

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

In the Matter of the Petition of
Altresco Lynn, Inc. for Approval
to Construct a Bulk Generating Facility
and Ancillary Facilities

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EFSB 91-102A

FINAL DECISION

Robert W. Ritchie
Hearing Officer
August 17, 1995

On the Decision:
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APPENDIX A: Altresco Decision - Findings on Need

I. INTRODUCTION

A. Procedural History

On March 29, 1991, Altresco Lynn, Inc. ("Altresco" or "Company") filed with the Energy Facilities Siting Council ("Siting Council"),¹ a petition to construct a 325 megawatt ("MW"), natural gas-fired cogeneration facility and ancillary facilities in the City of Lynn, Massachusetts. The Siting Council docketed the petition as EFSC 91-102.² On October 18, 1991, Altresco submitted a revised petition for construction of a smaller, 170 MW natural gas-fired cogeneration facility and ancillary facilities.

The Siting Council initially conducted 12 days of evidentiary hearings commencing April 16, 1992 and ending June 5, 1992. On September 25, 1992, the Hearing Officer issued a Procedural Order reopening the proceeding for the limited purpose of comparing the proposed Altresco project to alternative energy resources in response to the Supreme Judicial Court's ("Court") Decision in City of New Bedford v. Energy Facilities Siting Council, 413 Mass. 482 (1992) ("City of New Bedford"). In City of New Bedford, the Court remanded the conditional approval of a proposed generating facility to the Siting Council "to compare alternative energy resources" in its review of that proposed facility.³ Id. at 484.

¹ Pursuant to Chapter 141 of the Acts of 1992 ("Reorganization Act"), the Siting Council was merged with the Department of Public Utilities ("Department") effective September 1, 1992. Reorganization Act, § 55. Petitions for approval to construct facilities that were pending before the Siting Council prior to September 1, 1992 were to be decided by the newly created Energy Facilities Siting Board ("Siting Board") which is within, but not under the control or supervision of, the Department. Id., §§ 9, 15, 43, 46. The terms Siting Council and Siting Board will be used throughout this Decision as appropriate to the circumstances being discussed.

² Jurisdiction over Altresco's petition originally arose pursuant to G.L. c. 164, §§ 69H and 69I, which required electric companies to obtain Siting Board approval for construction of proposed facilities. Altresco Lynn, Inc., 2 DOMSB 1, 11 (1993). Said jurisdiction is now codified in G.L. c. 164, §§ 69H and 69J. Subsequent to the creation of the Siting Board, this proceeding was re-docketed as EFSB 91-102.

³ In City of New Bedford, the Court also identified four other issues for further consideration:

(continued...)

An evidentiary hearing was held on alternative energy resources on October 30, 1992. At that evidentiary hearing, in response to a motion filed by intervenor Point of Pines Beach Association, Inc. ("Point of Pines"), the Hearing Officer allowed further testimony, discovery and cross-examination on the issue of the need for power in Massachusetts, including the relationship between the need for power in Massachusetts and the need for regional power. Additional evidentiary hearings were held on February 17, 23, and 24, 1993, on the issue of Massachusetts need. The Hearing Officer entered 376 exhibits into the record, consisting primarily of information and record request responses. Altresco entered 42 exhibits into the record. Point of Pines entered 47 exhibits into the record. Intervenor John Arrigo entered one exhibit into the record.

On November 24, 1993, the Hearing Officers issued the initial Tentative Decision in this proceeding. The Siting Board, by majority vote, adopted the Tentative Decision with some minor amendments at its December 14, 1993 meeting. Altresco Lynn, Inc., 2 DOMSB 1, 225 (1993) ("Altresco Decision").⁴

³(...continued)

- (1) Because the Siting Council's mandate referred to a necessary energy supply for the Commonwealth, the Siting Council's finding that additional energy resources are needed for New England was inadequate (413 Mass. at 489);
- (2) The Siting Council must make a finding that the proposed project would produce power at the lowest possible cost (id.);
- (3) The Siting Council must determine that the proposed project would provide a "necessary" energy supply (id. at 489-490); and
- (4) The final decision must be "accompanied by a statement of reasons ... including determination of each issue of fact or law necessary to the decision ..." (id. at 490).

⁴ In the Altresco Decision, 2 DOMSB at 222-223, the Siting Board conditionally approved Altresco's petition. The conditions imposed on Altresco fell into three categories: need, viability and environmental. Id. The Siting Board found that there would be a need for 170 MW or more of additional energy resources for reliability purposes beginning in the year 1997 for Massachusetts and beginning in the year 2000 in New England. Id. at 61, 92. The Siting Board also found that Altresco had established that, beginning in 2000 or later, New England will need 170 MW of additional energy resources from the proposed project for economic efficiency purposes. Id. at 68. As it was unclear from the record whether the regional surplus would be available to meet the earlier need for

(continued...)

A timely joint petition for appeal of the Altresco Decision was filed with the Court sitting in the County of Suffolk by Point of Pines and the City of Revere ("Revere"), both intervenors in the proceeding, pursuant to G.L. c. 164, § 69P, and c. 25, § 5. Altresco filed a motion for leave to intervene in the proceeding, which was granted by the Court. The joint petition for appeal was reported by a single justice to the full Court and docketed as Civil Action SJC-6551.

The Court issued its decision on the appeal on January 11, 1995. Point of Pines Beach Association, Inc. vs. Energy Facilities Siting Board, 419 Mass. 281 (1995) ("Point of Pines v. Siting Board").

B. The Appeal of the Altresco Decision and the Court's Decision in Point of Pines v. Energy Facilities Siting Board

In their joint petition for appeal, Point of Pines and Revere raised several issues as causes of action. The first set of issues related to the Siting Board conditioning approval

⁴(...continued)

power in the Commonwealth, the Siting Board found that the submission of (1) a signed and approved contract with Boston Edison Company for 132 MW ("RFP 3") or (2) signed and approved power purchase agreements which include capacity payments for at least 75 percent of the proposed project's electric output, would be sufficient evidence to establish that the proposed project would provide a necessary energy supply for the Commonwealth. Id. at 106.

With respect to viability, the Siting Board found that, upon the submission of signed and approved PPAs with Boston Edison Company for 132 MW or signed and approved PPAs for at least 75 percent of the proposed project's electric output, Altresco would have established that its proposed project is financially viable. Id. at 141-142. The Siting Board also found that upon compliance with the condition that the Company provide the Siting Board with a signed copy of an agreement between Altresco and the Lynn Water and Sewer Commission for provision of treated effluent and potable water, Altresco would have established that its proposed project is likely to be constructed within applicable time frames and be capable of meeting performance objectives. Id. at 144. Accordingly, the Siting Board found that, upon compliance with these conditions, Altresco would establish that its proposed project is likely to be a viable source of energy.

of the Altresco project on the submission of signed and approved power purchase agreements ("PPAs") to demonstrate a year of need earlier than 2000. Point of Pines and Revere argued that the Siting Board precluded any factual inquiry into whether such PPAs would, in fact, be evidence of need or of a supply of energy at the lowest possible cost (Joint Petition for Appeal at 5). Point of Pines and Revere also argued that the Siting Board's need determination was not based on an independent and case-specific evaluation of evidence in the record (*id.* at 8). Point of Pines and Revere asserted that, by relying on the mere existence of a Boston Edison Company ("BECo") PPA without conducting an inquiry into the circumstances of that contract's creation, the Siting Board's approval of the Altresco petition was not supported by substantial evidence (*id.* at 16). Point of Pines and Revere interpreted the Siting Board's decision to condition approval on the submission of signed and approved PPAs as a failure to find a need for the proposed project (*id.* at 8, 9, 19).

As a second set of issues, Point of Pines and Revere argued that the Siting Board improperly found that the proposed facility will provide power at the lowest possible cost. Specifically, Point of Pines and Revere argued that the Siting Board's comparative cost analysis erroneously excluded consideration of the costs of (a) the alternative of implementing demand side management ("DSM") energy savings and conservation techniques, and (b) the alternative of purchasing excess power supplies from the New England Power Pool ("NEPOOL") energy grid (*id.* at 17-18). Point of Pines and Revere also asserted that the Siting Board failed to determine that the proposed project would offer power at a cost below purchasing utilities' avoided costs (*id.*).

As noted above, the Court issued its decision in Point of Pines v. Siting Board on January 11, 1995. The Court remanded the case to the single justice with instructions that the Siting Board decision conditionally approving the siting of the Altresco facility be vacated, and stated that "[w]e leave any question concerning a reopening of the [Siting B]oard's hearings to the discretion of the [Siting B]oard." Point of Pines v. Siting Board, 419 Mass. at 287.

Addressing the Siting Board's conditional approval of the proposed Altresco project, the Court stated that the Siting Board had not explained how the approval of PPAs by the Department, which may show need for an individual utility, implies a need for the

Commonwealth. Id. at 284-285. The Court noted that it had not received a reasoned explanation of the inferability of Commonwealth need from utility need in either this case, arguments before the Court concerning this case, or in previously cited Siting Board decisions. Id. Further, the Court noted that the Siting Board may not abdicate its independent responsibility to ensure that projects are necessary by relying solely on conclusions of the Department, and stated that the Siting Board must make an independent finding of Commonwealth need before approving the construction of a new facility. Id. at 286.

The Siting Board will comply with the Court's directive relative to making an independent finding regarding the need for Altresco's proposed project in Section II.B, below. Before doing so, however, the Siting Board notes that the Court's decision in Point of Pines v. Siting Board did not address several other issues which were raised on appeal. Our analysis in this decision will rely in part on portions of the Altresco Decision which were not addressed by the Court. Therefore, we find it necessary to address herein the misunderstandings or misinterpretations of the parties reflected in those other issues which were raised on appeal, in order to clarify the basis for, and the subsidiary findings of, this decision and the Altresco Decision.

As to the first set of issues raised on appeal, stemming from the use of signed and approved PPAs as evidence of need earlier than the year 2000, the Siting Board acknowledges that it did not properly justify the use of such PPAs in the Altresco Decision. Further, the Siting Board will neither place any reliance on such PPAs as evidence of need in this decision, nor place any condition on Altresco that requires the submission of PPAs for such purpose in the future. Accordingly, all arguments with regard to this issue are moot. In regard to Point of Pines' and Revere's assertion as to the Siting Board's failure to find a need for the proposed project, the Siting Board will address this in Sections II.B.2 and II.B.3, below.

