

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Petition of the University of Massachusetts for
Jurisdictional Determination Pursuant to
980 C.M.R. § 2.09

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EFSB 15-2

FINAL DECISION

James A. Buckley
Presiding Officer
September 21, 2015

On the Decision:

John Young

APPEARANCES:

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Pursuant to 980 C.M.R. §2.09, the Energy Facilities Siting Board (“EFSB,” “Board,” or “Siting Board”) determines that it does not have jurisdiction to approve or deny the construction of a liquefied natural gas (“LNG”) storage facility in Hadley, Massachusetts, by the Petitioner, the University of Massachusetts Amherst (“UMASS” or “University”).

I. INTRODUCTION

A. Petition for Jurisdictional Determination

On April 21, 2015, UMASS filed a petition pursuant to 980 C.M.R § 2.09 (“Petition”) seeking a determination as to whether the University’s proposed construction of a new LNG storage facility (“Project”), adjacent to its Central Heat and Power (“CHP”) generation facility at 200 Mullins Way in Hadley, Massachusetts, is subject to Siting Board jurisdiction and would therefore require Siting Board approval. UMASS asserts that the University is not subject to the provisions of G.L. c. 164, §§ 69G – 69S (the “EFSB statute”) and, therefore, that the Project would not require Siting Board approval under G.L. c. 164, § 69J.

If the Board were to determine that the University is subject to the EFSB statute, then, alternatively, UMASS asks that the Siting Board waive its jurisdiction pursuant to the waiver provision in 980 C.M.R. § 1.02(1). The University’s rationale for a waiver is that the new LNG storage facility would only serve the University community and would not be part of the network of energy infrastructure designed to serve the public with a reliable energy supply. (Petition at 11-13).

B. Procedural History

The Presiding Officer directed UMASS to publish a Notice of Petition for Determination of Board Jurisdiction (“Notice”) in the Boston Globe and the Daily Hampshire Gazette, and to send the Notice by electronic mail to all gas companies in Massachusetts, the Attorney General and the Department of Public Utilities’ (“DPU” or “Department”) generic service list for the gas industry, which includes, among others, representatives of environmental organizations. The Notice invited interested parties to submit comments on the Petition. The Berkshire Gas Company (“Berkshire”) filed two comment letters (“Berkshire June 10 Comment” and

“Berkshire June 30 Comment”) and the Northeast Gas Association (“NGA”)¹ submitted a letter (“NGA Comment”). On July 6, 2015, UMASS submitted reply comments in response to Berkshire’s letters (“UMASS Responses to Berkshire”). On July 15, 2015, the Siting Board staff submitted a set of Information Requests to UMASS. On August 7, 2015, UMASS filed its Responses to those Information Requests.

II. BACKGROUND

A. UMASS

The University of Massachusetts was founded under the Morrill Land-Grant Colleges Act in 1862. In 1962, the General Court enacted G.L. c. 75, § 1 et seq. creating the current University of Massachusetts System consisting of five campuses. The original campus in Amherst became the flagship campus and is now known as the University of Massachusetts Amherst. Situated on 1,450 acres, the Amherst campus is the largest public university in New England.

B. The Need for LNG and the Temporary Storage Facility

The CHP facility is a cogeneration system designed to produce steam for central heating and up to 16 megawatts of electricity for campus use (Petition at 2). The CHP facility is a flexible, dual-fuel unit that can burn either natural gas, ultra-low-sulfur distillate (“ULSD”), or combinations of both at the same time (id.). The plant receives interruptible natural gas transportation service from Berkshire via its distribution system, pursuant to a contract approved by the Department. See Berkshire Gas Company, D.T.E 04-GC-31 (2005).² UMASS stated

¹ The NGA is a regional trade association that represents natural gas distribution companies, transmission companies, liquefied natural gas importers and associate member companies. Its member companies provide natural gas service to 10 million customers in eight northeastern states (all of New England, New York and New Jersey).

² On August 21, 2015, Berkshire filed its Petition for Approval of the First Amendment to the Transportation Agreement between Berkshire and UMASS, seeking Department approval. The Berkshire Gas Company, D.P.U. 15-GC-21. In the cover letter to that filing, Berkshire stated that the First Amendment contemplates a second amendment to the Transportation Agreement and that Berkshire and UMASS expect to execute the second amendment in the future (Cover letter to Petition for Approval of First Amendment, D.P.U. 15-GC-21). The review and approval, if appropriate, for that filing

that, given the limited capacity of the Berkshire Gas system, gas deliveries to the CHP unit are frequently curtailed during cold weather (up to 360 hours per heating season), when ambient temperatures are below 51 Heating Degree Days (i.e., below 14°F) (Petition at 2). During such gas curtailments, UMASS must switch to ULSD, which is more costly and requires operators to shut off the exclusively gas-fueled duct-firing unit attached to the main turbine, thereby reducing the CHP unit's electrical output and supply of steam for campus heating. Further, the frequent winter gas supply interruptions reduce the efficiency of the CHP facility and increase its emissions and operating costs (id.).

