).

The Company stated that construction activity would be planned for daytime hours to the extent possible, and that if nighttime work were necessary, it would be performed in accordance

with applicable local requirements (Exh. NGC-3, at 5-48).³⁴ The Company also identified noise mitigation techniques that might be appropriate for nighttime construction, including the use of flagmen instead of back-up beepers, and the use of portable "noise tents," which shield the operator and provide a noise barrier (Exh. RR-EFSB-18). As mentioned above, the Company identified four areas under consideration for night work in its traffic management plan:

- on Medford Street, between Somerville Avenue and the MBTA overpass;
- in the Twin City Mall parking lot;
- on the O'Brien Highway southbound, between the Twin City Mall entrance drive and Third Street; and
- on First Street, south of Cambridge Street

(Exhs. RR-EFSB-24-S at Sheet 3; RR-EFSB-24-S2). These areas are highlighted on Figure 2 (attached).

The Company estimated the numbers of residences in the vicinity of some of these potential nighttime work areas (Exh. RR-EFSB-17-S). Along Medford Street, the Company identified one residence east of the overpass that is potentially within 30 to 40 feet of a nighttime work area, if the nighttime work extends as far east as the overpass (*id.*). Near the O'Brien Highway, the Company identified one residence on Sciarappa Street north of Winter Street that is within 30 to 40 feet of the pipeline construction area (*id.*).³⁵ In the vicinity of the Twin City Mall parking lot, information provided by the Company shows residential properties along Gore Street within about 370 feet on the opposite side of Gore Park (Exhs. NGC-3, at 5-38 and 5-40; EFSB-SS-6 Att.; RR-EFSB-6). The Company stated that along First Street, the abutters are primarily commercial, with the exception of one large apartment building (Exh. EFSB-3, at 5-9).

The Company asserted that, since the preferred and alternate routes are similar from a construction standpoint, the pace of construction, the need for nighttime work, and the extent of noise impacts all should be similar (Exh. NGC-3, at 5-48). The Company did not present a

³⁴ The Company noted the need for a variance if any work is to be done at night in Cambridge (Tr. 2, at 184).

³⁵ The Company originally asserted that there are two single family residences fronting on Winter Street between Sciarappa Street and Third Street with backyard exposure to the O'Brien Highway (Exh. RR-EFSB-17).

traffic management plan for the alternate route. Therefore, other than the Medford Street location (which is common to both the preferred and alternate routes), locations along the alternate route that might require nighttime work were not identified for the record.

On brief, the City of Cambridge asserted that NSTAR Gas has not demonstrated how it would minimize nighttime construction noise impacts without committing to noise specifications in contracts or exploring other ways of mitigating noise at night (Cambridge Reply Brief at 2). Cambridge requested that the Company be required to obtain City approval of a construction work plan that includes nighttime noise mitigation measures (Cambridge Initial Brief at 6; Cambridge Reply Brief at 2). The Company asserted that its traffic management plans address the locations where nighttime work will be needed, and the detailed plans for work in those locations (NSTAR Gas Reply Brief at 3). Further, the Company noted that the City has authority to review and approve the Company's plans for construction work in public streets as part of the street opening approval process (Exh. EFSB-E-25-S; NSTAR Gas Reply Brief at 3). The Company therefore objected to the City's request for a separate construction work plan (NSTAR Gas Reply Brief at 3).

The record demonstrates that the noise impacts of the proposed project would be limited to temporary noise associated with construction activities. The record shows that, given the presence of residences along substantial portions of the route, overall construction noise impacts would be minimized by confining construction work to daytime hours to the maximum extent possible. The record in this proceeding is unclear as to the necessity and precise geographic extent of nighttime construction, and whether such construction can be undertaken consistent with local restrictions.

The City of Cambridge has requested that the Company be required to present and obtain City approval of a construction work plan that includes nighttime noise mitigation measures. The Siting Board agrees that the Company's noise mitigation plan should be developed in further detail prior to construction. The Company, the MDC, and the Cities of Cambridge and Somerville may have conflicting interests regarding the timing and procedures for construction relative to noise, traffic impacts, duration of work, and other considerations. Since mitigation of noise and traffic impacts may conflict, the Company's noise mitigation strategy likely will need

to be developed in conjunction with its traffic management plan to determine the extent of any nighttime work. To ensure that the noise impacts of any nighttime construction are minimized, the Siting Board directs NSTAR to submit to the Siting Board a plan, developed in consultation with the MDC and Cities of Cambridge and Somerville, which minimizes, and if possible avoids, work at night near residential areas and sets forth measures to mitigate the noise impacts of any nighttime construction through contract specifications or otherwise.

The Company has stated that it would notify all abutters regarding noise related to construction work. The Siting Board notes that noise from nighttime construction has the potential to affect residents who are not direct abutters. Therefore, in addition to any noise mitigation measures developed in consultation with Cambridge, Somerville, and the MDC, the Siting Board directs the Company to provide advance written notification to residents at properties within 100 feet of areas where work is to occur at night.

The Siting Board finds that, with implementation of the above conditions, the noise impacts of the proposed project along the preferred route would be minimized.

The record shows that the preferred and alternate routes would be comparable with respect to the types and volume of noise generated during construction. However, the record also indicates that the preferred route has fewer adjacent residences. This suggests that daytime noise impacts to residents would be minimized by selecting the preferred route. At the same time, the Company identified areas along the preferred and alternate routes where traffic concerns may warrant nighttime construction -- a factor of potential importance in evaluating relative noise impacts.

With respect to noise impacts overall, the Siting Board notes that while the preferred route would affect a smaller number of residents than the alternate route, more residents along the preferred route may be affected at night. Consequently, if the Company does perform work at night, use of the preferred route or the alternate route would result in comparable noise impact; if the Company does not engage in nighttime construction, use of the preferred route would result in less noise impact than use of the alternate route. On balance, therefore, the Siting Board finds that the preferred route is superior to the alternate route with respect to noise.

d. Land and Water Resources

NSTAR Gas assessed the impact of the construction of the proposed facilities with respect to land and water resources, including wetlands, wildlife, hazardous waste sites, historical and archeological resources, and trees. The Company contended that construction of the proposed facilities along either the preferred or alternate route would not adversely affect open spaces or wildlife (Exh. NGC-3, at 5-6). The Company asserted that, due to the urban nature of the project area, no significant wildlife areas exist near the proposed project (*id.* at 5-4). The Company stated that, while typical urban wildlife is present in the area, no federally-listed threatened or endangered species are located in the vicinity of the proposed project (Exhs. NGC-2, at App. A; NGC-3, at 5-4), and that the Natural Heritage and Endangered Species Program (Massachusetts Division of Fisheries & Wildlife) has no record of rare plants or animals or exemplary natural communities in the area (Exh. EFSB-E-12 Att.).

The Company indicated that, where trees are present along the project route, a Company arborist will oversee excavation and any root cutting to insure tree health, and will make additional recommendations to help preserve trees (Exh. EFSB-E-7). The Company stated that it is NSTAR's policy to replace with a similar tree any irreparably damaged tree with a diameter at breast height ("dbh") of up to 3 to 4 inches, and to replace larger irreparably damaged trees with additional 3- to 4-inch dbh trees of the same total dollar value as the damaged trees prior to construction (Exh. RR-EFSB-19).³⁶

The Company indicated that approximately six evergreen trees, 12 to 15 feet in height, are located within the proposed pipeline easement on Twin City Mall property (Exh. RR-EFSB-6 Att.; Tr. 3, at 352).³⁷ The Company indicated that it would cost approximately \$850 per tree to replace these trees with trees of the same height and species (Exh. RR-EFSB-22). The Company provided information showing that the trees are owned and maintained by the City of Cambridge

³⁶ The Company indicated that the dollar value of trees would be determined by a valuation method published by the International Society of Arboriculture in its Guide for Plant Appraisal, 9th Edition (Exh. RR-EFSB-19).

³⁷ The Company stated that the proposed easement was located at the edge of Twin City Mall's property in accordance with the property owner's preference (Tr. 3, at 353).

and are considered part of the landscaping of the adjacent park (Exh. RR-EFSB-7; Tr. 3 at 351). The Company stated that it would route the pipeline between the trees, rather than cut down any trees (id. at 351-352). The Company indicated that the owner of the Twin City Mall is planning modifications to the property that would include the relocation of some existing trees and the planting of new trees (Exh. RR-EFSB-21). The Company stated it would continue to communicate with the owner regarding both the location of the easement and ways to minimize or avoid impacts to new, existing, or relocated trees (id.).

NSTAR Gas asserted that the proposed pipeline would have no impact on historical or archaeological resources because it would be located underground (Exh. NGC-3, at 5-13). Further, the Company asserted that there is little likelihood of encountering undisturbed archaeological resources during construction (id.). The Company stated that the preferred route would pass adjacent to two historic districts and one historic site, and near several additional historic sites (Exhs. NGC-3 at 5-13; EFSB-SS-6 Att.).³⁸ The Company provided a letter from the Massachusetts Historical Commission ("MHC") stating that MHC has determined that the project would have no effect on identified properties and districts listed in the State and National Registers of Historic Places (Exh. EFSB-G-3 Att.).

NSTAR Gas indicated that it identified known oil and hazardous materials ("OHM") disposal sites along the preferred and alternate routes from the Massachusetts Department of Environmental Protection's ("MADEP") database of disposal sites and reportable releases (Exhs. NGC-3, at 5-5; EFSB-E-1-S Att.; Tr. 1, at 112). As summarized in Table 5, below, the Company indicated that there are ten active³⁹ OHM sites along the preferred route and three active sites

³⁸ The Company stated that the preferred route would pass adjacent to the East Cambridge National Historic District and near the Winter Street Historic District; that it would pass adjacent to the historic Athenaeum Press Building; and that it would be near several additional historic properties (Exh. NGC-3, at 5-13). The Company stated that the alternate route would pass adjacent to the East Cambridge National Historic District and to the Blake and Knowles Steam Pump Company Historic District, and near several additional historic properties (id.).

³⁹ In this context, "active" means that response actions have not been completed at the sites and that the potential to encounter contamination during construction exists (Tr. 1, at 114

(continued...)

along the alternate route (Exh. EFSB-E-1-S Att.).⁴⁰ The Company identified three of these sites as having the potential for contamination extending into the street right-of-way under consideration for construction (Exh. RR-EFSB-11).⁴¹ One of these three sites is common to both routes, while the other two are unique to the preferred route (Exhs. RR-EFSB-11; EFSB-E-1-S). The Company noted that the MADEP database is constantly updated as new sites are added or older sites are closed (Exh. EFSB-E-1).

TABLE 5: COMPARISON OF OHM SITES ALONG PREFERRED AND ALTERNATE ROUTES

	Preferred	Alternate
Total OHM Sites in MADEP Database	17	9
Active OHM Sites	10	3
Sites with Potential to Contaminate	3	1

Sources: Exhs. EFSB-1-S Att.; RR-EFSB-11.

NSTAR Gas stated that soil that is encountered during excavation, including limited

³⁹ (...continued)
and 118).

⁴⁰ At the hearing, the Company said there were nine active sites along the preferred route (Tr. 1, at 122), but the map and table provided by the Company as Exh. EFSB-E-1-S show three active sites common to both the preferred and alternative routes, with seven additional sites on the preferred route alone, and one additional site possibly located along the alternate route alone. The Company indicated that the location of this last site was not described in the MADEP database in sufficient detail to determine whether or not it was on the alternate route (*id.* at 121).

⁴¹ The Company summarized the results of its record searches at MADEP (Exh. RR-EFSB-11). One site, at 306-308 McGrath Highway in Somerville, along both preferred and alternate routes, involved multiple releases (of perchloroethylene, trichloroethylene, and heating oil) and discolored soil identified at a depth of 11 to 13 feet (*id.*). The other two sites, at 182-186 and 188-198 First Street in Cambridge, along the preferred route, had petroleum releases including gasoline and diesel fuel; offsite migration of contamination was said to be limited to groundwater and soil just above groundwater (*id.*).

amounts of segregated contaminated soil, will be reused as backfill at the point of original excavation, to the extent feasible (Exh. NGC-3, at 5-5, 5-6).⁴² The Company stated that a Massachusetts Licensed Site Professional will oversee soil management along the entire route (*id.*).⁴³ The Company also stated that its specifications would require the excavation and construction contractor to maintain compliance with applicable health and safety and environmental laws, regulations, guidelines, and policies, including but not limited to Occupational Safety and Health Administration ("OSHA") regulations, Cambridge and Somerville regulations, MADEP regulations, and Massachusetts fire prevention regulations (*id.*). The Company judged the alternate route slightly superior to the preferred route with respect to hazardous materials sites, due to the greater number of such sites along the preferred route with ongoing Environmental Response Actions per MADEP regulations (*id.* at 5-6).

The Company indicated that neither the preferred nor the alternate route crosses wetlands, 100-year flood zones, tidelands, or waterways (Exh. NGC-3, at 5-3), falls within any wetland or wetland buffer zones (Exh. CAM-1-26), or is near any waterbody or floodplain defined under the Massachusetts Wetlands Protection Act (Exh. NGC-3, at 5-3), or by the Federal Emergency Management Agency (*id.*). The Company stated that neither the preferred nor alternate route passes through tidelands subject to G.L. c. 91, §1 et seq. (Waterways) (*id.* at 5-3).

NSTAR Gas stated that the proposed project would not require the use or discharge of water during construction or operation (Exhs. EFSB-E-9; EFSB-E-11). The Company stated that it does not expect to encounter groundwater during construction, but if it does or if stormwater enters the trench, the Company would pump the water into sedimentation control systems (*e.g.*,

⁴² The Company indicated that the maximum amounts of contaminated soil that can be backfilled by NSTAR per OHM disposal site, pursuant to Utility-Related Abatement Measures of the Massachusetts Contingency Plan at 310 CMR, § 40.0460, are 100 cubic yards of soil contaminated with petroleum and 20 cubic yards of soil contaminated with hazardous materials (Exh. NGC-3, at 5-5).

⁴³ The Company stated that if contaminated groundwater is encountered during construction activities, the water would be handled in accordance with MADEP and U.S. Environmental Protection Agency ("USEPA") policies, likely including issuance of an Emergency National Pollution Discharge Elimination System Permit Exclusion from USEPA Region I (Exh. NGC-3, at 5-5).

hay bale dams) prior to discharge to storm drains (Exhs. EFSB-E-8; EFSB-E-9; EFSB-E-10). The Company also would take measures to keep hazardous construction materials away from the trench and handle any spills in accordance with the Massachusetts Contingency Plan 310 CMR, § 40.0000 *et. seq.* (Exh. EFSB-E-8).

The record indicates the presence of no significant wetlands, water resources, wildlife areas, or historic or archeologic resources that would be adversely affected by the project along either the preferred or the alternate route. Although there are more OHM sites along the preferred route than along the alternate route, the record does not demonstrate that the likelihood of finding OHM differs significantly between the two routes. The record does indicate that appropriate measures will be taken to prevent the migration of sediment and any hazardous materials from construction areas into the storm sewer system. Accordingly, the Siting Board finds that the preferred route would be comparable to the alternate route with respect to land and water resources and that the land and water resource impacts of the proposed project along the preferred route would be minimized.

e. Overall Environmental Impact

In the sections above, the Siting Board has reviewed the evidence presented regarding the environmental impacts of the proposed project along the preferred and alternate routes. The Siting Board finds that NSTAR Gas has provided sufficient information on the environmental impacts of the proposed project, including information on the potential for mitigation, for the Siting Board to determine whether the environmental impacts would be minimized.

The principal differences between the environmental impacts of the preferred and alternate routes stem from the land uses adjacent to the two routes. Related to the issue of land use are construction noise impacts and traffic disruptions. The Siting Board has found that the preferred route would be superior to the alternate route with respect to land use. The Siting Board has found that the alternate route is slightly superior with respect to traffic impacts. With respect to noise, the Siting Board has found the preferred route superior to the alternate route. The Siting Board also has found that the two routes are comparable with respect to land and water resources. On balance, the Siting Board finds that the preferred route is superior to the

alternate route with respect to environmental impacts.

The Siting Board has found that the land use, traffic, noise, and land and water resources impacts of the project along the preferred route would be minimized. Consequently, the Siting Board finds that the environmental impacts of the proposed project along the preferred route would be minimized.

3. Facility Cost

The Company provided cost estimates indicating that construction of the proposed pipeline along the preferred route would cost approximately \$5,263,633, as compared to an estimated \$4,117,782 for the alternate route (Exh. NGC-3, at 4-23, 5-49).⁴⁴ Excluding gate station modifications and excluding the Company's 10% contingency allowance, the comparison is \$4,285,121 for the preferred route versus \$3,243,438 for the alternate route (*id.* at 4-23).

The record shows that the cost of constructing the pipeline along the proposed route could exceed the corresponding costs for the alternate route by approximately \$1.1 million, or 32%.⁴⁵ Accordingly, the Siting Board finds that the alternate route would be superior to the preferred route with respect to cost.

4. Reliability

The Company stated that the preferred route for the pipeline is approximately 2.2 miles long (Exh. NGC-3, at 1-11), while the alternate route is about 1.7 miles (Exh. NGC-3, at 1-14). Along both routes, the pipeline would be built underground in urban areas (Exh. NGC-3, at 1-4). The same construction techniques would be used for both routes (*id.* at 1-4 through 1-14), and

⁴⁴ The Company noted that these costs do not include costs associated with any delay in obtaining permits and approvals for construction, which could potentially be greater for the alternate route (Exh. NGC-3, at 5-49).

⁴⁵ Including gate station modifications and 10% overall contingency, the whole project using the preferred route would cost approximately 28% more than the project using the alternate route.

the same corrosion control system would be used for both.⁴⁶ In its application of screening criteria to the six pipeline routes initially considered, the Company scored the alternate route as "high" for reliability/serviceability, and the preferred route as "medium." However, the record does not indicate how the Company apportioned these scores between reliability and serviceability. Given the similarity of the two routes with respect to length, construction environment and techniques, and corrosion technology, the Siting Board finds that the two routes would be comparable with respect to reliability.

5. Conclusions on Facility Routing

The Siting Board has found that the preferred route would be superior to the alternate route with respect to environmental impacts, that the alternate route would be superior to the preferred route with respect to cost, and that the two routes would be comparable with respect to reliability. In balancing environmental impact and cost, the Siting Board has given significant weight to the fact that the preferred route has fewer impacts on residential areas. Accordingly, the Siting Board finds that the preferred route would be superior to the alternate route with respect to providing a reliable energy supply to the Commonwealth with a minimum impact on the environment at the lowest possible cost. The Siting Board also finds that the proposed project along the preferred route would achieve an appropriate balance among conflicting environmental concerns as well as among environmental impacts, reliability, and cost.

IV. DECISION

The Siting Board's enabling statute directs the Siting Board to implement the energy policies contained in G.L. c. 164, §§ 69H to 69Q, to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. G.L. c.

⁴⁶ The Company stated that the cathodic protection corrosion control system used on the preferred route would not be effective if the pipeline were to come in contact with air (Exh. NGC-3, at 4-5). Certain types of bridge or railroad crossings, as encountered by several of the rejected route alternatives, entailed such exposure (*id.*; Tr. 1, at 107-108). Because the preferred and alternate routes involve all the same bridge and railroad crossings, the Siting Board concludes that the cathodic protection system would be equally effective on both routes.

164, § 69H. In addition, the statute requires that the Siting Board determine whether plans for the construction of energy facilities are consistent with current health, environmental protection, and resource use and development policies as adopted by the Commonwealth. G.L. c. 164, § J. In addition, G.L. c. 164, § 69J requires that a facility proposed by a natural gas company required to file a long-range forecast pursuant to G.L. c. 164, § 69I be consistent with that company's most recently approved long-range forecast.

In Section II.A, above, the Siting Board determined that the Company has established that its existing system is inadequate to serve its anticipated load growth in the Third Street Gate Station area with acceptable reliability, and consequently found that there is a need for additional energy resources in the area of Third Street Gate Station in Cambridge. Further, in Section II.A, the Siting Board found that the proposed project is consistent with the Company's most recently approved long-range forecast.

In Section II.B, above, the Siting Board found that: (1) Alternative Approaches 2 and 3 would be superior to the proposed project with respect to reliability; (2) the proposed project would be superior to Alternative Approaches 2 and 3 with respect to environmental impacts; (3) the proposed project would be superior to Alternative Approaches 2 and 3 with respect to cost. On balance, the Siting Board found that the proposed project would be superior to Alternative Approaches 2 and 3 with respect to providing a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

In Section III.A, above, the Siting Board found that the Company has developed and applied a reasonable set of criteria for identifying and evaluating alternate routes in a manner which ensures that it has not overlooked or eliminated any routes which are, on balance, clearly superior to the proposed project. The Siting Board also found that the Company has identified a range of practical gas pipeline routes with some measure of geographic diversity. Consequently, the Siting Board found that NSTAR Gas Company has demonstrated that it examined a reasonable range of practical siting alternatives.

In Section III.C, above, the Siting Board reviewed the environmental impacts of the approximately 2.2 mile route in light of related regulatory or other programs of the Commonwealth, including programs related to wetlands protection, rare and endangered species,

historic preservation, and the prevention and control of the release of oil and hazardous materials. As evidenced by the above discussions and analyses, the proposed 2.2 mile pipeline along the preferred route and variation to that route, would be generally consistent with the identified requirements of all such programs.

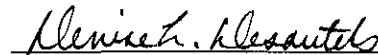
In Section III.C, above, the Siting Board found that the preferred route would be superior to the alternate route with respect to providing a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. The Siting Board also found that with the implementation of the conditions addressing construction noise impacts, and compliance with all applicable local, state, and federal requirements, the environmental impacts of the proposed project along the preferred route would be minimized. Further, in Section III.C, the Siting Board also found that the proposed project along the preferred route would achieve an appropriate balance among conflicting environmental concerns as well as among environmental impacts, reliability, and cost.

Accordingly, the Siting Board APPROVES the Company's application to construct one 2.2 mile, 18 inch natural gas pipeline in Somerville and Cambridge, Massachusetts using the Company's preferred route and, in the event that unforeseen circumstances prevent the construction of the facilities through the O'Brien Highway/Cambridge Street intersection, the variation to that route, subject to the following conditions:

- A. To minimize nighttime construction noise impacts, the Company shall submit to the Siting Board a plan, developed in consultation with the MDC and Cities of Cambridge and Somerville which minimizes, and if possible avoids, work at night near residential areas and sets forth measures to mitigate the noise impacts of any nighttime construction through contract specifications or otherwise.
- B. The Siting Board directs the Company to provide advance written notification to residents at properties within 100 feet of areas where work is to occur at night.

The Siting Board notes that the findings in this decision are based on the record in this case. A project proponent has an absolute obligation to construct and operate its facility in conformance


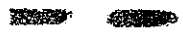


with all aspects of its proposal as presented to the Siting Board. Therefore, the Siting Board requires the Company to notify the Siting Board of any changes other than minor variations to the proposal so that the Siting Board may decide whether to inquire further into a particular issue. The Company is obligated to provide the Siting Board with sufficient information on changes to the proposed project to enable the Siting Board to make these determinations.



Denise L. Desautels
Hearing Officer

Dated this 14th day of December, 2001.

Figure 2. Possible Extent of Nighttime Work

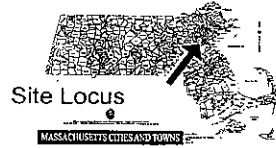
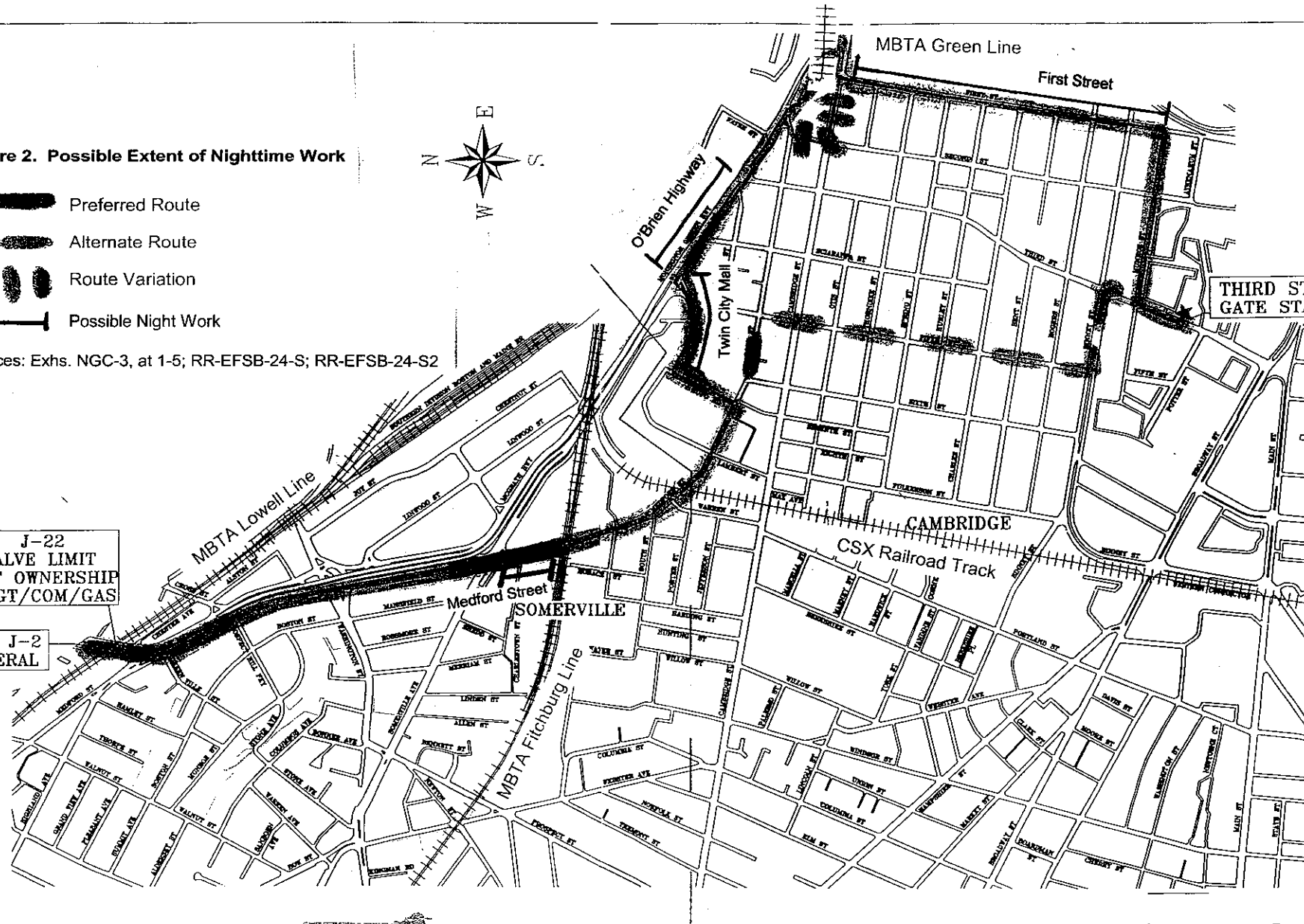
-  Preferred Route
-  Alternate Route
-  Route Variation
-  Possible Night Work


Sources: Exhs. NGC-3, at 1-5; RR-EFSB-24-S; RR-EFSB-24-S2

-205-

J-22
VALVE LIMIT
OF OWNERSHIP
AGT/COM/GAS

AGT J-2
LATERAL



			
KENDALL STATION PROJECT, CAMBRIDGE AND SOMERVILLE			
PROPOSED 18" HIGH PRESSURE MAIN			
PREFERRED AND ALTERNATE ROUTES			
SCALE: N.T.S.		SHEET 1 of 2	
Drawn by / Date	Checked by / Date	Drawing Number	
008 / 1/20/00	001 / 1/20/00	2000-001A	
Approved by / Date	Filed by / Date		
001 / 1/20/00	001 / 1/20/00		

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Proposed Rulemaking to Amend Provisions Regarding the
Regulations Governing the Conduct of Energy Facilities
Siting Board Adjudicatory Proceedings; the Regulations
Governing the General Information and Conduct of Siting Board
Business; and Proposed Rulemaking to Repeal Existing Siting
Board Rules for Adopting Administrative Regulations

EFSB 02-RM-1

FINAL ORDER ON PROPOSED RULEMAKING

Sheila R. McIntyre
Hearing Officer
April 8, 2002

On the Decision:
Diedre Shupp Matthews
Jolette Westbrook

I. INTRODUCTION

In 1975, the Energy Facilities Siting Council ("Siting Council"), the predecessor to the Energy Facilities Siting Board ("Siting Board"), initially promulgated 980 CMR § 1.00, "Rules for the Conduct of Adjudicatory Proceedings" and 980 CMR § 2.00, "General Information; Conduct of Council Business". The Siting Board deems it necessary to revise these regulations, which have not been amended in over 20 years, in order to reflect subsequent statutory changes. Also, in updating these regulations, the Siting Board seeks to comply with the directives of Executive Order 384 calling for regulatory clarity.¹ A copy of the proposed regulations is attached.

Pursuant to G.L. c. 164, § 69H and G.L. c. 30A, the Siting Board hereby opens a rulemaking for the purpose of revising 980 CMR §§ 1.00 et seq. and 980 CMR §§ 2.00 et seq. In addition, the Siting Board hereby opens a rulemaking to repeal in its entirety 980 CMR § 3.00, "Rules for Adopting Administrative Regulations".

II. BACKGROUND

In 1992, the Siting Board was established to replace the Siting Council. St. 1992, c. 141 ("merger legislation"). The merger legislation placed the Siting Board within the Department of Telecommunications and Energy ("Department"),² but not under the supervision or control of the Department and assigned certain of its prior duties to the Department. The merger legislation also changed the composition of the Siting Board³ and gave the Siting Board authority to review certain matters referred to it by the Chairman of the Department. Further, the merger legislation

¹ The Siting Board notes that this rulemaking is the first step in a Siting Board initiative to update its regulations. Over the next twelve to eighteen months, the Siting Board plans to open a series of rulemakings to address other chapters of 980 CMR that are in need of revision.

² The Department of Telecommunications and Energy was formerly known as the Department of Public Utilities.

³ As a result of the merger legislation, the Siting Board members consisted of the three Commissioners of the Department, the Secretary of Environmental Affairs, the Secretary of Economic Affairs and two public members appointed by the Governor.

established a facility siting division within the Department to administer, implement, and enforce the Siting Board's statutory obligations.