With regard to the second set of issues raised on appeal regarding the comparative cost analysis excluding consideration of DSM⁵ and conservation as alternatives to the proposed

⁵ Demand side management or DSM encompasses both conservation and load management measures. Conservation is a technology, measure, or action designed to
(continued...)

facility, in essence, Point of Pines and Revere urged the Siting Board to ignore the plain language of its statute and Court decisions that indicate the proper tools for use in statutory interpretation.⁶ The Siting Board has previously considered and rejected similar arguments in Eastern Energy Corporation, EFSB 90-100R2, 7-9 (1995) ("EEC Decision III"). In considering whether conservation or conservation and load management should be analyzed as alternatives to a proposed project, "[t]he starting point of our analysis is the language of the statute, 'the principal source of insight into Legislative purpose.' Commonwealth v. Lightfoot,

⁵(...continued)

decrease the kilowatt or kilowatthour requirements of an electric end-use, thereby reducing the overall need for electricity. Eastern Energy Corporation (on remand), 1 DOMSB 213, n. 94 (1993). Load management, on the other hand, is a measure or action designed to modify the time pattern of customer electricity requirements, for the purpose of improving the efficiency of an electric company's operating system. Id. For example, a utility may reach an agreement with a manufacturer that uses electricity whereby that manufacturer will curtail its use during peak times when the utility's system, as a whole, is placing increasing demands for electricity for cooling or heating purposes. During non-peak times the manufacturer may then resume its use of electricity. The utility providing electricity has, therefore, managed its load, thereby decreasing its need for additional peak capacity. Id.

The Siting Board notes that its statute requires consideration of both "load management" and "conservation and load management" as explained in the ensuing text. Accordingly, the Siting Board's discussion of DSM reflects this statutory distinction.

⁶ The Court has held that, in construing a statute, common words and phrases employed in the statute are to be accorded their usual meaning. Commissioner of Corp. & Tax v. Chilton Club, 318 Mass. 285, 288-289 (1945); citing, Fluet v. McCabe, 299 Mass. 173 (1938); Hinckley v. Retirement Board of Gloucester, 316 Mass. 496 (1944), and Killiam v. March, 316 Mass. 646 (1944). In addition, statutory language, when clear and unambiguous, must be given its ordinary meaning. Bronstein v. Prudential Ins. Co. of America, 390 Mass. 701, 704 (1984); Hashimi v. Kalil, 388 Mass. 607, 610 (1983). Further, none of the words of a statute is to be disregarded, for they are the main source for the ascertainment of the legislative purpose. Commissioner of Corp. & Tax v. Chilton Club, *supra*, at 288; Nichols v. Commissioner of Corporations & Taxation, 314 Mass. 285 (1943). And, "no word in a statute is to be treated as superfluous, unless no other possible course is open." Commonwealth v. McMenimon, 295 Mass. 467, 469 (1936).

391 Mass. 718, 720 (1984)." City of New Bedford, 413 Mass. at 484, citing, Simon v. State Examiners of Electricians, 395 Mass. 238, 242 (1985).

Specifically, G.L. c. 164, § 69J states that:

[a] petition to construct a facility shall include ... the following information: a description of actions planned to be taken by the applicant to meet future needs or requirements, including, but not limited to ... a description of alternatives to planned action such as ... no additional electrical power or gas; a reduction of requirements through load management ... (emphasis added).

Additional requirements of Section 69J include that:

[t]he [Siting B]oard shall ... approve a petition to construct a facility ... if it determines that it meets the following requirements: ... projections of the demand for electric power, or gas requirements and of the capacities for existing and proposed facilities are based on substantially accurate historical information and reasonable statistical projection methods and include an adequate consideration of conservation and load management ... (emphasis added).

Based on the ordinary meaning of the words of Section 69J, the Legislature has directed the Siting Board to include consideration of "conservation and load management" ("C&LM") in its projections of the demand for electric power. Had the Legislature meant "conservation" also to be included as one of the alternatives to a petitioner's planned action, the Siting Board presumes the Legislature would have so stated. To assume that the Legislature intended the term "no additional electrical power,"⁷ which is included in the list of alternatives, to mean the same as "conservation," when it had used this latter term elsewhere in the same statute, would result in the Siting Board ignoring the plain meaning of the words that were used and disregarding other words in the statute. Therefore, the Siting Board declines to accept the arguments of Point of Pines and Revere that would have the Siting Board ignore the intent of the Legislature as ascertained by the Legislature's choice of words.

Similarly, Point of Pines and Revere would have the Siting Board ignore that (1) the language of the statute requires the consideration of different DSM measures, i.e., "conservation" and "load management," in different ways, and (2) the term "load management"

⁷ The Siting Board more fully addressed the meaning of the words "no additional electrical power" in the context of its statute in Eastern Energy Corporation (on remand), 1 DOMSB 213, 286-288 (1993).

as used in the relevant statutory language modifies the phrase "description of actions planned to be taken by the applicant to meet future needs and requirements" and is not included in the clause that lists "a description of alternatives to such action." G.L. c. 164, § 69J. In City of New Bedford, 413 Mass. at 487-488, the Court faulted the Siting Council for failing to undertake a comparison of alternatives, a requirement that was clear from the language of the statute and identified by the Court in that decision. Where as here, the language of the statute is clear, and the rules of statutory interpretation prevent us from ignoring the plain language or treating it as superfluous, the Siting Board has refused to adopt the arguments of Point of Pines and Revere to do otherwise.^{8,9}

With respect to the argument raised by Point of Pines and Revere that the Siting Board erred by failing to compare the cost of the Altresco project to the cost of purchasing excess power supplies through NEPOOL, the Siting Board notes that NEPOOL is simply a pooling

⁸ In addition, the Siting Board's interpretation of the language of its statute is consistent with an attempt to read the statute in a manner that will make sense of the legislative enactment. The Siting Board requires a developer to "include an adequate consideration of" C&LM in its projections of the demand for power by requiring the inclusion of all cost-effective C&LM measures, based on reasonable statistical projections. Projections of future demand are then reduced by the identified amount that can be attributed to such C&LM to establish the level of future need. As all cost-effective C&LM has been assumed to be implemented, no additional cost-effective C&LM measures would be available as an alternative to the planned action.

⁹ The Siting Board also notes that, as the Court indicated in City of New Bedford, prior to the review of Altresco's proposed facility in the Altresco Decision, the Siting Council "had required a non-utility applicant to establish that its proposed project was superior to alternative approaches in terms of cost, environmental impact, reliability, and ability to address the previously identified need for energy. This past practice comports with the [Siting C]ouncil's statutory mandate." 413 Mass. at 482. These past comparisons, for the reasons cited above, did not include a comparison of conservation as an alternative. Rather, conservation was analyzed in these earlier cases as required by the statute by adequately considering C&LM in the projections of the demand for electric power. The Siting Board can find no basis for abandoning a practice that is consistent with the language of its statute and that has been specifically acknowledged by the Court to comport with the statutory mandate.

arrangement for New England electric utilities which facilitates efficient generation planning and dispatch through the interchange of electric power among its member utilities.

G.L. c. 164A, § 3. NEPOOL is not an independent source of power and, therefore, does not provide an alternative energy supply which would require separate analysis under G.L. c. 164, § 69J. Moreover, the Siting Board's analysis of regional need effectively considered whether excess supplies would be available from other New England electric utilities as part of its analysis of regional need, and concluded that no such regional surplus would be available to meet Massachusetts need beginning in the year 2000. As with C&LM, the potential availability of a NEPOOL (or New England utility) surplus is effectively eliminated by the Siting Board's finding of need for the Altresco project beginning in the year 2000 (*Id.*, 2 DOMSB at 106), which means that no such surplus would exist in that year or beyond. There is no rational basis for requiring a cost comparison between the proposed facility and power supplies that will not exist.

In response to Point of Pines' and Revere's argument that the Siting Board failed to determine that the proposed Altresco facility offers power at a cost below purchasing utilities' avoided costs, the Siting Board notes that the parties are simply incorrect. In the previous decision in this proceeding, the Siting Board specifically found that the proposed Altresco project is likely to offer power at a cost below the purchasing utilities' avoided cost. Altresco Decision, 2 DOMSB at 131. This finding was based on a record indicating that the Altresco project could provide power at a cost below seven Massachusetts utilities' avoided costs.

C. Post-Appeal Procedural History

As noted above, the Court left to the discretion of the Siting Board whether to reopen hearings. Point of Pines v. Siting Board, 419 Mass. at 287. Thus the Siting Board must first determine whether it is necessary to reopen hearings to respond to the Court's directive. In order to make such a determination, the Siting Board must review the existing record and determine whether the evidence contained therein is sufficient for a response to the Court, and if it is sufficient, whether the evidence remains valid. Finally, if the record evidence is

sufficient and valid, the Siting Board must determine whether other factors might require the Siting Board to exercise its discretion and reopen hearings.

The Siting Board notes that it has before it both Altresco's pending petition and an extensive evidentiary record that was developed over more than two years by all parties to the proceeding. In order to make the above-noted determinations and move the proceeding toward closure, the Hearing Officer issued a memorandum on February 2, 1995 ("Memorandum") that provided all parties to the proceeding with an opportunity to address the issue of the reopening of hearings. In it, the Hearing Officer asked parties "to address the continued validity/sufficiency of the [existing] record evidence for the purpose of responding to the Court's directive" in Point of Pines v. Siting Board (Memorandum at 2). The Memorandum established a procedure that provided all parties with the opportunity to "make an Offer of Proof, as to specific additional information which should be included in the record to enable the Siting Board to decide those issues relevant to the Court's directive" (id.). The information to be submitted by the parties was to indicate the nature of the evidence (e.g., testamentary, documentary, etc.) that would constitute the Offer of Proof, the expectations of the movant as to what issues would be addressed and what would be demonstrated if such evidence were introduced, and the reasons why such evidence was not available at the time of the earlier development of the administrative record in the proceeding (id.). Further, all parties were provided an opportunity to submit a rebuttal to any Offer of Proof that was submitted (id.).¹⁰

¹⁰ The Memorandum did not require the parties to submit additional record evidence. Rather, it asked the parties to indicate whether the existing record remained valid and sufficient to enable the Siting Board to respond to the Court's directive (Memorandum at 2). Further, if any party believed the record was not valid or sufficient, he was directed to identify specifically the additional information which the Board should consider, explain what that information would demonstrate, and explain why it was not previously available (id.). The Hearing Officer requested this information to assist him in determining whether it was necessary to reopen hearings to take additional evidence in order to respond to the Court's concerns. However, parties were under no obligation to provide the Hearing Officer with such assistance (id.). The submissions that were made addressed the Hearing Officer's request to varying degrees and in varying ways, but for purposes of further discussion, all submissions will be referenced as Offers of Proof or (continued...)

