COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Notice of Inquiry with Regard to the Siting Board's Standard of Review for Generating Facility Viability

EFSB 98-1

FINAL DETERMINATION

Jolette Westbrook
Hearing Officer
August 17, 1998

On the Decision:
William S. Febiger
Diedre Shupp Matthews

For the reasons stated below, the Energy Facilities Siting Board hereby determines that it will not conduct a stand alone review of project viability for generating facilities filed pursuant to G.L. c. 164, §§ 69 H and J¼.

I. INTRODUCTION

A. Procedural History

On November 3, 1997, the Energy Facilities Siting Board ("Siting Board") announced its intention to issue a Notice of Inquiry ("NOI") seeking comments on the purpose and scope of its review of generating facility viability. The Siting Board indicated that it was undertaking this review in response to structural changes in the electric industry, noting that " . . it is appropriate at this time to reexamine [the Siting Board's] fundamental standard of review for viability in light of ongoing changes in the electric industry. The standard that was developed for NUGs selling capacity to utilities under long-term contracts may not be appropriate for merchant plants intending to sell power under short-term contracts or on the spot market". U.S. Generating Company, EFSB 96-4 at 74 (1997) ("Millennium Power Decision").

On November 25, 1997, pursuant to the Electric Restructuring Act ("Restructuring Act"), the statute governing the Siting Board and its scope of review regarding generating facility plants was amended.[1] The Restructuring Act altered the mandate of Siting Board review to state that the Siting Board "shall review only the environmental impacts of generating facilities, consistent with the commonwealth's policy of allowing market forces to determine the need for and cost of such facilities." St. 1997, c. 164, § 204.

On February 9, 1998, the Siting Board issued an NOI concerning the Board's viability review and permitted written comment to be filed prior to the public hearing.[2] On March 16,

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[1] The effective date of the relevant portions of the Electric Restructuring Act was February 25, 1998.

[2] Initial written comments were submitted by Associated Industries of Massachusetts ("AIM"); Cabot Power Corporation; Charles River Watershed Association ("CRWA"); Competitive Power Coalition of New England ("CPC"); Sandra Dam; Robin Fletcher; William Graban; the City of Haverhill; State Representative Barbara Hyland; Infrastructure Development Corporation ("IDC"); State Senator William R. Keating;

(continued…)

1998, the Siting Board held a public hearing at which 15 people, including developers, legislative personnel, private citizens, and an environmental organization provided oral comments.[3] At that time, the Siting Board established April 13, 1998 as the deadline for submission of final written comments.[4]

B. Scope of Decision

As outlined in the procedural history, above, this proceeding was deemed necessary prior to the enactment of the Restructuring Act, and was originally intended to review the need for an appropriate scope of the Siting Board's review of the viability of non-utility generators in light of changes in the electric industry. Between the time that the Siting Board directed staff to conduct this review and the time that it issued the NOI, the Restructuring Act was passed; the NOI that was issued therefore requested comment on the viability standard in light of both industry changes and the Restructuring Act.

Both in writing and at the March 16 public hearing, the Siting Board received many comments on the steps that it should take to implement the Restructuring Act and on the appropriate scope of its environmental review pursuant to the Act. In the first category, AIM urged the Siting Board to open the Technology Performance Standard rulemaking mandated by the second paragraph of G.L. c. 164, § 69J¼ (AIM Initial at 4). A number of commenters,

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2 (…continued)
Levitt, Conford & Associates; Patricia LoTurco; Reginald J. Macari; Massachusetts Citizens for Safe Energy ("Safe Energy"); Lisa A. Mosczynski; State Representative Douglas W. Petersen; Power Development Corporation ("PDC"); Sithe Energies, Inc. ("Sithe"); State representative Jo Ann Sprague; and U.S. Generating Company ("USGen").

3 Oral comments were given by IDC; PDC; Sithe; Jody Lerher, on behalf of Representative Douglas Petersen; Patricia LoTurco in her individual capacity and on behalf of Representative Barbara Hyland; CRWA; AIM; USGen; Competitive Power Coalition of New England; Karl Stieg; Louis Russo; Peter Longo; Michael Del Negro, and Diane Kozlowski.