Two bills passed in the late 1990s further altered the role and structure of the Siting Board. The Electric Restructuring Act of 1997 ("Restructuring Act")⁴ altered the scope of the Siting Board's review of generating facility proposals and revised the Siting Board's fundamental mandate, directing it to provide a "reliable," rather than a "necessary," energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. In 1999, further legislation was passed that increased the Siting Board to nine members, including the Chairman and two additional Commissioners of the Department, the Secretary of Environmental Affairs, the Director of Economic Development, the Commissioner of Energy Resources and three public members appointed by the Governor. St. 1999, c. 127, § 152.

III. PROPOSED REGULATIONS

The Siting Board proposes to revise 980 CMR §§ 1.00 et seq., the regulations governing its adjudicatory proceedings, to reflect the statutory changes discussed in Section II above and to put in place procedures that will make the hearing process more efficient. All proposed revisions are drafted to be consistent with the requirements of the Administrative Procedures Act, G.L. c. 30A.

The Siting Board also proposes to revise 980 CMR §§ 2.00 et seq., the regulations setting forth the purpose and functions of the Siting Board. The existing regulations, which have not been revised in several decades, reflect neither the 1992 replacement of the Siting Council with the Siting Board, nor the later changes to the Siting Board's structure and mandate. The proposed regulations incorporate these changes and establish consistency between statutory and regulatory language concerning the purpose and function of the Siting Board.

Finally, the Siting Board proposes to repeal 980 CMR §§ 3.00 et seq., its rules for adopting, repealing or revising administrative regulations. The existing 980 CMR § 3.00

⁴ An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protection Therein. St. 1997, c. 164.

contains procedural language that generally parallels the requirements of G.L. c. 30A. It also contains language, at 980 CMR § 3.03, that limits to twelve the number of chapters that may be promulgated under 980 CMR. This limitation does not serve any useful regulatory purpose, is not required by G.L. c. 30A, and would prevent the Siting Board from reorganizing its regulations in a more coherent fashion. Because the requirements for adopting, amending and repealing regulations are set forth in considerable detail in G.L. c. 30A, the Siting Board sees no purpose in retaining and revising 980 CMR §§ 3.00 et seq., and consequently proposes to repeal this section.

As it revises its regulations to reflect the statutory changes discussed above, the Siting Board also seeks to comply with Executive Order 384, issued by Governor Weld in February 1996. This Executive Order directed each state agency to ensure that its regulations are clear, concise and drawn in plain and readily understandable language. The Siting Board believes that it is extremely important that its regulations be readily understood, not only by the regulated community, but also by the numerous groups and individuals that participate in Siting Board proceedings without any prior familiarity with administrative law. Therefore, these sections in their entirety have been revised and reorganized for clarity.

IV. REQUEST FOR COMMENTS

The Siting Board seeks written comments addressing any or all provisions of the proposed regulations. The Siting Board also seeks written comments specifically addressing the following questions.

1. Electronic Filings - 980 CMR § 1.03(3)

The proposed regulation gives the Presiding Officer the discretion to require the electronic filing of documents in a given proceeding. Are there advantages to requiring that all documents be filed electronically in all proceedings? If so, should the party providing the document also be required to send to all parties a hard copy of the electronically filed document? Would parties be able to electronically file maps, graphs and large exhibits? What treatment

should be afforded to parties and limited participants, including those appearing *pro se*, who may not have the ability to access or file documents electronically?

2. Representation - 980 CMR § 1.05(1)(g)

The proposed regulation requires that any party, except an individual appearing *pro se*, must be represented by counsel in good standing before the Massachusetts bar. Representation by counsel in good standing in another jurisdiction could be allowed *pro hac vice*⁵ upon written petition. Thus, any group, corporation, municipality or other entity permitted to intervene in a Siting Board proceeding would be required to obtain attorney representation. This requirement may create a barrier to intervention by grassroots groups or municipal agencies or other entities. Does this proposed regulation appropriately balance administrative efficiency concerns with accessibility to Siting Board proceedings? Should there be any allowances for groups or entities to participate as a party in Siting Board proceedings without representation by an attorney? For example, should the president of a watershed group be permitted to represent the group? Should a fire chief be allowed to represent a fire department? In addition, an individual could not be represented by an individual who is not an attorney. Should there be any allowances for an individual who is not an attorney to represent another individual? For example, should a son be allowed to represent the interests of his elderly father?

3. Public Meetings - 980 CMR § 2.04

The proposed regulation at 980 CMR § 2.04 provides that all Siting Board meetings shall be open to the public and to the press to the extent required by G.L. c. 30A, §§ 11A and 11A½. Further, the proposed regulation at 980 CMR § 1.08(3)(a) states that every final decision of the Siting Board in an adjudicatory proceeding shall be issued following a vote taken in a meeting of the Siting Board pursuant to 980 CMR § 2.04. The current practice of the Siting Board is to vote on final decisions involving adjudicatory matters in an open meeting, even though G.L. c. 30A,

⁵ *Pro hac vice* means “for this one particular occasion”. Therefore, if a *pro hac vice* motion is granted, the petitioning attorney would be permitted to participate before the Siting Board in a representative capacity for that particular case only.

§ 11A allows “any meeting of a quasi-judicial Board or Commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it . . .” to be held in closed session. Does the current practice appropriately consider administrative efficiency and public policy issues? Would a rule permitting adoption of a final decision in a closed meeting better balance these interests?

4. Determination of Board Jurisdiction - 980 CMR § 2.08

The proposed regulation would allow an applicant to seek a conclusive determination from the Siting Board as to whether a proposed electric generating unit, electric transmission line, ancillary structure, natural gas pipeline, natural gas storage facility, or oil pipeline, refinery, storage facility or transshipment facility is within the definition of facility, is exempt from Siting Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR § 6.00. This proposed subsection generally parallels the existing regulation at 980 CMR § 7.01(10), which allows for a determination of jurisdiction. Is the proposed regulation necessary given that applicants may petition the Siting Board for an advisory ruling (see proposed regulation at 980 CMR § 2.07)? How would a conclusive determination of Siting Board jurisdiction be beneficial?

V. FILING COMMENTS

The Siting Board seeks written comments on these proposed revisions and to the questions asked in Section IV above, no later than 5:00 p.m. on Wednesday, June 5, 2002. Comments should be filed with Sheila R. McIntyre, Energy Facilities Siting Board, One South Station, Boston, Massachusetts 02110. The Siting Board requests that all written comments also be submitted to the Siting Board in electronic format using one of the following methods: (1) by electronic mail (“e-mail”) attachment to SitingBoard.Filing@state.ma.us (copy to Peter.Ray@state.ma.us); or (2) on a 3.5" floppy diskette, IBM-compatible format. The text of the e-mail or diskette label must specify: (1) an easily identifiable case caption; (2) the docket number; (3) the name of the person or company submitting the filing; and (4) a brief descriptive title of the document (e.g., comments on 980 CMR § 1.00). The electronic filing should also include the name, title and telephone number of a person to contact in the event of questions

about the filing. Text responses should be written in either WordPerfect (naming the document with a ".wpd" suffix) or in Microsoft Word (naming the document with a ".doc" suffix).

Documents submitted in electronic format will be posted on the Siting Board's web page which can be accessed via the Department's Website, <http://www.state.ma.us/dpu>.

To provide further opportunity for comment, and pursuant to G.L. c. 30A, §§ 2 and 4, the Siting Board will hold a public hearing on Tuesday, May 21, 2002, at 10:00 a.m., at the Siting Board's offices, One South Station, Boston, Massachusetts. Interested persons may present facts, opinions, or arguments relating to the proposed regulations at the public hearing.

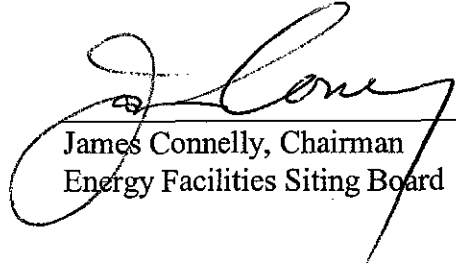
The effective date of the revised regulations shall be the date of their final publication in the Massachusetts Register.



Sheila R. McIntyre
Hearing Officer

Dated this 8th day of April, 2002.

APPROVED by the Energy Facilities Siting Board at its meeting of April 8, 2002, by the members and designees present and voting: James Connelly (Chairman, DTE/EFSB); Deirdre K. Manning (Commissioner, DTE); W. Robert Keating (Commissioner, DTE); Robert Sydney (for David L. O'Connor, Commissioner, Division of Energy Resources); and Sonia Hamel (for Robert Durand, Secretary of Environmental Affairs).



James Connelly, Chairman
Energy Facilities Siting Board

Dated this 8th day of April, 2002.

980 CMR 1.00: RULES FOR THE CONDUCT OF ADJUDICATORY PROCEEDINGS

Section

- 1:01: Scope and Construction of Rules
- 1:02: Rules of General Applicability
- 1:03: General Procedures
- 1:04: Institution of an Adjudicatory Proceeding
- 1:05: Intervention
- 1:06: Conduct of Adjudication
- 1:07: Post-Hearing
- 1:08: Rendering of Decisions
- 1:09: Supplemental Procedures

1.01: Scope and Construction of Rules

- (1) Scope. 980 CMR 1.00 shall govern the conduct of adjudicatory proceedings before the Energy Facilities Siting Board.
- (2) Statutory Authority. 980 CMR 1.00 is promulgated pursuant to M.G.L. c. 30A, § 9 and c. 164, § 69H.
- (3) Application of 980 CMR 1.00. 980 CMR 1.00 shall apply to all adjudications conducted by the Board except when a specific provision of 980 CMR indicates otherwise.
- (4) Definitions. For the purpose of 980 CMR, the following definitions shall apply unless the context or subject matter requires a different interpretation:

Applicant means a person who submits to the Board an application or petition seeking determination of a matter within the Board's jurisdiction, or who has a matter referred to the Board by the Chairman of the Department of Telecommunications and Energy pursuant to M.G.L. c. 164, § 69H.

Board means the Energy Facilities Siting Board.

Board Member means any of the nine persons set forth in 980 CMR 2.03(1) or any person named to serve as a designee under the terms of 980 CMR 2.03(3).

Chairman means the Chairman of the Energy Facilities Siting Board.

Director means the person appointed by the Chairman to direct the work of the siting division and to conduct the day-to-day business of the Board as well as to perform any other duty delegated by the Chairman.

Hand Delivery means delivery by methods other than pre-paid U.S. mail (e.g., Federal Express or paid courier service). Hand delivery shall not include delivery by electronic mediums such as facsimile or e-mail unless authorized by the Presiding Officer.

Facility means any "facility" described in M.G.L. c. 164, §69 G including:

- (a) any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities;
- (b) a new electric transmission line having a design rating of 69 kilovolts or more and which is one mile or more in length on a new transmission corridor;
- (c) a new electric transmission line having a design rating of 115 kilovolts or more which is ten miles or more in length on an existing transmission corridor except reconductoring or rebuilding of transmission lines at the same voltage;
- (d) an ancillary structure which is an integrated part of the operation of any transmission line which is a facility;
- (e) a unit, including associated buildings and structures, designed for, or capable of, the manufacture or storage of gas, except such units below a minimum threshold size as established by regulation;
- (f) a new pipeline for the transmission of gas having a normal operating pressure in excess of one hundred pounds per square inch gauge which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity; and
- (g) any new unit, including associated buildings and structures, designed for, or capable of, the refining, the storage of more than 500,000 barrels or the transshipment of oil or refined oil products and any new pipeline for the transportation of oil or refined oil products which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity.

Generating Facility means any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.

Limited Participant means any person allowed to participate in an adjudicatory proceeding pursuant to M.G.L. c. 30A, § 10, and 980 CMR 1.05(2). The rights of a limited participant are more restricted than the rights of a party.

Party means an applicant, any person allowed to intervene in an adjudicatory proceeding pursuant to M.G.L. c. 30A, § 1 (3), and 980 CMR 1.05(1), or any person who intervenes in an adjudicatory proceeding by right.

Person means a natural person, partnership, corporation, association, society, authority, agency or department of the State, or any body politic or political subdivision of the State including municipal corporations.

1.02: Rules of General Applicability

- (1) Waiver of Rules. Where good cause appears, not contrary to statute, the Board and any Presiding Officer may permit deviation from any rules contained in 980 CMR.
- (2) Severability. If any provision of 980 CMR is held to be invalid, such invalidity shall not affect the provisions or the applications thereof not specifically held invalid.

1.03: General Procedures

- (1) Docket. A numbered docket shall be maintained for all adjudicatory proceedings and shall contain all documents filed in a proceeding and other relevant material.
- (2) Filing of Documents with the Board.
 - (a) Filing.
 - (i) Any document to be filed with the Board pursuant to 980 CMR 1.00 shall be hand delivered, or mailed first class, to the Energy Facilities Siting Board or to the Presiding Officer at the Energy Facilities Siting Board. The Presiding Officer may allow documents to be filed by other means.
 - (ii) A document shall be deemed to be filed on the date stamped "Received" by the Board or its agent during usual business hours. Documents received after usual business hours shall be deemed filed on the following business day.
 - (b) Filing Format.
 - (i) Printing Requirements. All documents filed for possible inclusion in the record shall be clear and legible and shall be presented in accordance with the standards established by the Presiding Officer.
 - (ii) Form. Every document filed shall contain a title which indicates the nature of the proceeding, the name of the applicant, and the docket number if available. The Director or Presiding Officer shall determine the number of copies to be filed. The Board may provide forms to be used for specific purposes by any person or party; in such cases, use of forms provided shall be mandatory.
- (3) Electronic Filing. The Presiding Officer may require documents to be filed electronically.

(4) Service to Board, Parties and Participants.

(a) Service of a document upon the Board or the Presiding Officer shall be in accordance with 980 CMR 1.03(2).

(b) In addition to filing any document with the Board or Presiding Officer, the person filing documents simultaneously shall serve a copy on all other parties and limited participants required to be served in the proceeding, by hand delivery or by first class mail postage prepaid using the name(s) and address(es) stated on the service list issued by the Presiding Officer. The Presiding Officer may allow documents to be served by other means.

(c) All documents filed with the Board or the Presiding Officer shall be accompanied by a statement certifying the date and means of service and the persons to whom service was made. Failure to comply with these rules may be grounds for the Board or Presiding Officer to refuse to accept documents for filing.

(d) Documents shall be deemed served on the day of hand delivery or, if mailed, on the earlier of receipt or three days after mailing. The postmark shall be evidence of the date of mailing.

(5) Signatures. Every document filed pursuant to 980 CMR 1.03(2) or served pursuant to 980 CMR 1.03(4) shall be signed by the party making such filing or service or by his authorized representative. Such signature shall constitute certification by the signatory or his authorized representative that he has read the document, that, to the best of his knowledge, every statement contained in the document is true and that the document is not being filed to delay the proceeding.

(6) Computation of Time. Unless otherwise specifically provided by 980 CMR 1.00 or by other applicable law, computation of any time period referred to in 980 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Board is closed, in which case the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the office of the Board is closed shall be excluded.

(7) Extensions of Time. At the discretion of the Board or the Presiding Officer, for good cause shown, any time limit prescribed or allowed in 980 CMR 1.00 and in other Chapters of 980 CMR may be extended. All requests for extensions of time must be made either by oral motion during a hearing or conference or by written motion. All requests for extensions of time must be made before the expiration of the original time period or before the expiration any subsequent extension(s) granted. Provisions contained in 980 CMR 1.03(7) shall not apply to any limitation of time prescribed by statute, unless extensions are permitted by the applicable statute.

1.04: Institution of an Adjudicatory Proceeding

- (1) Commencement of Proceeding. Proceedings may be initiated by a petition to construct, a petition for a certificate of environmental impact and public need, a petition for other matters over which the Board has jurisdiction, or the Board's own motion.
- (2) Presiding Officer
 - (a) A Presiding Officer shall be appointed to conduct each adjudicatory proceeding. The Presiding Officer shall have the authority to take all actions necessary to ensure a fair, orderly and efficient proceeding. Such actions may include, but are not limited to: conducting evidentiary and public comment hearings; ruling on petitions to intervene or to participate in a proceeding; establishing ground rules for a proceeding; holding procedural or other conferences for the settlement or simplification of issues; regulating the course of the hearing; prescribing the order in which evidence shall be presented; administering oaths and affirmations; examining witnesses and requiring them to produce evidence which will aid in the determination of any question of law or fact at issue; disposing of procedural requests or similar matters; hearing and ruling upon motions; issuing subpoenas; causing depositions to be taken; ruling upon offers of proof and receiving relevant material and probative evidence; fixing the time for filing briefs, motions and other documents in connection with hearing; and excluding any person from a hearing for disrespectful, disorderly, or contumacious language or conduct.
 - (b) A Presiding Officer may at any time withdraw from a proceeding if he deems himself disqualified. Should a Presiding Officer withdraw, another Presiding Officer shall be appointed. Any party who becomes aware of grounds that may exist for the disqualification of a Presiding Officer must immediately file an affidavit which clearly sets forth the grounds for the disqualification.
- (3) Notice of Adjudication
 - (a) Notice shall be given at the beginning of any adjudicatory proceeding. The Presiding Officer shall give notice or shall require the applicant to give notice of an adjudication.
 - (b) A notice shall set forth a summary statement of the matter to be adjudicated. The notice shall state: (1) the name and address of the applicant; (2) the address of the Board and the statement that any person desiring further information or wishing to participate in the proceeding may contact the Board; and (3) the date, time and address of any scheduled public comment hearing.
 - (c) In cases where a proposed facility is the subject of the proceeding, notice shall be given by publication in at least two newspapers available in the vicinity of the proposed facility and as otherwise ordered by the Presiding Officer. In cases where a proposed facility is not the subject of the proceeding, notice by publication shall be given as ordered by the Presiding Officer. Notice shall further be given by first class mail or hand delivery to any person required by law or regulation to be so notified and to such other persons as the Presiding Officer may direct. Additional notice or publication shall be made, if required by statute or regulation, in the manner prescribed therein. Unless otherwise directed by the

Board or Presiding Officer, the applicant is responsible for all costs related to the publication and distribution of notice.

(d) In cases where a proposed facility is the subject of the proceeding, the notice shall contain a deadline for the filing of petitions to intervene as a party or participate as a limited participant. This deadline shall be no less than 21 days after the initial date of publication of the notice.

(e) In cases where a proposed facility is not the subject of the proceeding, the deadline for the filing of petitions to intervene as a party or participate as a limited participant shall be as ordered by the Presiding Officer.

(4) Repository of Documents. The Presiding Officer may require an applicant to place certain documents in a repository to provide for public access to these documents. A repository of documents is a public library, public office or applicant's office or similar location where documents involved in a particular proceeding may be kept and made available to members of the public. If a repository is required, the applicant shall be responsible for placing the documents therein and making adequate arrangements for convenient public access to the documents.

(5) Public Comment Hearing. When required by statute or otherwise determined appropriate by the Presiding Officer, the Board shall hold a public comment hearing. A public comment hearing shall be conducted to afford members of the general public an opportunity to comment on that matter. A public comment hearing shall be held as soon as practicable after the commencement of a proceeding. Comments made at a public comment hearing are not deemed to be evidence.

1.05: Intervention

(1) Parties.

(a) Any person who desires to intervene as a party in any proceeding shall file a written petition to intervene as a party. A petition to intervene as a party may be deemed to constitute, in the alternative, a petition to participate as a limited participant under 980 CMR 1.05(2). If a petition to intervene is granted in the alternative as a petition to participate as a limited participant, the petitioner may participate as a limited participant without prejudicing any review on appeal of the denial of his petition to intervene.

(b) If a petitioner desires to intervene pursuant to M.G.L. c. 30A, § 10, the petition shall state the name and address of the petitioner, the manner in which the petitioner is substantially and specifically affected by the proceeding, the representative capacity, if any, in which the petition is brought, and how the petitioner intends to participate in the proceeding.

(c) If ten or more persons desire to intervene pursuant to M.G.L. c. 30A, § 10A, the petition shall state the names and addresses of the petitioners, the representative capacity, if any, in which the petition is brought, and the damage to the environment as defined in M.G.L. c. 214, § 7A that is or might be at issue. Intervention pursuant to M.G.L. c. 30A, § 10A shall be limited to the issue of

damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue.

(d) The Presiding Officer shall rule on the petitions to intervene as a party and may condition any allowance of a petition on such reasonable terms as he may set.

(e) Persons who are granted leave to intervene as a party must comply with all requirements of 980 CMR 1.00 and with all directives of the Presiding Officer. In addition, parties may be required to respond to discovery by the Presiding Officer and by other parties if allowed by the Presiding Officer after motion.

(f) Generally, the rights of a person who is granted leave to intervene as a party include the right to present witnesses, the right to cross-examine witnesses, the right to file a brief, the right to file comments on the tentative decision and the appellate status as a party in interest who may be aggrieved by any final decision. In addition, persons who are granted leave to intervene as a party may be afforded an opportunity to issue discovery and to present oral comments regarding the tentative decision under such conditions as the Board may provide.

(g) Except for a party that appears *pro se*, a party shall be represented by counsel in good standing before the Massachusetts bar. Representation by counsel in good standing in another jurisdiction may be allowed *pro hac vice* upon written petition.

(2) Participation.

(a) Any person who desires to participate as a limited participant in any proceeding shall make a written request for such status. Every request to participate as a limited participant shall describe the manner in which the petitioner is interested and his representative capacity, if any, and it shall state the contention of the petitioner and the purpose for which participation is requested.

(b) The Presiding Officer may grant leave to a person to participate as a limited participant and may condition any grant on such reasonable terms as he may set.

(c) Unless otherwise indicated, a limited participant's rights shall be limited to filing a brief at the close of evidentiary hearings pursuant to 980 CMR 1.07(1) and to filing comments on the tentative decision pursuant to 980 CMR 1.08(2). A limited participant may be afforded an opportunity to present oral comments regarding the tentative decision under such conditions as the Board may provide.

(d) Limited participants are not parties. Therefore, a grant of leave to participate in a proceeding, unless so stated, does not confer upon the person allowed to participate as a limited participant status as a party in interest who may be aggrieved by any final decision.

1.06: Conduct of Adjudication

(1) Procedural Conferences.

(a) The Presiding Officer may schedule a procedural conference, either on his own initiative or upon written request by a party.

(b) At a procedural conference the following matters may be considered:

- (i) the schedule for the proceeding;
 - (ii) simplification and limitation of issues; and
 - (iii) such other matters as will aid in the efficiency of the proceeding.
 - (c) Unless the Presiding Officer has approved a stipulation to the contrary, statements made by any person at a procedural conference shall not be evidence in the proceeding or in any subsequent proceeding.
- (2) Evidentiary Record. For every adjudicatory proceeding, there shall be an evidentiary record which shall include testimony as well as exhibits properly entered into evidence.
- (3) Motions.
- (a) Any party may request that the Presiding Officer take any action by filing a motion which clearly states the order or action sought and the grounds therefor. Such a motion may either be made during a hearing or timely filed in writing. The Presiding Officer may require any oral motion made to be reduced to writing. A copy of all motions made in writing or reduced to writing shall be served upon all parties in accordance with 980 CMR 1.03(4).
 - (b) Unless the Presiding Officer directs otherwise, a party may file a written answer to a written motion with the Presiding Officer within seven days after such motion is filed. The moving party may then file a written reply within seven days after such answer is filed. Additional filings will only be permitted at the discretion of the Presiding Officer.
 - (c) A party may request a hearing on the motion at the time the motion is filed or at the time a party responds to the motion. It is within the Presiding Officer's discretion to determine whether a hearing on the motion is necessary.
 - (d) Motions and responses to motions may be filed only by parties.
- (4) Evidence; Privileges.
- (a) All parties shall have the right to introduce both oral and documentary evidence. All witnesses shall testify under an oath administered by the Presiding Officer and shall be subject to cross-examination.
 - (b) Evidence shall be submitted in accordance with the schedule established by the Presiding Officer. Generally, parties will be required to submit documentary evidence, including exhibits and written direct testimony, in advance of evidentiary hearing.
 - (c) The Presiding Officer shall be guided by, but need not observe, the rules of evidence observed by the courts.
 - (d) The Board shall observe the rules of privilege recognized by law.
- (5) Discovery. Discovery is allowed at the discretion of the Presiding Officer.
- (a) Purpose. The purpose of discovery is to facilitate the hearing process by permitting the parties and the Board to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a

complete and accurate record is compiled.

(b) Rules Governing Discovery. In exercising his discretion, the Presiding Officer may be guided by the principles and the procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 *et seq.* These rules, however, shall be instructive, rather than controlling.

(c) Information Requests. After the commencement of an adjudicatory proceeding, a party may serve written information requests, as permitted by the Presiding Officer, for the purpose of discovering relevant information. A party may serve information requests only during the time specified by the Presiding Officer. The Presiding Officer may, at his discretion, serve written information requests on any party to the proceeding.

(d) Responses to Information Requests. Each information request shall be separately and fully answered under the penalties of perjury by the witness(es) who can testify during hearings regarding the content of the response, unless an objection to the information request with supporting reason is stated in lieu of a response. A response shall be served within 14 days of service of the information request, or within such other time as the Presiding Officer may specify. Responses shall be filed in the form specified by the Presiding Officer.

(e) Motions to Compel Discovery. A party may move for an order to compel compliance with its discovery request. Unless otherwise permitted by the Presiding Officer for good cause shown, such motion shall be made no later than seven days after the deadline for responding to the request. If the Presiding Officer finds that a party has failed to comply in a reasonable manner with a legitimate discovery request without good cause, he may, after issuance of an order compelling discovery, order whatever sanctions are deemed to be appropriate, including, but not limited to, suspending proceedings until the party has complied with the order or other appropriate sanctions listed in Rule 37 of the Massachusetts Rules of Civil Procedure. These rules, however, shall be instructive, rather than controlling. A party's failure to file a motion to compel discovery in a timely manner absent a showing of good cause, may result in a waiver of its right to compel the response.

(f) Protective Orders. Upon a request for protective treatment of documents and a showing that a protective order is necessary, the Presiding Officer may make an order to protect any such document(s). The Presiding Officer may be guided by the principles and the procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 *et seq.* These rules, however, shall be instructive, rather than controlling.

(6) Evidentiary Hearings

(a) Purpose. Evidentiary hearings may be held at the discretion of the Presiding Officer in order to allow Board staff and parties to examine witnesses with respect to the content of their pre-filed testimony and any responses to information requests.

(b) Hearing Schedule. At least seven days prior to the first day of evidentiary hearings, the Presiding Officer shall notify all parties and limited participants, and

any persons whose petitions to intervene or participate are pending, of the hearing schedule. The hearing schedule shall include the times, dates, place, and nature of the hearings. There may be multiple hearing dates and times during the course of a proceeding. Hearing dates and times may change. It is the responsibility of each party and limited participant to keep abreast of all changes to the hearing schedule.

(c) Rescheduling. The Presiding Officer may grant a request to reschedule a hearing. A request for rescheduling should be made timely and in writing so as not to burden or delay the proceedings.

(d) Location. All evidentiary hearings shall be held at the Boston offices of the Board, unless a different location is designated by the Board or the Presiding Officer or a different location is required by statute.

(e) Public Access. All hearings of the Board shall be open to the public and the press to the extent required by law.

(f) Off The Record Discussions. The Presiding Officer may go off the transcribed record during the course of any hearing for consultation among the parties if the Presiding Officer deems that such consultation would facilitate the conduct of the hearing. In the absence of a stipulation to the contrary, statements made by any person during such consultation shall not be considered as evidence in the proceeding or any subsequent proceeding.

(g) Record Requests. During the course of evidentiary hearings, the Presiding Officer or parties may ask witnesses to provide documents or written responses to questions asked at the hearing. Responses to record requests are written substitutes to oral answers where fault of memory, complexity of subject or lack of immediate access to documentation precludes a responsive answer by the witness in the hearing. As such, they become, upon proper filing, part of the record and the evidence, unless challenged as unresponsive and expunged in whole or part. Record requests shall not be used as a substitute for discovery. The ordinary time for response will be seven calendar days following the day on which the request is made. Objections to record requests shall be made at the time the request is made, and in no event later than the end of the next business day.

(h) Transcript. The Presiding Officer shall arrange for the hearing to be reported by a court reporter. The transcript shall be included in the evidentiary record of the proceeding. The Presiding Officer has discretion to order expedited preparation of transcripts as the needs of the case may warrant. Any objections regarding the accuracy of the transcripts shall be brought to the attention of the Presiding Officer. Objections not raised within 30 days after the transcript is made available to the parties shall be deemed to be waived. If the accuracy of witness testimony is in question, the Presiding Officer may require an affidavit of the witness who gave such testimony or may require further inquiry. The cost of the transcript preparation shall be the responsibility of the applicant.

(7) Matters for Official Notice.

(a) Official notice may be taken of such matters as might be judicially noticed

by the courts of the United States or of Massachusetts. The Presiding Officer also may take notice of general, technical, or scientific facts within the Board's specialized knowledge, provided that parties are afforded an opportunity to contest the matters of which official notice is to be taken.

(b) Official notice also may be taken of any facts found in any other Board proceeding. In all circumstances where such notice is taken, the parties shall be afforded an opportunity to contest the matter of which official notice is to be taken.

(c) Any party requesting that any fact be officially noticed must supply every party with a copy of the fact they are requesting to be noticed.

1.07: Post-Hearing

(1) Briefs. The Presiding Officer may set a schedule for the filing of briefs to be submitted by parties and limited participants. The purpose of briefs is to allow parties and limited participants to provide written argument based on the evidence properly entered into the record. Briefs also may be used to address specific briefing questions posed by the Presiding Officer. Briefs may not be used to submit new evidence.

(2) Oral Arguments. Oral argument at the close of a hearing may, upon motion, be allowed at the discretion of the Presiding Officer.

(3) Other Post Hearing Filings. No post-hearing filings other than those allowed for in 980 C.M.R. 1.07(1) may be made without the permission of the Presiding Officer.

1.08: Rendering of Decisions

(1) Form of Decisions. Every tentative and final decision shall be in writing and shall contain a statement of the reasons therefor, including a determination of issues of fact or law necessary to the decision.

(2) Tentative Decisions.

(a) A written tentative decision shall be issued on each matter adjudicated by the Board unless a quorum of the Board has heard the matter or has read the evidence.