The following two Offers of Proof were submitted: (1) February 24, 1995 Offer of Proof of the Point of Pines Beach Association ("Point of Pines Offer of Proof"); and (2) February 24, 1995 Filing of Altresco Lynn, Inc. in Response to the Hearing Officer's Memorandum ("Altresco Offer of Proof"). In addition, the following two rebuttals were submitted: (1) March 6, 1995 Response to Offer of Proof of Altresco Lynn, Inc. ("Point of Pines Rebuttal"); (2) March 6, 1995 Filing of Altresco Lynn in Response to Hearing Officer's Memorandum ("Altresco Rebuttal").¹¹

1. The Parties' Offers of Proof

Point of Pines argued that the record should not be reopened, asserting that "[a]fter consideration of a voluminous record", the Siting Board found that the record evidence before it did not permit a conclusion that the proposed facility would provide a necessary energy supply for the Commonwealth (Point of Pines Offer of Proof at 1). Point of Pines argued that, since the Court struck down the use of PPAs as evidence of need, the Siting Board must now rely on its original findings and deny the petition to construct the proposed facility (*id.* at 1-2).

¹⁰(...continued)

Rebuttals as envisioned by the Memorandum.

¹¹ On February 9, 1995, BECo filed a petition for leave to intervene in this proceeding or, in the alternative, to participate as an interested person for the purpose of presentation of arguments and briefs. In a Hearing Officer Memorandum issued on April 11, 1995 ("Hearing Officer Memorandum of April 11, 1995"), the Hearing Officer noted that ample opportunity had been afforded the public to intervene in this proceeding, which commenced in March 1991, and accordingly found that BECo's petition constituted a petition for leave to intervene out-of-time (Hearing Officer Memorandum of April 11, 1995, at 4). The Hearing Officer also noted that this proceeding was not the appropriate forum in which to adjudicate BECo's need for power from the Altresco facility, and concluded that BECo had not shown that it was substantially and specifically affected by this proceeding (*id.*). Therefore, the Hearing Officer found no compelling reason for allowing BECo's untimely petition, and denied BECo's petition for leave to intervene or, in the alternative, to participate as an interested person (*id.*, at 4-5). BECo submitted a conditional Offer of Proof on February 24, 1995. However, in light of the above ruling, the Siting Board does not consider it here.

However, Point of Pines asserted that if the petitioner filed an amended or new application, the entire record must be reopened (id. at 2).

Without waiving its objections to reopening the record, Point of Pines outlined information that should be evaluated if the record were reopened (id. at 2). With regard to the issue of need, Point of Pines stated that need projections in the 1994 NEPOOL Forecast Reports of Capacity, Energy, Loads and Transmission ("1994 CELT Report"), 1994 NEPOOL Resource Adequacy Assessment ("1994 Resource Assessment") and Boston Edison Company's 1994 IRM Filing ("1994 BECo IRM Filing") should be analyzed, and asserted that these documents would demonstrate that the Altresco facility would not be needed until well into the 21st century (id.).

Finally, Point of Pines argued that, "[i]f the Siting Board reopens the record, it should also ensure that a PPA based on RFP #3 or any other PPA plays no role in demonstrating need, nor provides any support in any way in favor of siting the proposed facility" (id.).

Altresco argued that the record should not be re-opened and asserted that the existing record is sufficient to support a decision to approve the proposed facility (Altresco Offer of Proof at 1). Altresco stated that the Court's decision found fault only with the Siting Board's new "market-based test" of need, which required the submission of signed and approved PPAs to demonstrate need (id. at 3). The Company argued that the Siting Board has already made the necessary independent finding of need required to approve the facility, in as much as the Siting Board has determined that Altresco will provide a necessary energy supply for the Commonwealth beginning in the year 2000 (id. at 5).

The Company stated that, due to delays in the construction schedule for the proposed facility arising from litigation, the in-service date of the project would be pushed back until 1998 or 1999 (id. at 7). Altresco cited record evidence indicating that it would need 30 months for further permitting and construction following financial closing, which would not occur until some time after Siting Board approval of the proposed facility (id. at 8, citing, Exh. HO-V-1). The Company noted that as Siting Board approval could occur no earlier than the summer of 1995, the earliest possible on-line date for Altresco's proposed project would be February 1998, assuming that financial closing was contemporaneous with Siting Board approval, a

logistically unlikely result (id. at 7-9). Altresco also noted that the Siting Board has found that it is appropriate to consider the need for a project beyond the first year of operation, and that examining a four-year window of need is appropriate to reflect the uncertainties of resource planning (id. at 6). Therefore, the Company concluded that the Siting Board's finding of need for the year 2000 is sufficient to approve the proposed facility (id. at 7).

Altresco argued that the Siting Board could also make a finding of need for at least 170 MW of additional capacity before the year 2000 based on the current record and a reconsideration of policy decisions the Siting Board made at its October 1993 public hearing during consideration of the October 4, 1993 Tentative Decision in the matter of Eastern Energy Corporation (on remand) ("EEC (remand) Tentative Decision") (id. at 9). The Company asserted that overwhelming evidence could support a conclusion based on the methodology used in the EEC (remand) Tentative Decision, that the Altresco facility would be needed in the Commonwealth beginning in 1999, even after applying identified regional surpluses in that year (id. at 9-10). The Company further argued that it would be appropriate to adopt the staff methodology and analyses utilized in the EEC (remand) Tentative Decision, noting that the methodology used in the EEC (remand) Tentative Decision was set aside by the Siting Board in order to accommodate a finding of need conditioned on PPAs (id. at 11). Altresco argued that a return to that methodology would be appropriate in this proceeding following the Court's rejection of such reliance on PPAs in Point of Pines v. Siting Board (id.).

Finally, Altresco asserted that the submission of new evidence would only reinforce the previous findings of the Siting Board and would accelerate the year of need (id. at 14). In support of its assertion, the Company provided information in the form of an affidavit prepared by Robert Graham, of La Capra Associates ("Graham affidavit") that it would submit as evidence if hearings were reopened (id., Attachment B). The Graham affidavit purports to show an earlier year of need based on analyses of recent CELT Reports (id. at 14-15).

2. The Parties' Rebuttals

In response to Altresco's Offer of Proof, Point of Pines agreed with Altresco's position that the record should not be reopened, but argued that the Siting Board should deny the

Company's petition (Point of Pines Rebuttal at 1). Point of Pines asserted that its legal rights would be abused if the issue of need were reexamined (id.). Point of Pines also stated that "[t]here was no error in the record as of December 15, 1993", the date on which the Altresco Decision was issued (id.). Point of Pines asserted that the Siting Board, in the Altresco Decision, accepted Point of Pines' position that the Altresco facility was not needed, and therefore improperly relied on the submission of PPAs to show need for the proposed facility (id.). Point of Pines argued that the Siting Board could and should reissue the Altresco Decision without the condition relating to PPAs (id.).

Point of Pines also argued that if Altresco changed its on-line date, it should be required to amend its petition, and the Siting Board should re-open the entire record (id. at 2). Point of Pines also argued that, if the record were reopened on the issue of need, the issues of alternative technologies, environmental impacts, and site selection should also be reexamined (id.). Specifically, Point of Pines asserted that progress in the development of Best Available Control Technology ("BACT") and alternative sources of energy had rendered the record in the Altresco Decision obsolete (id.).

Point of Pines also challenged Altresco's calculations in its Offer of Proof concerning the regional surplus (id.). Further, Point of Pines took issue with many of the conclusions and methodologies contained in the Graham affidavit (id. at 3). Point of Pines argued that a new need analysis, such as that submitted in the Altresco Offer of Proof, should be considered only in a reopened proceeding, where the intervenors would have the opportunity to rebut the evidence submitted (id. at 3).

Finally, Point of Pines asserted that "RFP #3 is the main source for the sale of the plant's energy" (id. at 4). Therefore, Point of Pines claimed that "[e]ven if the RFP #3 PPA is not used to show need for the facility, it must be examined to make a determination as to whether any siting of the facility will be consistent with the statutory policies" (id. at 7).

Altresco urged the Siting Board to reject Point of Pines' Offer of Proof due to Point of Pines' vague and unsubstantiated assertions concerning the need for new energy resources (Altresco Rebuttal at 3). Altresco asserted that Point of Pines' characterization of the Siting Board's Final Decision as finding need based solely on signed PPAs was flawed, and did not

recognize that the record evidence included forecasts of future Commonwealth and New England energy requirements (id. at 1-2). Altresco argued that in the Altresco Decision the Siting Board made findings that support an independent determination that the proposed Altresco facility constitutes a necessary energy supply for the Commonwealth (id. at 2).

In response to Point of Pines' contention that if the record were reopened, the 1994 CELT Report and the 1994 BECo IRM filing should be examined, Altresco stated that Point of Pines did not identify how these documents address the need for new energy facilities, or their impact on the analyses and findings of the Altresco Decision (id. at 2-3). The Company further argued that the 1994 BECo IRM filing was not relevant to the need for new energy resources within the Commonwealth, and therefore did not constitute a basis for reopening the record (id. at 3-4).

Finally, the Company provided a second affidavit from Mr. Graham, that it would submit if the record were reopened, which concluded that load growth would increase and require the addition of new capacity before the year 2000 (id.).