4 Final written comments were submitted by AIM; Ethan D. Hoag; IDC; Representative Petersen; PDC; Sithe; and USGen.

including Representative Petersen, Keating, and Sprague, asked the Siting Board to establish guidelines, authorized by the fourth paragraph of G.L. c. 164, § 69J¼, that would require applicants to submit sufficient data to enable the Siting Board to review such issues as local and regional land use impacts, and local and regional cumulative health impacts. Some of these commenters suggested that an advisory committee would be helpful in devising such guidelines (Hyland at 1; Petersen at 2; Keating at 1; Sprague at 1; Safe Energy at 1; LoTurco at 2; Dam at 1).

In the second category, a large number of commenters set forth the environmental issues of greatest concern to them, including air quality, water resources, wetlands issues, noise, safety, electro-magnetic fields ("EMF"), and public health issues such as occupational safety and the effects of using treated wastewater for cooling (CRWA at 1; Fletcher at 1-3; LoTurco at 2; Levitt; Mosczynski at 1,3; Dam at 1). Two commenters suggested that the Siting Board give preference to facilities using brownfield sites or to cogeneration facilities (Sithe Initial at 19; Dam at 1). Representative Petersen recommended that the Siting Board work with the Executive Office at Environmental Affairs ("EOEA") to develop its review of cumulative health impacts, and use Geographic Information System technology as appropriate. A number of commenters asked the Siting Board to address issues arising from clusters of power plants proposed in the same geographic area, including plants located in neighboring states (Fletcher at 1; Mosczynski at 1; Tr. at 74).

The Siting Board notes that these comments, while outside the scope of this proceeding, will be very useful to us as we move forward with our implementation of the Restructuring Act. While we cannot respond to each one in detail in this decision, we will address the main points briefly before turning to the primary subject of this proceeding.

The Siting Board appreciates the magnitude of the task before it in implementing the provisions of the Restructuring Act that apply to the review of generating facilities. We have now completed the promulgation of Technology Performance Standard regulations, which took effect in final form on August 7, 1998 and which can be found at 980 C.M.R. § 12.00. We are in the process of evaluating the need for additional rulemakings or other proceedings either to set forth filing guidelines or to clarify the scope of the Siting Board's review. Issues such as

the appropriate scope of review for projects proposed at brownfield sites likely will be resolved through case precedent. We note that EOEA has a seat on the Siting Board, and Siting Board Staff and staff from EOEA will be working closely with each other to develop coordinated approaches to issues such as water supply.

Although many issues have yet to be resolved, there should be no doubt about the scope of the Siting Board's environmental review. In the decade since Northeast Energy Associates ("NEA") filed the first non-utility generating project ("NUG") in Massachusetts for review by the Siting Board, we have reviewed over 13 proposals for generating facilities. In each and every case, we have considered the full spectrum of environmental and community impacts – air quality, water supply, wastewater, wetlands, land use, visual, noise, traffic, safety, EMF – in determining whether the facility should be approved and, if so, what conditions should be imposed as part of the approval. When appropriate, this analysis has encompassed a review of the cumulative impacts of the proposed facility and other existing and planned uses on resources such as airsheds, watersheds, and the local noise environment.

Under the Restructuring Act, the Siting Board's broad environmental analysis has become the central focus of its review of generating facilities. The Siting Board is unequivocally committed to continuing this analysis, and to expanding it where necessary to address explicitly the local and regional land use impacts, local and regional cumulative health impacts, wetlands impacts, and visual impacts of proposed generating facilities.

The remainder of this decision addresses the subject noticed in the NOI – namely, the purpose, scope, and fundamental standard of review for viability which the Siting Board uses in its review of petitions to construct power plants. Section II briefly reviews the development of the Siting Board's review of the viability of non-utility generators. Section III addresses the legal authority for a review of generating facility viability pursuant to G.L. c. 164, §§ 69H and J¼, and concludes that no such authority exists. Section IV addresses the policy implications of this legal conclusion. Section V summarizes the Siting Board's determination in this matter.