Given the negative consequences of gas supply interruptions, UMASS decided to test the viability and economics of using LNG as a backup fuel for its CHP unit over the last three winters by installing temporary LNG storage and vaporization facilities. During this period, LNG suppliers provided supplemental natural gas to the CHP plant by connecting a skid-mounted vaporization unit and storing LNG in two tanker trailers, of up to 15,000 gallons capacity each, parked beside the vaporization unit. LNG was delivered as needed by tanker trailers from two LNG suppliers. The LNG equipment was dismantled and removed during the non-winter months.

Prior to constructing the temporary LNG facility, UMASS sought an Advisory Ruling from the Siting Board as to whether the facility required EFSB approval. In an Advisory Ruling issued on August 20, 2012, The University of Massachusetts at Amherst, Advisory Ruling (August 20, 2012) ("Advisory Ruling"), the Board advised UMASS that it could construct and operate the temporary LNG storage facility to fuel the CHP Plant without obtaining approval from the Siting Board under G.L. c. 164, §69J. Advisory Ruling at 6-7. The Board reasoned that: (1) the temporary facility's capacity would be only slightly greater than the minimum size threshold of 25,000 gallons for jurisdictional gas storage facilities specified in the Siting Board's regulation 980 CMR 1.01(4)(e); (2) the storage facility would be temporary; (3) the facility would serve a non-utility purpose³; and (4) the overall benefits to UMASS, its faculty and

will be determined by the Department in that separately docketed proceeding, and is beyond the scope of this Order.

³ The Board noted that the minimum size threshold of 25,000 gallons for jurisdictional natural gas storage facilities was intended to retain jurisdiction over utility-scale natural gas facilities but to exempt non-utility facilities. Rulemaking to Amend 980 CMR 1.01(4)(e), 18 DOMSB 269, 272 (2012).

students, and taxpayers of the Commonwealth constituted good cause for granting a waiver from the regulation. Id. at 6. Accordingly, the Board advised UMASS that it would waive its jurisdictional minimum size threshold of 25,000 gallons pursuant to 980 CMR 1.02(1) and that UMASS did not require Section 69J approval.⁴ Id. at 6-7.

C. The Project

Because the temporary storage facility demonstrated that LNG is a viable and economical backup fuel for its CHP facility, UMASS now proposes to construct and operate the Project, which would be a permanent LNG storage facility (Petition at 2). The Project would replace the temporary facility after the 2015/2016 winter, and become operational by the 2016/2017 winter (Exh. EFSB-2). The Project site is approximately 2.2 acres, located adjacent to the CHP facility in Hadley (Petition at 2). UMASS proposes to build the Project in two phases, the first creating 54,000 gallons of storage capacity, and the second phase increasing the total storage capacity up to 108,000 gallons (id.). With the CHP unit running at maximum capacity solely on vaporized LNG, the first phase of the Project would be capable of providing the CHP unit with a maximum of two days of fuel supply (Exh. EFSB-1).

The first phase would consist of: (1) three 18,000-gallon storage tanks with ancillary equipment necessary to control pressure and temperature; (2) an LNG vaporizer unit and piping connections; and (3) an access driveway and trucking station so that LNG can be off loaded from tanker trailers to the storage tanks (Petition at 2; Exh. EFSB-27(1)). The second phase would consist of up to three additional 18,000-gallon tanks and a second vaporization unit (Petition at 2). Each storage tank would be circular, and about 39 feet high and eleven feet in diameter (Exh. EFSB-27(1)). UMASS proposes to begin construction of phase one after the 2015/2016 heating season and to complete construction by the beginning of the 2016/2017 heating season. UMASS has not set a timetable for the second phase. However, during phase one, the containment system would be designed and constructed to accommodate all six tanks. The containment area would be about 55 feet by 120 feet, and would consist of a thick concrete liner designed to hold

⁴ In the Advisory Ruling, the Board waived the minimum size jurisdictional threshold for the winters of 2012/2013 and 2013/2014. In a Supplemental Advisory Ruling issued on August 14, 2014, the Board waived the regulation through the winter of 2015/2016. The University of Massachusetts at Amherst, EFSB 14-3 (2014).

200 percent of the total storage volume of the first phase and 140 percent of the total storage volume of both phases of the Project⁵ (Exhs. EFSB-4; EFSB-27(1)).