3. Analysis

An analysis of the issues and arguments provided in the Offers of Proof and Rebuttals must commence with a review of the Court's decision in Point of Pines v. Siting Board, specifically with regard to the scope of the Court's directive to the Siting Board. In that decision, the Court noted that, in the course of the Altresco proceedings, the Siting Board "concluded that 'based on the record, the [Siting B]oard is unable to determine that the proposed project is needed to provide a necessary energy supply for the Commonwealth prior to the year 2000.'" Point of Pines v. Siting Board, 419 Mass. at 284. The Court continued, stating that

"Even apart from the statutory requirement that the board make an independent finding of Commonwealth need as a prerequisite to approving construction of a facility, the [Siting B]oard's approval in this case must be set aside because, standing alone, the [D]epartment's approval of a [PPA] does not warrant an inference of Commonwealth need."

Id. at 286. As noted above, the Court then left to the Siting Board's discretion any question concerning reopening of hearings on this matter. Id. at 287. Thus, the Court vacated the Siting Board's decision due to the lack of a single finding and the improper or unexplained substitution of a proxy for that finding. Accordingly, the Siting Board finds that the scope of the Court's directive in Point of Pines v. Siting Board is very specific and is limited to the requirement that the Siting Board make an independent finding of need and not rely on signed and approved PPAs to take the place of such a finding.

The Court did not indicate that this necessary finding could not be made on the existing record. Rather, the Court acknowledged that the record in the Altresco proceeding contained voluminous material regarding capacity and demand forecasts for the Commonwealth and for New England. Id. at 283-284. Further the Court authorized the Siting Board to use its discretion in determining whether this record needed to be reopened. Therefore, the Siting Board finds that it must determine whether the existing record evidence on which its findings of need are based remains valid and sufficient to address the Court's directive. In order to assist him in determining whether the record evidence remained valid and sufficient, or whether the record needed to be reopened, the Hearing Officer requested that the parties submit Offers of Proof and Rebuttals in this proceeding.¹² Here the Siting Board reviews those Offers of Proof and Rebuttals, mindful that, although presented with several other issues on appeal, the Court's

¹² As stated in n.10, above, the Hearing Officer's request for Offers of Proof was not a request that parties enter new evidence into the record. Rather, the Hearing Officer's request was to identify evidence that would justify a finding by the Siting Board as to the continued validity and sufficiency of the existing record such that the Siting Board could respond to the Court's directive. Such an offer of proof is comparable to an offer of proof made during a judicial proceeding that would identify evidence to allow the presiding officer or appeals court to make a determination as to whether that information should be allowed into the record of the judicial proceeding.

The Siting Board notes that any evidence submitted with the Offers of Proof would become a part of the record in this proceeding to be considered by the Hearing Officer and staff in the preparation of a tentative decision if, and only if, a finding were made that it was necessary to reopen the record. The Siting Board acknowledges that such a finding would then result in the evidence submitted being subject to discovery, cross-examination, and rebuttal as per the requirements of G.L. c. 30A, § 11.

only stated concern with the Altresco Decision was with the lack of an independent finding of need and the use of PPAs to infer Commonwealth need.¹³ First, however, in light of various arguments raised by the parties that would limit the Siting Board's options in this proceeding, the Siting Board must address what is meant by the term "discretion" as used by the Court.

A look at pertinent case law establishes that when discretion is exercised, it cannot lead to arbitrary action, but it also cannot lead to actions based on decisions made in a vacuum. Discretion implies flexibility and requires judgment based on consideration of all facts surrounding a situation. The Court has held that the term discretion when used in a statute denotes "freedom to act according to honest judgment." Paquette v. Fall River, 278 Mass. 172, 174 (1932); Corrigan v. School Committee of New Bedford, 250 Mass. 334, 339 (1924). In Paquette, the Court noted a United States Supreme Court decision that stated "The term *discretion* implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. `Discretion means a decision of what is just and proper in the circumstances.'" Paquette, above, 278 Mass. at 174, citing, The Styria v. Morgan, 186 U.S. 1, 9 (1902). The Siting Board, therefore, must carefully consider the circumstances surrounding this proceeding. Further, the history surrounding the enactment of our statute provides additional circumstances that must be considered.¹⁴ The Siting Board must then use honest judgment as to what is just and proper in deciding whether to reopen hearings. Thus, in determining whether to exercise its discretion, the Siting Board must consider (1) the specifics of the Court's directive in Point of Pines v. Siting Board, *i.e.*, to make an independent finding

¹³ While the Court did not address the issue of viability, the financiability portion of the viability finding in the Altresco Decision included a condition requiring the submission by the Company of signed and approved PPAs for the Altresco facility. The Siting Board addresses this issue in Section II.C, below.

¹⁴ The Siting Board notes that the Court has held that: "[s]tatutes are to be interpreted, not alone according to their strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, [and] prior legislation" Wilcox v. Riverside Park Enterprises, Inc., 399 Mass. 533, 535 (1987), quoting, Commonwealth v. Welosky, 276 Mass. 398, 401 (1931).

of need, (2) the historical context of the Siting Board's statutory mandate, and (3) the state of the existing record.

With regard to the historical context of the Siting Board's statutory mandate, the Siting Board notes that it and its predecessor agency, the Siting Council, were empowered to oversee a process whereby the Commonwealth's future energy needs would be identified early enough so that plans to meet those needs could be approved, and actions to meet those future needs could be taken. The parties to this proceeding may differ as to the extent and timing of future need, but if projections of need are subject to continued evaluation, timely action to meet those future needs may be prevented. Such possibilities were seen by the Legislature when it first studied the problems associated with siting energy facilities.

The Massachusetts Electric Power Plant Siting Commission ("Siting Commission"), the commission responsible for the drafting of the initial siting legislation, was concerned that a collision of "contradictory public attitudes about electric power" could slow the orderly development of essential power supplies. Third Report of the Massachusetts Electric Power Plant Siting Commission, House No. 6190, March 30, 1973 ("Third Report").¹⁵ The Siting Commission sought to mitigate two factors it perceived as delaying new and needed capacity: insufficient public notice and environmental challenges. Id. at 8, 9, 15. The enactment of Sections 69G through 69J of G.L. Chapter 164 was aimed at addressing these two concerns. Id. at 15, 20.

To establish future need and ensure timely action to meet such need, G.L. c. 164, § 69I requires all electric companies to file long-range forecasts for the ensuing ten-year period with respect to the power needs and requirements of their market area. With respect to an electric utility that is required to file such forecasts, the Siting Board may approve a petition to construct a facility only if it is consistent with the company's most recently approved long-range forecast. G.L. c. 164, § 69J. Accordingly, after a Siting Board review, consistent with the requirements of G.L. c. 164, § 69J, an electric utility proposal to construct a

¹⁵ A more complete analysis of the activities of the Siting Commission can be found in the EEC (remand) Decision, 1 DOMSB at 246-251.

facility could be approved up to ten years prior to its on-line date, assuming that the most recently approved long-range forecast for that utility indicated a need for the facility in that year. Thus, the siting statute envisioned the approval of facilities before a need for such facilities actually existed.

With respect to an electric company with no set market area, i.e., a non-utility developer, the Siting Board has required comparable long-range forecasts of power needs and requirements in conjunction with its petition for approval of a proposed facility. Thus, based on the historical context of the Siting Board's statutory mandate, the Siting Board concludes that approval of a non-utility developer's petition to construct a facility is appropriate if the Siting Board finds that the long-range forecasts demonstrate a need for the proposed facility.¹⁶

The Siting Board acknowledges that future need for electric power is dependent on numerous factors, any one of which, if altered, could affect the ultimate timing of need. Thus, the Siting Board now reviews the state of the existing record. As an initial matter, the Siting Board finds that its statute requires that projections of future need must be based on substantially accurate historical information and reasonable statistical projection methods. G.L. c. 164, §§ 69I & 69J. In the present proceeding, the Siting Board conducted an extensive analysis of need forecasts for the region and Massachusetts consistent with the statutory guidelines that are contained in G.L. c. 164, § 69J, and the Court's directive in City of New Bedford, above. Both Altresco and Point of Pines acknowledge that the record on need in the Altresco Decision was sufficient and complete. In fact, both parties in their Offers of Proof and their Rebuttals opposed reopening the record, arguing that the Siting Board should rest on the need findings in the existing record, although they disagreed as to whether those findings would compel the approval or rejection of the facility. The Siting Board thus finds that the existing record on both regional and Massachusetts need is extensive and provided sufficient

¹⁶ In City of New Bedford, the Court acknowledged the Siting Council's argument "that the review format of the long-range forecast is not easily applied to a non-utility producer." 413 Mass. at 488. The Court stated that modifications to the procedure may be necessary to accommodate the non-utility producer but cautioned that any such modifications "must permit a review that fulfills the statutory mandate." Id.

evidence to support an independent finding regarding need at the time that the Altresco Decision was issued. Therefore, as the Siting Board has undertaken the analysis of need required under its statute and no party has identified any information that would lead the Siting Board to conclude that the record is insufficient to do so, the Siting Board also finds that the record evidence is sufficient to respond to the Court's directive. Accordingly, the Siting Board now looks to the continued validity of the record evidence.

Findings of future need that are based on such substantially accurate historical information and reasonable statistical projection methods are not rendered inaccurate or in violation of the statute simply with the passage of time. Consistent with its recent EEC Decision III, issued June 27, 1995, the Siting Board finds that in an ongoing proceeding such as this, it is only if evidence of a nature that would demonstrate that one or more factors that affect the historical information or statistical projection methods have significantly changed, that findings of future need based on such information or methods would be brought into question. The Siting Board here concludes that sufficient evidence to indicate that future projections are significantly changed must be identified before a record is reopened.

With regard specifically to the future demand for electricity, both Altresco and Point of Pines noted that if the record were reopened, the Siting Board should consider recent versions of the CELT report¹⁷ that are not contained in the existing record. Since the Siting Board has concluded that the record should be reopened only if sufficient evidence has been identified that would indicate that projections of future need have significantly changed, we must consider whether the existence of later CELT reports constitutes such evidence. This requires a review of our consideration of those CELT reports that are present in the record. The Siting Board notes that all the CELT reports that were previously admitted into the record have been subjected to numerous corrections, analyses and other manipulations by the parties to the proceeding. Thus, the information provided in the CELT reports amounts to a starting point for analysis, not a definitive statement as to future need. Indeed, if the CELT reports could

¹⁷ For purposes of discussion, all references to CELT reports encompass all the related NEPOOL forecasts, including the NEPOOL Resource Adequacy Assessment.

serve that purpose, the Siting Board's independent finding of need, although it would still be required by the statute as the Court has indicated, would be superfluous. Our rejection, after a complete analysis, of the 1991 CELT Report (see, EEC Decision, 22 DOMSC at 235-236) illustrates that CELT reports are not to be treated any differently than any other piece of evidence that is submitted. Thus, the Siting Board has no independent basis to conclude that more recent CELT reports necessarily provide more accurate demand projections than earlier CELT reports.