(b) A copy of any tentative decision shall be sent to each party and limited participant in the proceeding. The Presiding Officer shall designate a comment period, extending at least seven days from the issuance of the tentative decision, during which parties and limited participants may file written comments regarding the tentative decision.

(3) Final Decisions.

(a) Every final decision of the Board in an adjudicatory proceeding shall be issued following a vote taken at a meeting of the Board conducted pursuant to 980 CMR 2.04.

- (b) If a tentative decision was issued in a matter, the Board shall meet following the comment period to vote on the tentative decision. At such meeting, parties and limited participants may be afforded an opportunity to present oral comments under such conditions as the Board may provide. The Board shall render a final decision after considering the tentative decision, all timely-filed written comments and any oral comments permitted. The Board need not consider written comments received after the close of the comment period.
- (c) If a quorum of the Board has heard a matter, the Board may at its discretion render a final decision without first issuing a tentative decision pursuant to 980 CMR 1.08(2).

(4) Judicial Review. By the terms of M.G.L. c. 25, § 5, as made applicable to the Board by M.G.L. c. 164, § 69P, a party may seek judicial review of a final Board decision.

1.09: Supplemental Procedures

- (1) Re-Opening Hearings. A party may, at any time before the Board renders a final decision, move that the hearing be reopened for the purpose of receiving new evidence. The motion should clearly show good cause for re-opening the hearing, state the nature and relevance of the evidence to be offered and explain why the evidence was unavailable at the time of the hearing.
- (2) Consolidation. The Presiding Officer may order proceedings involving a common question of law or fact to be consolidated for hearing or decision on any or all of the matters at issue in such proceedings.
- (3) Stipulations. At the discretion of the Presiding Officer, the parties may agree upon any fact pertinent to the proceeding, either by filing a written stipulation at any point in the proceeding, or by making an oral stipulation at the hearing. In making findings, the Board need not be bound by any such stipulation.
- (4) Technical Sessions. A technical session is an off-the-record meeting during which experts may provide detailed oral or written information in order to facilitate understanding of complex technical issues. The Presiding Officer may convene a technical session if he deems that such session would facilitate the conduct of the proceeding. The Presiding Officer shall permit representatives of the applicant, parties and limited participants to attend a technical session and shall make a reasonable effort to schedule and notice the time and place of any such session to permit attendance. In the absence of a stipulation to the contrary, statements made by any person during a technical session shall not be referred to or considered as evidence in the proceeding or in any subsequent proceeding. Board members, staff and parties may ask questions during a technical session.
- (5) Subpoenas. The Presiding Officer may issue, vacate or modify subpoenas, in

accordance with the provisions of M.G.L. c. 30A, § 12.

(6) Depositions. The Presiding Officer may at his discretion allow a deposition to be taken upon a showing that the person to be deposed cannot make an appearance at the hearing without substantial hardship and that the testimony being sought is significant, not privileged and not discoverable by an alternative means. If the Presiding Officer allows the taking of a deposition, the Presiding Officer shall specify the rules and procedures that will govern said deposition.

(7) Reconsideration. Any party may file a written motion requesting the Presiding Officer reconsider a ruling as long as the motion is received within five days of the issuance of the ruling.

(8) Offers of Proof. Any offer of proof made in connection with an evidentiary ruling shall consist of a statement, which may be in writing, of the substance of the evidence the party making the offer contends would be adduced by such testimony. If the offer of proof consists of documentary evidence, a copy of the document shall be marked for identification and shall constitute the offer of proof.

(9) Site Visit of a Proposed Facility. The Board and staff may visit the proposed site and any alternative sites in order to facilitate an understanding of the pending matter. A site visit is for informational purposes only and shall not be considered as evidence in the proceeding.

(10) Production or View of Objects. Of his own accord, or upon the motion of a party, the Presiding Officer may order the production or view of any object which relates to the subject matter of a proceeding.

980 CMR 2.00: GENERAL INFORMATION AND CONDUCT OF BOARD BUSINESS

Section

- 2.01: Purpose and Scope
- 2.02: Purpose and Functions of the Board
- 2.03: Board Membership
- 2.04: Meetings; Voting
- 2.05: Delegation of Duties; Board Staff
- 2.06: Action by Consent
- 2.07: Advisory Rulings
- 2.08: Determination of Board Jurisdiction

2.01: Purpose and Scope

- (1) Purpose. 980 CMR 2.00 describes the Energy Facilities Siting Board and establishes rules for the conduct of business.
- (2) Scope. 980 CMR 2.00 is of general applicability and applies, whenever appropriate, to all other sections of 980 CMR.
- (3) Statutory Authority. 980 CMR 2.00 is promulgated pursuant to M.G.L. c. 164, §§ 69H and 69H½.

2.02: Purpose and Functions of the Board

- (1) Purpose of the Board. The Board has been established by M.G.L. c. 164, § 69H, as amended. The Board is responsible for implementing the energy policies contained in its enabling legislation in order to provide a reliable energy supply for Massachusetts with a minimum impact on the environment at the lowest possible cost. The powers and duties of the Board are enumerated in M.G.L. c. 164, § 69H.
- (2) Primary Functions of the Board. Matters reviewed by the Siting Board include petitions for:
 - (a) electric transmission lines
 - (b) electric generating facilities
 - (c) natural gas pipelines
 - (d) natural gas storage facilities
 - (e) oil refining, storage and transportation facilities
 - (f) hydropower generation facilities
 - (g) certificates of environmental impact and public need or public interest.The Board also has the authority to issue civil penalties to any applicant who violates an order of the Board.

- (3) Adjudicatory proceedings. The Board reviews the following matters which shall

be resolved through adjudicatory proceedings in accordance with M.G.L. c. 30A and 980 CMR 1.00: a hearing on a petition to construct a facility held pursuant to M.G.L. c. 164, §§ 69J or 69J½; a hearing on an initial petition filed pursuant to M.G.L. c. 164, § 69K or M.G.L. c. 164, § 69K½; a hearing on an Application for a Certificate filed pursuant to M.G.L. c. 164, § 69L or M.G.L. c. 164, § 69L½; and hearings on appeal under M.G.L. c. 164, § 69H½.

(4) Mailing List. The Board shall maintain a mailing list, shall place upon the list the name and address of any person or group so requesting, and shall give to such persons and groups written notice of activities of the Board for which notice may be appropriate. Failure to give notice to any person or group on the list shall not, in itself, render any act of the Board invalid. The Board may from time to time remove from the list persons or groups no longer expressing interest in receiving notices.

2.03: Board Membership

(1) Description of the Board. The Board comprises the Chairman and two additional Commissioners of the Department of Telecommunications and Energy, the Secretary of Environmental Affairs or his designee, the Director of Economic Development or his designee, the Commissioner of Energy Resources or his designee, and public members appointed by the Governor for terms of three years, two of whom shall be experienced in environmental and consumer matters and one who shall be experienced in matters relating to the development of energy facilities. Where a designee is permitted, the designee shall be named in accordance with 980 CMR 2.03(3).

(2) Chairman. The Chairman of the Department of Telecommunications and Energy shall serve as the Chairman of the Board. In the event of the absence, recusal, or disqualification of the Chairman, the Director of Consumer Affairs and Business Regulations shall appoint an acting chairman from the remaining members of the Board.

(3) Designees. The Secretary of Environmental Affairs, the Director of Economic Development, and the Commissioner of Energy Resources each may nominate a designee to serve in his stead as a member of the Board. Nomination shall be made by a letter addressed to the Chairman and signed by the nominating official. The nominating letter shall state whether the nomination is general or limited. The nominating official may revoke a nomination at any time by letter to the Chairman.

Once nominated, a general designee shall assume all responsibilities of the nominating official pursuant to M.G.L. c. 164, §§ 69G-69S and 980 CMR 2.00. The nominating official may temporarily suspend a general nomination by appearing personally at a Board meeting or proceeding and performing the responsibilities of a Board member.

A limited designee shall assume only those responsibilities set forth in the nominating letter. The nominating official may retain and perform or may further name another designee to perform all other responsibilities.

(4) Compensation. Any public member appointed by the Governor shall receive compensation for his services in the amount allowable by law, and shall be reimbursed by the State for all reasonable expenses actually and necessarily incurred in the performance of his official duties.

(5) Effect of Board Actions. No action taken by the Board pursuant to 980 CMR 2.00 shall bind any member of the Board or any designee for the purposes of any responsibilities of such member or designee not solely related to the operation of the Board.

2.04: Meetings; Voting

(1) Public Meetings. All meetings of the Board shall be open to the public to the extent required by M.G.L. c. 30A, §§ 11A and 11A½. All meetings of the Board shall be open to the press to the extent required by law. The Board may establish specific policies regarding the use of video cameras and other recording devices as necessary.

(2) Notice of Public Meetings. Except in an emergency as provided by 980 CMR 2.04(3), a notice of each meeting of the Board shall be filed with the Secretary of State, and a copy thereof posted in the public office of the Executive Office for Administration and Finance, at least 24 hours, not including Saturdays, Sundays, or legal holidays, prior to the time of such meeting or session.

(3) Emergencies. The Board may conduct a public meeting or executive session without giving notice as required by 980 CMR 2.04(2), if it determines that an emergency exists and that immediate, undelayed action by the Board is imperative.

(4) Executive Sessions. The Board may in the course of a public meeting vote to go into executive session. An executive session may be held only as authorized by M.G.L. c. 30A, §§ 11A, 11A½.

(5) Records of Meetings. The Board shall maintain accurate records of its meetings, setting forth the action taken at each meeting, including executive sessions. Either a full transcript of the meeting or a summary of all matters voted shall be made available with reasonable promptness after each meeting; provided, however, that votes taken in executive session may be withheld from public disclosure for so long as their publication would defeat the lawful purposes of the executive session, but no longer.

(6) Quorum; Voting.

(a) A quorum consisting of four Board members shall be required to conduct any meeting of the Board held for the purpose of considering and voting upon an adjudicatory decision, or a proposal to adopt, amend or rescind regulations, or any other matter requiring a vote of the Board. A majority of members in attendance at a meeting shall be sufficient to dispose of any question properly before the Board during the meeting at which the question is taken up.

- (b) Each Board member or designee in attendance at a meeting shall be entitled to vote on any matter which is properly before the Siting Board at that meeting.

2.05: Delegation of Duties; Board Staff

- (1) Delegation of Duties. Pursuant to M.G.L. c. 25, § 12N, the Board may delegate specific responsibilities other than responsibility for the final decision in any matter listed in 980 CMR 2.04(6)(a) to the Chairman or to the Board staff. The facility siting division of the Department of Telecommunications and Energy shall serve as staff to the Board.
- (2) Director. The Chairman shall appoint a Director to direct the work of the facility siting division of the Department of Telecommunications and Energy and to conduct the day-to-day business of the Board. The Board or the Chairman may delegate to the Director specific responsibilities other than the responsibility for the final decision in any matter listed in 980 CMR 2.04(6)(a).
- (3) Staff. The Chairman may appoint such other persons to the facility siting division staff as may be required to assist the Board in performing its functions. Staff functions shall include, among others: conducting adjudicatory, rulemaking, or factfinding hearings for the purpose of creating a record; rendering tentative decisions; and intervening in the proceedings of other agencies. The Chairman may authorize the Director to appoint a Presiding Officer for an adjudicatory or other proceeding conducted under 980 CMR.

2.06: Action by Consent

- (1) Scope. Any decision of the Board, except the final decision in any adjudicatory proceeding, may be made by action by consent pursuant to the procedures of 980 CMR 2.06. These procedures shall be used only when the Board, in its discretion, determines that expeditious action is necessary.
- (2) Procedure. The Chairman shall prepare a document entitled "Action by Consent" which sets forth the decision proposed to be taken by the Board. The document or copies thereof shall be presented to each member of the Board for review. A member may indicate consent by affixing his signature to the document or copy. The proposed action by consent shall be deemed to have been taken when the document and copies bearing the signatures of all Board members are returned to the Chairman. A proposed action by consent shall become void if it does not receive all required signatures before the beginning of any meeting of the Board held pursuant to 980 CMR 2.04.
- (3) Notice.
- (a) Except in an emergency, a notice of each proposed "Action by Consent" shall be filed with the Secretary of State, and a copy thereof posted in the public office of the Executive Office for Administration and Finance at least 24 hours, not including Saturdays, Sundays and legal holidays, prior to the circulation of

such proposed decision to Board members for signature.

(b) The notice shall state:

1. that the notice is for an action proposed to be taken by unanimous written consent of the Board rather than by meeting;
2. that the proposed action by consent shall become void if not signed by all Board members prior to the next meeting of the Board; and
3. the full and complete text of the proposed action by consent, or, if the proposed action by consent consists of more than 200 words, a summary of its terms and a statement that the full text may be obtained at the offices of the Board.

(c) For the purpose of 980 CMR 2.06, "emergency" shall mean a situation in which immediate action without delay is deemed by the Board to be imperative.

(4) Records of Actions by Consent. The Board shall maintain accurate records of all proposed actions by consent. A record of the Board's action on a proposed action by consent shall be made available with reasonable promptness after its approval by all Board members or after it becomes void.

2.07: Advisory Rulings

Any person may at any time request, via written petition, an advisory ruling with respect to the applicability of any statute or regulation enforced or administered by the Board to any person, property or factual situation. A petition shall be signed by the applicant, shall contain the applicant's address, and shall state clearly and concisely the substance or nature of the request. The petition shall be accompanied by any supporting data, views or arguments. Upon receipt of the petition, the Board shall consider it and shall, within 60 days after the receipt of the request, notify the applicant either that the request is denied or that the Board will render an advisory ruling. In order to assist the Board in considering the request, the Director may require additional information as he deems appropriate. At any time before issuance of an advisory ruling, the Board may rescind a decision to render an advisory ruling. If the advisory ruling is rendered, a copy of the ruling shall be sent to the applicant. A complete record of every advisory ruling shall be maintained by the Board. No advisory ruling shall bind or otherwise estop the Board in any pending or future matter. There shall be no obligation to render an advisory ruling.

2.08: Determination of Board Jurisdiction

(1) Any applicant may at any time petition the Board for a determination of whether a proposed electric generating unit, electric transmission line, ancillary structure, natural gas pipeline, natural gas storage facility, or oil pipeline, refinery, storage facility or transshipment facility is within the definition of facility, is exempt from Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR 6.00.

(2) The petition shall state the name of the applicant and describe the nature of the facility for which a determination is being sought. The petition shall be accompanied by such briefs, information, and written testimony as the applicant may deem appropriate to

support the request. For administrative efficiency, the petition shall contain a draft notice for publication. At any time after the petition is filed, the Board may require additional information as it deems appropriate.

(3) Should the Board decide to adjudicate the petition, its action shall be taken via an adjudicatory proceeding subject to the procedures set forth in M.G.L.c. 30A and 980 CMR 1.00. Evidentiary hearings may be held at the discretion of the Presiding Officer.

(4) Notice shall be given by publication in at least one newspaper of general circulation and as otherwise ordered by the Presiding Officer. The notice shall contain a deadline for the filing of petitions to intervene as a party or participate as a limited participant. In no event shall this deadline be less than 14 days after the initial date of publication.

(5) The Board shall, within four months of the date of the filing of the petition, issue a decision on the petition stating the extent to which a proposed facility is within Board jurisdiction, is exempt from Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR 6.00. The issues adjudicated in proceedings under 980 CMR 2.08 shall be only those issues necessary for the Board to make a determination regarding jurisdiction.

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).

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Sithe Edgar Development LLC
Notice of Probable Violations

July 31, 2002

ACTION BY CONSENT

This "Action by Consent" is made pursuant to authority granted the Chairman of the Energy Facilities Siting Board ("Siting Board") under 980 CMR 2.06. Section 2.06 provides the Siting Board with the authority to render a decision "when it would be a hardship to the public welfare to defer the decision until the next scheduled meeting of the [Siting Board]." 980 CMR 2.06(1).

On February 10, 2000, the Energy Facilities Siting Board ("Siting Board") conditionally approved the petition of Sithe Edgar Development LLC ("Sithe" or "Company") to construct a natural gas-fired combined-cycle, electric generating facility with a net nominal electrical output of 775 megawatts in the Town of Weymouth, Massachusetts. Sithe Edgar Development LLC, 10 DOMSB 1 (2000) ("Final Decision"). On November 30, 2001, the Siting Board conditionally approved a Notice of Project Change filed by the Company. Sithe Edgar Development LLC, EFSB 98-7A (2001) ("Project Change Decision").

In accordance with G. L. c. 164, § 69H(4), the Siting Board is authorized to levy a civil penalty when an applicant has violated any order of the Siting Board. The applicant is subject to a civil penalty not to exceed \$1000 per day per violation, with a maximum civil penalty of \$200,000 for any related series of violations.

Pursuant to Condition P of the Project Change Decision, the Company is required to submit monthly noise complaint reports for the duration of nighttime construction. See Project Change Decision at 29. Based on the Siting Board's review of the Company's monthly noise reports for the months of December 2001 through June 2002, we are issuing this notice of probable violations of the following orders or conditions in EFSB 98-7A:

1. Construction work performed during times prohibited by the Siting Board

In accordance with the Project Change Decision, the Siting Board approved with conditions a change in the construction schedules for the Sithe Edgar project, including a night shift that would extend from 4:30 p.m. to 2:00 a.m., Monday through Saturday. Project Change Decision at 12-16; see also Exh. PC-Sithe-6, EFSB 98-7A.

A. May 19, 2002

On Sunday, May 19, 2002 at 2:30 a.m., Paula Pineo, a resident of 7 Vanness Road, Weymouth, Massachusetts, reported construction noise. The Company indicated that the noise

resulted from unexpected work on the boiler (May 2002 Noise Complaint Report).¹ The Siting Board finds that this is a probable violation of the Project Change Decision in that the Company worked past the approved end-of-shift at 2:00 a.m. and hereby fines the Company \$1000 for said violation.

B. June 30, 2002

On Sunday, June 30, 2002 at 12:39 p.m., Eileen Burwell, a resident of 50 Monatiquot Street, Weymouth, Massachusetts, reported sounds of machinery emanating from the Edgar Station site. The Company indicated that the noise resulted from machinery movement necessary for performing X-raying of welds and other operation/commissioning activities, but did not specify these activities or the number of workers involved (June 2002 Noise Complaint Report at 3). The Siting Board finds that this work constitutes a probable violation of the Project Change Decision in that the Project Change Decision does not provide for a daytime construction shift on Sundays and hereby fines the Company \$1000 for said violation.

2. Use of outdoor crane or other machinery after 11:00 p.m.

In accordance with Condition N of the Project Change Decision, the Siting Board directed Sithe to limit the use of outdoor cranes to occasional occurrences during the night shift, and prior to 11:00 p.m., when possible. When this is not possible, the Siting Board directed the Company to provide advance notice to all affected neighbors and to the City of Weymouth. Project Change Decision at 29.

A. May 30, 2002

On May 30, 2002, at 12:27 a.m., Paul Burwell, a resident of 50 Monatiquot Street, Weymouth, Massachusetts, reported noise from a crane. According to the Company, the night shift construction manager stopped any crane movement that "might have been taking place." (May 2002 Noise Complaint Report at 3). The Company made no claim that it had provided the affected neighbors notice of crane movement after 11:00 p.m. (May 2002 Noise Complaint Report at 3). The Siting Board finds that this is a probable violation of Condition N of the Project Change Decision, which limits the use of outdoor cranes as stated above, and hereby fines the Company \$1000 for said violation.

B. June 20, 2002

On June 20, 2002 at 11:25 p.m., Eileen Burwell, a resident of 50 Monatiquot Street, Weymouth, Massachusetts, reported crane use and general banging. The Company indicated that

¹ On the same day, Richard Pineo of the same address, sent an electronic mail communication to the City of Weymouth and to Marcia MacClary, an employee of Sithe, reporting banging noises at 2:30 a.m. on May 19, 2002 (June 7, 2002 Letter from Sithe at Appendix B, p. 9).

one crane was being moved in order to reposition it for the following day. The Company made no claim that it had provided the affected neighbors notice of crane movement after 11:00 p.m. (see June 2002 Noise Complaint Report at 3). The Siting Board finds that this is a probable violation of Condition N of the Project Change Decision, which limits the use of outdoor cranes as stated above, and hereby fines the Company \$1000 for said violation.

C. June 21, 2002

On June 21, 2002 at 11:25 p.m., Paula Pineo, a resident of 7 Vanness Road, Weymouth, Massachusetts, reported the sounds of cranes. The Company indicated that one crane was being repositioned for the following day (June 2002 Noise Complaint Report at 3). The Company made no claim that it had provided the affected neighbors notice of crane movement after 11:00 p.m. (see June 2002 Noise Complaint Report at 3). The Siting Board finds that this is a probable violation of Condition N of the Project Change Decision, which limits the use of outdoor cranes as stated above, and hereby fines the Company \$1000 for said violation.

3. Procedure

Sithe has the right to appear with counsel before Siting Board staff in an informal conference on any or all of the probable violations at the offices of the Siting Board on Wednesday, August 7, 2002. At the informal conference, the hearing officer will make available to Sithe the evidence on which the Siting Board based its issuance of this Notice of Probable Violations, and Sithe may present evidence disputing the probable violations.

If Sithe chooses to dispute the probable violations set forth in this notice but does not choose to attend the informal conference, it should send a written response to this notice to the Siting Board on or before August 7, 2002. The reply must include a complete statement of all relevant facts, and a full description of the reasons the Company disputes the probable violations enumerated in this notice.

If Sithe chooses not to dispute the probable violations, it should sign and return the attached Consent Order. The Consent Order must be accompanied by a check in the amount of \$5000 made payable to the Commonwealth of Massachusetts, and mailed to the Energy Facilities Siting Board, One South Station, Boston, MA 02110. The Siting Board hereby authorizes Diedre Matthews, Director of the Siting Board, to sign on behalf of the Siting Board any Consent Order or other agreement with the Company regarding this Notice of Probable Violations.

If Sithe does not respond to this notice as required by August 7, 2002, and does not attend the informal conference, the Company will be deemed to have admitted the allegations and will be subject to all penalties set forth herein.

Sithe Edgar Development LLC
Notice of Probable Violations

4

This Action by Consent may be executed in any number of counterparts, each of which shall be an original, but all of which constitute one agreement, and shall be dated and become effective when the copies bearing all of the signatures of the Siting Board members are received by the Chairman. 980 CMR 2.06(2).

Signed:



Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Joseph Donovan
For Elizabeth Ames, Director
Department of Economic
Development

David L. O'Connor
Commissioner
Division of Energy Resources

Sithe Edgar Development LLC
Notice of Probable Violations


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Department of Telecommunications and Energy

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for Robert Durand
Secretary of Environmental Affairs


W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Joseph Donovan
For Elizabeth Ames, Director
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Development

David L. O'Connor
Commissioner
Division of Energy Resources

Sithe Edgar Development LLC
Notice of Probable Violations

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Energy Facilities Siting Board/
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Sonia Hamel
for Robert Durand
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Commissioner
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Deirdre K. Manning
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Joseph Donovan
For Elizabeth Ames, Director
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David L. O'Connor
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Division of Energy Resources

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Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia Hamel
Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

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Joseph Donovan
For Elizabeth Ames, Director
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David L. O'Connor
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Division of Energy Resources

Sithe Edgar Development LLC
Notice of Probable Violations

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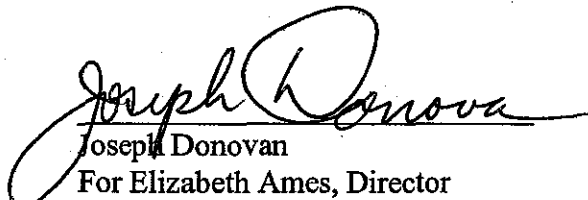
Signed:

Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

W. Robert Keating
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Joseph Donovan
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Division of Energy Resources

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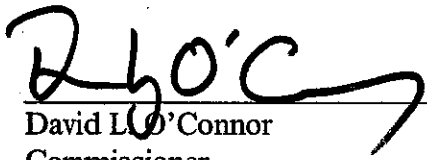
Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

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Department of Telecommunications and Energy

Deirdre K. Manning
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Department of Telecommunications and Energy

Joseph Donovan
For Elizabeth Ames, Director
Department of Economic
Development



David L. O'Connor
Commissioner
Division of Energy Resources

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Sithe Edgar Development LLC)
Notice of Probable Violations)

September 5, 2002

ACTION BY CONSENT

This "Action by Consent" is made pursuant to authority granted the Chairman of the Energy Facilities Siting Board ("Siting Board") under 980 CMR 2.06. Section 2.06 provides the Siting Board with the authority to render a decision "when it would be a hardship to the public welfare to defer the decision until the next scheduled meeting of the [Siting Board]." 980 CMR 2.06(1).

On February 10, 2000, the Energy Facilities Siting Board ("Siting Board") conditionally approved the petition of Sithe Edgar Development LLC ("Sithe" or "Company") to construct a natural gas-fired combined-cycle, electric generating facility with a net nominal electrical output of 775 megawatts in the Town of Weymouth, Massachusetts. Sithe Edgar Development LLC, 10 DOMSB 1 (2000) ("Final Decision"). On November 30, 2001, the Siting Board conditionally approved a Notice of Project Change filed by the Company. Sithe Edgar Development LLC, EFSB 98-7A (2001) ("Project Change Decision").

In accordance with G. L. c. 164, § 69H(4), the Siting Board is authorized to levy a civil penalty when an applicant has violated any order of the Siting Board. The applicant is subject to a civil penalty not to exceed \$1000 per day per violation, with a maximum civil penalty of \$200,000 for any related series of violations.

Pursuant to Condition P of the Project Change Decision, the Company is required to submit monthly noise complaint reports for the duration of nighttime construction. See Project Change Decision at 29. Based on the Siting Board's review of the Company's monthly noise report for the month of July 2002, we are issuing this notice of probable violations of the following orders or conditions in EFSB 98-7A:

1. Use of back-up beepers during the night shift

According to the noise mitigation plan approved by the Siting Board, the Company agreed to eliminate backup-beepers in favor of flaggers during the night shift. Project Change Decision at 13.

On July 23, 2002 at 8:45 p.m., Eileen Burwell, a resident of 50 Monatiquot Street, Weymouth, Massachusetts, reported sounds of a backup beeper at the Edgar Station site. The

Company indicated that the Nighttime Noise Monitor located a flatbed truck with its beeper engaged. According to the Company, the driver of the truck was a teamster who was unaware of the nighttime noise shift restrictions (July 2002 Noise Complaint Report at 4). The Siting Board finds that this is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision, and hereby fines the Company \$1000 for said violation.

2. Use of outdoor crane or other noisy equipment after 11:00 p.m.

In accordance with Condition N of the Project Change Decision, the Siting Board directed Sithe to limit the use of outdoor cranes or other particularly noisy equipment to occasional occurrences during the night shift, and prior to 11:00 p.m., when possible. When this is not possible, the Siting Board directed the Company to provide advance notice to all affected neighbors and to the Town of Weymouth. Project Change Decision at 29.

On July 25, 2002, Frank Burke, a resident of 93 Bluff Road, Weymouth, Massachusetts, reported noise from a crane on the project site at 11:35 p.m. on July 24, 2002. The Company stated that the crane has to be moved at times at the end of the shift in order to comply with the fire chief's directives regarding emergency egress. The Company made no claim that it had provided the affected neighbors notice of crane movement after 11:00 p.m. and indicated it reminded the contractor of the requirement to provide such notification (July 2002 Noise Complaint Report at 4). The Siting Board finds that this is a probable violation of Condition N of the Project Change Decision, which limits the use of outdoor cranes as stated above, and hereby fines the Company \$1000 for said violation.

3. Procedure

Sithe has the right to appear with counsel before Siting Board staff in an informal conference on any or all of the probable violations at the offices of the Siting Board on September (), 2002. At the informal conference, the hearing officer will make available to Sithe the evidence on which the Siting Board based its issuance of this Notice of Probable Violations, and Sithe may present evidence disputing the probable violations.

If Sithe chooses to dispute the probable violations set forth in this notice but does not choose to attend the informal conference, it should send a written response to this notice to the Siting Board on or before September (), 2002. The reply must include a complete statement of all relevant facts, and a full description of the reasons the Company disputes the probable violations enumerated in this notice.

If Sithe chooses not to dispute the probable violations, it should sign and return the attached Consent Order. The Consent Order must be accompanied by a check in the amount of \$2000 made payable to the Commonwealth of Massachusetts, and mailed to the Energy Facilities Siting Board, One South Station, Boston, MA 02110. The Siting Board hereby authorizes Diedre

Sithe Edgar Development LLC
Notice of Probable Violations

3

Matthews, Director of the Siting Board, to sign on behalf of the Siting Board any Consent Order or other agreement with the Company regarding this Notice of Probable Violations.

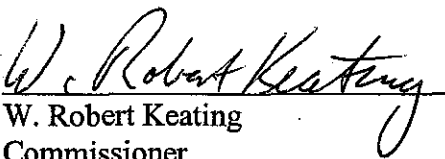
If Sithe does not respond to this notice as required by September (), 2002, and does not attend the informal conference, the Company will be deemed to have admitted the allegations and will be subject to all penalties set forth herein.