UMASS indicated that it has instructed its project team to design the facility to meet or exceed the applicable design guidelines, standards and codes, and to review the jurisdictional provisions of the environmental, building, mechanical, electrical, fire, safety, fuel gas and energy codes (UMASS Response at 3). Even though it contends that it is exempt from the administrative procedures of several of the codes, UMASS stated that the Project's design is based upon applicable sections of NFPA 59A and meets or exceeds the provisions set forth in the EFSB regulations (980 CMR §10.00), the Department's regulations (220 CMR § 101.00 & 112.00),⁶ the Board of Fire Prevention regulations (529 CMR/NFPA 1), and the State Building Code regulations (780 CMR) (Response at 3). UMASS noted that the DPU Pipeline Engineering and Safety Division has inspected the temporary LNG facility before each of the past heating seasons, and UMASS will continue to provide access to the DPU staff to perform inspections (Exh. EFSB-16).

UMASS anticipates that it will apply for: (1) an Application for Construction and Installation under the Office of the State Fire Marshal, which applies to the installation of above-ground storage tanks of 10,000 gallons or more, for storage of fluids other than water; (2) a Building Inspector Approval under the State Building Inspector;⁷ (3) a Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity under the U.S. Environmental Protection Agency ("USEPA"); and (4) a Construction General Permit under the USEPA (Exh. EFSB-6).

With regard to local permitting, UMASS noted that the Project site is located on state-owned land and is being financed through state funding. Therefore, UMASS contends that the

⁵ UMASS indicated that the concrete containment area would exceed the regulatory requirements of National Fire Protection Association ("NFPA") Standard 59A (Exh. EFSB-4)

⁶ 220 CMR 101.00 is the Department's regulation of General Requirements for Gas Distribution Companies; 220 CMR § 112.00 is the Department's regulation: Design, Operation, Maintenance and Safety of Liquefied Natural Gas Plants and Facilities.

⁷ UMASS met with the State Building Inspector to discuss the Project on July 16, 2015 (Exh. EFSB-17).

Project does not need to comply with local laws or regulations or obtain local permits or approvals. However, UMASS stated that it cooperates with local governments to ensure that its projects comply with applicable safety codes (id.).

The closest adjacent property line to the 2.2-acre site is a sewage treatment plant owned and operated by the Town of Amherst (“Amherst”), located approximately 254 feet from the center of the LNG containment area (Exh. EFSB-13). The closest residences to the Project, which are private, are approximately 1,640 feet from the edge of the LNG containment area; the closest campus residence hall is approximately 1,975 feet from the edge of the LNG containment area (Exh. EFSB-20). Across Mullins Way, there are or have recently been tennis courts approximately 200 feet from the Project site (google.com/maps). UMASS has stated that it performed vapor dispersion modeling, thermal radiation modeling, and noise impact modeling for the Project (Exhs. EFSB-12; EFSB-13; EFSB-14; EFSB-21; EFSB-25).

The construction contract will include one year of oversight and maintenance (UMASS Response to Berkshire at 4). A commission agent is to be hired by UMASS to develop the operations and maintenance program as well as arrange for four training sessions to encompass all shift employees of the Amherst and Hadley fire departments (Exh. EFSB-17).⁸ UMASS stated that it has developed a preliminary safety plan and has solicited input directly from the Amherst and Hadley fire departments; the plan will be updated after the final equipment selection (UMASS Response at 4).⁹ With regard to emergency planning procedures and training, UMASS will continue the process that has been undertaken for the temporary LNG facility which consists of an annual table top exercise with the Amherst Fire Department (Exh. EFSB-28).

UMASS estimated that each phase of operation would require approximately 310 truckloads of LNG delivered annually, with no daily or hourly restrictions on deliveries (Exh. EFSB-9). UMASS stated that the U.S. Department of Transportation, the Federal Motor Carrier Safety Administration, the Pipeline and Hazardous Materials Safety Administration and the National Fire Protection Association Standard 59A specify and govern the safety procedures

⁸ The Amherst Fire Department provides fire protection service to the CHP and temporary LNG facility, and will continue to provide such services to the Project (Exh. EFSB-18).

⁹ UMASS met jointly with the Amherst and Hadley fire departments to discuss the Project on September 15, 2014 (Exh. EFSB-17).

and transportation of LNG (Exh. EFSB-10). Off-loading procedures would be developed in accordance with the requirements of Chapter 14 of NFPA Standard 59A (Exh. EFSB-11).