II. DEVELOPMENT OF SITING BOARD'S VIABILITY REVIEW

The Siting Board first undertook to review the viability of proposed generating facilities in Northeast Energy Associates, 16 DOMSC 335 (1987) ("NEA Decision"), its first review of a qualifying facility ("QF").[5] The NEA project was the first generating facility presented by a non-utility developer to the Siting Board for review, and the Siting Board consequently devoted a considerable portion of the NEA Decision to a discussion of the standard of review applicable to such facilities. With respect to cost and environmental impacts, the Siting Board established a four-part standard of review, stating that: "… the Siting [Board] determines whether the project (1) is superior to a reasonable range of practical alternatives in terms of cost, (2) offers power at a cost below the purchasing utility's avoided cost, (3) is superior to alternatives in terms of environmental impacts, and (4) is likely to be viable as a source of energy over time and will therefore satisfy the previously identified need for additional power resources."[6] NEA Decision at 27. In reviewing the viability of the NEA project, the Siting Board considered the project's financing arrangements, its existing and proposed power sales agreements and its fuel supply strategy, and concluded that the NEA project was reasonably likely to be financed and constructed, and was likely to be a viable source of energy over the life of its contracts. Id. at 41-43.

The Siting Board's standard of review for non-utility generating facilities initially focused on viability over the life of QF contracts. See e.g., MASSPOWER, 20 DOMSC 301,

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[5] The Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 796, 824a-3 (PURPA"), established a QF category consisting of non-utility electric cogenerators with the capability to generate both electric energy and useable steam. In order to qualify for QF status under PURPA, the cogenerator had to certify to the Federal Energy Regulatory commission that it would sell a specified portion of its steam by-product in addition to its electric sales.

[6] The Siting Board's statute implicitly assumed that generating facilities would be proposed in the context of a utility's long-range forecast and supply plan, and did not directly address the type of review that would be appropriate for a non-utility generating facility. However, the statute did provide for the review of non-utility oil facilities. A review of project viability was required for oil facilities, but not for facilities proposed by utilities. G.L. c. 164, §§ I and J (amended).

352 (1990); Altresco-Pittsfield, 17 DOMSC 351, 378 (1988). This standard of review was modified over time to accommodate projects that were not QFs and did not intend to hold long-term power sales contracts. See e.g., Enron Power Enterprise Corporation, 23 DOMSC 1, 89-90 (1991) ("Enron Decision"); Eastern Energy Corporation; 22 DOMSC 188, 295-299 (1991). It was also expanded over time to cover issues such as transmission interconnection agreements. Altresco Lynn, Inc., 2 DOMSB 1, 143 (1993); Enron Decision, 23 DOMSC at 101; West Lynn, 22 DOMSC 1, 69.

More recently, the Siting Board modified its standard of review to reflect "the need for flexibility, the expected shorter timeframe of [power purchase agreements] in a restructured electric industry, and the industry-wide shift away from long term gas supply contracts." Berkshire Power Development, Inc., 4 DOMSB 221, 343 (1996) ("Berkshire Power Decision"). At that time, the Siting Board also restated the purpose of its viability review, noting that a demonstration that "proposed facilities will remain competitive and reliable over time not only provides important security in meeting long term energy needs, but also provides assurances that such facilities will be as fully utilized over their planned lives as possible, thereby helping to minimize the future need for additional new construction and its associated cost and environmental impact." Id.

Currently, the Siting Board determines that a proposed non-utility generator is likely to be a viable source of energy if (1) the project is reasonably likely to be financed and constructed so that the project will actually go into service as planned, and (2) the project is likely to operate and be a reliable, least-cost source of energy over the planned life of the proposed project. Millennium Power Decision, EFSB 96-4, at 71; Dighton Power Associates, EFSB 96-3, at 24 (1997) ("Dighton Power Decision"); Berkshire Power Decision 4 DOMSB at 328. In order to meet the first test of viability, the proponent must establish (1) that the project is financiable, and (2) that the project is likely to be constructed within the applicable time frame and will be capable of meeting performance objectives. In order to meet the second test of viability, the proponent must establish (1) that the project is likely to be operated and maintained in a manner consistent with appropriate performance objectives, and (2) that the proponent's fuel acquisition strategy reasonably ensures low-cost, reliable energy resources

over the planned life of the proposed project. Millennium Power Decision, EFSB 96-4, at 71-72; Dighton Power Decision, EFSB 96-3, at 24; Berkshire Power Decision, 4 DOMSB at 328.