Of those making Offers of Proof regarding the later CELT reports, only Altresco addressed the accuracy of those reports. However, Altresco's analysis, even if assumed to be accurate, fails to establish that an examination of more recent CELT reports is likely to result in a substantial change in the year of need.¹⁸ Thus, no party's offer of proof provides clear reason for the Siting Board to reopen the record, based on any expectation that review of more recent CELT reports is likely to lead to a finding of substantially earlier or later need.

The Siting Board finds that no party has provided any support for its conclusion that the more recent CELT reports provide substantially different and more accurate information or demonstrate that those CELT reports currently in the record are invalid.¹⁹ Accordingly, the Siting Board finds that it has no basis on which to conclude that the analyses of need based on those CELT reports that are currently in the existing record are no longer valid for purposes of supporting a finding of need. Further, the Siting Board has no basis on which to conclude that the more recent CELT reports, standing alone, would better enable it to respond to the Court's directive.

In addition to the 1994 CELT Report, Point of Pines argued that the Siting Board should consider both the 1994 BECo IRM filing and "the relation of RFP #3 to the needs of Boston

¹⁸ The Siting Board notes that, although Point of Pines claimed that more recent CELT reports would demonstrate no need for the Altresco facility until well into the 21st century, Point of Pines did not explain how these updated CELT reports would lead to such a conclusion.

¹⁹ The Siting Board is unable to conclude that a later report is necessarily more accurate based solely on its having been issued at a later time.

Edison and the Commonwealth as a whole" in a reopened record on need. The Siting Board rejects this argument. In response to the Court's directives in Point of Pines v. Siting Board, the Siting Board here considers whether the proposed facility provides a necessary supply of energy to the Commonwealth, without reference to existing or potential PPAs between Altresco and any other party. This analysis is based, not on information from individual utilities' IRM filings, but rather on projections of the energy needs for the Commonwealth and the region as a whole. To paraphrase the Court's decision, Point of Pines has provided no reasoned explanation as to the inferability of Commonwealth need from BECo's need for power. See, Point of Pines v. Siting Board at 284-285.

Neither is there any reason for the Siting Board to take up the issue of BECo's RFP 3. The timing of Commonwealth need in the aggregate is not dependent upon and will not be affected by the disposition of the PPA between Altresco and BECo. Questions regarding the continuing appropriateness of the PPA are properly before the Department, and it would be improper for the Siting Board to comment upon them at this time. Consequently, the Siting Board finds that an examination of the BECo IRM filing and issues surrounding RFP 3 would be irrelevant to the determination of Commonwealth need, and therefore would not indicate that the Siting Board's analysis of need in the Altresco Decision is no longer valid.

Based on the above, the Siting Board finds that none of the parties has identified any potential evidence, as requested by the Hearing Officer, that would indicate that the Siting Board's analysis of need in the Altresco Decision is no longer valid or is based on insufficient evidence, such that we are compelled again to revisit the issue of need. In addition, the Siting Board finds that none of the parties has identified any other factors that would compel us to reopen the record. Further, the Siting Board finds that it does not have independent general, technical or scientific facts within its specialized knowledge, as permitted pursuant to G.L. c. 30A, § 11(5), which would lead it to determine that the existing record is invalid or insufficient.²⁰

²⁰ The Siting Board notes that during the period between the issuance of the Altresco Decision and this decision, the state and region did not undergo major changes in the

4. Findings and Conclusions

In Section I.C.3, above, the Siting Board has found that:

- the scope of the Court's directive in Point of Pines v. Siting Board is very specific and is limited to the requirement that the Siting Board make an independent finding of need and not rely on signed and approved PPAs to take the place of such a finding (p. 16);
- it must determine whether the existing record evidence on which its findings of need are based remains valid and sufficient to address the Court's directive (p. 16);
- its statute requires that projections of future need must be based on substantially accurate historical information and reasonable statistical projection methods, G.L. c. 164, §§ 69I & 69J (p. 19);
- the existing record on both regional and Massachusetts need is extensive and provided sufficient evidence to support an independent finding regarding need at the time that the Altresco Decision was issued (p. 20);
- the record evidence is sufficient to respond to the Court's directive (p. 20);
- in an ongoing proceeding such as this, it is only if evidence of a nature that would demonstrate that one or more factors that affect the historical information or statistical projection methods have significantly changed that findings of future need based on such information or methods would be brought into question (p. 20);

²⁰(...continued)

economy. More importantly, no party has identified any evidence that would support a finding by the Siting Board that current economic conditions are substantially different than those that were used in the need projections in the Altresco Decision. Accordingly, the Siting Board has no basis on which to conclude that the introduction of new evidence on need would do any more than provide an opportunity to relitigate an issue that already has been resolved. (Compare Eastern Energy Corporation (on remand), above, where the Court's directive in City of New Bedford, above, required reconsideration of two issues for which a full record had not been developed, and where a major economic slowdown occurred during the period between EEC's initial filing and the Court's remand decision.)

- no party has provided any support for its conclusion that the more recent CELT reports provide substantially different and more accurate information or demonstrate that those CELT reports currently in the record are invalid (p. 21);
- it has no basis on which to conclude that the analyses of need based on those CELT reports that are currently in the existing record are no longer valid for purposes of supporting a finding of need (pp. 21-22);
- an examination of the BECo IRM filing and issues surrounding RFP 3 would be irrelevant to the determination of Commonwealth need, and therefore would not indicate that the Siting Board's analysis of need in the Altresco Decision is no longer valid (p. 22);
- none of the parties has identified any potential evidence, as requested by the Hearing Officer, that would indicate that the Siting Board's analysis of need in the Altresco Decision is no longer valid or is based on insufficient evidence, such that we are compelled again to revisit the issue of need (p. 22);
- none of the parties has identified any other factors that would compel us to reopen the record (pp. 22-23); and
- it does not have independent general, technical or scientific facts within its specialized knowledge, as permitted pursuant to G.L. c. 30A, § 11(5), which would lead it to determine that the existing record is invalid or insufficient (p. 23).

Accordingly, the Siting Board concludes that the existing record evidence on which its need analyses in the Altresco Decision were based remains valid and can serve as the basis for an independent finding of need in response to the Court's directive in Point of Pines v. Siting Board.

As the Offers of Proof and Rebuttals provided to the Siting Board fail to identify information that would lead the Siting Board to conclude that the existing record is either invalid or insufficient or that the need projections have significantly changed, the Siting Board will not, based on conjecture and supposition, reopen the record. The Siting Board concludes that to do so would be contrary to the Court's discussion in Paquette v. Fall River, above, in that it would amount to an arbitrary action that is not just and proper under the circumstances,

and therefore would amount to an abuse of the discretion afforded the Siting Board by the Court.

In making such a determination, the Siting Board is mindful of the Legislature's concern, as expressed in the Third Report, that new and needed capacity could be delayed. The need to plan in advance for future requirements dictates a reasonable limitation on analysis and a move to action on that analysis at some point. Where, as here, the Court has identified one legal error in the Altresco Decision, the Siting Board concludes that it would be contrary to legislative intent to allow for a relitigation of issues that have already been extensively litigated.²¹ Where no evidence has been identified by the parties that would lead the Siting Board to conclude that the existing record was insufficient to address, or no longer valid for addressing, the sole issue raised by the Court after affording all parties an opportunity to do so, the Siting Board can find no reason to further delay these proceedings by reopening the record, and will address the Court's directive based on the existing record.²²

²¹ Had no record been developed on the issue of need, the Siting Board would have been in a comparable position to the Department in the Court's recent decision in Boston Edison Company v. Department of Public Utilities, 419 Mass. 738 (1995) ("BECo vs. DPU") and would have needed to reopen the record. In that case, the Department found it unnecessary to reopen the record to consider an offer of proof on an issue that had not been reviewed, i.e., BECo's avoided costs in light of the deferral of its proposed generating plant. Id., 419 Mass. at 744, 746. In contrast, as the Court has recognized in this proceeding, the Siting Board has reviewed voluminous material regarding capacity and demand forecasts for the Commonwealth and for New England. As no party has identified information that would establish that the existing record was either insufficient (as in BECo vs. DPU) or no longer valid for purposes of reviewing future need and responding to the Court's concern in Point of Pines v. Siting Board, the Siting Board has exercised the discretion afforded it by the Court and decided that to reopen the record would not be just and proper under the circumstances surrounding this proceeding. See, Paquette v. Fall River, 278 Mass. at 172.

²² The Siting Board notes that its decision not to reopen the record in this case is consistent with actions it has taken in prior cases, including its decision in the Eastern Energy Corporation proceedings to reopen the record on the five issues identified by the Court in City of New Bedford, above. See Section I.A. and n.3, above. As noted above, the Court's directive is significantly more limited in scope in Point of Pines v. Siting Board

Having determined that no evidence has been identified by the parties that would lead the Siting Board to conclude that the existing record is either invalid or insufficient to respond to the Court's directive in Point of Pines v. Siting Board, and having no independent basis on which to make such a determination, the Siting Board will consider the existing record in making its independent determination as to the need for Altresco's proposed facility. The remaining issues raised by the parties in their Offers of Proof and Rebuttals will be addressed in Sections II.B. and II.C., below. Before doing so, however, the Siting Board must revisit its findings in the Altresco Decision that have been affected by the Court's decision.

²²(...continued)

than in City of New Bedford. Further, the record developed in the EEC Decision was neither sufficient nor valid for purposes of responding to the Court's directive in City of New Bedford. The Court's directive in that decision required reconsideration of two issues for which a full record had not been developed in the record on which the EEC Decision was based, *i.e.*, the comparison of alternative resources and the analysis of Massachusetts need. In addition, new evidence of need was appropriate due to the major economic slowdown during the period between EEC's initial filing and the remand proceedings in that case (see EEC Decision III, EFSB 90-100R2, at n.33). In contrast, a sufficient record has been developed in the Altresco proceedings to address the Court's one stated concern in Point of Pines v. Siting Board. Further, no party has identified any information that would support a finding by the Siting Board that current economic conditions are markedly different than those used in the need projections in the Altresco Decision.