III. JURISDICTIONAL DETERMINATION

A. Position of UMASS

UMASS asserts that it is not subject to the EFSB statute because the University of Massachusetts system is exempt from regulation and control of any other state agency by the express terms of the University of Massachusetts enabling statute, G.L. c. 75, § 1 (Petition at 3). G.L. c. 75, § 1 provides that the University is governed by a Board of Trustees, which “shall have all authority, responsibility, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning.” Furthermore, the Board of Trustees “shall not in the management of the university be subject to, or superseded by, any other state agency, board, bureau, commission, department or officer....” (G.L. c. 75, § 1). UMASS asserts that universities throughout the country invest considerable time and resources in planning and meeting the energy needs of their campuses (Petition at 3). Indeed, UMASS states that 153 universities operate CHP facilities (*id.*). UMASS therefore concludes that managing the fuel need of the CHP facility is one of duties customarily and traditionally exercised by governing boards of institutions of higher learning, and as such, the University is not subject to the EFSB statute.

UMASS cites a number of Opinions of the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) finding that the University is not subject to the regulatory authority of various state agencies (Petition at 4-8). UMASS asserts that in these opinions, the Attorney General concluded that the University of Massachusetts is exempt from state regulatory authority, absent a clear contrary legislative intent *Id.* at 4, citing 2000-01 Mass. Op. Att. Gen. No. 2, 2001 WL 505661 (2001) (“AG Opinion re: State Sanitary Code”). UMASS also asserts that the Attorney General affirmed that G.L. c. 75, § 1 plainly accords the Board of Trustees considerable autonomy in the management of its affairs, not only academic but also financial. Petition at 7-8, citing 1976-77 Mass. Op. Att. Gen. No. 25, at 2, 1977 WL 36219 (“AG Opinion re: Small Business Purchasing Program”). In these opinions, UMASS contends that the Attorney General considered the statutory authority of the state agency or board to

regulate, but ultimately determined that the University's autonomy should not be restricted by the agency's jurisdiction or regulation (Petition at 4-7).

For example, the Attorney General opined that University swimming pools were not subject to the State Sanitary Code, enforced by local boards of health. AG Opinion re: State Sanitary Code. In addition, the Attorney General concluded that the General Court did not intend to limit the University's autonomy by subjecting it to the state statute that required state agencies to purchase five percent of their expenditures from small businesses. AG Opinion re: Small Business Purchasing Program. UMASS asserts that its ability to plan and provide for its energy needs is no less important for the University to maintain its fiscal and academic autonomy (Petition at 8).

UMASS also points out that, by the terms of G.L. c. 164, § 69G, Section 69J petitions must be brought by "a person or persons" and a longstanding rule of statutory construction holds that "person" does not include the Commonwealth or its agencies, citing Hansen v. Commonwealth, 344 Mass. 214, 219 (1962). Because the University of Massachusetts is an agency of the Commonwealth, and therefore not a person, UMASS asserts that the EFSB statute cannot apply to the University (Petition at 8-9). Even if the EFSB statute is only viewed as ambiguous on the question of whether state agencies are subject to it, UMASS argues that the clear legislative intent expressed in G.L. c. 75, § 1, that the University is not subject to other state agencies, means that its enabling statute should prevail over the EFSB statute (Petition at 10).

Lastly, if the Siting Board determines that it does have jurisdiction over the Project, UMASS asks that the Board waive its jurisdiction using its waiver provision in 980 CMR 1.02(1). UMASS reasons that its Project would not be part of the energy infrastructure of the State designed to serve the public unlike the typical project reviewed by the Siting Board (Petition at 11-12). Zoning exemptions and eminent domain, matters often referred to the EFSB by the DPU Chairman, are also not needed or available to the University's Project (Petition at 12).

B. Comments of Berkshire

Berkshire notes that its precedent agreement with Tennessee Gas Company, which calls for Berkshire to purchase additional interstate pipeline capacity in the Amherst service area and

is pending before the Department for its review and approval (D.P.U. 15-48)¹⁰, may eliminate the gas peak-day capacity limitations that UMASS cites as the reason the Project is needed (Berkshire June 10 Comment at 1). Berkshire asserts that its primary concerns relate to the safety and reliability of the LNG facilities, and its need to be certain that UMASS' design and operation of the Project will provide "for the safe and reliable integration and complementary operation" of the Project with Berkshire's gas pipeline facilities (id.).

Although Berkshire "defers to the Siting Board to interpret" its own statute and the scope of its jurisdiction over applicants like UMASS, Berkshire notes that the Siting Board has exercised jurisdiction over the construction of both gas and electric facilities by other governmental entities, namely municipal light and gas departments (id.). Berkshire adds that the EFSB statute was intended by the General Court to apply to significant energy facilities regardless of the identity of the developer (id. at 2). Berkshire notes that it built a similar LNG facility in Whately that was subject to EFSB approval (id. at 1). Berkshire cites the Siting Board's regulation (980 CMR 10.00) as intended to "ensure systemic review" of LNG facilities and "apply Massachusetts' more rigorous standards" (id. at 2). Berkshire also cites the Department's regulation for "Design, Operation, Maintenance and Safety of LNG Facilities" (220 CMR 112.00) and adds that its applicability to the UMASS Project would also be in question (id.). Because the Project and Berkshire's facilities will be "somewhat integrated," Berkshire wants "to be certain safety and responsibility concerns are clear and well-defined" (id.).