III. LEGAL ANALYSIS AND DETERMINATION

The Siting Board developed its standard of review for the viability of non-utility generating facilities under G.L. c. 164, §§ 69H-J, as they were in effect prior to the Restructuring Act. The statute at that time made no explicit provision for the review of non-utility generating facilities; the Siting Board therefore developed a standard of review by adopting its precedent to the facts presented by the development, first of QFs, and then of independent power producers. However, in 1997, the legislature addressed this issue and set forth new procedures for the review of proposed generating facilities as part of the Restructuring Act. Therefore, as a threshold matter, we consider whether the viability of proposed generating facilities, as currently reviewed by the Siting Board, remains within our jurisdiction under the Restructuring Act.

A. Positions of the Parties

Commenters from the development community have raised four legal arguments in support of the proposition that the Siting Board has no legal authority to review the economic viability of proposed generating facilities. First, they note that G.L. c. 164, § 69H limits the Siting Board's review of proposed generating facilities to the environmental impacts of those facilities, and articulates a Commonwealth policy of allowing market forces to determine need and cost issues (PDC Initial at 4-5; PDC Final 2; IDC Initial at 3-5; IDC Final at 2; USGen Initial at 3-5; Sithe Initial at 6; AIM Initial at 2; CPC at 2; Tr. at 159). Second, they argue that G.L. c. 164, § 69J¼ expressly prohibits the Siting Board from requesting cost and need data for generating facilities and conclude that the Siting Board cannot continue to use its current standard of review concerning viability, which relies in part on the evaluation of such data (IDC Initial at 3; PDC Initial at 4; Sithe Initial at 2, 11; CPC at 2; USGen Initial at 4; AIM Initial at 3). Third, they note that G.L. c. 164, § 69J¼ enumerates specifically what the Siting Board may review in a generating facility case, and that viability is not so enumerated (PDC

Final at 3; Sithe Initial at 4). Finally, they assert that the intent of the Restructuring Act, as it applies to the Siting Board, is to create a streamlined process for proposed generation facilities, and that continuation of the viability review without any clear statutory authority would run counter to this intent (IDC Initial at 3; Sithe Final at 5; Tr. at 11 and 158).

The developers acknowledge that the Siting Board may still request certain types of information related to project viability for use in its environmental review. For example, PDC, IDC and Sithe indicate that the Siting Board could review plans for the construction, operation and maintenance of proposed facilities, including the experience and track record of the providers, in order to satisfy environmental concerns (PDC Initial at 7, 9; IDC Initial at 6-7; Tr. at 108-109). Similarly, IDC notes that a proponent's plan for interconnection with the interstate gas pipeline system are likely to have environmental impacts (Tr. at 110-112).

In response to the suggestion that the siting statute still permits a review of the reliability of proposed generating facilities, Sithe argued that G.L. c. 164, § 69H requires the Siting Board to provide for "a reliable energy supply" by "review[ing] only the environmental impacts of generating facilities" (Tr. at 116-117). PDC suggests that the Siting Board could generally evaluate the reliability of new technologies, although PDC and Sithe both suggest that major technological innovation is usually tested on a small scale before being implemented in projects the size of those reviewed by the Siting Board (Tr. at 115-122).

No other commenter addressed the legal issues in written comments. In response to questioning, Jody Lehrer, speaking for Representative Peterson, expressed the opinion that any parts of the viability standard that related to cost and need were no longer germane to the review of power plants (Tr. at 78). In response to further questioning, she indicated that the Siting Board might be able to look at reliability in the context of a generating facility review (Tr. at 86).