II. ANALYSIS OF THE PROJECT²³

A. The Final Decision in EFSB 91-102

1. Identification of Affected Findings

The following excerpts from the Altresco Decision constitute the Siting Board's requirements of Altresco relative to the submission of PPAs. In that decision, the Siting Board relied upon PPAs to demonstrate the proposed project's viability, as well as the need for the project. In Point of Pines v. Siting Board the Court did not address the Board's reliance on PPAs in its analysis of viability. However, as the Siting Board will no longer rely on PPAs in its determination of need, the Siting Board, as a separate matter, reexamines, in Section II.C, below, its use of PPAs as they relate to the proposed project's viability.

In response to the Court's directive in Point of Pines v. Siting Board, the Siting Board hereby rescinds the conditions relating to PPAs and amends its Altresco Decision by deleting from it the following language:

- Here, in light of the need for the proposed project beginning in the year 2000 on reliability grounds, the Siting Board finds that the submission of (1) a signed and approved contract with BECo for 132 MW, or (2) signed and approved PPAs which include capacity payments for at least 75 percent of the proposed project's electric output, will be sufficient to establish that the proposed project will provide a necessary energy supply for the Commonwealth. Altresco must satisfy this condition within four years from the date of this conditional approval. Altresco will not receive final approval of its project until it complies with this condition. The Siting Board finds that, at such time that Altresco complies with this condition, Altresco will have demonstrated that the proposed project will provide a necessary energy supply for the Commonwealth. Altresco Decision, 2 DOMSB at 106.
- In Section II.A.5, above, the Siting Board was unable to find need for the proposed project prior to the year 2000. Therefore the Siting Board required

²³ In determining whether a proposed project will provide a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, the Siting Board conducts a broad analysis addressing a number of specific issues: (1) need for additional energy; (2) alternative project technologies; (3) project viability; (4) site selection; (5) facility environmental impacts; (6) facility costs, and (7) facility reliability. In this proceeding, as discussed in Section I.A, above, the Siting Board issued the Altresco Decision, which addressed these issues.

Altresco to submit signed and approved PPAs with BECo for 132 MW or signed and approved PPAs for at least 75 percent of the proposed projects' [sic] electric output to establish need. The Siting Board notes that in light of the uncertainty of need in the early years of planned facility operation, it may be difficult for the Company to market a sufficient portion of its capacity to be financially. Nevertheless, if Altresco complies with the condition regarding PPAs, the Company will be able to ensure that the proposed project is financially. Based on the foregoing, the Siting Board finds that upon compliance with the condition in Section II.A.5, above, Altresco will have established that its proposed project is financially. Id., 2 DOMSB at 141-142.

- The Siting Board has found that Altresco has established that its proposed project (1) upon compliance with the condition relative to power sales in Section II.A.5, above, is likely financially, and (2) upon compliance with the above condition relative to the provision of treated effluent and potable water, is likely to be constructed within applicable time frames and be capable of meeting performance objectives. Accordingly, the Siting Board finds that, upon compliance with the above conditions, Altresco will have established that its proposed project meets the Siting Board's first test of viability. Id., 2 DOMSB at 144.
- However, the Siting Board found that submission of (1) a signed and approved contract with BECo for 132 MW, or (2) signed and approved PPAs which include capacity payments for at least 75 percent of the proposed project's electric output, will be sufficient to establish that the proposed project will provide a necessary energy supply for the Commonwealth. Id., 2 DOMSB at 161.
- In addition, the Siting Board has found that the proposed project, (1) upon compliance with the conditions in Section II.C.2, is reasonably likely to be financed and constructed so that the project will actually go into service as planned, and (2) is likely to operate and be a reliable, least-cost source of energy over the life of its PPAs. Id., 2 DOMSB at 161-162.
- In order to establish that the proposed project will provide a necessary energy supply for the Commonwealth, and that its proposed project is financially, the Company shall submit to the Siting Board either (1) a signed and approved contract with BECo for 132 MW, or (2) signed and approved PPAs which include capacity payments for at least 75 percent of the proposed project's electrical output. Id., 2 DOMSC at 222.

2. Status of Remaining Findings

In Point of Pines v. Siting Board, although presented with several issues on appeal, the Court faulted the Siting Board only for its failure to make an independent finding of need and its reliance on PPAs in place thereof and did not identify any other issues of concern. The Court also did not disturb any of the subsidiary findings in the Altresco Decision except as they relate to the issue of the independent finding of need and the reliance on PPAs.

The findings in the Altresco Decision, beyond those identified in Section II.A.1, above, are based on the record evidence, which the Siting Board has concluded in Sections I.C.3 and I.C.4, above, to be sufficient and valid. Accordingly, the Siting Board reaffirms all of the other findings, conditions, and recommendations in the Altresco Decision and hereby incorporates them by reference.²⁴

B. Need Analysis

1. Introduction

As discussed in Sections II.A.1 and II.A.2, above, the Court's decision in Point of Pines v. Siting Board was limited to the findings and conditions associated with the need for the proposed facility. Specifically, the Court's decision addressed the conditions pertaining to the reliance on signed and approved PPAs. In the following section we review our findings on the issue of need for Altresco's proposed project.

2. The Commonwealth's Need for Additional Energy Resources

²⁴ The Siting Board has included the findings relative to the issue of need from the Altresco Decision in Appendix A to this decision.

In response to the Court's directive in City of New Bedford, the Siting Board set forth the following standard of review for evaluating need for non-utility developers which it used in its evaluation of need in the Altresco Decision.²⁵

Where a non-utility developer has proposed a generating facility for a number of power purchasers that include purchasers that are as yet unknown, or for purchasers with retail service territories outside of Massachusetts, the need for additional energy resources must be established through an analysis of regional capacity and a showing of Massachusetts need based either on reliability, economic or environmental grounds directly related to the energy supply of the Commonwealth.

Cabot Power Corporation, 2 DOMSB 241, 259 (1994) ("Cabot Power Decision"); EEC (remand) Decision, 1 DOMSB at 423.

Therefore, in order to evaluate the need for the proposed project on reliability grounds, the Siting Board in this proceeding reviewed forecasts of demand and supply for both the New England region and the Commonwealth. Altresco Decision, 2 DOMSB at 30-57, 70-88. The Siting Board review, with respect to the demand forecasts, focussed on demand forecast methodologies and estimates of DSM savings over the forecast period. Id. With respect to the supply forecasts, the Siting Board review included a review of capacity assumptions, contingency adjustments, and required reserve margin assumptions. Id. The Siting Board then reviewed forecasts of need, which are based on a comparison of the various demand and supply forecasts. Id., 2 DOMSB at 57-61, 88-92. Thereafter, the Siting Board reviewed how transmission and air quality benefits affected need. Id., 2 DOMSB at 92-102. The Siting Board also considered the need for the proposed project on grounds of economic efficiency savings, including (1) the variable cost savings resulting from inclusion of the proposed project in the NEPOOL dispatch pool, and (2) the avoided cost of new capacity to meet identified regional need. Id., 2 DOMSB at 61-68.

²⁵ The Siting Board notes that this standard of review would be identical for an electric utility proposing to construct a facility to meet a Commonwealth need as opposed to its own need. If such an electric utility were proposing to construct a facility to meet its own needs, the Siting Board would only need to review that utility's most recently approved long-range forecast. Thus, the Siting Board's need analyses for electric utilities and non-utility developers are comparable.

Based on this extensive analysis, the Siting Board found that (1) New England will need at least 170 MW of additional energy resources from the proposed project for reliability purposes in the year 2000 and beyond, and at least 170 MW of additional energy resources from the proposed project for economic efficiency purposes beginning in 2000 or later; and (2) Massachusetts needs at least 170 MW of additional energy resources from the proposed project for reliability purposes in the year 1997 and beyond. Id., 2 DOMSB at 161. Further, the Siting Board found that the Company's need analyses demonstrate that Massachusetts' need for 170 MW of additional capacity will occur earlier than New England's need for same. Id., 2 DOMSB at 103.

The analysis by the Siting Board showed, however, that the record was unclear regarding the ability of Massachusetts utilities to acquire surplus supplies from out-of-state providers in years in which there is a Massachusetts deficiency of 170 MW or more and a regional deficiency of less than 170 MW or a regional surplus. Id., 2 DOMSB at 104. Thus, the Siting Board concluded that there was insufficient evidence to determine that the proposed project would be needed to provide a necessary energy supply for the Commonwealth prior to the year 2000. Id. However, the Siting Board found that for all years in which there will be a regional need for the proposed project, i.e., for the years 2000 and beyond, the proposed project would provide a necessary energy supply for the Commonwealth. Id., 2 DOMSB at 103.

The Court has acknowledged that the record in the Altresco proceeding, which the Siting Board reviewed in reaching the conclusion that the proposed project was not needed to provide a necessary energy supply for the Commonwealth prior to the year 2000, contained voluminous material regarding capacity and demand forecasts for the Commonwealth and for New England. Point of Pines v. Siting Board, 419 Mass. at 283-284. The Court has not identified any legal flaw in the Altresco Decision other than its reliance on purchased power agreements to demonstrate need. Further, no party challenged the finding that the Commonwealth will have a need for an amount of capacity equal at least to that of Altresco's proposed facility in the year 2000 and beyond. Finally, in Section II.A.2, above, the Siting Board reaffirmed and incorporated herein all of the other findings, conditions, and

recommendations in the Altresco Decision. Therefore, Point of Pines' assertion that the Siting Board could not conclude that the proposed project would provide a necessary energy supply for the Commonwealth is without merit.

Accordingly, the Siting Board finds that the existing record clearly establishes a need for reliability purposes in the Commonwealth in the year 2000 and beyond for an amount of capacity equal at least to that of Altresco's proposed facility.