Berkshire filed another comment letter on June 30, 2015. In the letter, Berkshire stated that UMASS had asked that Berkshire "confirm and clarify its [June 10] comments" (Berkshire June 30 Comment, at 1). Berkshire added that as a participant in the natural gas industry within the Commonwealth, it is concerned about the safety and reliability of all natural gas infrastructure, including LNG facilities. Berkshire noted that its June 10 Comments "were intended to convey its view that all new LNG facilities should be designed to conform to and comply with all federal and Massachusetts requirements, under the oversight of appropriate regulators...." (id.).

¹⁰ The Department approved Berkshire's precedent agreement with Tennessee Gas Pipeline Company for its proposed Northeast Energy Direct Pipeline in D.P.U. 15-48 on August 31, 2015.

C. Comments of NGA

NGA submitted a comment letter on June 10, 2015, in which it notes that LNG is an important part of the regional gas supply chain (NGA Comment at 1). The NGA adds that it has developed several programs and protocols regarding LNG, including a safety training program at the Massachusetts Firefighting Academy and a New England-wide protocol and plan on responding to emergencies involving trucks transporting LNG (*id.*). While the NGA is encouraged that UMASS plans to enhance its energy system by using LNG, the NGA states that the issue of siting review warrants close consideration and that the Siting Board should keep the safe installation and operation of LNG facilities in mind while the Board considers the jurisdictional question (*id.*).

D. UMASS Response to Berkshire

UMASS asserts that, while Berkshire favors a statutory interpretation which finds Siting Board jurisdiction, Berkshire makes no legal argument to support its position (UMASS Response to Berkshire at 1). Instead, UMASS states, Berkshire only offers the observation that the EFSB has reviewed many energy facilities constructed by municipal light and gas departments (*id.*). However, UMASS argues, petitions to construct must be brought to the EFSB by an “applicant” and Section 69G defines an applicant to be a “person” (*id.*). UMASS cites numerous legal authorities that hold that “person” used in statute does not include the sovereign state, its agencies, or its political subdivisions (*id.* at 1-2). UMASS adds that, regardless of whether new pipeline capacity is constructed in central Massachusetts, the University will need to build the Project (*id.*).

Lastly, UMASS notes that Berkshire raises a number of safety concerns and implies that an LNG facility built outside of EFSB jurisdiction would be less safe than one reviewed by the Siting Board (*id.*). UMASS responds that it is fully aware of the rigorous standards established by the EFSB’s regulation as well as in the Department’s regulations. UMASS states that the University will construct the Project to meet or exceed the standards imposed by both the EFSB and Department regulations, and invites Berkshire to meet with the University’s design team and project managers, as Berkshire did regarding the temporary LNG facility (*id.* at 3-4).

E. Analysis and Findings

1. Definition of “Facility”

The Project clearly is a “facility” as that term is defined in Section 69G, the definition section of the EFSB statute. The fifth clause under “facility” in that section defines as a facility: “(5) a unit...designed for or capable of the ...storage of gas, except such units below a minimum threshold size as established by regulation.” The definition of “gas” in Section 69G includes LNG, and the Board’s regulation establishes a storage capacity threshold of 25,000 gallons, above which the Siting Board’s regulations deem a gas storage unit (including multiple tanks and associated buildings and structures) to be a “facility.” 980 C.M.R. § 1.01(4).

Considering just the first phase, the Project would create 54,000 gallons of LNG storage capacity, more than double the minimum threshold. Furthermore, because UMASS plans a second phase to increase the storage capacity of the facility, up to double the initial capacity, and build the concrete containment area large enough in the first phase to accommodate three more storage tanks and a second vaporization unit, it is likely that for jurisdiction determination purposes, the Project should be considered to have a 108,000-gallon storage capacity.¹¹ In any event, and even considering the first phase in isolation, UMASS proposes to construct a jurisdictional “facility.”