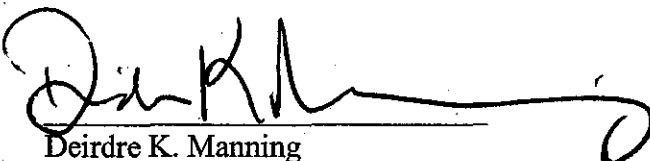
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Signed:


Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs


W. Robert Keating
Commissioner
Department of Telecommunications and Energy


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Sithe Edgar Development LLC
Notice of Probable Violations

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Signed:

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Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Sonia W. Hamel
Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

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Joseph Donovan
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David L. O'Connor
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Sithe Edgar Development LLC
Notice of Probable Violations

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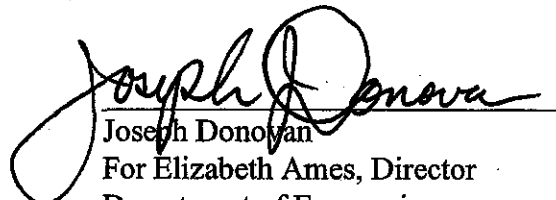
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David L. O'Connor
Commissioner
Division of Energy Resources


Joseph J. Donovan
For Elizabeth Ames, Director
Department of Economic
Development

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Proposed Rulemaking to Amend Provisions Regarding the
Regulations Governing the Conduct of Energy Facilities
Siting Board Adjudicatory Proceedings; the Regulations
Governing the General Information and Conduct of Siting Board
Business; and Proposed Rulemaking to Repeal Existing Siting
Board Rules for Adopting Administrative Regulations

EFSB 02-RM-1

FINAL DECISION
ADOPTION OF FINAL REGULATIONS AT 980 CMR § 1.00,
AND AT 980 CMR § 2.00; REPEAL OF 980 CMR § 3.00

Sheila R. McIntyre
Hearing Officer
September 13, 2002

On the Decision:
Diedre Shupp Matthews
Jolette Westbrook

SERVICE LIST OF COMMENTERS

EFSB 02-RM-1

David S. Rosenzweig, Esq.
John K. Habib, Esq.
Keegan, Werlin & Pabian LLP
21 Custom House Street
Boston, Massachusetts 02110-3525
FOR: NSTAR Electric and Gas Corporation
Filing Written Comments

Michael D. Vhay, Esq.
Hill & Barlow
One International Place
Boston, Massachusetts 02110-2607
PRO SE
Filing Written Comments

Patricia J. Crowe, Esq.
KeySpan Energy Delivery New England
One Beacon Street, 34th Floor
Boston, Massachusetts 02108
FOR: KeySpan Energy Delivery New England
Filing Written Comments

John K. Habib, Esq.
Keegan, Werlin & Pabian LLP
21 Custom House Street
Boston, Massachusetts 02110-3525
FOR: NSTAR Electric and Gas Corporation
Oral Commenter

Paige Graening, Esq.
National Grid USA Service Company
25 Research Drive
Westborough, Massachusetts 01582
FOR: National Grid USA Service Company
Oral Commenter

I. INTRODUCTION

The Energy Facilities Siting Board ("Siting Board") hereby adopts final regulations at 980 CMR § 1.00, "Rules for the Conduct of Adjudicatory Proceedings" and at 980 CMR § 2.00, "General Information; Conduct of Council Business." The Siting Board also hereby repeals in its entirety 980 CMR § 3.00, "Rules for Adopting Administrative Regulations." 980 CMR § 1.00 and 980 CMR § 2.00 are amended and reorganized in order to reflect the statutory changes discussed below and to comply with directives of Executive Order 384 calling for regulatory clarity. 980 CMR § 3.00 is being repealed because it contains language that is duplicative of the requirements of G.L. c. 30A and also contains language that limits how the Siting Board may organize its regulations.

II. BACKGROUND

In 1992, the Siting Board was established to replace the Energy Facilities Siting Council. St. 1992, c. 141 ("merger legislation"). The merger legislation placed the Siting Board within the Department of Telecommunications and Energy ("Department"),¹ but not under the supervision or control of the Department, and assigned certain of its prior duties to the Department. The merger legislation also changed the composition of the Siting Board² and gave the Siting Board authority to review certain matters referred to it by the Chairman of the Department. Further, the merger legislation established a facility siting division within the Department to administer, implement, and enforce the Siting Board's statutory obligations.

Two bills passed in the late 1990s further altered the role and structure of the Siting Board. The Electric Restructuring Act of 1997 ("Restructuring Act")³ altered the scope of the

¹ The Department of Telecommunications and Energy was formerly known as the Department of Public Utilities.

² As a result of the merger legislation, the Siting Board members consisted of the three Commissioners of the Department, the Secretary of Environmental Affairs, the Secretary of Economic Affairs and two public members appointed by the Governor.

³ An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced

(continued...)

Siting Board's review of generating facility proposals and revised the Siting Board's fundamental mandate, directing it to provide a "reliable," rather than a "necessary," energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. In 1999, further legislation was passed that increased the Siting Board to nine members, including the Chairman and two additional Commissioners of the Department, the Secretary of Environmental Affairs, the Director of Economic Development, the Commissioner of Energy Resources and three public members appointed by the Governor. St. 1999, c. 127, § 152.

In February 1996, Governor Weld issued Executive Order 384 directing each state agency to ensure that its regulations are clear, concise and drawn in plain and readily understandable language. The final regulations meet the directives of Executive Order 384. Also, the final regulations are consistent with the requirements of the Administrative Procedures Act, G.L. c. 30A.

III. PROCEDURAL HISTORY

On April 8, 2002, the Siting Board opened a rulemaking to revise 980 CMR § 1.00, "Rules for the Conduct of Adjudicatory Proceedings" and 980 CMR § 2.00, "General Information; Conduct of Council Business," and to repeal in its entirety 980 CMR § 3.00, "Rules for Adopting Administrative Regulations." On April 21, 2002, after notice duly issued, the Siting Board conducted a public hearing concerning its proposed revision of 980 CMR § 1.00 and 980 CMR § 2.00 and its proposed repeal of 980 CMR § 3.00. Written comments regarding the proposed rulemaking were accepted through June 5, 2002. Comments were received from National Grid ("Nat'l Grid"), NSTAR Electric and Gas Corporation ("NSTAR"), Michael Vhay, Esq., and KeySpan Energy Delivery New England ("KeySpan").

After considering these comments and upon its own recommendations, the Siting Board has made three major changes and several minor changes to its proposed regulations. The minor changes simplify or clarify the regulations and are not substantive. The following section discusses the three major revisions made to the proposed regulations.

³ (...continued)
Consumer Protection Therein. St. 1997, c. 164.

IV. MAJOR REVISIONS TO THE PROPOSED REGULATIONS

A. 980 CMR § 1.05(1)(g): Representation

As originally proposed, section 1.05(1)(g) required that parties, except an individual appearing *pro se*, should be represented by counsel in good standing. The Siting Board specifically requested comments on representation when it opened this rulemaking (Proposed Rulemaking, EFSB 02-RM-1, Order on Proposed Rulemaking, April 8, 2002, at 4). Subsequently, the Siting Board received comments supporting the representation section of the proposed regulation (Tr. at 7, Nat'l Grid; NSTAR Comments at 3-4). One commenter stated that, given the complexity of Siting Board proceedings and the statutory deadlines within which the Siting Board must render decisions, administrative efficiency would be promoted by requiring all parties to be represented by counsel (NSTAR Comments at 3-4). Another commenter suggested that requiring all parties to be represented by counsel would meet the applicant's interest in expediting the process (Tr. at 7-8, Nat'l Grid). The commenter also stated that it did not want to deny anyone the right to participate, at least on a limited basis (*id.*).

One commenter directly addressed the Siting Board's question about whether there should be any allowances for groups or entities to participate as a party in a proceeding without representation. The commenter argued that groups and municipal agencies should not be exempted from the representation requirement (NSTAR Comments at 4). The commenter contended that municipal agencies uniformly retain counsel and therefore the burden to retain counsel for a Siting Board proceeding would be minimal (*id.*). With respect to grass-roots groups, the commenter stated that such groups generally have the ability to fund legal costs through their members (*id.*). However, the commenter stated that "the companies do not oppose *pro se* appearances by individuals representing family members that, for any reason, have difficulty appearing before the Siting Board on their own behalf" (*id.*).

After reviewing the comments, the Siting Board remains convinced that parties other than individuals acting *pro se* should be represented by an attorney in almost all circumstances, due to the inherent legal complexity of Siting Board proceedings. However, the Siting Board recognizes that there may be a limited number of circumstances in which it would be appropriate to waive this requirement and allow a party to be represented by a non-attorney. In such cases, it

would be critical to ensure that the representative understood and was prepared to fulfill his obligations both to the Siting Board and to the party he has agreed to represent. Consequently, in the final regulation, the Siting Board has revised section 1.05(1)(g) to allow a party to seek a waiver allowing it to appoint a non-attorney representative. Section 1.05(1)(g) now reads:

(g) Except for an individual appearing *pro se*, all parties to a proceeding shall be represented by an attorney in good standing before the Massachusetts bar, unless the Presiding Officer grants a waiver of this requirement for good cause shown. A request for a waiver shall include: (1) an affidavit stating the good cause and naming a duly authorized representative; and (2) an affidavit by the duly authorized representative accepting the appointment and certifying that he will abide by the procedural rules set forth in 980 CMR and the Presiding Officer's directives.

B. 980 CMR § 2.08: Determination of Board Jurisdiction

As originally proposed, section 2.08 allowed the Siting Board to hold an adjudicatory proceeding to render a binding determination of jurisdiction. The Siting Board specifically requested comments on determination of jurisdiction when it opened this rulemaking (Proposed Rulemaking, EFSB 02-RM-1, Order on Proposed Rulemaking, April 8, 2002, at 5).

In response, the Siting Board received comments supporting the proposed determination of jurisdiction proceeding as a useful tool for the applicant (Tr. at 8-9, Nat'l Grid; NSTAR Comments at 5-6; KeySpan Comments at 3). One commenter stated that the conclusive determination of jurisdiction would be beneficial but suggested that a full adjudicatory proceeding was not required to resolve matters of jurisdiction and further suggested a time frame shorter than the allowed four months (KeySpan Comments at 3).

Upon further reflection, the Siting Board concludes that a determination of jurisdiction speaks only to the legal authority of the Siting Board to adjudicate a matter, and does not require the resolution of disputed factual issues. Consequently, an adjudicatory process is not needed to elicit pertinent information; all the information needed to allow the Board to make a determination could be made available to the Board through written submissions of legal

argument and information.⁴ Therefore, in the final rule, the determination of jurisdiction takes place in a non-adjudicatory proceeding. The final version of section 2.08 reads:

- (1) An applicant may at any time petition the Board for a determination of whether construction, expansion, or other modification of a proposed electric generating unit, electric transmission line, ancillary structure, natural gas pipeline, natural gas storage facility, oil pipeline, oil refinery, oil storage facility, oil transshipment facility, or other facility is subject to Board jurisdiction, is not subject to Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR 6.00.
- (2) The petition shall state the name of the applicant and describe the nature of the facility for which a determination is being sought. The petition shall be accompanied by a draft legal notice for publication and such written legal argument or other information as the applicant may consider appropriate. The Board may require that the applicant provide additional information after the petition is filed.
- (3) The applicant shall give notice of the petition by publishing the legal notice approved by the Presiding Officer in at least one newspaper of general circulation and as otherwise ordered by the Presiding Officer. The notice shall specify that any person may submit written legal argument or other information regarding the petition. The notice shall specify the deadline for such submissions, which shall be not less than 14 days after the initial date of publication.
- (4) Within four months of the petition filing date, the Board shall issue a final decision on jurisdiction. The final decision shall address only those issues necessary to decide the extent to which a proposed facility is within Board jurisdiction, is not subject to Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR 6.00. The Board's decision shall be final.

⁴ A determination of jurisdiction does not take the place of any adjudicatory proceeding required for a jurisdictional facility. If the Siting Board determines that it does in fact have jurisdiction over a proposed facility, a petition to construct that facility would be adjudicated in the usual manner.

The Siting Board notes that the final rule, like the proposed rule, requires the Siting Board to issue a final decision on jurisdiction within four months. While the Siting Board may well be able to resolve certain jurisdictional issues in significantly less than four months, we believe that the four months could be needed to resolve a particularly complex and controversial jurisdictional issue.

C. 980 CMR § 2.05(2): Appointment of Director

As originally proposed, section 2.05(2) did not accurately reflect the provisions of G.L. c. 25, § 12N, which governs the appointment of the Director of the Siting Board. Section 2.05(2) has been revised to be consistent with the statute, and now reads as follows:

(2) Director. The Director shall be appointed pursuant to G.L. c. 25, § 12N to direct the work of the facility siting division of the Department of Telecommunications and Energy and to conduct the day-to-day business of the Board. The Board or the Chairman may delegate to the Director specific responsibilities other than the responsibility for the final decision in any matter listed in 980 CMR 2.04(6)(a).


V. ORDER

Accordingly, after due notice, hearing and consideration it is hereby:

ORDERED: That, in accordance with G.L. c. 164, § 69H and G.L. c 30A, the amendments to 980 CMR § 1.00 et seq., the amendments to 980 CMR § 2.00 et seq., and the repeal of 980 CMR § 3.00 et seq., are hereby ADOPTED; and it is

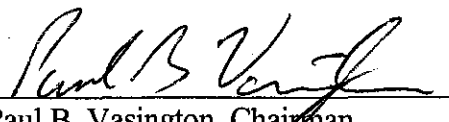
FURTHER ORDERED: That the Director of the Siting Board attest to a true copy of this Order amending 980 CMR § 1.00 et seq. and 980 CMR § 2.00 et seq., and the repeal of 980 CMR § 3.00 et seq., and transmit said attested true copy to the Office of the Secretary of State for the Commonwealth for publication in the Massachusetts Register; and it is

FURTHER ORDERED: That the rules and regulations of the Energy Facilities Siting Board are amended and repealed as set forth in the final regulations attached to this Decision, and shall take effect upon publication in the Massachusetts Register.


Sheila Renner McIntyre
Hearing Officer

Dated this 12th day of September, 2002

APPROVED by the Energy Facilities Siting Board at its meeting of September 12, 2002, by the members and designees present and voting: Paul B. Vasington (Chairman, DTE/EFSB); W. Robert Keating (Commissioner, DTE); David L. O'Connor, Commissioner, Division of Energy Resources; and Sonia Hamel (for Robert Durand, Secretary of Environmental Affairs).


Paul B. Vasington, Chairman
Energy Facilities Siting Board

Dated this 12th day of September, 2002.

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).

980 CMR 1.00: RULES FOR THE CONDUCT OF ADJUDICATORY PROCEEDINGS

Section

- 1.01: Scope and Construction of Rules
- 1.02: Rules of General Applicability
- 1.03: General Procedures
- 1.04: Institution of an Adjudicatory Proceeding
- 1.05: Intervention
- 1.06: Conduct of Adjudication
- 1.07: Post-Hearing
- 1.08: Rendering of Decisions
- 1.09: Supplemental Procedures

1.01: Scope and Construction of Rules

(1) Scope. 980 CMR 1.00 shall govern the conduct of adjudicatory proceedings before the Energy Facilities Siting Board.

(2) Application of 980 CMR 1.00. 980 CMR 1.00 shall apply to all adjudications conducted by the Board except when a specific provision of 980 CMR indicates otherwise.

(3) Definitions. For the purpose of 980 CMR, the following definitions shall apply unless the context or subject matter requires a different interpretation:

Applicant means a person who submits to the Board an application or petition seeking determination of a matter within the Board's jurisdiction, or who has a matter referred to the Board by the Chairman of the Department of Telecommunications and Energy pursuant to M.G.L. c. 164, § 69H.

Board means the Energy Facilities Siting Board.

Board Member means any of the nine persons set forth in 980 CMR 2.03(1) or any person named to serve as a designee under the terms of 980 CMR 2.03(3).

Chairman means the Chairman of the Energy Facilities Siting Board.

Director means the person appointed by the Chairman to direct the work of the siting division and to conduct the day-to-day business of the Board as well as to perform any other duty delegated by the Chairman.

Hand Delivery means delivery by methods other than pre-paid U.S. mail (e.g., Federal Express or paid courier service). Hand delivery shall not include delivery by electronic mediums such as facsimile or e-mail unless authorized by the Presiding Officer.

Facility means any "facility" described in M.G.L. c. 164, §69 G including:

- (a) any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities;
- (b) a new electric transmission line having a design rating of 69 kilovolts or more and which is one mile or more in length on a new transmission corridor;
- (c) a new electric transmission line having a design rating of 115 kilovolts or more which is ten miles or more in length on an existing transmission corridor except reconductoring or rebuilding of transmission lines at the same voltage;
- (d) an ancillary structure which is an integrated part of the operation of any transmission line which is a facility;
- (e) a unit, including associated buildings and structures, designed for, or capable of, the manufacture or storage of gas, except such units below a minimum threshold size as established by regulation;
- (f) a new pipeline for the transmission of gas having a normal operating pressure in excess of one hundred pounds per square inch gauge which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity; and
- (g) any new unit, including associated buildings and structures, designed for, or capable of, the refining, the storage of more than 500,000 barrels or the transshipment of oil or refined oil products and any new pipeline for the transportation of oil or refined oil products which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity.

Generating Facility means any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.

Limited Participant means any person allowed to participate in an adjudicatory proceeding pursuant to M.G.L. c. 30A, § 10, and 980 CMR 1.05(2). A limited participant is not a party.

Party means an applicant, any person allowed to intervene in an adjudicatory proceeding pursuant to M.G.L. c. 30A, § 1(3), and 980 CMR 1.05(1), or any person who intervenes in an adjudicatory proceeding by right.

Person means a natural person, partnership, corporation, association, society, authority, agency or department of the State, or any body politic or political subdivision of the State including municipal corporations.

1.02: Rules of General Applicability

- (1) Waiver of Rules. Where good cause appears, not contrary to statute, the Board and any Presiding Officer may permit deviation from any rules contained in 980 CMR.
- (2) Severability. If any provision of 980 CMR is held to be invalid, such invalidity shall not affect the provisions or the applications thereof not specifically held invalid.

1.03: General Procedures

- (1) Docket. A numbered docket shall be maintained for all adjudicatory proceedings and shall contain all documents filed in a proceeding and other relevant material.
- (2) Filing of Documents with the Board.
 - (a) Filing.
 - (i) Any document to be filed with the Board pursuant to 980 CMR 1.00 shall be hand delivered, or mailed first class, to the Energy Facilities Siting Board or to the Presiding Officer at the Energy Facilities Siting Board. The Presiding Officer may allow documents to be filed by other means.
 - (ii) A document shall be deemed to be filed on the date stamped "Received" by the Board or its agent during usual business hours. Documents received after usual business hours shall be deemed filed on the following business day.
 - (b) Filing Format.
 - (i) Printing Requirements. All documents filed for possible inclusion in the record shall be clear and legible and shall be presented in accordance with the standards established by the Presiding Officer.
 - (ii) Form. Every document filed shall contain a title which indicates the nature of the proceeding, the name of the applicant, and the docket number if available. The Director or Presiding Officer shall determine the number of copies to be filed. The Board may provide forms to be used for specific purposes by any person or party; in such cases, use of forms provided shall be mandatory.
- (3) Electronic Filing. The Presiding Officer may require documents to be filed electronically.
- (4) Service to Board, Parties and Participants.
 - (a) Service of a document upon the Board or the Presiding Officer shall be in accordance with 980 CMR 1.03(2).

(b) Any person filing documents with the Board or Presiding Officer shall simultaneously serve a copy on all parties and limited participants required to be served in the proceeding, by hand delivery or by first class mail postage prepaid using the name(s) and address(es) stated on the service list issued by the Presiding Officer. The Presiding Officer may allow documents to be served by other means.

(c) All documents filed with the Board or the Presiding Officer shall be accompanied by a statement certifying the date and means of service and the persons to whom service was made. Failure to comply with these rules may be grounds for the Board or Presiding Officer to refuse to accept documents for filing.

(d) Documents shall be deemed served on the day of hand delivery or, if mailed, on the earlier of receipt or three days after mailing. The postmark shall be evidence of the date of mailing.

(5) Signatures. Every document filed pursuant to 980 CMR 1.03(2) or served pursuant to 980 CMR 1.03(4) shall be signed by the party making such filing or service or by his authorized representative. Such signature shall constitute certification by the signatory or his authorized representative that he has read the document, that, to the best of his knowledge, every statement contained in the document is true, and that the document is not being filed to delay the proceeding.

(6) Computation of Time. Unless otherwise specifically provided by 980 CMR 1.00 or by other applicable law, computation of any time period referred to in 980 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Board is closed, in which case the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the office of the Board is closed shall be excluded.

(7) Extensions of Time. At the discretion of the Board or the Presiding Officer, for good cause shown, any time limit prescribed or allowed in 980 CMR may be extended. All requests for extensions of time must be made either by oral motion during a hearing or conference or by written motion. All requests for extensions of time must be made before the expiration of the original time period or before the expiration of any subsequent extension(s) granted. Provisions contained in 980 CMR 1.03(7) shall not apply to any limitation of time prescribed by statute, unless extensions are permitted by the applicable statute.

1.04: Institution of an Adjudicatory Proceeding

(1) Commencement of Proceeding. Proceedings may be initiated by a petition to construct, a petition for a certificate of environmental impact and public need, a petition for other matters over which the Board has jurisdiction, or the Board's own motion.

(2) Presiding Officer

(a) A Presiding Officer shall be appointed to conduct each adjudicatory proceeding. The Presiding Officer shall have the authority to take all actions necessary to ensure a fair, orderly and efficient proceeding. Such actions may include, but are not limited to: conducting evidentiary and public comment hearings; ruling on petitions to intervene or to participate in a proceeding; establishing ground rules for a proceeding; holding procedural or other conferences; regulating the course of the hearing; prescribing the order in which evidence shall be presented; administering oaths and affirmations; examining witnesses and requiring them to produce evidence which will aid in the determination of any question of law or fact at issue; disposing of procedural requests or similar matters; hearing and ruling upon motions; issuing subpoenas; causing depositions to be taken; ruling upon offers of proof and receiving relevant material and probative evidence; fixing the time for filing briefs, motions and other documents in connection with hearing; and excluding any person from a hearing for disrespectful, disorderly, or contumacious language or conduct.

(b) A Presiding Officer may at any time withdraw from a proceeding if he deems himself disqualified. Should a Presiding Officer withdraw, another Presiding Officer shall be appointed. Any party who becomes aware of grounds that may exist for the disqualification of a Presiding Officer must immediately file an affidavit which clearly sets forth the grounds for the disqualification.

(3) Notice of Adjudication

(a) Notice shall be given at the beginning of any adjudicatory proceeding. The Presiding Officer shall give notice or shall require the applicant to give notice of an adjudication.

(b) A notice shall set forth a summary statement of the matter to be adjudicated. The notice shall state: (1) the name and address of the applicant; (2) the address of the Board and the statement that any person desiring further information or wishing to participate in the proceeding may contact the Board; and (3) the date, time, and address of any scheduled public comment hearing.

(c) In cases where a proposed facility is the subject of the proceeding, notice shall be given by publication in at least two newspapers available in the vicinity of the proposed facility and as otherwise ordered by the Presiding Officer. In cases where a proposed facility is not the subject of the proceeding, notice by publication shall be given as ordered by the Presiding Officer. Notice shall further be given by first class mail or hand delivery to any person required by law or regulation to be so notified and to such other persons as the Presiding Officer may direct. Additional notice or publication shall be made, if required by statute or regulation, in the manner prescribed therein. Unless otherwise directed by the Board or Presiding Officer, the applicant is responsible for all costs related to the publication and distribution of notice.

(d) In cases where a proposed facility is the subject of the proceeding, the notice shall contain a deadline for the filing of petitions to intervene as a party or participate as a limited participant. This deadline shall be no less than 21 days

after the initial date of publication of the notice.

(e) In cases where a proposed facility is not the subject of the proceeding, the deadline for the filing of petitions to intervene as a party or participate as a limited participant shall be as ordered by the Presiding Officer.

(4) Repository of Documents. The Presiding Officer may require an applicant to place certain documents in one or more repositories to provide for public access to these documents. A repository of documents is a public library, public office, applicant's office, or similar location where documents involved in a particular proceeding may be kept and made available to members of the public. If a repository is required, the applicant shall be responsible for placing the documents therein and making adequate arrangements for convenient public access to the documents.

(5) Public Comment Hearing. When required by statute or otherwise determined appropriate by the Presiding Officer, the Board shall hold a public comment hearing. A public comment hearing shall be conducted to afford members of the general public an opportunity to comment on that matter. A public comment hearing shall be held as soon as practicable after the commencement of a proceeding. Comments made at a public comment hearing are not deemed to be evidence.

1.05: Intervention

(1) Parties.

(a) Any person who desires to intervene as a party in any proceeding shall file a written petition to intervene as a party. A petition to intervene as a party shall be deemed to constitute, in the alternative, a petition to participate as a limited participant under 980 CMR 1.05(2). If a petition to intervene is granted in the alternative as a petition to participate as a limited participant, the petitioner may participate as a limited participant without prejudicing any review on appeal of the denial of his petition to intervene.

(b) If a petitioner desires to intervene pursuant to M.G.L. c. 30A, § 10, the petition shall state the name and address of the petitioner, the manner in which the petitioner is substantially and specifically affected by the proceeding, the representative capacity, if any, in which the petition is brought, and how the petitioner intends to participate in the proceeding.

(c) If ten or more persons desire to intervene pursuant to M.G.L. c. 30A, § 10A, the petition shall state the names and addresses of the petitioners, the representative capacity, if any, in which the petition is brought, and the damage to the environment as defined in M.G.L. c. 214, § 7A that is or might be at issue. Intervention pursuant to M.G.L. c. 30A, § 10A shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue.

(d) The Presiding Officer shall rule on the petitions to intervene as a party and may condition any allowance of a petition on such reasonable terms as he may set.

(e) Persons who are granted leave to intervene as a party must comply with all

requirements of 980 CMR 1.00 and with all directives of the Presiding Officer. In addition, parties may be required to respond to discovery by the Presiding Officer and by other parties if allowed by the Presiding Officer after motion.

(f) Generally, the rights of a person who is granted leave to intervene as a party include the right to present witnesses, the right to cross-examine witnesses, the right to file a brief, the right to file comments on the tentative decision and the appellate status as a party in interest who may be aggrieved by any final decision. In addition, persons who are granted leave to intervene as a party may be afforded an opportunity to issue discovery and to present oral comments regarding the tentative decision under such conditions as the Board may provide.

(g) Except for an individual appearing *pro se*, all parties to a proceeding shall be represented by an attorney in good standing before the Massachusetts bar, unless the Presiding Officer grants a waiver of this requirement for good cause shown. A request for a waiver shall include: (1) an affidavit stating the good cause and naming a duly authorized representative; and (2) an affidavit by the duly authorized representative accepting the appointment and certifying that he will abide by the procedural rules set forth in 980 CMR and the Presiding Officer's directives.

(2) Participation.

(a) Any person who desires to participate as a limited participant in any proceeding shall make a written request for such status. Every request to participate as a limited participant shall describe the manner in which the petitioner is interested and his representative capacity, if any, and it shall state the contention of the petitioner and the purpose for which participation is requested.

(b) The Presiding Officer may grant leave to a person to participate as a limited participant and may condition any grant on such reasonable terms as he may set.

(c) Unless otherwise indicated, a limited participant's rights shall be limited to filing a brief and to filing comments on the tentative decision pursuant to 980 CMR 1.08(2). A limited participant may be afforded an opportunity to present oral comments regarding the tentative decision under such conditions as the Board may provide.

(d) Limited participants are not parties. Therefore, a grant of leave to participate as a limited participant in a proceeding, unless so stated, does not confer status as a party in interest who may be aggrieved by any final decision.

1.06: Conduct of Adjudication

(1) Procedural Conferences.

(a) The Presiding Officer may schedule a procedural conference, either on his own initiative or upon written request by a party.

(b) At a procedural conference the following matters may be considered:

- (i) the schedule for the proceeding;
- (ii) simplification and limitation of issues; and

- (iii) such other matters as will aid in the efficiency of the proceeding.
- (c) Unless the Presiding Officer has approved a stipulation to the contrary, statements made by any person at a procedural conference shall not be evidence in the proceeding or in any subsequent proceeding.

(2) Evidentiary Record. For every adjudicatory proceeding, there shall be an evidentiary record which shall include testimony as well as exhibits properly entered into evidence.

(3) Motions.

- (a) Any party may request that the Presiding Officer take any action by filing a motion which clearly states the order or action sought and the grounds therefor. Such a motion may either be made during a hearing or timely filed in writing. The Presiding Officer may require any oral motion made to be reduced to writing. A copy of all motions made in writing or reduced to writing shall be served upon all parties in accordance with 980 CMR 1.03(4).
- (b) Unless the Presiding Officer directs otherwise, a party may file a written response to a written motion with the Presiding Officer within seven days after such motion is filed. The moving party may then file a written reply within seven days after such response is filed. Additional filings will only be permitted at the discretion of the Presiding Officer.
- (c) A party may request a hearing on the motion at the time the motion is filed or with a response or reply filed timely in accordance with 1.06(3)(b). It is within the Presiding Officer's discretion to determine whether a hearing on the motion is necessary.
- (d) Motions, except motions seeking intervention, responses to motions and replies to motions may be filed only by parties.

(4) Evidence: Privileges.

- (a) All parties shall have the right to introduce both oral and documentary evidence. All witnesses shall testify under an oath administered by the Presiding Officer and shall be subject to cross-examination.
- (b) Evidence shall be submitted in accordance with the schedule established by the Presiding Officer. Generally, parties will be required to submit documentary evidence, including exhibits and written direct testimony, in advance of evidentiary hearing.
- (c) The Presiding Officer shall be guided by, but need not observe, the rules of evidence observed by the Massachusetts courts.
- (d) The Board shall observe the rules of privilege recognized by law.

(5) Discovery. Discovery is allowed at the discretion of the Presiding Officer.

- (a) Purpose. The purpose of discovery is to facilitate the hearing process by permitting the parties and the Board to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a

complete and accurate record is compiled.

(b) Rules Governing Discovery. In exercising his discretion, the Presiding Officer may be guided by the principles and the procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 *et seq.* These rules, however, shall be instructive, rather than controlling.

(c) Information Requests. After the commencement of an adjudicatory proceeding, a party may serve written information requests, as permitted by the Presiding Officer, for the purpose of discovering relevant information. A party may serve information requests only during the time specified by the Presiding Officer. The Presiding Officer may, at his discretion, serve written information requests on any party to the proceeding.

(d) Responses to Information Requests. Each information request shall be separately and fully answered under the penalties of perjury by the witness(es) who can testify during hearings regarding the content of the response, unless an objection to the information request with supporting reason is stated in lieu of a response. A response shall be served within 14 days of service of the information request, or within such other time as the Presiding Officer may specify. Responses shall be filed in the form specified by the Presiding Officer.

(e) Motions to Compel Discovery. A party may move for an order to compel compliance with its discovery request. Unless otherwise permitted by the Presiding Officer for good cause shown, such motion shall be made no later than seven days after the deadline for responding to the request. If the Presiding Officer finds that a party has failed to comply in a reasonable manner with a legitimate discovery request without good cause, he may, after issuance of an order compelling discovery, order whatever sanctions are deemed to be appropriate, including, but not limited to, suspending proceedings until the party has complied with the order or other appropriate sanctions listed in Rule 37 of the Massachusetts Rules of Civil Procedure. These rules, however, shall be instructive, rather than controlling. A party's failure to file a motion to compel discovery in a timely manner, absent a showing of good cause, may result in a waiver of its right to compel the response.