B. Analysis

In reviewing petitions to construct generating facilities, the Siting Board is guided by G.L. c. 164, § 69H, which states the general purpose and scope of that review, and by G.L. c. 164, § 69J¼, which provides detailed direction on procedures, information requirements, and

necessary findings. G.L. c. 164, § 69H, as revised by the Restructuring Act, directs the Siting Board to "review only the environmental impacts of generating facilities consistent with the commonwealth's policy of allowing market forces to determine the need and cost of such facilities." G.L. c. 164, § 69H. Prior to the Restructuring Act, the Siting Board had statutory authority to consider the need for and cost of proposed generating facilities, as well as their environmental impacts. The Restructuring Act thus requires a clear shift in the focus of the Siting Board's review of generating facilities. In this context, it requires the Siting Board to eliminate any part of its viability review that focuses on need and cost.

In addition to this general proscription on reviewing the need for and cost of generating facilities, G.L. c. 164, § 69J¼ prohibits the Siting Board from requesting data regarding the need for and cost of proposed generating facilities. This section is specific; it states that "[n]othing in this chapter shall be construed as requiring the board to make findings regarding the need for, or cost of…" a generating facility. G.L. c. 164, § 69J¼. Further, while G.L. c. 164, § 69J¼ authorizes the Siting Board to develop guidelines relative to the information that it requests from petitioners, the section states that "these guidelines shall not require any data related to the necessity or cost of the proposed generating facility." Id.

Based on the general and specific exclusion of cost and need issues from the Siting Board's review of generating facilities, there is a compelling argument that the first test of the Siting Board's viability review – whether the project is reasonably likely to be financed and constructed so that the project will actually go into service as planned -- is now beyond the scope of the Siting Board's mandate. Project financing is driven almost exclusively by projections of project cost and demand for power, and the ability to construct a project depends on receipt of financing and the project's financial and other arrangements with the construction contractor. Similarly, the cost aspect of the second part of the viability test – whether the project is likely to operate and be a reliable, least-cost source of energy over the planned life of the proposed project – also is now clearly beyond the permitted scope of Siting Board review. Therefore, for the Siting Board to continue to assess such issues would be contrary to the Commonwealth's policy as articulated by the legislature.

The commenters also make a more general argument that the scope of the Siting

Board's review of generating facilities is narrowly defined, and that the Siting Board has no authority to go beyond that scope. In this regard, G.L. c. 164, § 69H directs the Siting Board to "review only the environmental impacts of generating facilities". In addition, § 69J¼ explicitly outlines specific criteria for the approval of proposed generating facilities. The statute states that the Siting Board shall approve a petition to construct a generating facility if the Siting Board determines that the petition meets the following requirements: (1) the description of the proposed generating facility and its environmental impacts are substantially accurate and complete; (2) the description of the site selection process used is accurate; (3) the plans for the construction of the proposed generating facility are consistent with current health and environmental policies of the commonwealth and with such energy policies as are adopted by the commonwealth for the specific purpose of guiding decisions of the board; (4) such plans minimize the environmental impacts consistent with the minimization of costs associated with the mitigation, control, and reduction of environmental impacts of the proposed facility; and (5) if the petitioner was required to provide information on other fossil fuel generating technologies, the construction of the proposed generating facility on balance contributes to a reliable, low-cost, diverse, regional energy supply with minimal impacts on the environment. G.L. c. 164, § 69J¼.

G.L. c. 164, § 69J¼ clearly provides no explicit authority for a stand-alone review of project viability. Given the specificity with which § 69J¼ sets forth the scope of the Siting Board's review, accepted rules of statutory construction suggest that if the legislature had intended the Siting Board to review viability issues, it would have so stated.[7] Therefore, it wold be difficult to support the position that viability issues, such as whether or not a project is financiable and whether a project is likely to meet its performance deadlines, remain valid issues for Siting Board inquiry under the new legislation. The Siting Board concludes that §§ 69H and 69J¼, taken together, are intended to limit its review of generating facilities to the topics enumerated in § 69J¼. Accordingly, we concur with the commenters that the

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[7] The Siting Board notes that, in drafting § 69J¼, the legislature chose not to carry over language from § 69J that authorizes a review of viability for oil facilities.

Restructuring Act no longer allows the Siting Board to continue to use its current standard of review relative to viability.