2. EFSB Precedent

Because the Project is a facility within Section 69J, the Siting Board must decide whether UMASS is an entity that is subject to Section 69J. The Siting Board was confronted by a similar issue in 2000 when the Massachusetts Development Finance Agency (“MDFA”) asked for an Advisory Ruling. Request by MDFA for Advisory Ruling, letter from Rubin & Rudman (June 23, 2000). The MDFA took the position that it did not require EFSB approval to construct a 69 kV electric transmission line of greater than one mile on land owned by MDFA at the former Fort Devens. Like the UMASS LNG storage facility, the MDFA-proposed transmission

¹¹ This jurisdictional concept is referred to as an “anti-segmentation” principle. See e.g., Delaware Riverkeeper Network v. FERC, 753 F.2d 1304, 2014 WL 2535225 (D.C. Cir. 2014) (FERC erred by segmenting the environmental review of four projects that were functionally and financially interdependent rather than considering the cumulative impacts of all the projects). The planned expansion of the facility would also seem relevant to considering UMASS’s request to waive the minimum threshold regulation.

line was clearly a “facility.” However, MDFA asserted that it was a separate public instrumentality of the Commonwealth and was not subject to the jurisdiction of the Siting Board because MDFA’s enabling statute, G.L. c. 23G, § 2(a), provides that it was not subject to “the supervision or control ... of any board, bureau department, or other agency of the commonwealth....”. In addition, MDFA argued that it could not be an applicant before the EFSB because, as a state agency, it could not be a “person” as required by the definition of “applicant” in the EFSB statute, Section 69G.

In its Response to Request for Advisory Ruling (“MDFA Advisory Ruling”), the Siting Board declined to issue an advisory ruling as requested by MDFA. The Siting Board stated that MDFA’s request raised “complex questions of law subject to varying interpretations which are better explored in the context of an adjudicatory (or judicial) proceeding rather than an advisory ruling.” MDFA Advisory Ruling at 3. The Siting Board explained that MDFA’s argument that its enabling statute exempted it from EFSB jurisdiction raised “vexing questions of law” with little precedent to guide the Board. Id. As to MDFA’s second argument, that the EFSB statute applied only to “persons” and that the State, its agencies and political subdivisions, are not considered “persons,” the Board concluded that “the issue is not as clear-cut as MDFA suggests.” Id. The Board reasoned that, because of the EFSB’s long-standing jurisdiction over energy facilities constructed by municipal electric departments, the Legislature intended Siting Board review of both public and private energy facilities. Id. Accordingly, the Siting Board concluded that MDFA’s request was “too complex to rule on in an advisory ruling.” Id.

3. Judicial Precedent

To demonstrate the “vexing” nature of the question of law presented by MDFA, the Board cited a Supreme Judicial Court (“SJC”) decision involving the Massachusetts Port Authority (“Massport”), another public authority of the Commonwealth, similar in form to the MDFA. Id. at 3, citing City of Boston v. Massachusetts Port Authority, 364 Mass. 639 (1974) (“Massport Decision”). In the Massport Decision, the SJC held that Massport was subject to air pollution control regulations adopted by the State’s Department of Health, even though Massport had statutory enabling language exempting it from supervision and control by other state

agencies (*id.*).¹² The Court noted that the statute authorizing the Department of Health’s air pollution regulations provided that “all departments, agencies, commissions, authorities and political subdivisions shall be subject to rules and regulations adopted by the Department [of Health]” (*Id.* at 641-642, n. 3, quoting G.L. c. 111, § 142E). Because of the quoted statutory language, the Court found that the Legislature intended the air pollution regulations to be applied universally throughout the State, enforceable against public bodies and not just private business (*id.*). Consequently, the Court decided “that the absolute language of the [Massport] enabling act must yield to the equally absolute language of § 142E.” (*Id.* at 653).

4. Attorney General Opinion

In addition to the Attorney General Opinions discussed above that involved the University, UMASS cites a 2000 Opinion in which the Attorney General opined that the State Fire Code, a regulation promulgated by the State Fire Marshal, did not apply to state-owned buildings. 2000-01 Mass. Op. Att. Gen. No. 1, 2000 WL 1692752 (2000) (“AG Opinion: State Fire Code”). The Attorney General cited a long line of prior opinions that found that state agencies are not subject to proscriptions enacted by the General Court in the exercise of its police powers, absent an explicit legislative directive that state agencies are subject to the statute and any regulations promulgated pursuant to it. *Id.* at 2. For an example, the Attorney General noted the statute authorizing a state-wide building code explicitly waives the Commonwealth’s exemption from regulation, citing G.L. c. 143, § 2A.¹³ *Id.* at 4. Unlike the statute authorizing the State Building Code, the statute authorizing the State Fire Code does not contain language that waives the exemption of regulation of the Commonwealth and its agencies that is otherwise presumed. Consequently, the Attorney General concluded that the State Fire Code does not apply to state-owned buildings. *Id.*

¹² The enabling statute of Massport is found at St. 1956, c. 465, and the exemption language in Section 2 of that chapter.

¹³ Section 2A of Chapter 143 states that the provisions of that chapter, as they relate “to the safety of persons in buildings shall apply to buildings and structures, other than the state house, owned, operated or controlled by the commonwealth, and to buildings and structures owned, operated or controlled by any department, board or commission of the commonwealth, or by any of its political subdivisions, in the same manner and to the same extent as such provisions apply to privately owned or controlled buildings occupied, used or maintained for similar purposes.”