(f) Protective Orders. Upon a request for protective treatment of documents and a showing that a protective order is necessary, the Presiding Officer may make an order to protect any such document(s). The Presiding Officer may be guided by the principles and the procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 *et seq.* These rules, however, shall be instructive, rather than controlling.

(6) Evidentiary Hearings

(a) Purpose. Evidentiary hearings will be held when required by law or at the discretion of the Presiding Officer in order to allow Board staff and parties to examine witnesses with respect to the content of their pre-filed testimony and any responses to relevant information requests.

(b) Hearing Schedule. At least seven days prior to the first day of evidentiary hearings, the Presiding Officer shall notify all parties and limited participants, and

any persons whose petitions to intervene or participate are pending, of the hearing schedule. The hearing schedule shall include the times, dates, place, and nature of the hearings. There may be multiple hearing dates and times during the course of a proceeding. Hearing dates and times may change. It is the responsibility of each party and limited participant to keep abreast of all changes to the hearing schedule.

(c) Rescheduling. The Presiding Officer may grant a request to reschedule a hearing. A request for rescheduling should be made timely and in writing so as not to burden or delay the proceedings.

(d) Location. All evidentiary hearings shall be held at the Boston offices of the Board, unless a different location is designated by the Board or the Presiding Officer or a different location is required by statute.

(e) Public Access. All hearings of the Board shall be open to the public and the press to the extent required by law.

(f) Off The Record Discussions. The Presiding Officer may go off the transcribed record during the course of any hearing for consultation among the parties if the Presiding Officer deems that such consultation would facilitate the conduct of the hearing. In the absence of a stipulation to the contrary, statements made by any person during such consultation shall not be considered as evidence in the proceeding or any subsequent proceeding.

(g) Record Requests. During the course of evidentiary hearings, the Presiding Officer or parties may ask witnesses to provide documents or written responses to questions asked at the hearing. Responses to record requests are written substitutes to oral answers where fault of memory, complexity of subject or lack of immediate access to documentation precludes a responsive answer by the witness in the hearing. Upon proper filing, responses to record requests become part of the record and the evidence, unless challenged as unresponsive and expunged in whole or part. Record requests shall not be used as a substitute for discovery. The ordinary time for response will be seven calendar days following the day on which the request is made. Objections to record requests shall be made at the time the request is made, and in no event later than the end of the next business day.

(h) Transcript. The Presiding Officer shall arrange for the hearing to be reported by a court reporter. The transcript shall be included in the evidentiary record of the proceeding. The Presiding Officer has discretion to order expedited preparation of transcripts as the needs of the case may warrant. Any objections regarding the accuracy of the transcripts shall be brought to the attention of the Presiding Officer. Objections not raised within 30 days after the transcript is made available to the parties shall be deemed to be waived. If the accuracy of the reporting of witness testimony is in question, the Presiding Officer may require an affidavit of the witness who gave such testimony or may require further inquiry. The cost of the transcript preparation shall be the responsibility of the applicant. The cost of copies of the transcript shall be the responsibility of the person requesting the copies.

(7) Matters for Official Notice.

(a) Official notice may be taken in such matters as might be judicially noticed by the courts of the United States or of Massachusetts. The Presiding Officer also may take notice of general, technical, or scientific facts within the Board's specialized knowledge, provided that parties are afforded an opportunity to contest the matters of which official notice is to be taken.

(b) Official notice also may be taken of any facts found in any other Board proceeding. In all circumstances where such notice is taken, the parties shall be afforded an opportunity to contest the matter of which official notice is to be taken.

(c) Any party requesting that any fact be officially noticed must supply every party with a copy of the fact they are requesting to be noticed.

1.07: Post-Hearing

(1) Briefs. The Presiding Officer may set a schedule for the filing of briefs to be submitted by parties and limited participants. The purpose of briefs is to allow parties and limited participants to provide written argument based on the evidence properly entered into the record. Briefs also may be used to address specific briefing questions posed by the Presiding Officer. Briefs may not be used to submit new evidence.

(2) Oral Arguments. Oral argument at the close of a hearing may, upon motion, be allowed at the discretion of the Presiding Officer.

(3) Other Post Hearing Filings. No post-hearing filings other than those allowed for in 980 C.M.R. 1.07(1) may be made without the permission of the Presiding Officer.

1.08: Rendering of Decisions

(1) Form of Decisions. Every tentative and final decision shall be in writing and shall contain a statement of the reasons therefor, including a determination of issues of fact or law necessary to the decision.

(2) Tentative Decisions.

(a) A written tentative decision shall be issued on each matter adjudicated by the Board unless a quorum of the Board has heard the matter or has read the evidence.

(b) A copy of any tentative decision shall be sent to each party and limited participant in the proceeding. The Presiding Officer shall designate a comment period, extending at least seven days from the issuance of the tentative decision, during which parties and limited participants may file written comments regarding the tentative decision.

(3) Final Decisions.

(a) Every final decision of the Board in an adjudicatory proceeding shall be

issued following a vote taken at a meeting of the Board conducted pursuant to 980 CMR 2.04.

(b) If a tentative decision was issued in a matter, the Board shall meet following the comment period to vote on the tentative decision. At such meeting, parties and limited participants may be afforded an opportunity to present oral comments under such conditions as the Board may provide. The Board shall render a final decision after considering the tentative decision, all timely-filed written comments and any oral comments permitted. The Board need not consider written comments received after the close of the comment period.

(c) If a quorum of the Board has heard a matter, the Board may at its discretion render a final decision without first issuing a tentative decision pursuant to 980 CMR 1.08(2).

(4) Judicial Review. By the terms of M.G.L. c. 25, § 5, as made applicable to the Board by M.G.L. c. 164, § 69P, a party may seek judicial review of a final Board decision.

1.09: Supplemental Procedures

(1) Re-Opening Hearings. A party may, at any time before the Board renders a final decision, move that the hearing be reopened for the purpose of receiving new evidence. The motion should clearly show good cause for re-opening the hearing, state the nature and relevance of the evidence to be offered and explain why the evidence was unavailable at the time of the hearing.

(2) Consolidation. The Presiding Officer may order proceedings involving a common question of law or fact to be consolidated for hearing or decision on any or all of the matters at issue in such proceedings.

(3) Stipulations. At the discretion of the Presiding Officer, the parties may agree upon any fact or issue pertinent to the proceeding, either by filing a written stipulation at any point in the proceeding, or by making an oral stipulation at the hearing. In making findings, the Board need not be bound by any such stipulation.

(4) Technical Sessions. A technical session is an off-the-record meeting during which experts may provide detailed oral or written information in order to facilitate understanding of complex technical issues. The Presiding Officer may convene a technical session if he deems that such session would facilitate the conduct of the proceeding. The Presiding Officer shall permit representatives of the applicant, parties and limited participants to attend a technical session and shall make a reasonable effort to schedule and notice the time and place of any such session to permit attendance. In the absence of a stipulation to the contrary, statements made by any person during a technical session shall not be referred to or considered as evidence in the proceeding or in any subsequent proceeding. Board members, staff and parties may ask questions during a technical session.

(5) Subpoenas. The Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12.

(6) Depositions. The Presiding Officer may at his discretion allow a deposition to be taken upon a showing that the person to be deposed cannot make an appearance at the hearing without substantial hardship and that the testimony being sought is significant, not privileged and not discoverable by an alternative means. If the Presiding Officer allows the taking of a deposition, the Presiding Officer shall specify the rules and procedures that will govern said deposition.

(7) Reconsideration. Any party may file a written motion requesting the Presiding Officer reconsider a ruling as long as the motion is received within five days of the issuance of the ruling.

(8) Offers of Proof. Any offer of proof made in connection with an evidentiary ruling shall consist of a statement, which may be in writing, of the substance of the evidence the party making the offer contends would be adduced by such testimony. If the offer of proof consists of documentary evidence, a copy of the document shall be marked for identification and shall constitute the offer of proof.

(9) Site Visit of a Proposed Facility. The Board and staff may visit the proposed site and any alternative sites in order to facilitate an understanding of the pending matter. A site visit is for informational purposes only and shall not be considered as evidence in the proceeding.

(10) Production or View of Objects. Of his own accord, or upon the motion of a party, the Presiding Officer may order the production or view of any object which relates to the subject matter of a proceeding.

REGULATORY AUTHORITY

980 CMR 1.00: M.G.L. c.164, § 69H.

980 CMR 2.00: GENERAL INFORMATION AND CONDUCT OF BOARD BUSINESS

Section

- 2.01: Purpose and Scope
- 2.02: Purpose and Functions of the Board
- 2.03: Board Membership
- 2.04: Meetings; Voting
- 2.05: Delegation of Duties; Board Staff
- 2.06: Action by Consent
- 2.07: Advisory Rulings
- 2.08: Determination of Board Jurisdiction

2.01: Purpose and Scope

- (1) Purpose. 980 CMR 2.00 describes the Energy Facilities Siting Board and establishes rules for the conduct of business.
- (2) Scope. 980 CMR 2.00 is of general applicability and applies, whenever appropriate, to all other sections of 980 CMR.

2.02: Purpose and Functions of the Board

- (1) Purpose of the Board. The Board has been established by M.G.L. c. 164, § 69H, as amended. The Board is responsible for implementing the energy policies contained in its enabling legislation in order to provide a reliable energy supply for Massachusetts with a minimum impact on the environment at the lowest possible cost. The powers and duties of the Board are enumerated in M.G.L. c. 164, § 69H.
- (2) Primary Functions of the Board. Matters reviewed by the Siting Board include petitions for:
 - (a) electric transmission lines
 - (b) electric generating facilities
 - (c) natural gas pipelines
 - (d) natural gas storage facilities
 - (e) oil refining, storage and transportation facilities
 - (f) hydropower generation facilities
 - (g) certificates of environmental impact and public need, or public interest.

The Board also has the authority to issue civil penalties to any applicant who violates an order of the Board.

- (3) Adjudicatory proceedings. The Board reviews the following matters which shall be resolved through adjudicatory proceedings in accordance with M.G.L. c. 30A and 980 CMR 1.00: a hearing on a petition to construct a facility held pursuant to M.G.L. c. 164, §§ 69J or 69J½; a hearing on an initial petition filed pursuant to M.G.L. c. 164, § 69K or

M.G.L. c. 164, § 69K½; a hearing on an Application for a Certificate filed pursuant to M.G.L. c. 164, § 69L or M.G.L. c. 164, § 69L½; and hearings on appeal under M.G.L. c. 164, § 69H½.

(4) Mailing List. The Board shall maintain a mailing list, shall place upon the list the name and address of any person or group so requesting, and shall give to such persons and groups written notice of activities of the Board for which notice may be appropriate. Failure to give notice to any person or group on the list shall not, in itself, render any act of the Board invalid. The Board may from time to time remove from the list persons or groups no longer expressing interest in receiving notices.

2.03: Board Membership

(1) Description of the Board. The Board comprises the Chairman and two additional Commissioners of the Department of Telecommunications and Energy, the Secretary of Environmental Affairs or his designee, the Director of Economic Development or his designee, the Commissioner of Energy Resources or his designee, and three public members appointed by the Governor for terms of three years, two of whom shall be experienced in environmental and consumer matters and one who shall be experienced in matters relating to the development of energy facilities. Where a designee is permitted, the designee shall be named in accordance with 980 CMR 2.03(3).

(2) Chairman. The Chairman of the Department of Telecommunications and Energy shall serve as the Chairman of the Board. In the event of the absence, recusal, or disqualification of the Chairman, the Director of Consumer Affairs and Business Regulations shall appoint an acting chairman from the remaining members of the Board.

(3) Designees. The Secretary of Environmental Affairs, the Director of Economic Development, and the Commissioner of Energy Resources each may nominate a designee to serve in his stead as a member of the Board. Nomination shall be made by a letter addressed to the Chairman and signed by the nominating official. The nominating letter shall state whether the nomination is general or limited. The nominating official may revoke a nomination at any time by letter to the Chairman.

Once nominated, a general designee shall assume all responsibilities of the nominating official pursuant to M.G.L. c. 164, §§ 69G-69S and 980 CMR 2.00. The nominating official may temporarily suspend a general nomination by appearing personally at a Board meeting or proceeding and performing the responsibilities of a Board member.

A limited designee shall assume only those responsibilities set forth in the nominating letter. The nominating official may retain and perform or may further name another designee to perform all other responsibilities.

(4) Compensation. Any public member appointed by the Governor shall receive compensation for his services in the amount allowable by law, and shall be reimbursed by the State for all reasonable expenses actually and necessarily incurred in the performance

of his official duties.

(5) Effect of Board Actions. No action taken by the Board pursuant to 980 CMR 2.00 shall bind any member of the Board or any designee for the purposes of any responsibilities of such member or designee not solely related to the operation of the Board.

2.04: Meetings; Voting

(1) Public Meetings. All meetings of the Board shall be open to the public to the extent required by M.G.L. c. 30A, §§ 11A and 11A½. All meetings of the Board shall be open to the press to the extent required by law. The Board may establish specific policies regarding the use of video cameras and other recording devices as necessary.

(2) Notice of Public Meetings. Except in an emergency as provided by 980 CMR 2.04(3), a notice of each meeting of the Board shall be filed with the Secretary of State, and a copy thereof posted in the public office of the Executive Office for Administration and Finance, at least 24 hours, not including Saturdays, Sundays, or legal holidays, prior to the time of such meeting or session.

(3) Emergencies. The Board may conduct a public meeting or executive session without giving notice as required by 980 CMR 2.04(2), if it determines that an emergency exists and that immediate, undelayed action by the Board is imperative.

(4) Executive Sessions. The Board may in the course of a public meeting vote to go into executive session. An executive session may be held only as authorized by M.G.L. c. 30A, §§ 11A, 11A½.

(5) Records of Meetings. The Board shall maintain accurate records of its meetings, setting forth the action taken at each meeting, including executive sessions. Either a full transcript of the meeting or a summary of all matters voted shall be made available with reasonable promptness after each meeting; provided, however, that votes taken in executive session may be withheld from public disclosure for so long as their publication would defeat the lawful purposes of the executive session, but no longer.

(6) Quorum; Voting.

(a) A quorum consisting of four Board members shall be required to conduct any meeting of the Board held for the purpose of considering and voting upon an adjudicatory decision, or a proposal to adopt, amend or rescind regulations, or any other matter requiring a vote of the Board. A majority of members in attendance at a meeting shall be sufficient to dispose of any question properly before the Board during the meeting at which the question is taken up.

(b) Each Board member or designee in attendance at a meeting shall be entitled to vote on any matter which is properly before the Siting Board at that meeting.

2.05: Delegation of Duties; Board Staff

- (1) Delegation of Duties. The Board may delegate Board-specific responsibilities other than responsibility for the final decision in any matter listed in 980 CMR 2.04(6)(a) to the Chairman or to the Board staff. The facility siting division of the Department of Telecommunications and Energy shall serve as staff to the Board.
- (2) Director. The Director shall be appointed pursuant to M.G.L. c. 25, § 12N to direct the work of the facility siting division of the Department of Telecommunications and Energy and to conduct the day-to-day business of the Board. The Board or the Chairman may delegate to the Director Board-specific responsibilities other than the responsibility for the final decision in any matter listed in 980 CMR 2.04(6)(a).
- (3) Staff. The Chairman may appoint such other persons to the facility siting division staff as may be required to assist the Board in performing its functions. Staff functions shall include, among others: conducting adjudicatory, rulemaking, or factfinding hearings for the purpose of creating a record; rendering tentative decisions; and intervening in the proceedings of other agencies. The Chairman may authorize the Director to appoint a Presiding Officer for an adjudicatory or other proceeding conducted under 980 CMR.

2.06: Action by Consent

- (1) Scope. Any decision of the Board, except the final decision in any adjudicatory proceeding, may be made by action by consent pursuant to the procedures of 980 CMR 2.06. These procedures shall be used only when the Board, in its discretion, determines that expeditious action is necessary.
- (2) Procedure. The Chairman shall prepare a document entitled "Action by Consent" which sets forth the decision proposed to be taken by the Board. The document or copies thereof shall be presented to each member of the Board for review. A member may indicate consent by affixing his signature to the document or copy. The proposed action by consent shall be deemed to have been taken when the document and copies bearing the signatures of all Board members are returned to the Chairman. A proposed action by consent shall become void if it does not receive all required signatures before the beginning of any meeting of the Board held pursuant to 980 CMR 2.04.
- (3) Notice.
 - (a) Except in an emergency, a notice of each proposed "Action by Consent" shall be filed with the Secretary of State, and a copy thereof posted in the public office of the Executive Office for Administration and Finance at least 24 hours, not including Saturdays, Sundays and legal holidays, prior to the circulation of such proposed decision to Board members for signature.
 - (b) The notice shall state:
 - (i) that the notice is for an action proposed to be taken by unanimous written consent of the Board rather than by meeting;

- (ii) that the proposed action by consent shall become void if not signed by all Board members prior to the next meeting of the Board; and
 - (iii) the full and complete text of the proposed action by consent, or, if the proposed action by consent consists of more than 200 words, a summary of its terms and a statement that the full text may be obtained at the offices of the Board.
- (c) For the purpose of 980 CMR 2.06, "emergency" shall mean a situation in which immediate action without delay is deemed by the Board to be imperative.

(4) Records of Actions by Consent. The Board shall maintain accurate records of all proposed actions by consent. A record of the Board's action on a proposed action by consent shall be made available with reasonable promptness after its approval by all Board members or after it becomes void.

2.07: Advisory Rulings

Any person may at any time request, via written petition, an advisory ruling with respect to the applicability of any statute or regulation enforced or administered by the Board to any person, property or factual situation. A petition shall be signed by the applicant, shall contain the applicant's address, and shall state clearly and concisely the substance or nature of the request. The petition shall be accompanied by any supporting data, views or arguments. Upon receipt of the petition, the Board shall consider it and shall, within 60 days after the receipt of the request, notify the applicant either that the request is denied or that the Board will render an advisory ruling. In order to assist the Board in considering the request, the Director may require additional information as he deems appropriate. At any time before issuance of an advisory ruling, the Board may rescind a decision to render an advisory ruling. If the advisory ruling is rendered, a copy of the ruling shall be sent to the applicant. A complete record of every advisory ruling shall be maintained by the Board. No advisory ruling shall bind or otherwise estop the Board in any pending or future matter. There shall be no obligation to render an advisory ruling.

2.08: Determination of Board Jurisdiction

- (1) An applicant may at any time petition the Board for a determination of whether construction, expansion, or other modification of a proposed electric generating unit, electric transmission line, ancillary structure, natural gas pipeline, natural gas storage facility, oil pipeline, oil refinery, oil storage facility, oil transshipment facility or other facility is subject to Board jurisdiction, is not subject to Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR 6.00.
- (2) The petition shall state the name of the applicant and describe the nature of the facility for which a determination is being sought. The petition shall be accompanied by a draft legal notice for publication and such written legal argument or other information as the applicant may consider appropriate. The Board may require that the applicant provide additional information after the petition is filed.
- (3) The applicant shall give notice of the petition by publishing the legal notice

approved by the Presiding Officer in at least one newspaper of general circulation and as otherwise ordered by the Presiding Officer. The notice shall specify that any person may submit written legal argument or other information regarding the petition. The notice shall specify the deadline for such submissions, which shall be not less than 14 days after the initial date of publication.

(4) Within four months of the petition filing date, the Board shall issue a final decision on jurisdiction. The final decision shall address only those issues necessary to decide the extent to which a proposed facility is within Board jurisdiction, is not subject to Board jurisdiction, or may qualify for a Certificate pursuant to 980 CMR 6.00. The Board's decision shall be final.

REGULATORY AUTHORITY

980 CMR 2.00: M.G.L. c. 164, § 69H.

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Petition of Southern Energy Kendall, LLC)
for Approval to Upgrade and Replace)
Generating Facilities at the Existing)
Kendall Square Station in)
Cambridge, Massachusetts)

EFSB 99-4A

FINAL DECISION ON COMPLIANCE
AND REQUEST TO AMEND CONDITION E

Jolette A. Westbrook
Hearing Officer
November 15, 2002

On the Decision:
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Diedre Matthews

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The Energy Facilities Siting Board hereby: (1) finds that Mirant Kendall, LLC has complied with Condition D of the Final Decision; and (2) amends Conditions E and F of the Final Decision.

I. INTRODUCTION

On December 15, 2000, the Energy Facilities Siting Board ("Siting Board") issued its final decision in Southern Energy Kendall, LLC, 11 DOMSB 225 (2000) ("Final Decision"). The Final Decision conditionally approved the petition of Mirant Kendall, LLC ("Mirant Kendall" or "Company"), formerly known as Southern Energy Kendall, LLC, to upgrade generating facilities at the existing Kendall Square Station ("Kendall Station") in Cambridge, Massachusetts. The project is designed to upgrade the existing cogeneration plant into a natural gas-fired, combined cycle, electric generating facility and increase generating capacity at Kendall Station from approximately 64 megawatts to approximately 234 megawatts. Final Decision, 11 DOMSB 255, 266. As part of this project, Mirant Kendall intends to alter the water supply for Kendall Station by taking water for process use and steam generation from the Broad Canal/Charles River rather than from the Cambridge municipal water supply. Id. at 317.

In the Final Decision, the Siting Board imposed three conditions, Conditions D, E and F, for Mirant Kendall to meet prior to the commencement of operation. On October 11, 2002, Mirant Kendall submitted a compliance filing with respect to Conditions D and F ("Compliance Filing").¹ On October 15, 2002, Mirant Kendall submitted a request to amend Condition E of the Final Decision ("Request to Amend").² On October 18 and October 25, 2002, Mirant Kendall submitted responses to information requests.³ On October 23, 2002, the City of Cambridge

¹ The Compliance Filing, including all attachments, is hereby moved into evidence as Exhibit EFSB-CF-1 with Attachment A ("Recycling Audit and Recycling Plan", dated October 2000) and Attachment B ("In-Stream Water Quality and Biological Monitoring During Project Operations").

² The Request to Amend, including all attachments, is hereby moved into evidence as Exhibit EFSB-CF-2.

³ The October 18, 2002 information requests and all attachments are hereby moved into
(continued...)

("City") submitted comments on the Compliance Filing and Request to Amend ("City Comments"). On October 25, 2002, Mirant Kendall submitted a response to the City's Comments ("Response").

The upgraded Kendall Station facility currently is scheduled to begin operation in November 2002 (Exh. EFSB-CF-2, at 2). However, Mirant Kendall does not expect to receive a modified National Pollutant Discharge Elimination System ("NPDES") permit for Kendall Station until early 2003 (*id.* at 3). Until the Company receives a modified NPDES permit, Kendall Station will continue to draw process and steam water from the Cambridge municipal water system (Exh. EFSB-CF-3). The Company also intends to delay commissioning of the use of oil in its new combustion turbine generator until the relative prices of natural gas and low-sulfur oil make oil use economic (Exh. EFSB-CF-1, at 4).

II. COMPLIANCE WITH CONDITION D – SOLID AND HAZARDOUS WASTE

A. Description

In the underlying case, the Siting Board determined that the operation of the upgraded facility would have minimal impact on the production of solid waste at Kendall Station. Final Decision at 331. The Siting Board noted that the Company indicated that it would attempt to meet or exceed the City's 31% average rate of recycling, and would work to reduce construction and demolition debris during construction. *Id.* In Condition D of the Final Decision, the Siting Board directed Mirant Kendall to file a copy of the updated recycling plan with the Siting Board, and to report on its recycling rate for construction and demolition debris and its anticipated recycling rate for operational wastes. Final Decision at 393. The Siting Board found that, with the implementation of Condition D, the solid waste impacts of the proposed project would be minimized.

In response to Condition D, Mirant Kendall submitted to the Siting Board copies of a

(...continued)

evidence as Exhibit EFSB-CF-3 (submitted as EX-1) and EFSB-CF-4 (submitted as EX-2). The October 25, 2002 information requests and all attachments are hereby moved into evidence as EFSB-CF-5 (submitted as CF-1) and EFSB-CF-6 (submitted as CF-2).

recycling plan filed with the City of Cambridge ("City") on October 20, 2000, and of an update to that plan filed with the City on October 25, 2002 (Exhs. EFSB-CF-1, Att. A, EFSB CF-3). The Company's plans show that it intends to recycle scrap metal (11.1% of its total waste stream), lamps/CRTs (cathode ray tube) (0.2%), waste oil (16.0%), and office paper (2.9%) (*id.*). With respect to the recycling rate for construction and demolition debris, the Company reports that it has recycled approximately 308 tons of metal and has transferred much of the dirt generated by the upgrade to other entities to be used as fill (Exh. EFSB CF-1, at 2). Mirant Kendall also states that other construction debris such as wood, concrete and paper scrap has been taken to local landfills (*id.*).

B. Analysis

Mirant Kendall has provided a copies of its original and updated recycling plans, including information which allows the Siting Board to calculate the Company's anticipated recycling rate for operational wastes as approximately 30.2%. This rate nearly reaches 31%; the Company therefore appears to be keeping its commitment made in the underlying case to attempt to meet or exceed the City's 31% average rate of recycling. Mirant Kendall also has provided the Siting Board with information regarding its recycling rate for construction and demolition debris. Accordingly, the Siting Board finds that Mirant Kendall has complied with Condition D of the underlying decision.

III. REQUEST TO AMEND CONDITION E – EMERGENCY WATER AGREEMENT

A. Description

The Mirant Kendall plant currently uses water drawn from the Broad Canal for once-through cooling, and uses water obtained from the City of Cambridge for process and sanitary purposes, and for production of steam for distribution to steam customers (Exh. EFSB CF-3). Final Decision at 300. As part of its upgrade project, Mirant Kendall proposed to divert process and steam water from the once-through cooling flow, thus reducing its use of City water from an annual average of 188,640 gallons per day ("gpd") to 5,040 gpd. Final Decision at 317. The Company stated that, in an emergency, it might seek to use City water for process water and

steam production, and estimated its maximum emergency water use needs at a variety of levels ranging up to 518,000 gpd. Id. In the underlying case, the City supported the use of city water as a back-up supply, but expressed concerns about its ability to provide water at the higher levels proposed by the Company. Id. at 317-318.

In the Final Decision, the Siting Board noted that the terms and conditions for the use of City water as a back-up water supply should be resolved through negotiations between the City and the Company. Id. at 318. The Siting Board therefore directed the Company to negotiate a mutually acceptable emergency water use agreement with the City and to provide a copy to the Siting Board prior to the commencement of operation. Id.

In its Request to Amend, Mirant Kendall seeks to alter the timing of its compliance with Condition D. Specifically, the Company asks that it not be required to submit a copy of the emergency water use agreement to the Siting Board until it receives a modified NPDES permit allowing it to begin consumption of Charles River water for process and steam purposes (“Consumption Commencement”) (Exh. EFSB CF-2). The Company notes that, until Consumption Commencement, it will continue to rely on City water for its entire process and steam needs, and argues that an emergency water agreement is not needed until such time as it begins to rely on City water only in emergencies (id. at 2-3). The Company asserted that it would not increase its consumption of City water over historical levels prior to the likely time of Consumption Commencement, and in support provided a brief analysis of the likelihood of increases in its water consumption for steam sales, boiler blowdown, water injection due to oil firing, power augmentation, evaporative cooling, and sanitary uses (id.; EFSB-CF-3).

B. City of Cambridge Comments

In its Comments, the City notes that, ordinarily, a change in conditions such as that proposed by Mirant Kendall would require the taking of additional evidence (City Comments at 1). However, the City indicates that it would accept the use of a less formal process if the City’s interests in its water supply are protected (id. at 2). Specifically, the City proposes that any amendment to Condition E be temporary, and that Mirant Kendall should be prohibited from using City water in quantities above historical levels without the City’s express consent (id. at 1

to 2). The City argues that these restrictions would protect the City's water supply both from the burden of unanticipated demand, and in the event that the Company's use of City water for process and steam purposes continues into the summer months when the demand for water is high (id.). The City therefore proposes that Condition E be amended to read as follows:

In order to minimize water impacts, the Siting Board directs the Company to negotiate a mutually acceptable emergency water agreement with Cambridge and to provide a copy to the Siting Board on the earlier of: (a) March 1, 2003 or (b) when Mirant begins taking water from the Charles River and relying upon the City of Cambridge for emergency water back-up. If Mirant limits its use of City water to historical levels (or obtains City consent), the water use agreement may be filed after other portions of the plant begin operation, as long as no River water is used, no new discharge to the River occurs and no new outfall is used (id. at 2).

C. Response of Mirant Kendall

Mirant Kendall states that, while it understands the City's interest in protecting its water infrastructure, it has two concerns with the specific condition proposed by the City (Response at 2-3). First, Mirant Kendall opposes the City's proposal for a firm March 1, 2003 deadline for the emergency water agreement, arguing that, while it expects that a NPDES permit for the upgraded facility could be issued by March 1, 2003, it does not control the timing of the permitting process (id. at 2). The Company asserts that it might need to request a further amendment to Condition E if the NPDES permit has not been issued by March 1 and if the Company and the City have not reached a mutually acceptable agreement by that time (id.). Second, Mirant Kendall expresses concern that the City's proposed condition, as drafted, could be read to restrict water withdrawals from and discharges to the Charles River in a manner inconsistent with the Final Decision (id.). The Company argues, for example, that the proposed amendment could be read to restrict the use of the Charles River for once-through cooling water purposes, even though the Final Decision recognizes that both the existing and upgraded facilities use river water for once-through cooling (id. at 2-3). The Company therefore proposed alternate language for an amended Condition E, as follows:

In order to minimize water impacts, the Siting Board directs the Company to negotiate a mutually acceptable emergency water use agreement with Cambridge and to provide a copy to the Siting Board during operation when Mirant Kendall begins taking process water requirements from the Charles River and depending

on the City of Cambridge for emergency back-up of the required process water. The Siting Board also directs Mirant Kendall to limit its use of City water to historical levels during the interim period until the commencement of Charles River water consumption for process use.

(id. at 4).