Finally, the Siting Board agrees with the commenters that the intent of the Restructuring Act, as it relates to the Siting Board's review of generating facilities, is to streamline the review by focusing it on environmental issues and leaving issues of need and cost exclusively to the marketplace. The Siting Board therefore concludes that the purposes of the Restructuring Act would not be well served by continuing its review of generating facility viability in the absence of explicit legislative authorization of such review. It is important to note that prior to the Restructuring Act, the Siting Board had a mandate to "provide a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." Former G.L. 164, § 69H. Therefore, under the former statute, the Siting Board's examination of viability had legal underpinnings in that such an examination helped to provide the Siting Board with assurance that generating facilities pending before the Board were likely to be constructed and able to meet the need for additional energy resources. The Siting Board is now required to "provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost" by reviewing "only the environmental impacts of generating facilities, consistent with the commonwealth's policy of allowing market forces to determine the need for and cost of such facilities." G.L. c. 164, § 69H. In the absence of any authority to review the need for generating facilities, the prior legal rationale for the viability analysis no longer exists.

In summary, the Siting Board concludes that it has no statutory authority pursuant to G.L. c. 164, §§ 69H and J¼ to continue its review of the economic viability of generating facilities. The Siting Board also concludes that much of its existing standard of review for viability covers subjects that have been explicitly placed outside its scope of review by the Restructuring Act. Consequently, the Siting Board determines that it will not conduct a stand-alone review of project viability for generating facilities filed pursuant to G.L. c. 164, §§ 69H and J¼.

In making this determination, the Siting Board notes that certain topics that we have previously investigated as part of our viability review, e.g., the experience and track record of

construction and operation and maintenance ("O&M") contractors, may be directly linked to environmental issues. We do not interpret the Restructuring Act as precluding us from continuing to request such information from petitioners, unless the information falls squarely within the subjects of need or project cost. While we take seriously the directive to streamline our review of generating facilities by leaving the issues of need and cost for the market to determine, we will not compromise our environmental review. This issue is discussed further in Section IV, below.

IV. POLICY ANALYSIS

In Section III, the Siting Board concluded that it has no statutory authority pursuant to G.L. c. 164, §§ 69H and J¼ to continue its review of the economic viability of generating facilities, and that much of its existing standard of review for viability covers subjects that have been explicitly placed outside its scope of review by the Restructuring Act. Consequently, the Siting Board determined that it will not conduct a stand-alone review of project viability for generating facilities filed pursuant to G.L. c. 164, §§ 69H and J¼. This section clarifies the scope of this determination and addresses a number of related policy issues raised in participant comments.

A. Positions of the Parties

The policy comments of AIM and the development community primarily address the need for the Siting Board's current review of economic viability in a restructured electric industry. USGen argues that the Siting Board originally undertook a review of the viability of QFs and other independent power projects to ensure that such facilities would "be reliable sources of power if utilities were to reasonably rely on them to meet their captive customer's needs" (USGen Initial at 2). USGen suggests that, due to structural changes in the market, the Siting Board's oversight is no longer needed to ensure system reliability (id. at 2).

USGen and other developers also argue that the financial community conducts ongoing and intensive reviews of the viability of merchant projects that go well beyond the Siting Board's review of financing, contracts, and fuel supply strategy both in detail and in scope.

(PDC Initial at 6; IDC Initial at 5; Sithe Initial at 12, 18; Tr. at 16-19). They argue that since market participants and regulators have a shared interest in ensuring the viability of proposed generating facilities, there is no need for the Siting Board to attempt to duplicate the financial market's review (Sithe Final at 4; IDC Final at 4; Tr. at 33-36). They note that an administrative review of viability, as currently conducted by the Siting Board, places a significant amount of commercially sensitive information in the public record, and may increase the ultimate cost of power to consumers (PDC Initial at 6; IDC Initial at 5-6; Sithe Initial at 22; USGen Initial at 10-11).

The developers specifically address concerns raised by staff that the elimination of the Siting Board's viability review could result in the more frequent approval and construction of plants that prove commercially unsuccessful. First, they argue that projects of this magnitude do not receive financing and go to construction without undergoing internal and external reviews of project viability that are much more detailed than any that the Siting Board could reasonably conduct (PDC Final at 3; IDC final at 3; Tr. at 16-17). Second, they note that the Siting Board historically has approved projects which ultimately did not go forward, and note the inherent difficulty of trying to predict the success of a market-driven project based on a snapshot of the project's finances and draft contracts at a relatively early stage in project development. (PDC Initial at 6; IDC Initial at 5-6; Sithe Initial at 22). Third, they assert that the new generation of power plants being proposed in Massachusetts is unlikely to be closed or sit idle, because new plants can produce power at a lower cost than most existing plants (PDC Final 4; Tr. at 53).