5. State Agencies and Section 69J Jurisdiction

In order to determine whether the Legislature intended state agencies to be subject to the requirements of Section 69J, we first must review the statutory language that establishes the approval requirement. That requirement is established in the first sentence of Section 69J, which provides that:

No *applicant* shall commence construction of a facility at a site unless a petition for approval of construction of that facility has been approved by the board and, in the case of an *electric* or *gas company* which is required to file a long-range forecast pursuant to section sixty-nine I, that facility is consistent with the most recently approved long-range forecast for that company. (emphasis added)

The obligation to obtain Section 69J approval is imposed on *applicants*. “Applicant” is defined in Section 69G, and means “a person or persons who submits to the department or board a long-range plan [pursuant to Section 69I or] a petition to construct a facility” pursuant to Section 69J.¹⁴ The word “person” is neither defined in Section 69G nor in G.L. c. 164, § 1, the definitional section for the entire Chapter 164. While in G.L. c. 4, § 7, 23rd clause, the General Court directs that, in construing Massachusetts statutes, the word “person” includes corporations, societies, associations and partnerships, the General Court does not provide any statutory guidance on whether “person” includes the Commonwealth or its agencies. However, the SJC does provide such guidance. The Court accepted the long-standing rule of statutory construction that the word “‘persons’ will not ordinarily be construed to include the State,” its agencies or its political subdivisions. Hansen v. Commonwealth, 344 Mass. 214, 219 (1962). Thus, the Court

¹⁴ The entire definition of “Applicant” is:

“Applicant”, a person or persons who submits to the department or board a long-range plan, a petition to construct a facility, a petition for a certificate of environmental impact and public need, or a notice of intent to construct an oil facility, or any application, petition, or matter referred by the chairman of the department to the board pursuant to section sixty-nine H.

presumes that the word “person” in statute does not include state agencies. There appears to be no language in the EFSB statute that rebuts that presumption.

Furthermore, SJC precedent, cited by the Attorney General in AG Opinion re: State Fire Code, also holds that state agencies are not subject to police power statutes like Section 69J absent explicit legislative direction. There appears to be no implicit much less explicit direction in Section 69J that would indicate a legislative intent to impose the regulatory scheme within Section 69J upon state agencies.

6. Municipal Light and Gas Departments

In the MDFA Advisory Ruling, the Siting Board expressed concern that the Board’s long-standing jurisdiction over energy facilities proposed by municipal electric departments could be jeopardized by a finding that state agencies like the MDFA were not subject to Section 69J approvals. It is accurate that the concept of the State as sovereign includes not only state agencies but also political subdivisions of the State and that political subdivisions include municipalities. However, the EFSB statute provides explicit legislative direction that a subset of municipal organizations, namely municipal light and gas departments, should be subject to Section 69J approvals.

As mentioned above, Section 69G defines an applicant as a person who submits a long-range plan pursuant to Section 69I. However, Section 69I imposes the obligation to submit long-range plans not on applicants but on certain types of *electric companies* and *gas companies*, both of which are also defined terms in Section 69G. Because electric and gas companies must submit long-range plans, they necessarily become “applicants” when they do so. Accordingly, electric and gas companies must be considered “persons” as that word is used in the definition of “applicant.”

Similarly, “electric company” and “gas company” are mentioned in the first sentence of Section 69J, because electric and gas companies must demonstrate not only that their proposed energy facilities meet the standards in Section 69J, but also that their facilities are consistent with their approved Section 69I long-range forecasts for those companies that must file such plans. The sentence exhibits an expectation that when electric and gas companies construct facilities, the facilities need Section 69J approval. Because they must seek Section 69J approval, electric and gas companies necessarily must be “applicants” when they seek that approval. Thus, the

language of Section 69J also shows a legislative intent that an “electric company” and a “gas company” are “persons” as that word is used in the definition of “applicant” in Section 69G.

The Section 69G definitions of both “electric company” and “gas company” include municipal corporations that provide electricity or gas service to customers, as well as a myriad of different types of private companies, both Massachusetts and “foreign” corporations. In these definitions, the General Court has exhibited a clear intent that in the limited instance when municipal corporations provide essential electric or gas utility service, such municipal corporations are “electric” or “gas companies” as well as “persons” as those words are used in Section 69G. Accordingly, both private and *public* electric and gas companies are subject to the regulatory jurisdiction of the Siting Board when they construct large-scale energy facilities.