D. Analysis

Mirant Kendall has requested that Condition E be amended to allow the upgraded Kendall Station to begin commercial operations before the Company has negotiated an emergency water agreement with the City, arguing that such an agreement is not needed until such time as the Company ceases to rely regularly on City water for process and steam use. The City has agreed to an amendment of this nature, provided that restrictions are placed on Mirant Kendall's consumption so that the City's water supply is not overburdened in the interim. In the underlying decision, the Siting Board noted that the terms and conditions for the use of City water as a back-up water supply should be resolved through negotiations between the City and the Company, and set a time-frame for the completion of these negotiations. Final Decision at 318. In light of the change in the expected timing of the Company's modified NPDES permit, and given the agreement of the two affected parties, the Siting Board is willing to extend that deadline. The Siting Board agrees with the City that it is appropriate to place restrictions on Kendall Station's consumption of City water until such time as it implements the water supply plan approved in the Final Decision. However, given the importance of the emergency water supply agreement, the Siting Board finds that it is appropriate to impose a firm deadline for the completion of contract negotiations, regardless of when the modified NPDES permit is issued, and the Company is able to begin taking its process and steam water from the Broad Canal/Charles River. Accordingly, the Siting Board amends Condition E to read as follows:

In order to minimize water impacts, the Siting Board directs the Company to negotiate a mutually acceptable emergency water agreement with Cambridge and to provide a copy to the Siting Board on the earlier of: (a) March 1, 2003 or (b) that time when Mirant begins taking water from the Broad Canal/Charles River for process and steam purposes, and relying upon the City water only for sanitary purposes and for emergency process and steam use. The Siting Board also directs Mirant to limit its use of City water to historical levels, or obtain City consent to use City water at higher levels, until such time as it ceases to rely regularly on

City water for process and steam purposes.

IV. COMPLIANCE WITH CONDITION F – WATER QUALITY MONITORING

A. Description

In the underlying decision, Mirant Kendall proposed to mitigate potential entrainment, impingement, and thermal impacts on fish populations by directing a portion of its discharge to the bottom of the Charles River through a newly constructed deep diffuser. Final Decision at 311-312, 320. The diffuser was intended to re-oxygenate the lower Charles Basin resulting, inter alia, in an increase of approximately 10% in fish habitat in the Charles River. Id. at 311-312. The Company also proposed to install a barrier net at the intake structures to reduce impingement and entrainment losses. Id. at 311.

In the Final Decision, the Siting Board required Mirant Kendall to monitor the effects of its intake/discharge system, including the proposed barrier net and diffuser, on water quality and fisheries. Id. at 322. Specifically, Condition F of the Final Decision required Mirant Kendall:

... in consultation with MDEP and EPA, to develop and implement a plan to monitor the impacts and the beneficial effects of the proposed intake/discharge system, including temperature impacts, fishery impacts as indicated by changes in impingement and entrainment rates, DO [dissolved oxygen] changes and other parameters the Company considers important, for a minimum of two years following the commencement of commercial operation. The Company shall provide the Siting Board with a copy of its monitoring plan prior to commencement of commercial operation.

Id. at 393.

In its Compliance Filing, Mirant Kendall submitted to the Siting Board a detailed draft monitoring plan describing the various water quality monitoring programs that it plans to implement (Exh. EFSB CF-1, Att. 2).⁴ These programs include continuous multi-depth monitoring of river temperatures at various locations and biological sampling during the three years following the initial operation of the upgraded Kendall Station (Exh. EFSB-CF-1, Att. B). The Company stated that the objectives of the biological sampling include: (1) repeating

⁴ Mirant Kendall states that monitoring plan likely will be revised when the Company's modified NPDES permit is issued (Exh. EFSB CF-1, at 3).

baseline studies to identify any changes in fish populations and migration patterns resulting from plant operation; (2) better defining the extent of habitat and temperature tolerance of yellow perch; (3) determining the efficiency of the fine mesh barrier surrounding the water intakes at Kendall Station; and (4) refining details of the timing of and temperatures associated with the Charles River herring run (id.).

B. City of Cambridge Comments

The City argues that a finding of compliance with Condition F would be premature at this time, since Mirant Kendall has filed a draft, rather than a final, water monitoring plan (City Comments at 3). The City expressed concern that acceptance of the draft monitoring plan at this time would limit the effectiveness of Condition F by reducing the period of time over which the Company would be required to monitor the effects of its new intake and discharge system (id.). The City noted that Condition F required Mirant Kendall to do water quality monitoring "for a minimum of two years following the commencement of commercial operation," with the implicit assumption that the new intake and discharge system would be in operation for the full two years (id.). The City argues that, rather than making a finding of compliance at this time, the Siting Board should amend Condition F to allow Mirant Kendall to file its final water quality monitoring plan after it receives its modified NPDES permit, and to ensure two full years of water quality monitoring with the new intake/discharge system in place (id. at 4). Specifically, the City proposes that Condition F be amended to read as follows:

In order to minimize water impacts, the Siting Board directs the Company, in consultation with MDEP and EPA, to develop and implement a plan to monitor the impacts and the beneficial effects of the proposed intake/discharge system, including temperature impacts, fishery impacts as indicated by changes in impingement and entrainment rates, dissolved oxygen changes and other parameters the Company considers important, for a minimum of two years following the time when Mirant commences operation of the proposed Charles River intake/discharge system. The Company shall provide the Siting Board with a copy of its monitoring plan prior to commencing such operation.

Id.

C. Analysis

Mirant Kendall has presented a detailed water quality monitoring plan that addresses, inter alia, the issues raised in Condition F. However, as both the Company and the City note, the plan is in draft form and likely will be revised when Mirant Kendall receives its modified NPDES permit. The Siting Board therefore cannot conclude that Mirant Kendall has complied with Condition F. The Siting Board agrees with the City that an amended Condition F would allow Mirant Kendall to begin operation of its upgraded equipment while ensuring that the Company retains its obligation to monitor the effects of the new intake/discharge system for at least two full years of operation. Accordingly, the Siting Board amends Condition F to read as follows:

In order to minimize water impacts, the Siting Board directs the Company, in consultation with MDEP and EPA, to develop and implement a plan to monitor the impacts and the beneficial effects of the proposed intake/discharge system, including temperature impacts, fishery impacts as indicated by changes in impingement and entrainment rates, dissolved oxygen changes and other parameters the Company considers important, for a minimum of two years following the time when Mirant commences operation of the proposed intake/discharge system. The Company shall provide the Siting Board with a copy of its monitoring plan prior to commencing such operation.

V. ADDITIONAL ISSUES

The Siting Board requires that project proponents notify the Siting Board of any changes other than minor variations to the proposal as presented to the Siting Board, so that it may decide whether to inquire further into such issues. Final Decision at 396. In addition to the compliance and amendment issues addressed above, Mirant Kendall also provided the Siting Board with information that the Company intends to delay commissioning of the use of oil in its new combustion turbine generator until the relative prices of natural gas and low-sulfur oil make oil use economic (Exh. EFSB-CF-1, at 4). Mirant Kendall stated that this delay does not change the Company's proposed operation of the new combustion turbine generator (id. at 3). In the underlying case, Mirant Kendall clearly stated that oil was to be used as a back-up fuel for up to 30 days. Final Decision at 294. Mirant Kendall also indicated that economic factors could influence the use of oil at the upgraded facility. Id. Accordingly, the Siting Board finds that the

delay in the commissioning in the use of oil does not require further inquiry.

VI. DECISION

In the Final Decision, the Siting Board found, inter alia, that upon compliance with three pre-operative conditions, Conditions D, E and F, Mirant Kendall could begin operation of the upgraded Kendall Facility. Here, the Siting Board has found that Mirant Kendall has complied with Condition D. The Siting Board has also amended Conditions E and F as follows:

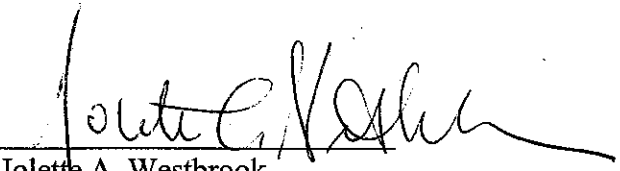
During operation of the proposed facility:

- E. In order to minimize water impacts, the Siting Board directs the Company to negotiate a mutually acceptable emergency water agreement with Cambridge and to provide a copy to the Siting Board on the earlier of: (a) March 1, 2003 or (b) that time when Mirant begins taking water from the Broad Canal/Charles River for process and steam purposes, and relying upon the City water only for sanitary purposes and for emergency process and steam use. The Siting Board also directs Mirant to limit its use of City water to historical levels, or obtain City consent to use City water at higher levels, until such time as it ceases to rely regularly on City water for process and steam purposes.
- F. In order to minimize water impacts, the Siting Board directs the Company, in consultation with MDEP and EPA, to develop and implement a plan to monitor the impacts and the beneficial effects of the proposed intake/discharge system, including temperature impacts, fishery impacts as indicated by changes in impingement and entrainment rates, dissolved oxygen changes and other parameters the Company considers important, for a minimum of two years following the time when Mirant commences operation of the proposed intake/discharge system. The Company shall provide the Siting Board with a copy of its monitoring plan prior to commencing such operation.

As a result of these amendments, Mirant Kendall is no longer required to comply with Conditions E and F prior to the operation of the proposed facility. Consequently, Mirant Kendall

has met all pre-operational conditions imposed by the Siting Board, and may begin operation of the proposed facility in November 2002.

In addition, consistent with the Siting Board's directive to Mirant Kendall to inform the Siting Board of any changes to the Company's proposed project, other than minor variations, Mirant Kendall informed the Siting Board of one such change. The Siting Board has found that this change does not require further inquiry.



Jolette A. Westbrook
Hearing Officer

Dated this 14th day of November, 2002

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).

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Promulgation of Rules Governing Siting of Natural Gas Pipelines)
and Participation in Federal Siting Proceedings, and Repeal of)
Certain Existing Siting Board Rules)

EFSB 02-RM-2

FINAL ORDER OPENING RULEMAKING

Denise L. Desautels
Selma Urman
Presiding Officers
December 20, 2002

On the Decision:

Diedre Shupp Matthews
William Febiger
Jolette Westbrook
John Young

I. BACKGROUND

In 1975, the Energy Facilities Siting Council (“Siting Council”), the predecessor to the Energy Facilities Siting Board (“Siting Board”), initially promulgated regulations regarding Long-Range Forecasts and Supplements, 980 CMR § 7.00. These regulations address, *inter alia*, construction of natural gas pipeline facilities by Massachusetts local distribution companies and by interstate gas pipeline companies. In 1978, the Siting Council amended its regulations to establish a procedure for Siting Council participation in proceedings before the Federal Energy Regulatory Commission (“FERC”) associated with the construction of gas pipelines by interstate gas pipeline companies in Massachusetts.

In 1992, the Siting Board was established to replace the Siting Council. St. 1992, c. 141 (“merger legislation”). The merger legislation placed the Siting Board within the Department of Telecommunications and Energy (“Department”),¹ and established a facility siting division to administer, implement, and enforce the Siting Board’s statutory obligations. As a result of the merger legislation, certain of the Siting Council’s prior responsibilities, including the review of long-range forecasts and supplements for both electric and gas companies, were transferred to the Department; however, the review of petitions to construct energy facilities remained with the Siting Board.

In 1997, the Electric Restructuring Act of 1997 (“Restructuring Act”)² altered the scope of the Siting Board’s review of generating facility proposals and revised the Siting Board’s fundamental mandate, directing it to provide a “reliable,” rather than a “necessary” energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. G.L. c. 164, § 69H.

The Siting Board adopted emergency regulations in 1998 to address the most immediate issues resulting from the merger legislation and the Restructuring Act. Order on Rulemaking, 7

¹ The Department of Telecommunications and Energy was formerly known as the Department of Public Utilities.

² An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protection Therein. St. 1997, c. 164.

DOMSB 1 (1998); however, less urgent issues were deferred pending the review of the need for a complete revision of 980 CMR. The Siting Board discussed the need for a complete revision of its regulations on November 9, 2000 (see Tr. of Siting Board Meeting of November 9, 2000, at 105-112), and in September 2002 adopted revisions to 980 CMR § 1.00 ("Rules For the Conduct of Adjudicatory Proceedings") and 980 CMR § 2.00 ("General Information and Conduct of Board Business"), and repealed 980 CMR § 3.00 ("Rules for Adopting Administrative Regulations").³

The current rulemaking, which creates new regulations governing the review of natural gas pipeline projects constructed in Massachusetts to replace obsolete provisions of 980 CMR § 7.00, represents the second step in the Siting Board's on-going revision of its regulations. Proposed 980 CMR § 15.00 addresses the Siting Board's review of natural gas pipeline projects that fall under its jurisdiction; proposed 980 CMR § 17.00 addresses Siting Board participation in the review of proposed natural gas facilities that also fall under federal jurisdiction. In adopting these regulations, the Siting Board seeks to comply with the directives of Executive Order 384 calling for regulatory clarity.

Accordingly, pursuant to G.L. c. 164, §§ 69H, 69J, 69J½, and G.L. c. 30A, §§ 1, et seq., the Siting Board hereby opens a rulemaking for the purpose of adopting 980 CMR § 15.00, "Rules for Petitions to Construct Natural Gas Pipeline Facilities" and 980 CMR § 17.00, "Energy Facilities Siting Board Participation in Federal Energy Regulatory Commission Proceedings Associated with Natural Gas Projects in Massachusetts," and for the purpose of repealing 980 CMR §§ 7.07(7)(d) and 7.07(9). A copy of the proposed regulations is attached.

II. PROPOSED REGULATIONS FOR SITING GAS PIPELINES

The Siting Board proposes to promulgate two new regulations governing the construction of natural gas pipelines in Massachusetts. Proposed 980 CMR § 15.00 sets forth procedures to be followed when a company (whether a local distribution company, an interstate pipeline company, a large gas customer, or another market participant) proposes to build a natural gas

³ Adoption of 980 CMR §§ 1.00 and 2.00 and Repeal of 980 CMR § 3.00, EFSB 02-RM-1 (2002). The revised rules became effective on October 11, 2002.

pipeline that falls under the Siting Board's jurisdiction and thus requires the Siting Board's approval. Proposed 980 CMR § 17.00 sets forth procedures to be followed when an interstate pipeline company subject to regulation by FERC proposes to build a natural gas pipeline (or other natural gas facility) that falls under FERC jurisdiction and is not subject to Siting Board adjudication. As further discussed in Section III.E, below, the Siting Board seeks comment on both legal and policy issues affecting the delineation of these two categories of pipelines.

A. Construction of Natural Gas Pipelines Subject to Siting Board Jurisdiction

1. Existing Regulation – 980 CMR § 7.00

The Siting Board's existing regulation governing the construction of pipeline facilities is found within 980 CMR § 7.00, "Long-Range Forecasts and Supplements," which sets forth requirements related to long-range forecasting and supply planning for Massachusetts electric and gas utilities. Relevant subsections of 980 CMR § 7.00 require that a gas company planning a new natural gas facility include in its long-range forecast or supplement⁴ a description of the planned facility and an assessment of its environmental impact and its consistency with the policies of the Commonwealth. 980 CMR § 7.07(7). The existing regulation specifically requires that the gas company provide: a statement of need, nominal business information,⁵ agency jurisdiction(s), estimated project cost, physical project summary,⁶ existing and proposed

⁴ 980 CMR § 7.00 applies to planned new facilities, the in-service dates of which are expected to be within the time period covered by a long-range forecast filing. 980 CMR § 7.00 also allows gas companies to file an "annual supplement" to cover facilities proposed between long-range forecast filings. 980 CMR §§ 7.07(7), 7.08.

⁵ This information includes the name of the lead company, facility name and location, names of participating owners, and predicted dates of commencement and completion of construction. 980 CMR § 7.07(7)(a).

⁶ The applicant shall provide: "a summary statement of name or numerical description of line, purpose, location of terminal points, general location and length of route, facility characteristics including types of structures above and below the ground, proposed normal maximum operating pressure, right-of-way width, estimated cost, possible alternative routes and transportation methods, and a discussion of the alternative of no new pipeline." 980 CMR § 7.07(7)(d)(1).

land use, and effects of the project on natural features and land use, facility visibility, and, as applicable, air quality, water quality, solid waste, and noise effects. 980 CMR § 7.07(7)(a), (b), (d), (e).

The existing regulation applies to proposed gas pipelines “intended to have normal operating pressure in excess of 100 psi [pounds per square inch] gauge and length in excess of one mile.” 980 CMR § 7.07(7)(d). It excludes from review: (1) necessary maintenance of existing pipelines; (2) upgrading of an existing pipeline that has been in existence for at least 24 months and is capable of operating at pressures in excess of 100 psig; (3) construction of certain pipelines that for the first two years of service will be used at a pressure of less than 100 psig; and (4) construction of facilities on an emergency basis subject to 980 CMR § 6.06(2).⁷ 980 CMR § 7.07(8)(b)-(e).

Several aspects of 980 CMR § 7.00 render it difficult to use as guidance when constructing a natural gas pipeline in Massachusetts. First, the regulation assumes that the project proponent is a Massachusetts natural gas utility making an application in the context of a long-range forecast filing. This interweaving of gas pipeline siting requirements with forecast filing requirements hinders straightforward application of the regulations to gas pipeline siting, and in particular to gas pipelines proposed by an applicant other than a Massachusetts natural gas utility. Second, the regulations are difficult to locate and are not comprehensive; for example, 980 CMR § 7.00 provides only cursory guidance as to the required content of a petition to construct a natural gas pipeline, and does not address procedural issues such as notice and filing fees. Further, natural gas pipelines to be constructed in coastal zones also are subject to requirements set forth in 980 CMR § 9.00 but nowhere referenced in 980 CMR § 7.00.

2. Proposed Regulation – 980 CMR § 15.00

The Siting Board proposes to promulgate 980 CMR § 15.00 to address the structural

⁷ Section 6.06(2) provides that, when an accident, act of God, or unforeseen condition jeopardizes the health and safety of the public, the Siting Board may grant a Certificate of Environmental Impact and Public Need for a facility without requiring that the facility have been included in an approved long-range forecast or supplement or that a Notice of Intention have been approved by the Siting Board.

weaknesses of 980 CMR § 7.00 identified in Section II.A.1, above. Proposed 980 CMR § 15.00 separates regulatory provisions regarding the siting of natural gas pipelines from unrelated regulations regarding long-range forecasts and supplements, clarifies certain jurisdictional issues, provides detailed guidance on the contents of a petition to construct a natural gas pipeline, provides certain procedural requirements, and highlights the relationships between Siting Board review of a proposal and review by other agencies of the Commonwealth.

Proposed 980 CMR § 15.00 is organized in four sections. Section 15.01, "Purpose and Scope," sets forth the general purpose of the regulation and addresses jurisdictional issues. Section 15.02 defines terms used in the body of the regulation. Section 15.03, "Application for Siting Board Approval to Construct a Gas Pipeline," sets forth in detail the expected contents of a petition to construct a natural gas pipeline, and addresses related issues such as filing fees, provision of a draft notice, and joint filing of related Siting Board and Department matters. Section 15.04, "Procedures," addresses the publication of notice, public comment hearings, evidentiary hearings, and the timing and content of the Siting Board's decision on a petition to construct a natural gas pipeline. All other procedural issues are left to 980 CMR § 1.00, the Siting Board's revised rules governing the conduct of adjudicatory hearings. A brief summary of certain complex or novel provisions of 980 CMR § 15.00 follows.

a. Jurisdiction

G.L. c. 164, § 69G defines a jurisdictional pipeline as "a new pipeline for the transmission of gas having a normal operating pressure above 100 pounds per square inch gauge ("psig") which is greater than one mile in length," excepting pipeline repair and replacement projects. The proposed regulation more specifically defines the set of pipeline projects over which the Siting Board takes jurisdiction, and addresses certain jurisdictional issues that have arisen in recent years.

First, the proposed regulation supplies a definition for "normal operating pressure," and states that any pipeline with a Maximum Allowable Operating Pressure in excess of 150 psig will be treated as having a normal operating pressure in excess of 100 psig. This provision is intended to resolve uncertainty about the regulatory treatment of pipelines that are built to

operate safely at high pressures, but arguably are intended to operate at lower pressures. The proposed regulation, unlike the existing regulation, does not exempt from review pipelines that will be operated under 100 psig for two years.

Second, the proposed regulation clarifies that contiguous pipeline constructed within any five-year period is considered to be a single new facility subject to the Siting Board's jurisdiction. This rule is intended to reduce the potential for segmentation of a pipeline project to avoid siting review, without requiring inquiry into the motives of a developer who constructs a natural gas pipeline in stages.

Third, the proposed regulation distinguishes pipeline repair and replacement projects from new pipeline construction. Replacement pipe includes lengths of restructured, rebuilt, or relaid pipe that are of the same nominal diameter and design pressure and are also within the same right-of-way as the pipe being replaced; repair and replacement projects are excluded from siting review.

Finally, the proposed regulation addresses the issue of Siting Board jurisdiction over pipelines that also are regulated by FERC. The existing 980 CMR § 7.00 states that if a pipeline is regulated by FERC pursuant to the Natural Gas Act, the Siting Board shall participate in the federal proceeding and request joint adjudicatory hearings with FERC. As a matter of practice, the Siting Board staff intervenes in FERC's adjudication of requests for a § 7(c) Certificate of Public Convenience and Necessity ("CPCN") under the Natural Gas Act, views the route of any major proposed pipeline, holds one or more public hearings, and forwards environmental comments and recommendations to FERC; however, the Siting Board does not attempt parallel adjudication, since FERC's review covers the major issues (need, alternatives, routing, environmental impacts, and cost) that would be raised in a Siting Board proceeding.

However, it has come to the Siting Board's attention in recent years that interstate pipeline companies may make use of certain federal regulatory provisions to construct sizable pipelines (significantly longer than one mile, and with a pressure significantly higher than 100 psig) with little or no substantive FERC review. The Siting Board is concerned about the potential disparity in regulatory treatment between pipelines built by interstate pipeline companies and pipelines built by Massachusetts gas utilities or other non-interstate developers.

The Siting Board also is concerned that sizable pipelines may be built in Massachusetts without the level of pre-construction review deemed appropriate by the Massachusetts legislature. The proposed regulations address this issue broadly, by exempting from Siting Board review *only* those interstate pipelines or pipeline laterals that receive a full project-specific § 7(c) CPCN review, including a need analysis, alternatives analysis, and substantive environmental review of the proposed site or route, pursuant to § 7(c) of the Natural Gas Act. Any other pipeline construction that meets the size and pressure thresholds established in G.L. c. 164, § 69H, as interpreted in 980 CMR §§ 15.01 and 15.02, would be subject to review by the Siting Board pursuant to 980 CMR § 15.00.

The draft regulation's approach to this issue is to attempt to ensure that a substantive, site-specific review occurs for all pipeline projects proposed for Massachusetts, which is consistent with the mandate given the Siting Board by the Massachusetts legislature. However, since this requires the Siting Board to conduct a substantive review of pipelines over which FERC also asserts jurisdiction, the approach could be vulnerable to legal challenge. The Siting Board has identified four other approaches for reviewing interstate pipeline projects, which have various strengths and weaknesses. In Section III.E, below, the Siting Board describes these approaches and requests comments on the legal and policy implications of each approach.

b. Application to Construct

The proposed regulation identifies the required elements of an application to construct a jurisdictional gas pipeline, which include a detailed petition, a draft of the public notice for the proceeding, and, in certain circumstances, copies of an approved long-range forecast and certain filings made with the Massachusetts Energy Policy Act ("MEPA") Office of the Executive Office of Environmental Affairs ("EOEA"). The proposed regulation specifies the content of the petition in considerable detail, drawing on both the existing regulations and current practice. Topics that must be covered in the petition include a project description, an analysis of the need for the facility, alternative approaches and routes, an analysis of the project's environmental effects, an economic analysis, and an analysis of the project's effect on the reliability of the gas supply system. Consistent with established precedent, the proposed regulation allows a

developer to propose a gas pipeline to meet a reliability-based need, an economic efficiency-based need, or an environmental need. It also specifies that a project may be proposed to serve needs within Massachusetts, outside of Massachusetts, or both within and outside of Massachusetts.

c. Inter-Agency Coordination

The proposed regulation requires an applicant proposing to construct a pipeline within a coastal zone to consult with the Office of Coastal Zone Management within EOEA as to the need for an inland alternative prior to filing with the Siting Board. This requirement was developed after consultation with the Office of Coastal Zone Management, and reflects the two agencies' views on the most efficient means of implementing an existing Memorandum of Understanding with respect to the review of energy facilities located in coastal zones. The proposed regulation also provides for the joint filing and review of related Siting Board and Department matters, as set forth in G.L. c. 25, § 4.

B. Construction of Natural Gas Pipelines Subject to Regulation by FERC

In this rulemaking, the Siting Board also proposes to promulgate 980 CMR § 17.00, a new regulation addressing Siting Board participation in proceedings conducted by FERC. Proposed 980 CMR § 17.00 is based on the existing 980 CMR § 7.07(9), which sets forth procedures for Siting Board participation in FERC proceedings involving interstate facilities. As discussed above, 980 CMR § 7.07(9) states that, if a pipeline is regulated by FERC pursuant to the Natural Gas Act, the Siting Board shall intervene in the federal proceeding, hold one or more public hearings, request joint adjudicatory hearings with FERC, and submit comments on the proposal. The existing 980 CMR § 7.07(9), which was adopted in 1978, does not reflect the subsequent changes in the federal regulatory process brought about by amendments to the Natural Gas Act, the adoption of the Natural Gas Policy Act of 1978, and corresponding amendments to FERC's regulations.

The proposed regulation sets forth procedures for participation in FERC proceedings that reflect these changes, which include FERC's use of abbreviated federal review processes for

certain types of pipeline projects. Proposed 980 CMR § 17.00 is organized in six sections. Section 17.01, "Purpose and Scope," sets forth the general purpose of the regulation. Section 17.02 defines terms used in the body of the regulation. Section 17.03, "Notice of Application filed with the Federal Energy Regulatory Commission," requires that the Siting Board be notified of all proposals filed with FERC to construct natural gas infrastructure in Massachusetts, and provides for the Siting Board to notify other relevant Massachusetts agencies of these filings. Section 17.04, "Board Participation in § 7(c) CPCN Proceedings," describes the public hearing and comment process that the Siting Board uses when it intervenes in FERC's extensive review of pipeline projects filed under § 7(c) of the Natural Gas Act. Section 17.05, "Board Participation in § 7(c) Blanket Certificate Proceedings,"⁸ describes an abbreviated comment process to be used when projects are being reviewed under FERC's 45-day blanket certificate process. Finally, Section 17.06, "Board Participation in Other FERC Proceedings," provides general authority for either the Siting Board or its staff to participate in any FERC proceeding of interest to the agency.

As discussed in Section II.A.2.a, above, Section 17.05 applies only to construction that does not meet the size and pressure thresholds established in G.L. c. 164, § 69H. All interstate natural gas facilities would undergo Siting Board review pursuant to 980 CMR § 15.00 unless they receive a full project-specific § 7(c) CPCN review, including a need analysis, alternatives analysis, and substantive environmental review of the proposed site or route, pursuant to § 7(c) of the Natural Gas Act. Any other pipeline construction that meets the size and pressure thresholds established in G.L. c. 164, § 69H would be subject to review by the Siting Board pursuant to 980 CMR § 15.00 rather than pursuant to 980 CMR § 17.05.

C. Repeal of 980 CMR §§ 7.07(7)(d) and 7.07(9)

The Siting Board proposes to repeal 980 CMR § 7.07(7)(d), its existing regulation

⁸ The holder of a blanket certificate may construct pipeline projects with costs within a certain range (currently \$7.4 million to \$20.6 million) after providing 45 days advance notice to FERC; no site-specific review is required unless a protest is filed within that 45 day period. 18 C.F.R. §§ 157.201, et seq.

governing the contents of a petition to construct a natural gas pipeline facility. The existing 980 CMR § 7.07(7)(d) is redundant of and will be superseded by 980 CMR § 15.03.

The Siting Board also proposes to repeal 980 CMR § 7.07(9), its current regulations addressing Siting Board participation in FERC proceedings. The existing 980 CMR § 7.07(9) does not reflect current federal statutes and federal regulatory law, is redundant of certain sections of proposed 980 CMR § 17.00, and will be superseded by the provisions in 980 CMR § 17.00.

III. REQUEST FOR COMMENTS

The Siting Board seeks written comments addressing any or all provisions of proposed 980 CMR §§ 15.00 and 17.00. The Siting Board also specifically seeks written comments on the following topics:

A. Length, Pressure, and Time Interval Thresholds - 980 CMR § 15.01(2)

The proposed regulation seeks to resolve certain issues that have arisen over time regarding the Siting Board's jurisdiction, including:

- segmentation of new pipeline construction;
- replacement of existing pipeline with new pipeline of the same capacity; and
- the definition of normal operating pressure.

The Siting Board would particularly like to receive comments addressing the following questions:

1. Is the regulation clear about the conditions under which a pipeline project is defined as jurisdictional to the Siting Board, or is there a class of projects for which jurisdiction would remain uncertain?
2. Does a five-year time-span provide a reasonable basis to encompass contiguous construction activities?
3. Is there a way to define "normal operating pressure" that can be objectively, accurately, and assuredly determined prior to facility construction?
4. To what extent would the new regulation change the number or type of gas pipeline petitions that are submitted?

B. Contents of Petition - 980 CMR § 15.03(1)

Proposed 980 CMR § 15.03(1) details the information that should be included in a petition to build a jurisdictional pipeline. Do the requirements appear to be sufficiently flexible to address any likely jurisdictional pipeline project, including larger or smaller projects or atypical circumstances?

C. Route Alternatives and Route Variations - 980 CMR §§ 15.02, 15.03(1, 5)

The Siting Board will continue to require a comparative analysis of reasonable alternative route(s) for gas pipelines. In addition, the Siting Board intends to permit developers to seek simultaneous approval of one or more *variations* to a specific route. As proposed in the draft regulations, a route variation is an alternative to a short segment of a proposed pipeline route; a variation typically would be proposed when the petitioner is aware of specific uncertainties (e.g., regarding the placement of other utilities in a city street, or the ability to obtain permission for a street opening) that would affect the feasibility of that route segment. Is the Siting Board's distinction between "route alternatives" and "route variations" clear and is it workable?

D. Filing Fees for Non-Utilities - 980 CMR § 15.03(7)

The proposed regulation sets filing fees for pipeline projects in accordance with G.L. c. 164, § 69J½, which specifies that a filing fee of between \$25,000 and \$75,000 may be assessed for proposals to construct a facility that does not generate electricity. Filing fees are not required if the applicant is a utility company subject to the jurisdiction of the Department that is assessed annually for the expenses of the Department. Please comment on the fee structure set forth in the proposed regulation.