Comments received from the Legislature, the environmental community, and the public at large focus more on the need for a review of the environmental or resource viability of proposed generating facilities that on the Siting Board's current review of financing, contracts, and fuel supply. For example, CRWA argues that the long-term viability of any generating facility is linked to the sustainability of the resources upon which it draws, and particularly upon the availability and stress on water resources (CRWA at 1; Tr. at 139-145). Similarly, Representative Peterson recommends that the term "viability" be redefined to clearly include environmental impacts, if this is necessary to ensure that the Siting Board conducts a

comprehensive review of the environmental impacts of proposed facilities (Petersen Initial at 1-2).

A number of commenters also express concern about the environmental impacts of a plant that is constructed and then fails; some suggest that this concern be addressed by requiring developers to post operational and post-closure bonds sufficient to remediate a site if a plant fails (Tr. at 133, 144; Petersen Final at 2; Sprague at 1; Keating at 1; LoTurco at 1, Mosczynski at 2). In response, the developers argue that the Siting Board has no legal authority to impose bonding requirements (PDC Final at 7; IDC Final at 6-7).

B. Analysis

The Siting Board concludes that its traditional review of financing strategies, construction and O&M contracts, and fuel supply arrangements is both inconsistent with its role under the Restructuring Act and of limited value given the current structure of the electric market. The original purpose of the viability review was to ensure that a non-utility generating facility would provide a reliable, low-cost supply of energy over the life of its QF contracts. At that time, the viability review was critical to consumer protection since, if approved, the NUGs would enter into long-term power contracts with utilities, which would rely on the NUGs for capacity and would pass the cost of the contracts, and of replacement power if necessary, on to their captive ratepayers. In the emerging competitive market for power, NUGs will no longer be able to pass their costs on to captive customers through long-term contracts with utilities; the viability review therefore no longer serves the same consumer protection function.

The viability review also was originally intended to "ensure that actual energy production benefits will flow from the project that outweigh any adverse environmental impacts associated with siting and operating the facility", so as to deter the construction of commercially unsuccessful plants that are underutilized or eventually abandoned. NEA Decision at 27. The Siting Board acknowledges that a power plant, once constructed, has land use and visual impacts that continue even if the plant is no longer in operation, and that communities that agree to host power plants may be legitimately concerned about the disposition of the project site

when the plant reaches the end of its useful life. However, the Siting Board is persuaded that its current review of financing, contracts, and fuel supply, even if it were still permissible, is no longer an effective tool to address this concern. At best, this review assures the Siting Board that a proposed project is credible at a relatively early stage in project development. However, it is clear from the record in this case that investors conduct an extensive review of the financial viability of a proposed project before committing to construct it; such a review provides the best assurance that a project that is not credible will not be financed and constructed, regardless of whether the Siting Board reviews its economic viability. In addition, the question of whether and how frequently a proposed facility likely will be dispatched in ten years' time depends largely on the future demand for power and the facility's cost-competitiveness relative to other plants; these issues are both clearly outside the Siting Board's scope of review, and difficult to predict with any accuracy.

While the Siting Board thus concludes that its current review of a generating facility's financing, contracts, and fuel supply plans has outlived its usefulness, it has no intention of abandoning its review of the environmental viability of such facilities. The Siting Board agrees with CRWA and other commenters that resource availability is critical to the success of any power plant, and that an analysis of the carrying capacity of water and other resources is an important element of its review of proposed generating facilities. The Siting Board historically has considered these issues in the context of its analysis of the environmental impacts of a proposed facility, and will continue to do so under G.L. c. 164, § 69J¼.