The express inclusion of municipal light and gas departments as electric and gas companies in the EFSB statute is also noteworthy to highlight the lack of similar statutory language including state agencies, departments, commissions or authorities in the definitions. The General Court has included such language in other statutes, as described in the Massport Decision and the AG Opinion re: State Fire Code.

7. UMASS and EFSB Statutory Comparison

The jurisdictional question presented here is not like the one in the Massport Decision, in which the regulatory exemption language as to Massport and the regulatory jurisdictional language over state agencies as to the Department of Health were both “absolute” in the words of the SJC. In this case, the regulatory exemption language of the University of Massachusetts enabling statute is clear, that its Board of Trustees “shall not in the management of the university be subject to, or superseded by, any other state agency, board, bureau, commission, department or officer....” G.L. c. 75, § 1. In addition, the last sentence of G.L. c. 75, § 1 directs that the University of Massachusetts enabling statute “shall be liberally construed to effectuate its purposes.” However, the regulatory jurisdictional language over state agencies as to the Siting Board is far from clear. As discussed above, it would appear that the Legislature did not intend to impose the regulatory scheme of the EFSB statute on any state agency. Unlike the statute

authorizing the state building code at G.L. c. 143, § 2A, it is difficult to find any clear legislative intent to subject state agencies to the regulatory scheme imposed in the EFSB statute.¹⁵

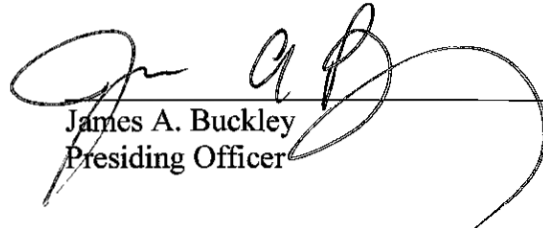
Because the regulatory exemption language of the University of Massachusetts is clear, we do not need to decide whether all state agencies are exempt from the EFSB statute to decide this case, and we expressly limit our findings regarding Siting Board jurisdiction to the specific facts relating to the Project and its proponent, UMASS. The Board need only find that, at best, there is some ambiguity as to whether state agencies are subject to the EFSB statute. Because the statutory authority of the Siting Board is silent on this issue, then the regulatory exemption language in the University of Massachusetts enabling statute (G.L. c. 75, § 1) must prevail.¹⁶

¹⁵ As acknowledged by UMASS, the Siting Board's regulation, 980 CMR 1.00, entitled the "Rules for the Conduct of Adjudicatory Proceedings", contains a definition of "person" that includes an "agency or department of the Commonwealth" and "political subdivision of the Commonwealth including municipal corporations." 980 CMR 1.01(4). However, the introductory sentence to 980 CMR 1.01(4) makes clear that the definitions are intended to be used for the purpose of the regulation only. In any event, the regulation is not relevant for determining legislative intent behind the language of the EFSB statute. In addition, the regulatory definition of "person" cannot expand the jurisdiction of the Siting Board beyond that authorized by the Legislature in the statute. See Providence and Worcester R.R. Co. v. Energy Facilities Siting Board, 453 Mass. 135 (2009).

¹⁶ We note Berkshire's concern that the applicability of the Department's Pipeline Engineering and Safety Division's design and operational requirements under 220 C.M.R. 112.00 is not clear with respect to the Project. The Siting Board makes no findings in this Decision regarding the proper role of the Department in its oversight of LNG facilities, such as the Project, pursuant to various state and federal requirements. In any event, UMASS indicated that it will coordinate with the Pipeline Engineering and Safety Division staff throughout the construction and operation of the Project. UMASS further stated that it will provide access to Department staff to perform inspections of the Project as the Department deems appropriate (Exh. EFSB-16).

IV. DECISION

For the reasons set forth above, the Siting Board concludes that it does not have jurisdiction pursuant to G.L. c. 164, §69J to approve the construction by the University of Massachusetts Amherst of the LNG storage facility on its campus in Hadley, Massachusetts.



James A. Buckley
Presiding Officer

Dated this September 21, 2015

APPROVED by the Energy Facilities Siting Board at its meeting of September 21, 2015, by the members and designees present and voting. **Voting for** approval of the Tentative Decision (as amended): Ned Bartlett, Chair, Designee for the Secretary of the Executive Office of Energy and Environmental Affairs; Angela M. O'Connor, Chairman, Department of Public Utilities; Jolette A. Westbrook, Commissioner, Department of Public Utilities; Judith Judson, Commissioner, Department of Energy Resources; Erica Kreuter, Designee for Secretary, Executive Office of Housing and Economic Development; Gary Moran, Designee for Commissioner, Department of Environmental Protection; Joseph C. Bonfiglio, Public Member; and Glenn Harkness, Public Member.



Ned Bartlett, Chair
Energy Facilities Siting Board

Dated this September 21, 2015

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 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).