The Siting Board must, therefore, determine whether Altresco's proposed facility will be available to meet that need in the year 2000. In the Altresco Decision, 2 DOMSB at 104, 125, the Company proposed an on-line date of 1996. Altresco introduced evidence in this proceeding that established that the construction of the proposed facility would take 30 months following financial closing. No party has challenged this evidence, and no party has identified any evidence that it would provide, were the record to be reopened, that is contrary to such a timetable for construction. At this time, if the final Siting Board approval is granted in August of 1995, the earliest possible date that Altresco's proposed facility could commence operation would be February, 1998. This assumes (1) financial closing contemporaneous with approval, and (2) no further judicial proceedings. As it is likely that financial closing will take a minimum of several months, and perhaps considerably longer, the Siting Board finds that Altresco's proposed facility would be capable of commencing operation no earlier than February, 1998, and probably not until the summer of 1998 or later.

As noted above, Point of Pines has argued that the Siting Board cannot recognize that the on-line date of the proposed facility has been changed without re-opening the record to consider alternative sources of energy, environmental impacts and site selection²⁶ using updated

²⁶ While Point of Pines asserted that the site selection process should be reexamined, it did not give any reason for this assertion. The Siting Board notes that, unlike its analyses of need, alternative technologies and environmental impact, the site selection analysis addresses a purely historical and methodological issue, namely, whether Altresco considered a reasonable range of practical facility siting alternatives in selecting the Lynn site. Thus, the only grounds for reopening the record on the site selection process would be the availability of new and previously unavailable information regarding the Company's actions prior to its selection of the Altresco site.

information, since there has been progress in the development of BACT and alternative sources of energy since these analyses were completed. The Siting Board rejects this argument for the following reasons.

With regard to changes in alternative sources of energy, no new evidence has been identified by any party that is likely to alter the Siting Board's finding that the proposed project is superior to all alternative technologies reviewed with respect to providing a necessary energy supply with a minimum impact on the environment at the lowest possible cost. Altresco Decision, 2 DOMSB at 136. In addition, no party has identified any evidence that would lead the Siting Board to conclude that new technologies exist beyond those considered in that decision. Further, with regard to BACT development, the Siting Board notes that the nature of BACT is that it is constantly changing. In the present case, however, no party has identified any recent application of BACT that could be examined in a reopened record that would lead the Siting Board to revisit its finding that the environmental impacts of the proposed facility could be further minimized with respect to air quality consistent with minimizing cost.

The Siting Board also notes that its statute explicitly provides for the conditional approval of petitions to construct jurisdictional facilities. G.L. c. 164, § 69J. Such conditions may include prerequisites for establishing viability, as well as design or mitigation conditions related to minimizing environmental impacts. The Siting Board notes that, whenever it exercises its statutory authority to approve the construction of a facility subject to need or viability conditions, it accepts the continuing validity of those portions of its analysis upon which it does not place conditions. If facilities were repeatedly refused approval because a newer technology, which may have some marginal benefit over the facility under review, has been developed, needed power facilities could not be approved and constructed in a timely fashion. For this reason, the Siting Board establishes a deadline for compliance with the conditions of such approvals.

In the Altresco Decision, the Siting Board allowed the Company four years from the date of the conditional approval to submit signed and approved PPAs to establish the need for the proposed project. 2 DOMSB at 222. In doing so, the Siting Board accepted the continuing validity of its analysis of alternatives so long as Altresco complied with the conditions of the

approval regarding need for the project by December 15, 1997. The Siting Board was fully aware that, if Altresco did not receive final approval until late 1997, the facility would not be constructed and operational until 2000. Thus, a delay in the project's on-line date until 2000 is a contingency for which provision was made and accepted in the Altresco Decision, and does not affect the continuing validity of the analysis of alternatives or BACT conducted in that decision.

Accordingly, the Siting Board finds that, as no party has identified information that would lead the Siting Board to conclude that its analyses of (1) alternative technologies; (2) environmental impacts, including the use of BACT; and (3) the site selection process, are now invalid, the Siting Board has no reason to revisit these analyses. Therefore, the Siting Board finds that its analyses in the Altresco Decision which demonstrate that: (1) the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply with a minimum impact on the environment at the lowest possible cost; (2) the environmental impacts of the proposed facility would be minimized consistent with minimizing cost; and (3) Altresco has considered a reasonable range of practical facility siting alternatives, remain valid if the on-line date of the proposed facility is changed from the year 1996 to the year 2000.

3. Findings and Conclusions

In addition to the subsidiary findings on need made in the Altresco Decision and listed in Appendix A, the Siting Board has found that:

- New England will need at least 170 MW of additional energy resources in New England for reliability purposes in the year 2000 and beyond, and at least 170 MW of additional energy resources from the proposed project for economic efficiency purposes beginning in 2000 or later. Id. at 161 (pp. 30-31);
- Massachusetts needs at least 170 MW of additional energy resources from the proposed project for reliability purposes in the year 1997 and beyond. Altresco Decision, 2 DOMSB at 161 (p. 31);

- (1) Massachusetts' need for 170 MW of additional capacity will occur earlier than New England's need for the same, and (2) for all years in which there will be a regional need for Altresco's proposed project, i.e., for the years 2000 and beyond, the proposed project would provide a necessary energy supply for the Commonwealth. Id. at 103, 161 (p. 31); and
- the existing record clearly establishes a need for reliability purposes in the Commonwealth in the year 2000 and beyond for an amount of capacity equal at least to that of Altresco's proposed facility (p. 32).

Consequently, the Siting Board finds that Altresco's proposed facility will provide a necessary energy supply for the Commonwealth beginning in the year 2000 and continuing thereafter.

The Siting Board has also found that:

- Altresco's proposed facility would be capable of commencing operation no earlier than February, 1998, and probably not until the summer of 1998 or later (p. 32).

Consequently, the proposed facility has the potential to commence operations at a date earlier than the first identified year of need. The Siting Board has determined that it is appropriate to consider need explicitly within a time frame beyond the first year of planned facility operation. Altresco Decision, 2 DOMSB at 58. In the Altresco Decision, the Siting Board explained that, if need has been established for the first year of operation, reviewing need over a longer time frame helps ensure that the need will continue for a number of years. Id. at 59. Further, if need has not been established for the first year of proposed operation, a demonstration of need within a limited number of years thereafter may still be an important factor in reaching a decision as to whether a proposed project should go forward. Id. For these reasons, the Siting Council previously approved two facilities which had the potential to commence operations prior to the time of Commonwealth need. See, Enron Power Enterprise Corporation, 23 DOMSC 1, at 14, 49 (1991) [approval of facility with target on-line date of 1993 based on finding of need in 1994 or 1995]; West Lynn Cogeneration, 22 DOMSC 1 at 14, 36 (1991) [approval of facility with target on-line date of 1993 based on finding of need in 1993 or 1994].

This prior practice reflects a recognition that it may be appropriate for a facility which will provide a necessary energy supply for the Commonwealth for most of its operational life to begin operations before the first identified year of Commonwealth need, especially where, as here, the determination of need has focussed primarily on providing additional capacity for reliability purposes. The early construction and operation of a facility may minimize its cost, thus ensuring that it provides a necessary supply of energy for the Commonwealth at the lowest possible cost. Alternately, the early construction and operation of a facility may make possible the displacement or retirement of older, dirtier facilities, thus ensuring that it provides a necessary supply of energy for the Commonwealth with a minimum impact on the environment. Such a facility may be the cleanest, least expensive alternative for a specific utility or municipality whose need for capacity occurs earlier than the Commonwealth's need.

Further, the Court has addressed the need for comparable treatment of non-utility and utility proposals in its remand of the EEC Decision in City of New Bedford, 413 Mass at 488. The Siting Board has noted above that our statute allows for the approval of a utility proposal to construct a facility as early as ten years before the need exists if such a proposal is consistent with the utility's most recently approved long-range forecast (See Section I.C.3 above). Therefore, the Siting Board can find no inherent reason to deny Altresco approval to construct its facility merely because its earliest date of operation might occur before, but within a reasonable time frame of the year of the administratively-determined Commonwealth need.

The probable on-line date of the Altresco facility precedes the administratively-determined date of Commonwealth need by eighteen months or less. Thus, the record establishes that the facility will provide a necessary supply of energy for the Commonwealth for all but a small portion of its operating life. Consequently, the Siting Board finds that the Altresco facility will provide a necessary supply of energy for the Commonwealth.

In Section II.B.2, above, the Siting Board has also found that:

- as no party has identified information that would lead the Siting Board to conclude that its analyses of (1) alternative technologies; (2) environmental impacts, including the use of BACT; and (3) the site selection process are now invalid, the Siting Board has no reason to revisit these analyses (p. 34); and

- its analyses in the Altresco Decision which demonstrate that: (1) the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply with a minimum impact on the environment at the lowest possible cost; (2) the environmental impacts of the proposed facility would be minimized consistent with minimizing cost; and (3) Altresco has considered a reasonable range of practical facility siting alternatives, remain valid if the on-line date of the proposed facility is changed from the year 1996 to the year 2000 (p. 34).

Consequently, the Siting Board here reaffirms its findings that: (1) the proposed facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply with a minimum impact on the environment at the lowest possible cost; (2) the environmental impacts of the proposed facility would be minimized consistent with minimizing cost; and (3) Altresco has considered a reasonable range of practical facility siting alternatives.

C. Viability

1. Introduction

As set forth in Section II.A.1, above, the Court's decision in Point of Pines v. Siting Board relative to the use of signed and approved PPAs leads the Siting Board to reexamine its condition relative to the viability of the proposed project. In the following section we review our findings on the issue of the viability of Altresco's proposed project.

2. Viability of the Proposed Facility

The Siting Board determines that a proposed non-utility generating project 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 life of its power sales agreements. Cabot Power Decision, 2 DOMSB at 358; Enron Power Enterprise Corporation, 23 DOMSC 1, 89 (1991) ("Enron Decision"); Northeast Energy Associates, 16 DOMSC 335, 380 (1987). In order to meet the first test of viability, the proponent must establish (1) that the project is financially, and (2) that the project is likely to be constructed within the

applicable time frames 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 terms of the power sales agreements. Cabot Power Decision, 2 DOMSB at 358; Enron Decision, 23 DOMSC at 89, Altresco-Pittsfield, Inc., 17 DOMSC 351, 378 (1988).