E. Pipeline Projects Undergoing FERC Review - 980 CMR § 15.01(3)(a)

As discussed in Section II.A.2. a, above, the development of the proposed regulation has highlighted disparities in the regulatory treatment of pipeline facilities proposed by interstate pipeline companies and by other developers of pipelines in Massachusetts. Under current FERC regulations, interstate pipeline companies are not required to seek a § 7(c) CPCN unless the project will cost more than \$20.6 million, or unless the company intends to seek eminent domain

rights to construct the project. Pipeline projects that cost between \$7.4 million and \$20.6 million must provide 45 days advance notice to FERC before construction; if no protest is filed during that period, construction may proceed without further review. Pipeline projects that cost less than \$7.4 million may be constructed without any advance notice to or review by FERC. See 18 C.F.R. § 157.208.

These cost-based review categories may promote regulatory efficiency at FERC, which is charged with ensuring just and reasonable rates within the industries that it regulates; however, they bear little resemblance to the Siting Board's jurisdictional thresholds, which are based on pipeline length and pressure. Thus, if the Siting Board simply relies upon FERC's review for this category of project, sizable pipeline projects may be built in Massachusetts by interstate pipeline companies, with little or no substantive review, and certainly without the level of pre-construction review deemed appropriate by the Massachusetts legislature. Moreover, the potential exists for significant regulatory disparity between construction proposed by interstate pipeline companies and construction proposed by Massachusetts utilities and other developers. This disparity could result in differing degrees of environmental protection for intrastate and interstate projects; it almost certainly will result in differing degrees of public participation in the review of such projects.

In developing the proposed regulation, the Siting Board considered several approaches to reviewing gas facilities built by interstate pipeline companies. These approaches ranged from a continuation of the Siting Board's current practices, up to a full adjudication of all interstate pipeline proposals that meet the definition of a facility set forth in G.L. c. 164, § 69G. In the proposed regulation, interstate pipeline projects are excluded from review under 980 CMR § 15.00 if they require or have been issued a § 7(c) CPCN under of the Natural Gas Act. Such pipeline projects undergo a substantive site-specific review by FERC; the Siting Board believes that it can most effectively pursue its mandate by intervening in the FERC proceeding and providing comments, as set forth in 980 CMR § 17.04. Pipelines that do not undergo substantive site-specific review by FERC would be reviewed by the Siting Board pursuant to 980 CMR § 15.00. Since there would be little or no overlap between FERC's minimal oversight of such pipeline projects and the issues reviewed by the Siting Board, the Siting Board's believes that its

investigation would have only indirect effects on the federal regulatory scheme. However, we cannot be sure that a rule requiring Siting Board adjudication of interstate pipeline projects would be accepted by the courts if challenged.

The Siting Board has considered four main alternatives to the regulatory approach presented in the draft regulation. Each strikes a different balance among the goals of environmental protection, public participation, regulatory efficiency, regulatory consistency, and the rational expansion of the natural gas delivery system in Massachusetts. The Siting Board seeks comments on the extent to which each alternative is practical, is consistent with both federal law governing the interstate pipeline system and state law governing the construction of gas pipelines, and addresses the Siting Board's central concern regarding the construction of major pipeline infrastructure with little or no substantive review. The four alternatives to the proposed approach are:

1. Current Practice. Under this alternative, the Siting Board would continue its current practices with respect to gas facilities that fall under FERC's jurisdiction. Specifically, the Siting Board would intervene in § 7(c) CPCN proceedings on gas facilities to be constructed in Massachusetts, hold public hearings, and provide site-specific comments to FERC. The Siting Board also would require that interstate pipeline companies provide notice of proposals to construct pipelines pursuant to a blanket certificate, and would file a protest if it believed more extensive review of a project is warranted. However, the Siting Board would not conduct its own adjudicatory proceedings for any pipeline under FERC jurisdiction.

The proposed regulation could be modified to reflect current practice by extending the exclusion located at 980 CMR § 15.01(3)(a) to any interstate pipeline, without restriction.

2. Full Siting Board Review of All Gas Facilities. Under this alternative, the Siting Board would acknowledge that FERC has jurisdiction over the siting of interstate natural gas pipelines. The Siting Board would nonetheless adjudicate all proposals to construct natural gas facilities in Massachusetts, consistent with the requirements of G.L. c. 164, § 69J. If a natural gas facility also fell under FERC's jurisdiction, the Siting Board would seek to coordinate its review schedule with FERC's, and would provide a copy of its decision to FERC as input to FERC's regulatory process. Under this alternative, some projects would undergo parallel review by the Siting Board and FERC.

Proposed 980 CMR § 15.00 could be modified to reflect this approach by eliminating the 980 CMR § 15.01(3)(a) exclusion and possibly by excluding interstate pipelines from

fees.

3. Circumscribed Scope of Review for Facilities under FERC Jurisdiction. As with alternative 2, the Siting Board would adjudicate all proposed facilities in Massachusetts and would provide a copy of its decision to FERC as input to any federal review. However, under this alternative, the Siting Board would not review the need for a proposed interstate pipeline facility. This approach is closest to the process which appears to be contemplated in the Siting Board's existing regulation at 980 CMR § 7.07(9), which calls for adjudicatory hearings but limits the scope of its comments to FERC to "the difficulties and problems identified at said public hearings." It also is similar to procedures used by our counterpart agencies, the Connecticut Siting Council and the New Hampshire Site Evaluation Committee, which hold evidentiary hearings and issue orders on projects that are subject to FERC jurisdiction, but do not rule on the need for such projects.⁹

The proposed regulation could be altered to reflect this approach by eliminating the 980 CMR § 15.01(3)(a) exclusion, by limiting the applicability of need-related sections 15.03(1)(b) and 15.03(1)(g)(ii) to only intrastate pipelines, and possibly by excluding interstate pipelines from fees.

4. Informal Review Process for non-§ 7(c) Pipelines. Under this alternative, the Siting Board would maintain its current practice of intervening in § 7(c) CPCN proceedings at FERC, holding public hearings, and providing comments based on those hearings to FERC. However, the Siting Board would conduct an informal review of gas facilities that are subject to FERC jurisdiction but are not subject to § 7(c) CPCN proceedings. As part of this informal review, the Siting Board would examine various possible routes for the proposed facilities and would work with the applicant to develop mitigation for any environmental impacts of the proposed project. During the informal

⁹ See, e.g., Docket Nos. SEC 96-01/96-03 of the New Hampshire Site Evaluation Committee, and Docket No. 221 of the Connecticut Siting Council. The Connecticut Siting Council issues a Certificate of Environmental Compatibility and Public Need for facilities built by interstate pipeline companies after considering issues related to the siting of pipeline facilities, environmental mitigation measures, and construction procedures. Opinion of the Connecticut Siting Council in Docket No. 221, at 1 (August 1, 2002). The New Hampshire Site Evaluation Committee issues a Certificate of Site and Facility after considering: (1) the applicant's financial, technical, and managerial capabilities; (2) whether the project will unduly interfere with the orderly development of the region; (3) whether the project will have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment and public safety; and (4) whether operation of the project is consistent with state energy policy. Decision and Order of the New Hampshire Site Evaluation Committee in Docket Nos. SEC 96-01/96-03, at 4 (July 16, 1997).

review, the Siting Board would not conduct full adjudicatory proceedings with direct cross-examination by parties, but would receive sworn testimony and public comment.

The proposed regulation could be altered to reflect this approach by (1) extending the proposed 980 CMR § 15.01(3)(a) exclusion to any interstate pipeline, without restriction, and (2) by developing within 980 CMR § 17.00 a procedure for interstate projects that are not subject to § 7(c) CPCN proceedings.

In conjunction with one or more of the approaches described above, the Siting Board would consider requiring all interstate pipeline companies provide notice to the Siting Board of any gas facility proposed for construction in Massachusetts and to indicate what level of FERC review, if any, is required before the facility may be constructed. This notice requirement would provide the Siting Board with an opportunity to evaluate whether further review is necessary and to alert other affected state agencies.

The Siting Board seeks comments on whether the public interest would be better served by Siting Board review or adjudication of gas facilities that are subject to FERC's rate-making authority, including those that undergo no substantive pre-construction review by FERC. The Siting Board also seeks comments on the legal constructs under which the Siting Board may conduct an adjudication or other substantive review of pipelines that are subject to FERC jurisdiction. Further, the Siting Board seeks comments regarding the merits of the proposed regulation and each of the other four approaches described above, including any suggested revisions that would assist the Siting Board in achieving its goal of ensuring meaningful review of the construction of interstate gas pipelines in Massachusetts.

F. Jurisdiction over Hinshaw Pipelines - 980 CMR § 15.01(3)(a)

The Hinshaw Amendment to the Natural Gas Act exempts from FERC regulation persons who transport natural gas received from another person within or at the boundary of a state, if (1) all the natural gas so received is ultimately consumed within such state, and (2) the facilities and rates are regulated by the state. 15 U.S.C., § 717(c). The construction and siting of Hinshaw Pipelines are regulated by the states even though such pipelines may hold a FERC limited-jurisdiction certificate. It is the Siting Board's understanding that FERC may regulate pipelines

otherwise subject to the Hinshaw Amendment if a state does not assert its authority to regulate such pipelines. The Siting Board believes that it has an obligation to regulate the siting of Hinshaw Pipelines pursuant to G.L. c. 164, § 69J.

The proposed regulation does not directly address the issue of Siting Board jurisdiction over Hinshaw Pipelines, as the Siting Board believes that an assertion of jurisdiction over all pipeline facilities built in Massachusetts is implicit in G.L. c. 164, § 69J. Nonetheless, the Siting Board seeks comments on whether it is clear from 980 CMR § 15.00 that Hinshaw Pipelines are subject to state regulation, or whether the proposed regulations should be modified to explicitly assert jurisdiction under 980 CMR § 15.00 over Hinshaw Pipelines and any other facilities that would be fully reviewed by FERC only if they are not reviewed by the state. In addition, the Siting Board seeks comments on the legal and policy implications of asserting jurisdiction over the siting of Hinshaw Pipelines, including possible implications with respect to the rate-setting responsibilities of the Department.

G. Jurisdiction over Direct Sales Laterals - 980 CMR § 15.01(3)(a)

Direct Sales Laterals are lateral pipelines that directly serve end-users and that are constructed and operated by the interstate company that operates the interstate pipelines from which the lateral branches.

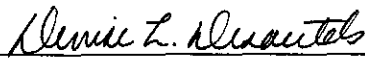
The proposed regulation does not directly address the issue of Siting Board jurisdiction over Direct Sales Laterals as the Siting Board believes that an assertion of jurisdiction over all pipeline facilities built in Massachusetts is implicit in G.L. c. 164, § 69J. Nonetheless, the Siting Board seeks comments on whether it is clear from 980 CMR § 15.00 that Direct Sales Laterals are subject to state regulation, or whether the proposed regulations should be modified to explicitly assert jurisdiction under 980 CMR 15.00 over Direct Sales Laterals and any other facilities that would be fully reviewed by FERC only if they are not reviewed by the state. In addition, the Siting Board seeks comments on the legal and policy implications of asserting jurisdiction over the siting of Direct Sales Laterals, including possible implications with respect to the rate-setting responsibilities of the Department.


IV. FILING COMMENTS

The Siting Board seeks written comments on the proposed regulations, 980 CMR §§ 15.00 and 17.00, and to the questions posed in Section III above, no later than Friday, January 31, 2003. Comments should be filed with the Energy Facilities Siting Board, One South Station, Boston, Massachusetts 02110. The Siting Board requests that all written comments also be submitted to the Siting Board in electronic format using one of the following methods: (1) by electronic mail ("e-mail") attachment to SitingBoard.Filing@state.ma.us (copy to Peter.Ray@state.ma.us); or (2) on a 3.5" floppy diskette, PC-compatible format. The text of the e-mail or diskette label must specify: (1) an easily identifiable case caption; (2) the docket number; (3) the name of the person or company submitting the filing; and (4) a brief descriptive title of the document (e.g., comments on 980 CMR § 15.00). The electronic filing should also include the name, title and telephone number of a person to contact in the event of questions about the filing. Text responses should be submitted in either WordPerfect (naming the document with a ".wpd" suffix) or in Microsoft Word (naming the document with a ".doc" suffix). Documents submitted in electronic format will be posted on the Siting Board's web page, which can be accessed via the Department's Website, www.state.ma.us/dpu/siting_board.htm.

To provide further opportunity for comment, and pursuant to G.L. c. 30A, §§ 2 and 4, the Siting Board will hold a public hearing on Tuesday, February 18, 2003 at 10:00 a.m. at the Siting Board's offices, One South Station, Boston, Massachusetts. Interested persons may present facts, opinions, or arguments relating to the proposed regulations at the public hearing.


The effective date of the revised regulations shall be the date of their final publication in the Massachusetts Register.


Denise L. Desautels


Selma Urman
Presiding Officers

Dated this 20th of December, 2002.

APPROVED by the Energy Facilities Siting Board at its meeting of December 20, 2002,
by the members and designees present and voting: Paul B. Vasington (Chairman, DTE/EFSB);
Deirdre K. Manning (Commissioner, DTE); W. Robert Keating (Commissioner, DTE); and
Joseph Donovan (for Peter J. Abair, Director of Economic Development).



Paul B. Vasington, Chairman
Energy Facilities Siting Board

Dated this 20th day of December, 2002.

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).

980 CMR 15.00: PETITIONS TO CONSTRUCT NATURAL GAS PIPELINE FACILITIES

Section

15.01: Purpose and Scope

15.02: Definitions

15.03: Application for Siting Board Approval to Construct a Gas Pipeline

15.04: Procedures

15.01: Purpose and Scope

- (1) Purpose. 980 CMR 15.00 sets forth procedures governing the filing and the review by the Energy Facilities Siting Board of an application to construct a gas pipeline. Requirements set forth in this chapter supersede any provisions contained in 980 CMR 5.00, 7.00, and 9.00 that relate to proposals to construct gas pipeline facilities.
- (2) Scope. An application must be filed under 980 CMR 15.00 whenever any person proposes to construct a gas transmission pipeline with a normal operating pressure in excess of 100 psig, when the total length of new gas pipeline will exceed one mile.
 - (a) Pipeline Segmentation. For purposes of determining jurisdiction, any adjacent lengths of gas pipeline constructed within the five preceding years shall be included when calculating the total length of new gas pipeline. However, lengths of pipeline that have previously been granted written approval by the Siting Board shall not be included in the total length of new gas pipeline.
 - (b) Replacement Pipe. Notwithstanding 980 CMR 15.01(2)(a), above, any lengths of restructured, rebuilt, or relaid pipe that are of the same nominal diameter and design pressure and are also within the same right-of-way as the replaced pipe shall be subtracted when calculating the total length of new gas pipeline, for purposes of determining jurisdiction.
- (3) Exclusions.
 - (a) Construction of any interstate pipeline that requires or has been issued a Certificate of Public Convenience and Necessity under § 7(c) of the Natural Gas Act does not constitute construction of a pipeline for transmission of gas subject to 980 CMR 15.00. Persons proposing to construct any pipeline for transmission of gas excluded from Siting Board review by 980 CMR 15.01(3)(a) must comply with the requirements of 980 CMR 17.00.
 - (b) Commencement of permanent placement of facilities on an emergency basis subject to compliance with the provisions of 980 CMR 6.06(2) does not constitute construction of a pipeline for transmission of gas subject to 980 CMR 15.00.
- (4) Application of 980 CMR 1.00. 980 CMR 1.00 shall apply to proceedings initiated pursuant to 980 CMR 15.00, except to the extent that 980 CMR 1.00 and 980 CMR 15.00 are in conflict. In the event of a conflict, 980 CMR 15.00 shall prevail over 980 CMR

1.00.

(5) Waiver of Rules. Where good cause appears, not contrary to statute, the Board or Presiding Officer may permit deviation from the rules in 980 CMR 15.00.

15.02: Definitions.

For the purposes of 980 CMR 15.00, the definitions set forth in 980 CMR 1.03 shall apply unless the context or subject matter requires a different interpretation. The following definitions also shall apply to this section:

Coastal Zone means the geographic area described in 301 CMR 21.05, used to establish the area of jurisdiction for the Coastal Zone Management Program Federal Consistency Review Procedures (301 CMR 21.00), pursuant to G.L. c. 21A, §§ 2, 4A.

Department means the Massachusetts Department of Telecommunications and Energy.

Design pressure means design pressure of a pipe as defined in 49 CFR Part 192 (Subpart C).

Gas means natural gas or any direct substitute. Gas includes natural gas, propane air, synthetic natural gas, and liquified natural gas.

Interstate Pipeline means a pipeline that is used in the transmission of natural gas in interstate commerce, and shall not include in-state transmission of gas such as intrastate pipelines, Hinshaw Amendment pipelines, or other means of intrastate distribution.

Long-Range Forecast means a long-range forecast filed with the Department of Telecommunications and Energy pursuant to G.L. c. 164, § 69I.

MAOP means maximum allowable operating pressure, which is the maximum pressure at which a pipeline or segment of a pipeline may be operated under 49 CFR Part 192.

Natural Gas Act means Natural Gas Act, 15 U.S.C. § 717 *et seq.*

Normal operating pressure means the maximum pressure that would be expected in the pipeline based on the configuration of compressors and pressure regulators. Any pipeline with an MAOP in excess of 150 psig will be treated as having a normal operating pressure in excess of 100 psig.

Preferred Route means the gas pipeline route and any route variations proposed by the Applicant for approval by the Board.

psig means pounds per square inch gauge.

Route alternative means a gas pipeline route and any route variations proposed for approval in the alternative to the preferred route.

Route segment means a discrete portion of a pipeline route.

Route variation means a route segment, generally short in distance, which could substitute for some portion of a preferred route or route alternative in the event that construction along that portion of the preferred route or route alternative proves infeasible.

15.03: Application for Siting Board Approval to Construct a Gas Pipeline

(1) Contents of Petition. An application for approval to construct a gas pipeline shall include a written petition which (1) sets forth the need for the pipeline project, (2) compares the pipeline project to other alternatives, and (3) analyzes the pipeline project's cost, environmental impacts, and effects on the reliability of the gas supply system, as specified below. The petition shall describe the pipeline project in its entirety, including any intervening replacement sections.

(a) Project Description. The petition shall contain a description of the pipeline project, specifying:

- (i) the total length of new and replacement pipeline, pipeline diameter and intended MAOP; the location of the proposed route and any route variations for which the Applicant seeks approval; the types and locations of structures to be constructed above and below the ground; the width of permanent right-of-way; and depth of installation;
- (ii) the existing gas supply system in the area, including interstate and intrastate pipelines, laterals, pressure regulation equipment, and locations of significant gas demand; and
- (iii) proposed construction methods, access and construction rights-of-way, and predicted dates of construction.

(b) Need. The petition shall document the need for the pipeline project.

(i) A pipeline project may be proposed to meet a reliability-based need (for example, to maintain or increase the reliability of gas service or to connect new customers), an economic efficiency-based need (for example, to reduce the cost of energy or to increase competition between gas suppliers), or an environmental need (for example, to reduce the level of environmental impacts associated with meeting certain energy requirements). A pipeline project may be proposed to serve needs within Massachusetts, or outside of Massachusetts, or both within and outside of Massachusetts.

(ii) If the project is proposed to meet a reliability-based need, the petition shall include: (i) an analysis of existing and projected gas requirements for the area to be served by the pipeline project; (ii) an analysis of existing and planned resources available to meet those requirements; and (iii) an analysis of service deficiencies that require

additional gas supply resources or an analysis of the reliability benefits of the pipeline project. The petition shall describe in reasonable detail the methods and assumptions used in each analysis.

(iii) If the project is proposed to meet an economic efficiency-based or environmental need, the petition shall include quantitative analyses of the economic or environmental benefits of the project. The petition shall describe in reasonable detail the methods and assumptions used in each analysis.

(iv) The petition shall describe any secondary benefits claimed for the proposed pipeline, shall provide analyses documenting such benefits, and shall describe in reasonable detail the methods and assumptions used in each analysis.

(c) Alternative Approaches. The petition shall describe all reasonably practicable means of meeting the need identified in 980 CMR 15.03(1)(b), above. These alternative approaches may include, without limitation: upgrades to existing facilities; enhancement of local or regional gas storage capacity; interconnection to a different source of gas; interconnection at a different location; pipeline development by a different person; and reduction of gas requirements through the use of demand-side management. The petition shall compare the environmental impacts, capital and operating costs, and effects on the reliability of the gas delivery system associated with each of the alternative approaches, and shall state the Applicant's reasons for pursuing the pipeline project rather than one of the alternative approaches.

(d) Route Selection Process. The petition shall contain a description of the process by which the proposed route for the pipeline was selected. Specifically, the petition shall:

- (i) describe how the Applicant identified potential routes or route segments for the pipeline project;
- (ii) list the potential routes or route segments that were identified; and
- (iii) present the environmental, economic, reliability, and other criteria used to evaluate the potential routes and describe how these criteria were applied, weighted and combined.

(e) Preferred Route and Route Alternatives.

(i) The petition shall indicate which route or combination of route segments identified in 980 CMR 15.03(1)(d), above, is the Applicant's preferred route for the pipeline project.

(ii) The petition shall identify any other routes or combinations of route segments identified in either 980 CMR 15.03(1)(c) or (d), above, that the Applicant intends to pursue as route alternatives. The petition shall present at least one route alternative that is geographically distinct from the preferred route. A waiver of this requirement pursuant to 980 CMR 15.01(5) may be sought if the Applicant can demonstrate that there are no feasible pipeline routes that are geographically distinct from the preferred route.

(f) Environmental Analysis. The petition shall include an analysis of the

likely environmental impacts of the pipeline project. Specifically, the petition shall:

- (i) describe the existing uses and natural resource characteristics of the land along the preferred route, including: types and densities of development; agricultural and other open space uses; parks and recreation areas; areas designated for protection of their natural, archaeologic, historic, or scenic value; utility and transportation corridors; types of disturbed and undisturbed habitat; actual and potential use by typical and rare wildlife species; and zoning;
 - (ii) describe the temporary environmental impacts from project construction and the proposed mitigation of such impacts including, as applicable: land use impacts, including effects on agricultural and forest resources, upland habitats, and changes to views; water resource impacts, including effects on rivers, streams, wetlands and other natural habitats and on water quality; noise impacts; air quality impacts; solid waste impacts; traffic impacts; and standard procedures for environmental impact mitigation and the handling of hazardous materials during construction;
 - (iii) describe the long-term environment impacts from the project and mitigation of such impacts including, as applicable: land use impacts, including effects on land use and on natural features and natural habitats and changes to views; water resource impacts, including effects on rivers, streams, wetlands and other natural habitats and on water quality; noise impacts; air quality impacts; and solid waste impacts; and
 - (iv) compare the environmental impacts of the route alternatives listed in 980 CMR 15.03(1)(e), above.
- (g) Economic Analysis.
- (i) The petition shall compare the capital and operating costs of the route alternatives listed in 980 CMR 15.03(1)(e), above. The petition shall list costs by major categories such as design and engineering costs, permitting costs, land acquisition costs, cost of labor, cost of materials, and pipeline and right-of-way maintenance costs.
 - (ii) If the project is proposed to meet an economic efficiency-based need, or if it would provide economic efficiency-related benefits if located along either the preferred or an alternative route, the petition also shall compare economic benefits of the project as built along the preferred route and the route alternatives. The petition shall describe in reasonable detail the methods and assumptions used in this analysis.
- (h) Reliability Analysis. The petition shall compare the route alternatives listed in 980 CMR 15.03(1)(e), above, with respect to their effects on the reliability of the gas supply system. The petition shall include an analysis of the extent to which each route alternative would maintain or enhance deliverability of gas at an adequate pressure and volume to customers affected by the pipeline project, and shall specify the approximate number of years for which adequate service would be provided under each alternative.

- (i) Maps. The petition shall include:
 - (i) a single map showing the proposed route and the route alternatives;
 - (ii) one or more maps based on United States Geological Survey topographic maps of 1:24,000 or 1:25,000 scale, showing the proposed pipeline route and any route variations, the route alternatives listed in 980 CMR 15.03(1)(e), above, and the locations of related facilities; and
 - (iii) aerial photographs at a scale of approximately 1:2400, marked to show proposed pipeline alignment, location of related facilities, land ownership, rights-of-way, and any proposed construction access roads.
- (j) Figures. The petition shall include figures or diagrams showing typical right-of-way and workspace configurations using cross-sectional or other views, and plans for waterway and road crossings.
- (k) Required Permits. The petition shall contain a list of the local, state, and federal permits required to construct and operate the pipeline project.

(2) Long-Range Forecast. If the Applicant is required to file a long-range forecast pursuant to G.L. c. 164, § 69I, the application shall include a copy of the Applicant's most recently approved long-range forecast and an analysis demonstrating that the pipeline project is consistent with that long-range forecast.

(3) MEPA Filings. If the pipeline project requires the filing of an Environmental Notification Form pursuant to 301 CMR 11.00, the application shall include a copy of the Environmental Notification Form and the resulting Certificate from the Secretary of Environmental Affairs. If additional filings have been made regarding the project pursuant to 301 CMR 11.00, a copy of these additional filings and any resulting Certificates from the Secretary of Environmental Affairs shall be included in the application.

(4) Coastal Zone Alternatives. If the preferred route is located in or passes through a Coastal Zone, the Applicant shall consult with the Office of Coastal Zone Management within the Executive Office of Environmental Affairs to determine whether it must present an inland alternative to the preferred route. If an inland alternative is required, this alternative shall be presented as a route alternative pursuant to 980 CMR 15.03(1)(e) (ii). If an inland alternative is not required, the petition shall be accompanied by a letter from the Office of Coastal Zone Management attesting to this determination.

(5) Draft Notice. An application for approval to construct a gas pipeline shall include a draft notice of adjudication that complies with the requirements set forth in 980 CMR §§ 1.04(3) *et seq.* The draft notice shall contain a description of the preferred route and any route alternatives identified in 980 CMR 15.03(1)(e), specifying for each route the total length of pipeline to be constructed, the location of route, pipeline diameter, proposed MAOP, types and locations of related structures above and below the ground, and route variations. The draft notice shall be provided both in writing and electronically.

(6) Joint Filing of Related Matters

(a) Related Siting Board Matters. An Applicant may file a petition to construct a generating facility or any other related matter within the Board's jurisdiction in conjunction with an application to construct a gas pipeline. These petitions shall be assigned separate docket numbers, but may be the subject of a joint notice, may be the subject of consolidated public and evidentiary hearings, and may be addressed in a consolidated decision by the Board.

(b) Related Department Matters. An Applicant may file, in conjunction with a petition to construct a gas pipeline, a petition with the Department for approval of a long-range forecast pursuant to G.L. c. 164, § 69I, a petition for a zoning exemption pursuant to G.L. c. 40A, § 3, or a petition for any other related matter within the Department's jurisdiction, with a request that the matter be referred to the Board and consolidated with the petition to construct a gas pipeline facility. This request may be granted at the discretion of the Chairman of the Department. If this request is granted, the Chairman of the Department shall issue a ruling stating that he has referred the matter to the Board pursuant to G.L. c. 25, § 4, for consolidation with the Board matter. The consolidated petitions may be the subject of a joint notice, may be the subject of consolidated public and evidentiary hearings, and may be addressed in a consolidated decision by the Board.

(7) Filing Fees

(a) Applicability. Filing fees are assessed whenever an Applicant is not a utility subject to the jurisdiction of the Department that is assessed annually for the expenses of the Department.

(b) Fee Levels. Fees are assessed based on the length of the preferred route, according to the schedule below. Where a conflict exists, the lower fee shall apply.

(i) For a gas pipeline that is less than two miles in length, the filing fee shall be \$40,000.

(ii) For a gas pipeline that is more than two miles in length but less than five miles in length, the filing fee shall be \$60,000.

(iii) For a gas pipeline that is more than five miles in length, the filing fee shall be \$75,000.

(iv) For an application to construct a gas pipeline of any length that is filed in conjunction with an application to construct a generating facility, the filing fee shall be \$25,000.

(c) Fee Payment. Payment of the filing fee is due at the time the Application to Construct is filed with the Board. The filing fee shall be made by certified check payable to the Commonwealth of Massachusetts.

15.04: Procedures

(1) Notice Requirements

(a) The applicant shall provide notice of adjudication by first class mail in accordance with the requirements of 980 CMR 1.03(4).

(b) In addition, the applicant shall send a copy of the notice via first class mail to all abutters and abutters to abutters within 300 feet of the preferred route and route alternatives identified in 980 CMR 15.03(1)(e), or as the Presiding Officer may otherwise provide.

(c) The applicant shall place a copy of the petition to construct on file in the Town or City Hall and the main public library of each Massachusetts municipality through which the preferred route or any route alternative identified in 980 CMR 15.03(1)(e) passes.

(d) Notice may be supplemented during the course of the proceeding, as the Presiding Officer may provide.

(2) Public Comment Hearings. As soon as practicable after the filing of a petition to construct a gas pipeline, the Board shall hold a public comment hearing in at least one of the municipalities through which the preferred route passes. In accordance with 980 CMR 1.04(5), public comment hearings are conducted to afford members of the general public an opportunity to comment on a matter. Comments made at public comment hearings are not deemed to be evidence. Additional public comment hearings may be held at the discretion of the Presiding Officer.

(3) Evidentiary Hearings. The Board shall commence evidentiary hearings within six months of the filing of a petition to construct a gas pipeline. Evidentiary hearings shall be conducted in accordance with 980 CMR §§1.06 *et seq.*

(4) Decisions

(a) Within twelve months of the filing of a petition to construct a gas pipeline, the Board shall issue a decision approving the petition, approving the petition with conditions, or rejecting the petition. The Board may approve the construction of the pipeline along the preferred route, along any route alternative included in the notice of adjudication, or along any combination of route segments included in the notice of adjudication; however, the Board may not approve the construction of the pipeline along any route or route segment that has not been included in a notice of adjudication.

(b) The Board's decision shall be in writing, and shall set forth all necessary determinations of fact or law, including findings with respect to: (i) the need for or benefits to be provided by the pipeline project; (ii) the relative merits of alternative approaches to serving the need or achieving the benefits for which the pipeline is proposed, in terms of cost, reliability, and environmental impact; (iii) whether the preferred route for the pipeline project is superior to route alternatives in terms of cost, reliability, and environmental impact; (iv) whether the pipeline project is consistent with current Massachusetts health, environmental protection, and resource use and development policies; and (v) whether the pipeline project is consistent with the Board's mandate to provide a reliable energy supply for Massachusetts with a minimum impact on the environment at the lowest possible cost.