The Siting Board also acknowledges the possibility that an apparently viable generating facility will fail commercially, although the record suggests that modern combined-cycle plants are likely to be dispatched frequently due to their efficiency and relatively low operating costs, and therefore are unlikely to be underutilized or prematurely abandoned. Certain commenters have proposed operational or post-closure bonding to ensure that resources are available to remediate generating facility sites if the facilities are abandoned. It is not immediately clear whether the Siting Board has the legal authority to require such bonding as a condition of approval. However, even if such authority exists, the Siting Board could exercise it only on a case-by-case basis, and only if it determined, after reviewing the cost of bonding, the likelihood

of abandonment, the potential for hazardous waters, other potential remedies, and related issues, that bonding was necessary to "minimize the environmental impacts of [the proposed facility] consistent with the minimization of the costs associated with the mitigation, control and reduction of the environmental impacts of the proposed generating facility," G.L. c. 164, § 69J¼.

Finally, the Siting Board notes that in the past there has been some overlap between the information needed to conduct the viability review and the information needed to evaluate the environmental impacts of a proposed generating facility. For example, a company's plans for interconnecting with the natural gas pipeline system and the electric grid, and its plans for disposing of its wastewater, have been necessary components of our review of project viability; however, they also are important to our review of the land use impacts, off-site construction impacts, waste water impacts, and EMF impacts of a proposed facility, as well as to our review of the site selection process. In the future, the Siting Board will continue to seek information necessary to its environmental review, such an interconnection routes and the capacity of the local waste water treatment facility, but will no longer seek information related primarily to viability, such as the proponent's financial arrangements with the Independent System Operator or wastewater treatment facility, or its purchasing strategy for natural gas.

V. SUMMARY

In Section III, above, the Siting Board concluded that it has no statutory authority pursuant to G.L. c. 164, §§ 69H and J¼ to continue its review of the economic viability of generating facilities. The Siting Board also concluded that much of its existing standard of review for viability covers subjects that have been explicitly placed outside its scope of review by the Restructuring Act.

Accordingly, based on the above, the Siting Board will not conduct a stand alone review of project viability for generating facilities filed pursuant to G.L. c. 164, §§ 69H and J¼.

ATTACHMENT A

COMMENTERS

Submitted Initial Written Comments

Representative Douglas Petersen

Representative Jo Ann Sprague

Senator William Keating

Cabot Power Corporation

Infrastructure Development Corporation

Power Development Company

Sithe Energies, Inc.

U.S. Generating Company

Associated Industries of Massachusetts

Charles River Watershed Association

Competitive Power Coalition

Haverhill City Council

Massachusetts Citizens for Safe Energy

Sandra Dam

Robin L. Fletcher

William Graban

Levitt, Conford and Associates

Patricia LoTurco

Reginald J. Macari

Lisa a. Mosczynski

Testified at Public Hearing

Representative Douglas Petersen (Jody Lehrer, speaker)

Representative Barbara Hyland (Patricia LoTurco)

Infrastructure Development Corporation (Donna C. Sharkey)

Power Development Company (Kenneth P. Roberts)

Sithe Energy, Inc. (Susan Tierney)

U.S. Generating Company (Gary Lambert)

Associated Industries of Massachusetts (Robert R. Ruddock)

Charles River Watershed Association (Robert Zimmerman)

Competitive Power Coalition (Neal B. Costello)

Patricia LoTurco

Karl Stieg

Louis Russo

Peter Longo

Michael Del Negro

Diane Kozlowski

Submitted Final Written Comments

Representative Douglas Petersen

Infrastructure Development Corporation

Power Development Company

Sithe Energies, Inc.

U.S. Generating Company

Associated Industries of Massachusetts

Ethan D. Hoag

Unanimously APPROVED by the Energy Facilities Siting Board at its meeting of August 13, 1998, by the members and designees present and voting. Voting for approval of the Draft Determination as amended: Janet Gail Besser (Chair, EFSB\DTE); James Connelly (Commissioner, DTE); W. Robert Keating (Commissioner, DTE); Sonia Hamel (for Trudy Coxe, Secretary, Executive Office of Environmental Affairs); and David L. O'Connor (for David A. Tibbetts, Director, Department of Economic Development).

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Janet Gail Besser
Chair

Dated this 17th day of August, 1998