(c) If the applicant is required to file a long-range forecast pursuant to G.L. c.

164, § 69I, the decision also shall include the Board's determination as to whether the pipeline project is consistent with the most recently approved long-range forecast.

REGULATORY AUTHORITY

M.G.L. c. 164, §§ 69H, 69J, and 69J½.

980 CMR 17.00: ENERGY FACILITIES SITING BOARD PARTICIPATION IN FEDERAL ENERGY REGULATORY COMMISSION PROCEEDINGS ADDRESSING NATURAL GAS PROJECTS IN MASSACHUSETTS

Section

17.01: Purpose and Scope

17.02: Definitions

17.03: Notice of Application filed with the Federal Energy Regulatory Commission.

17.04 Board Participation in § 7(c) CPCN Proceedings

17.05: Board Participation in § 7(c) Blanket Certificate Proceedings.

17.06: Board Participation in Other FERC Proceedings.

17.01: Purpose and Scope

(1) Purpose. 980 CMR § 17.00 sets forth: (1) the obligations of a person seeking approval from the Federal Energy Regulatory Commission to construct, expand, modify, or replace natural gas pipelines, natural gas manufacturing facilities, natural gas storage facilities, or natural gas importation facilities in Massachusetts, and (2) the procedures used by the Energy Facilities Siting Board to participate in the Federal Energy Regulatory Commission's review of any natural gas project. This chapter supersedes 980 CMR § 7.07(9).

(2) Scope. This chapter applies whenever a person or persons makes an application to the Federal Energy Regulatory Commission seeking approval to construct, expand, modify, or replace a gas project in Massachusetts, or initiates a collaborative approach preparatory to making such an application. The applications covered by this regulation include, but are not limited to: an application for a § 7(c) Certificate of Public Convenience and Necessity, an application under § 3 of the Natural Gas Act, and an application under § 311 of the Natural Gas Policy Act of 1978.

(3) Waiver of Rules. Where good cause appears, not contrary to statute, the Board or the Presiding Officer may permit deviation from any rules contained in 980 CMR §§ 17.00 *et seq.*

17.02: Definitions

For the purposes of 980 CMR §§ 17.00, the definitions set forth in 980 CMR § 1.03 shall apply unless the context or subject matter requires a different interpretation. The following definitions also shall apply to this section:

FERC means the Federal Energy Regulatory Commission.

FERC Application means an application or petition filed with FERC seeking to construct, expand, modify, or replace a gas project in Massachusetts, or seeking an exemption from

FERC regulation with respect to such a gas project.

Gas means natural gas or any direct substitute. Gas includes natural gas, propane air, synthetic natural gas, and liquified natural gas.

Gas project means the construction, expansion, modification, or replacement of a gas pipeline, gas manufacturing facility, gas storage facility, or gas importation facility, and associated facilities.

Protest means an objection to any application, complaint, petition, or order to show cause, filed with the Federal Energy Regulatory Commission pursuant to 18 C.F.R. § 157.10(a)(4).

Section 7(c) Blanket Certificate means a certificate issued by the Federal Energy Regulatory Commission authorizing certain construction and operation of facilities and certain certificate amendments and abandonment under § 7(c) of the Natural Gas Act, codified as 15 U.S.C. §§ 717 *et seq.*, and pursuant to 18 C.F.R. §§ 157.201 *et seq.*

Section 7(c) CPCN means a Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission authorizing certain acts or operations concerning the regulation, sale, or transportation of natural gas in interstate commerce under § 7(c) of the Natural Gas Act, codified as 15 U.S.C. § 717f(c), and pursuant to 18 C.F.R. §§ 157.1 *et seq.*

Staff means Staff of the Energy Facilities Siting Board.

17.03: Notice of Application filed with the Federal Energy Regulatory Commission.

(1) Notice to Board. Any person seeking approval from FERC to construct, expand, modify, or replace a gas project in Massachusetts shall file a copy of its FERC Application with the Board at its offices in Boston no later than seven days after such application is filed with FERC. This filing shall be accompanied by a cover letter that identifies: (1) the site or general route of the gas project, and (2) the municipalities in Massachusetts in which the construction, expansion, modification, or replacement of the gas project would take place.

(2) Notice to Other Agencies. Upon receipt of a FERC Application, the Board shall notify relevant state environmental agencies of the filing. Such agencies may include the Department of Environmental Protection, the Massachusetts Office of Coastal Zone Management, the Massachusetts Environmental Policy Act Unit, the Division of Fisheries and Wildlife, the Department of Environmental Management, and the Massachusetts Historical Commission.

17.04: Board Participation in § 7(c) CPCN Proceedings

(1) Determination of Interest. Upon receipt of a copy of an application to FERC for a § 7(c) CPCN, Staff shall evaluate the filing to determine whether intervention or other action in the FERC proceeding is warranted. Staff shall seek to intervene on behalf of the Board in any proceeding regarding a gas project that meets the definition of "facility" set forth in G.L. c. 164, § 69G, and may intervene, at its discretion, in other § 7(c) CPCN proceedings.

(2) Public Hearing and Site Visit. If Staff intervenes in a proceeding, Staff members shall view the site or route of the gas project and shall hold a public informational hearing in one or more municipalities in which the gas project would be located. The project developer shall attend each public informational hearing to address questions concerning the natural gas project. Notice of each public informational hearing shall be given to the public, to relevant local officials, and to state environmental agencies at least 21 days in advance in a practical manner to be specified by the Presiding Officer. If practical, notice of each public informational hearing also shall be placed in the *Environmental Monitor* published by the Massachusetts Executive Office of Environmental Affairs. Unless otherwise directed, the project developer shall be responsible for all costs related to the publication and distribution of notice. At its discretion, Staff may conduct public informational hearings jointly with FERC or with any relevant state environmental agency. At its discretion, Staff also may request written public comment on the potential impacts of the gas project.

(3) Comments. After conducting the public informational hearing, Staff shall provide comments to FERC on environmental, land use, and community issues associated with the gas project. Staff shall monitor the FERC proceeding and may file further comments or otherwise participate in the FERC proceeding as appropriate.

17.05: Board Participation in § 7(c) Blanket Certificate Proceedings.

(1) Project Evaluation. Upon receipt of a copy of a Request for Authorization to FERC to construct, modify, expand, or replace a gas project pursuant to a § 7(c) blanket certificate, Staff shall evaluate the filing to determine the environmental, land use, and community issues associated with the construction and operation of the gas project. As part of its review, Staff may visit the site or route of the gas project. At its discretion, Staff also may request written public comment on the potential impacts of the gas project. Notice of any such request for public comment shall be published at least 14 days in advance of the comment deadline in a practical manner to be specified by the Presiding Officer. Unless otherwise directed, the project developer shall be responsible for all costs related to the publication and distribution of the notice.

(2) Protest. If Staff's evaluation of the gas project raises concerns that cannot be resolved in the time allowed under FERC regulations, Staff may file a protest setting forth its concerns and describing the potential, if any, to reduce the impacts of the gas project through mitigation or routing changes. After filing the protest, Staff shall meet with the project developer in an effort to resolve their concerns within the time allowed under

FERC regulations. If the concerns are resolved, Staff shall withdraw its protest.

(3) Siting Board Jurisdiction. If the gas project is subject to the Siting Board's jurisdiction under 980 CMR §15.00, then §§17.05(1) and (2) shall not apply.

17.06: Board Participation in Other FERC Proceedings.

(1) Notice of Collaborative Approach or Pre-filing Process. Any person initiating a collaborative approach, pursuant to 18 C.F.R. § 157.22, or pre-filing process preparatory to making an application to FERC to construct a gas project in Massachusetts shall notify the Siting Board of its request to FERC to use the collaborative approach or pre-filing process within seven days after it makes such request, and shall include the Siting Board in the collaborative approach or pre-filing process as an interested entity.

(2) Notice of Petition for Exemption from Regulation. Any person filing an application with FERC pursuant to 18 C.F.R. §§ 152.1(a) *et seq.* for exemption from the provisions of the Natural Gas Act, codified as 15 U.S.C. § 717, *et seq.*, and the rules and regulations issued pursuant thereto, shall notify the Siting Board of its application within seven days of its filing with FERC.

(3) Participation. The Board or Staff may participate in any other FERC proceeding or in a collaborative approach, as an intervenor or through any other appropriate means, consistent with FERC regulations.

REGULATORY AUTHORITY

M.G.L. c. 164, § 69H.

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Sithe Edgar Development LLC
Notice of Probable Violations

January 7, 2003

ACTION BY CONSENT

I. INTRODUCTION

This "Action by Consent" is made pursuant to authority granted the Chairman of the Energy Facilities Siting Board ("Siting Board") under 980 CMR 2.06. Section 2.06 provides the Siting Board with the authority to render a decision when the Siting Board determines that expeditious action is necessary. 980 CMR 2.06(1).

On February 10, 2000, the Siting Board conditionally approved the petition of Sithe Edgar Development LLC ("Sithe" or "Company") to construct a natural gas-fired combined-cycle, electric generating facility with a net nominal electrical output of 775 megawatts in the Town of Weymouth, Massachusetts.¹ Sithe Edgar Development LLC, 10 DOMSB 1 (2000) ("Final Decision"). On November 30, 2001, the Siting Board conditionally approved a Notice of Project Change filed by Sithe. Sithe Edgar Development LLC, EFSB 98-7A (2001) ("Project Change Decision"). The Project Change Decision authorized the use of two construction shifts, one beginning at 7:00 a.m. and ending at 5:00 p.m., and a second beginning at 5:30 p.m. and ending at 2:00 a.m. Project Change Decision at 16.

In accordance with G. L. c. 164, § 69H(4), the Siting Board is authorized to levy a civil penalty when an applicant has violated any order of the Siting Board. The applicant is subject to a civil penalty not to exceed \$1000 per day per violation, with a maximum civil penalty of \$200,000 for any related series of violations.

Pursuant to Condition P of the Project Change Decision, the Company is required to submit monthly noise complaint reports for the duration of nighttime construction. See Project Change Decision at 29. On October 21, 2002 and November 7, 2002, the Company submitted reports for the months of September and October 2002, respectively. Further, by letter dated September 25, 2002, David M. Madden, Mayor of the Town of Weymouth, informed the Siting Board of the results of a site inspection conducted by the Town between the hours of 2:00 a.m. and 3:00 a.m. that morning. Mayor Madden attached to this correspondence a copy of a memorandum from the Department of Municipal Licenses and Inspections with specific

¹ As of November 1, 2002, the owner of the subject facility is Exelon Fore River Development, LLC ("Exelon").

observations of activities at the site at 2:15 a.m. on September 25, 2002. Based on the Siting Board's review of the Company's monthly noise report for the months of September and October 2002 and Mayor Madden's correspondence of September 25, 2002, the Siting Board is issuing this notice of probable violations of the following orders or conditions in EFSB 98-7A.

II. PROBABLE VIOLATIONS

A. Construction Activities Outside Shift Hours

On September 9, 2002, at 6:15 a.m., Frank Burke, a resident of 93 Bluff Road, reported the sound of backup beepers (September 2002 Noise Complaint Report at 3). According to the Company, the early morning Noise Monitor noted a "JLG Lift" moving with its beeper engaged (*id.*). The Noise Monitor instructed the construction manager to ask the driver to disengage the beeper (*id.*). The Siting Board finds that the use of construction equipment before the commencement of the first construction shift is a probable violation of the construction schedules approved in the Project Change Decision, and hereby fines the Company \$1000.00.

On September 25, 2002, Jeffrey E. Richards, Director of Municipal Licenses and Inspections for the Town of Weymouth, conducted a site inspection at 2:15 a.m., and observed the following construction activities: (1) fifteen electricians pulling wire into trays; (2) five electricians engaged in control room splice operations; and (3) six plumbers/gas fitters welding gas fittings (September 25, 2002 Memorandum from Jeffrey E. Richards to Jane Hackett, Chief of Staff at 1). According to the memorandum, Mr. Richards determined that the aforementioned activities constituted construction-related activities, and ordered the WGI staff to cease all construction-related activities between the hours of 2:00 a.m. and 7:00 a.m. (*id.*). The Siting Board finds that each of these activities is a probable violation of the Siting Board's approved construction schedule, and hereby fines the Company \$3000.00 for the three activities.

B. Prohibited Activities on Second Construction Shift

In order to mitigate the noise impacts of the second shift, the Project Change Decision placed various restrictions on second shift construction work. According to the Noise Mitigation Plan submitted by the Company, second shift construction work generally would take place in enclosed structures. *Id.* at 8. Specifically, the Company agreed that such activity would take place "in and around the turbine building, inside two warehouse buildings attached to the turbine building, and within the pipe that runs the air-cooled condenser" in order to take advantage of the shielding provided by these structures. *Id.* at 9. In addition, the Company agreed that second shift construction work would take place entirely to the north of a line running approximately from 340 to 600 feet north of Monatiquot Street ("second shift construction line"). *Id.* at 10. Finally, the Company agreed to eliminate backup-beepers in favor of flaggers during the night shift. *Id.* at 13.

1. Exterior Work on Second Shift

On October 1, 2002, Jackie Dann, a resident of Vanness Road ("Jackie Dann"), reported loud banging noises from the area of the air-cooled condenser ("ACC") (October 2002 Noise Complaint Report at 1). The Nighttime Noise Monitor discovered that welding operations were taking place on top of the ACC (*id.*). The Siting Board finds that second shift construction work on the ACC units is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision, which limits second shift construction work to enclosed structures, and hereby fines the Company \$1000.00 for said violation.

On October 21, 2002, the Company received five complaints about loud banging noises. Eileen Burwell, a resident of 50 Monatiquot Street ("Eileen Burwell") reported the sound of engines running and banging noises at 7:50 p.m., and made a second call at 8:30 p.m. to report the sound of banging noises coming from the vicinity of the ACC units (October 2002 Noise Complaint Report at 5-6). Peter Commerford, a resident of 16 Winona Way, Jackie Dann, and Debbie Evans, a resident of 30 Vanness Road, also reported loud banging noises from the ACC area of the construction site at 8:45 p.m., 8:50 p.m. and 9:00 p.m., respectively (*id.* at 6). The Siting Board finds that second shift construction work on or in the area of the ACC units is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision, which limits second shift construction work to enclosed structures, and hereby fines the Company \$1000.00 for said violation.

On October 22, 2002 at 6:20 p.m., Eileen Burwell reported loud banging noises from the ACC units. According to the Company, the Nighttime Noise Monitor informed the WGI supervisor, who stopped the noisy activity by 6:35 p.m. (October 2002 Noise Complaint Report at 6-7). The Siting Board finds that second shift construction work on or in the area of the ACC units is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision, which limits second shift construction work to enclosed structures, and hereby fines the Company \$1000.00 for said violation.

On October 25, 2002, at 11:45 p.m., Carrie Bell, a resident of 12 Winona Way, reported loud engine noises (October 2002 Noise Complaint Report at 7-8). The Nighttime Noise Monitor's investigation revealed that a stake bed truck was collecting trash, and that the noise stopped at 12:10 a.m. (*id.* at 8). The Siting Board finds that late night trash collection is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision, which limits second shift construction work to enclosed structures, and hereby fines the Company \$1000.00 for said violation.

2. Second Shift Work Beyond Second Shift Construction Line

On September 19, 2002, at 7:00 p.m. Eileen Burwell reported the sound of banging along the Monatiquot Street fenceline (September 2002 Noise Report at 5). According to the

Company, the Nighttime Noise Monitor located carpenters performing work in that area. The work was stopped by the WGI supervisor at 7:10 p.m. (id.). The Siting Board finds that second shift construction work along the Monatiquot Street fenceline is a probable violation of the Project Change Decision, which requires second shift construction work to be confined to the north of the second shift construction line, and hereby fines the Company \$1000.00.

On October 9, 2002, at 6:40 p.m., Eileen Burwell reported noise from a backhoe along the Monatiquot fenceline (October 2002 Noise Complaint Report at 3). The Company indicated that a backhoe and a vacuum pump were in use for the installation of a sewer line along Monatiquot Street (id.). The Siting Board finds that second shift construction work along the Monatiquot Street fenceline is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision, which prohibits second shift construction work beyond the second shift construction line, and hereby fines the Company \$1000.00 for said violation.

C. Use of Outdoor Crane or Other Noisy Equipment After 11:00 p.m.

In accordance with Condition N of the Project Change Decision, the Siting Board directed the Company to limit the use of outdoor cranes or other particularly noisy equipment to occasional occurrences during the night shift, and prior to 11:00 p.m. when possible. When this is not possible, the Siting Board directed the Company to provide advance notice to all affected neighbors and the Town of Weymouth. Project Change Decision at 29.

On September 5, 2002, Paula Pineo, a resident of 7 Vanness Road, and Gary Peters, a resident of 34 Bluff Road, reported the sound of backup beepers at 12:00 a.m. and 12:22 a.m., respectively (September 2002 Noise Complaint Report at 1). The Weymouth Police Department investigated and found that the noise was coming from a forklift operating on the North Parcel (id.). The Company made no claim that it gave prior notification to either the affected neighbors or the Town of Weymouth of the use of noisy equipment after 11:00 p.m. The Siting Board finds that use of an outdoor forklift after 11:00 p.m. without prior notice is a probable violation of Condition N of the Project Change Decision and hereby fines the Company \$1000.00 for said violation. The Siting Board also finds that the use of a backup beeper on construction equipment operated during the second shift is a probable violation of the noise mitigation plan approved by the Siting Board in the Project Change Decision which prohibits the use of backup beepers during the second shift, and hereby fines the Company \$1000.00 for said violation.

On October 1, 2002, Kim Chapman, a resident of 96 Bluff Road, reported the sound of equipment driving on the south side of the site (October 2002 Noise Complaint Report at 1). The nighttime noise monitor investigated and discovered a LULL forklift moving material (id.). The Company made no claim that it gave prior notification to either the affected neighbors or the Town of Weymouth of the use of noisy equipment after 11:00 p.m. The Siting Board finds that use of an outdoor forklift after 11:00 p.m. without prior notice is a probable violation of

Condition N of the Project Change Decision, and hereby fines the Company \$1000.00 for said violation.

III. PROCEDURE

Exelon has the right to appear with counsel before Siting Board staff in an informal conference on any or all of the probable violations at the offices of the Siting Board on Tuesday, January 21, 2003. At the informal conference, the hearing officer will make available to Exelon the evidence on which the Siting Board based its issuance of this Notice of Probable Violations, and the Company may present evidence disputing the probable violations.

If Exelon chooses to dispute the probable violations set forth in this notice but does not choose to attend the informal conference, it should send a written response to this notice to the Siting Board on or before Tuesday, January 21, 2003. The reply must include a complete statement of all relevant facts, and a full description of the reasons the Company disputes the probable violations enumerated in this notice.

If Exelon chooses not to dispute the probable violations, it should sign and return the attached Consent Order. The Consent Order must be accompanied by a check in the amount of \$13,000 made payable to the Commonwealth of Massachusetts, and mailed to the Energy Facilities Siting Board, One South Station, Boston, MA 02110. The Siting Board hereby authorizes Diedre Matthews, Director of the Siting Board, to sign on behalf of the Siting Board any Consent Order or other agreement with the Company regarding this Notice of Probable Violations.


If Exelon does not respond to this notice as required by Tuesday, January 21, 2003 and does not attend the informal conference, the Company will be deemed to have admitted the allegations and will be subject to all penalties set forth herein.

Sithe Edgar Development LLC; EFSB 98-7
Notice of Probable Violations

6

This Action by Consent may be executed in any number of counterparts, each of which shall be an original, but all of which constitute one agreement, and shall be dated and become effective when the copies bearing all of the signatures of the Siting Board members are received by the Chairman. 980 CMR 2.06(2).


Signed:



Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

12/26/02

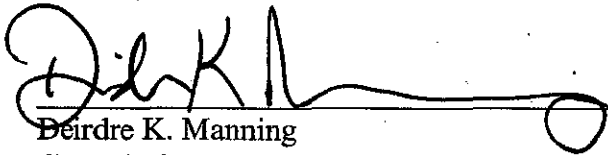
Date



W. Robert Keating
Commissioner
Department of Telecommunications and Energy

12/27/02

Date



Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

12/26/02

Date

David L. O'Connor
Commissioner
Division of Energy Resources

Date

Joseph Donovan
For Peter J. Abair, Director
Department of Economic Development

Date

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

Date

Sithe Edgar Development LLC; EFSB 98-7
Notice of Probable Violations

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Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

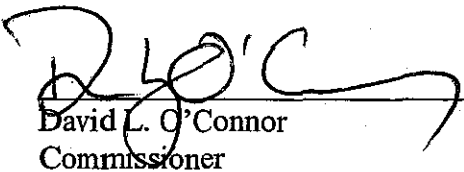
Date

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Date

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Date



David L. O'Connor
Commissioner
Division of Energy Resources

Date

12/20/02

Joseph Donovan
For Peter J. Abair, Director
Department of Economic Development

Date

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

Date

Sithe Edgar Development LLC; EFSB 98-7
Notice of Probable Violations

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Signed:

Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Date

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

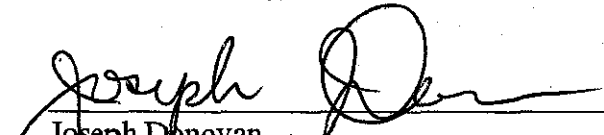
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Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

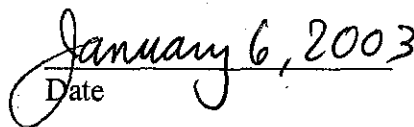
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Joseph Donovan
For Peter J. Abair, Director
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Date

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

Date

Sithe Edgar Development LLC; EFSB 98-7
Notice of Probable Violations

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Signed:

Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

Date

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Date

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Date

David L. O'Connor
Commissioner
Division of Energy Resources

Date

Joseph Donovan
For Peter J. Abair, Director
Department of Economic Development

Date

Sonia Hamel

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

Dec. 24, 2002

Date

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

KeySpan Energy Delivery New England
Order Opening Investigation

January 8, 2003

ACTION BY CONSENT

I. INTRODUCTION

This "Action by Consent" is made pursuant to authority granted the Chairman of the Energy Facilities Siting Board ("Siting Board") under 980 CMR 2.06. Section 2.06 provides the Siting Board with the authority to render a decision when the Siting Board determines that expeditious action is necessary. 980 CMR 2.06(1).

On September 9, 2002, Colonial Gas Company d/b/a/ KeySpan Energy Delivery New England ("KeySpan" or "Company") filed with the Energy Facilities Siting Board ("Siting Board") a petition for approval to replace approximately 32,000 feet of natural gas pipeline in the Towns of Bourne, Falmouth and Sandwich ("KeySpan project"). On October 4, 2002, in response to inquiries from Siting Board staff, KeySpan stated that it replaced approximately 6000 feet of 8-inch diameter pipeline with 12-inch diameter pipeline between January and May 2000 ("October 4 Letter"). During this time, the Company replaced pipeline in the Towns of Sandwich and Falmouth along Simpkins and Sandwich Roads (October 4 Letter at 1 and associated map).¹ KeySpan stated that it replaced the pipeline to address specific pressure constraints in the Sandwich and Falmouth area and that a majority of construction occurred on land within the Massachusetts Military Reservation ("MMR") (October 4 Letter at 2 and associated map).

Pursuant to G.L. c. 164, § 69J, natural gas pipelines that are longer than one mile and have a normal operating pressure in excess of 100 pounds per square inch gauge may not be constructed "unless a petition for approval of construction of the facility has been approved by the [Siting B]oard." KeySpan's upgrade of 6000 feet of pipeline would appear to require Siting Board review; however KeySpan did not seek Siting Board approval prior to constructing the project. Therefore, the Siting Board is opening this investigation: (1) to examine the circumstances under which the approximately 6000 feet of pipeline were constructed; (2) to determine whether the approximately 6000 feet of pipeline were constructed in violation of G.L. c. 164, § 69J; (3) to determine whether KeySpan failed to seek other state permits for the upgrade

¹ For a segment of the pipeline along Simpkins Road in Sandwich, the pipeline route is abutted along the east side of the road by property/public way located in Mashpee.

project; (4) to assess whether any damage to the environment or harm to KeySpan's customers occurred due to the Company's failure to obtain Siting Board approval; and (5) to determine whether any redress is warranted. Redress could include monetary sanctions, environmental remediation, recommendations to the Department of Telecommunications and Energy regarding future rate treatment of the costs of the upgrade, or a recommendation to the Office of the Attorney General.

II. BACKGROUND

The legislative mandate of the Siting Board is to ensure a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. G.L. c. 164, § 69H. As the agency of first permit,² the Siting Board provides coordinated review of critical energy infrastructure projects by officials representing consumer, environmental, and economic development interests, including representatives from the Executive Office of Environmental Affairs, the Department of Economic Development, and both the Department of Telecommunications and Energy and the Division of Energy Resources within the Office of Consumer Affairs. In addition, the Siting Board process provides members of the public an opportunity to be heard on important environmental and community issues associated with the construction of energy infrastructure.

Because the Siting Board review process addresses issues of reliability and energy costs, as well as environmental impacts, and because it provides for public input, compliance with individual environmental permitting programs is not a substitute for Siting Board review. Such compliance cannot ensure that Massachusetts energy needs are met through carefully planned infrastructure projects, rather than by a series of stop-gap measures that could result in deterioration of overall system reliability or increased costs to consumers. To allow utilities to substitute compliance with individual environmental permitting programs for Siting Board review would thwart the legislature's intent to provide for a coordinated approach to energy infrastructure projects.

KeySpan has suggested that the Siting Board conduct a post-construction review of the approximately 6000 feet of pipeline in the context of the Board's review of the KeySpan's 32,000 foot project. We will review the long-term impacts of the entire route, including the approximately 6000 feet of pipeline already constructed, during our review of the KeySpan project. However, post-construction review circumvents the major purposes of Siting Board review – to ensure that ratepayers are not charged for unnecessary projects, to ensure that the best

² The Siting Board must approve a particular facility before any other state agency can issue a construction permit for that facility. G.L. c. 164, § 69J.

alternative is built, to address construction impacts and safety issues,³ and to seek community input.

Further, we note that the Siting Board's coordinated review would have been particularly valuable in this instance since multiple state and federal agencies already are cooperating relative to land use issues on the MMR. Specifically, the Acts of 2002, c. 47 ("the Act") establishes an environmental management commission to monitor the activities on the MMR. The Act, at § 4. The commission consists of the Commissioner of the Department of Fisheries, Wildlife and Environmental Law Enforcement; the Commissioner of Environmental Management, and the Commissioner of Environmental Protection. Id. The commission is assisted by a community advisory council that includes representatives from the Towns of Falmouth, Bourne and Sandwich, and a science advisory council appointed by the Governor. Id. at § 6. In addition, federal entities such as the national guard are required to provide the commission with annual reports regarding various activities on the MMR. Id. at § 9.

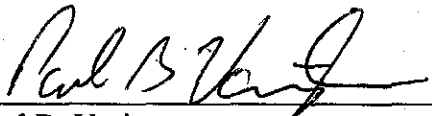
III. ORDER

The Siting Board hereby opens an investigation regarding the circumstances under which KeySpan constructed approximately 6000 feet of natural gas pipeline in the Towns of Sandwich and Falmouth between January and May 2000. The Siting Board directs KeySpan to cooperate fully with this investigation and requires KeySpan, inter alia, to provide all information requested by Siting Board staff and to present oral testimony, if requested to do so. Attached to this Order is a list of questions which the Siting Board expects KeySpan to answer no later than January 22, 2003. At the conclusion of this investigation, the Siting Board will take such further action as it deems necessary.

This Action by Consent may be executed in any number of counterparts, each of which shall be an original, but all of which constitute one agreement, and shall be dated and become effective when the copies bearing all of the signatures of the Siting Board members are received by the Chairman. 980 CMR 2.06(2).

³ The Siting Board has consulted with the Pipeline Safety and Engineering Division of the Department of Telecommunications and Energy ("Pipeline Safety Division"). The Pipeline Safety Division stated that it has reviewed construction records regarding the approximately 6000 feet of replacement pipeline and has found no safety-related issues.

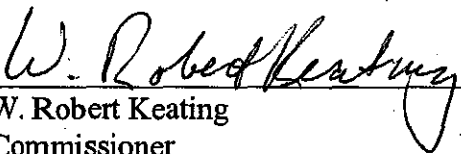
Signed:



Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy

12/25/02

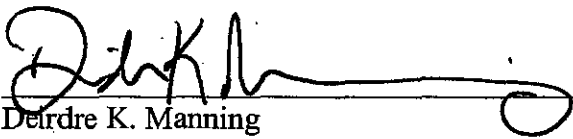
Date



W. Robert Keating
Commissioner
Department of Telecommunications and Energy

12/27/02

Date



Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

12/26/02

Date

David L. O'Connor
Commissioner
Division of Energy Resources

Date

Joseph Donovan
for Peter J. Abair, Director
Department of Economic Development

Date

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

Date

Signed:

Paul B. Vasington
Chairman
Energy Facilities Siting Board/
Department of Telecommunications and Energy


Date

W. Robert Keating
Commissioner
Department of Telecommunications and Energy

Date

Deirdre K. Manning
Commissioner
Department of Telecommunications and Energy

Date



David L. O'Connor
Commissioner
Division of Energy Resources

Date

12/23/02

Joseph Donovan
for Peter J. Abair, Director
Department of Economic Development

Date

Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

Date

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Paul B. Vasington
Chairman
Energy Facilities Siting Board/
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Commissioner
Department of Telecommunications and Energy

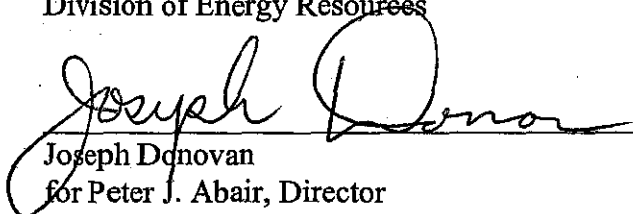
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Joseph Donovan
for Peter J. Abair, Director
Department of Economic Development

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Sonia Hamel
Sonia Hamel
for Robert Durand
Secretary of Environmental Affairs

12/24/02
Date