In the Altresco Decision, in order to evaluate the viability of the proposed facility, the Siting Board reviewed Altresco's strategies for financing and construction of the proposed project. Altresco Decision, 2 DOMSB at 137-144. The Siting Board then reviewed the ability of the Company or other responsible entities to operate and maintain the proposed facility in a manner which would ensure a reliable energy supply. Id., 2 DOMSB at 145-146. Finally, the Siting Board considered whether the applicant's fuel acquisition strategy would reasonably ensure low-cost, reliable energy resources over the terms of the power sales agreements for the proposed project. Id., 2 DOMSB at 146-152.

With respect to the first test of viability, the extensive analysis conducted by the Siting Board showed that (1) Altresco had presented a number of scenarios addressing the sensitivity of project finances to capital costs and the amount of capacity sold under long-term contract, and that (2) the range of the assumptions submitted by Altresco, including the base case assumptions, was reasonable and consistent with scenarios reviewed by the Siting Council in prior decisions. Id., 2 DOMSB at 141. The results of the Siting Board's analysis indicated that, in accordance with acceptable internal rates of return, the proposed project would be financially viable under a broad array of scenarios, but that financial viability of the proposed project could not be ensured in one low case scenario for capacity sold under long-term contract. Id., 2 DOMSB at 141. The Company argued, however, that the low case scenario for capacity was inapplicable because the proposed Altresco facility was the sole project in BECo's RFP 3 Award Group for 132 MW. Id., 2 DOMSB at 140.

In considering the Company's argument, the Siting Board noted that without the BECo contract, Altresco would need to market a significant portion of its remaining capacity to be financially. Id., 2 DOMSB at 141. The Siting Board further noted that it was unable to find need for the proposed project prior to the year 2000. Id. Finally, the Siting Board concluded that in light of the uncertainty of need in the early years of planned facility operation, the Company might have difficulty marketing a sufficient portion of its capacity, thereby raising a concern as to the facility's financiality. Id., 2 DOMSB at 141-142. However, the Siting Board noted that the PPAs that were required to demonstrate need, would also be sufficient to demonstrate financiality. Id., 2 DOMSB at 142.

In reexamining this condition, the Siting Board notes that it has found in Section II.B.2, above, that the existing record clearly establishes a need for 170 MW of additional energy resources for reliability purposes in the Commonwealth in the year 2000 and beyond for an amount of capacity equal at least to that of Altresco's proposed facility. In addition, in Section II.B.2, the Siting Board found that Altresco's proposed facility would be capable of commencing operation no earlier than February, 1998, and probably not until the summer of 1998 or later. Thus, the four year gap between the year of capacity need and the plant's projected on-line date, which was the original cause of the Siting Board's concern regarding the financiality of the proposed facility, has narrowed considerably. This change considerably diminishes the Siting Board's concern about the financiality of the proposed project.

Accordingly, based on the extensive analysis conducted by the Siting Board in the Altresco Decision, the Siting Board concludes that it is likely that the Company will be able to market a sufficient portion of the capacity of its proposed project to ensure its financiality. Consequently, the Siting Board finds that the proposed project is financially.

In the Altresco Decision, the Siting Board found that the proposed project was likely to be constructed within applicable time frames and be capable of meeting performance objectives upon compliance with the condition that the Company provide the Siting Board with a signed copy of the agreement between Altresco and the Lynn Water and Sewer Commission ("LWSC") for provision of treated effluent and potable water. Id.,

2 DOMSB at 144. As the Siting Board has found that the proposed project (1) is financially, and (2) upon compliance with the above condition relative to the provision of treated effluent and potable water, is likely to be constructed within applicable time frames and be capable of meeting performance objectives, the Siting Board finds that, upon compliance with this condition, Altresco will have established that its proposed project meets the Siting Board's first test of viability.

Further, in the Altresco Decision, the Siting Board found that Altresco had established that its proposed project meets the Siting Board's second test of viability. Id., 2 DOMSB at 152. As the Siting Board has reaffirmed this finding in Section II.A.2, above, no party has challenged this determination on appeal, and no party has identified any evidence that it would provide, were the record to be reopened, that would counter said finding, the Siting Board does not revisit it here.

3. Conclusions on Project Viability

The Siting Board has found that (1) upon compliance with the condition relative to the Company's submission of a signed copy of the agreement between Altresco and the LWSC for the provision of treated effluent and potable water, Altresco will have established that its proposed project meets the Siting Board's first test of viability in that it is reasonably likely to be financed and constructed so that the project will actually go into service as planned, and (2) Altresco has established that its proposed project meets the Siting Board's second test of viability in that it is likely to operate and be a reliable, leastcost source of energy over the life of its power sales agreements.

Accordingly, the Siting Board finds that, upon compliance with the above condition, Altresco will have established that its proposed project is likely to be a viable source of energy.

D. Conclusions on the Proposed Project

Based on the record evidence developed by all parties to these proceedings, the Siting Board has found that the Altresco facility, above, will provide a necessary energy supply for the Commonwealth. In addition, the Siting Board reaffirmed its findings that: (1) the proposed

facility is superior to all alternative technologies reviewed with respect to providing a necessary energy supply with a minimum impact on the environment at the lowest possible cost; (2) the environmental impacts of the proposed facility would be minimized consistent with minimizing cost; and (3) Altresco has considered a reasonable range of practical facility siting alternatives. Further, the Siting Board has found that, upon compliance with the condition in Section II.C.2, above, Altresco will have established that its proposed project is likely to be a viable source of energy.

Accordingly, based on the existing record as analyzed and set forth in the Altresco Decision as amended by this decision and the condition contained herein in response to the directive of the Court in Point of Pines v. Siting Board, the Siting Board finds that the proposed Altresco facility will provide a necessary energy supply for the Commonwealth with, on balance, a minimum impact on the environment at the lowest possible cost.

III. DECISION

In Point of Pines v. Siting Board, the Court vacated the Siting Board's decision conditionally approving the siting of Altresco's proposed facility due to the failure of the Siting Board to make an independent finding of need for that facility. 419 Mass. at 285-287. The Court left to the discretion of the Siting Board the determination as to whether to reopen hearings. Id.

Based on a review of pertinent Court decisions, the Siting Board determined that such discretion requires a review of circumstances surrounding the proceeding and the historical context of its statute in order to identify appropriate procedures to follow to address the Court's directive that the Siting Board make an independent finding of need. The Siting Board determined that all parties had been provided a full opportunity to develop a record as to the issue of need over the course of more than two years. Further, the Siting Board determined that an extensive record on need had been developed, including a complete analysis of regional and Commonwealth need. The Siting Board, nevertheless, provided all parties an opportunity to address the issues as to whether that record was sufficient and remained valid for purposes of addressing the Court's concern.

After reviewing the submissions of the parties, the Siting Board determined that the existing record is sufficient and remains valid for purposes of making an independent finding of need. The Siting Board, therefore, found no reason to exercise its discretion to reopen hearings in this proceeding.

Accordingly, the Siting Board conditionally approves the petition of Altresco to construct a 170 megawatt bulk generating facility and ancillary facilities in Lynn, Massachusetts, subject to the following condition:

1. Altresco shall provide the Siting Board with a signed copy of an agreement between Altresco and the LWSC for provision of treated effluent and potable water.

The Siting Board requires Altresco to comply with this condition within four years of the Altresco Decision, i.e., by December 15, 1997. Altresco will not receive a final approval of its proposed facility until such time as this condition has been met. Further, the Company is to comply with all other conditions and requirements set forth in the Altresco Decision as amended by Section II.A.1, above.

Robert W. Ritchie
Hearing Officer

Dated this 17th day of August, 1995

APPENDIX A
Findings on Need

The following subsidiary findings on need were made by the Siting Board in the Altresco Decision, 2 DOMSB 1.

The Siting Board found:

- that Altresco has not established that its proposed project is needed for economic efficiency or reliability reasons in Massachusetts through signed and approved PPAs (p. 28);
- that the reference forecast is an appropriate base case forecast for use in the analysis of regional demand for the years 1996 through 2007 (p. 43);
- that the high-low average forecast is an acceptable forecast for use in an analysis of regional need, but does not constitute a base case forecast (p. 44)
- that the end-year linear forecast is an acceptable forecast for use in the analysis of regional demand, but may warrant adjustment to reflect a more balanced long-term trend (p. 45);
- that the linear regression forecast and the constant annual growth rate ("CAGR") regression forecast provide acceptable forecasts for use in an analysis of regional demand, while recognizing that the forecast methodologies are not sophisticated and possible adjustments may be appropriate to reflect DSM trends over the forecast period (p. 46);
- that the multiple regression forecast provides an acceptable forecast for use in an analysis of regional demand, while recognizing that the forecast methodology is not sophisticated and that possible adjustments may be appropriate to reflect DSM trends over the forecast period (p. 47);
- that it is appropriate to adjust the 1992 CELT DSM levels in the base case (p. 50);

- that an adjustment of the 1992 CELT DSM levels by 8.4 percent of the increment over 1991 levels represents a reasonable base DSM case for the purposes of this review (p. 50);
- that the Company's high DSM case, which is the 1992 NEPOOL base DSM case, represents a reasonable high DSM case (p. 50);
- that the base supply case, as adjusted by an additional 83 MW, represents a reasonable base supply forecast (p. 54);
- that the high supply case, as adjusted by an additional 83 MW, and further adjusted by an additional 66 MW of the uncommitted capacity of NUG projects that are existing or under construction, represents a reasonable high supply forecast for the purposes of this review (p. 56);
- that the low supply case, as adjusted by an additional 83 MW, represents a reasonable low supply forecast for the purposes of this review (p. 56);
- that the Company's reserve margin for the years 1998 through 2000 should be adjusted as follows: (1) 21.5 percent for 1998; (2) 21 percent for 1999; and (3) 20.5 percent for 2000 (p. 57);
- that it is appropriate to explicitly consider need for the proposed facility within the 1996 to 2000 time period (p. 59);
- need for 170 MW or more of additional energy resources in New England for reliability purposes beginning in 2000 and beyond (p. 61);
- that Altresco has established that New England would realize economic savings of a substantial magnitude from the operation of the proposed project over the likely term of its PPAs, and that, under future demand levels consistent with the reference forecast, economic efficiency savings would begin to accrue on a continuous basis in 2000 or later (p. 68);
- that Altresco has established that, beginning in 2000 or later, New England will need 170 MW of the additional energy resource from the proposed project for economic efficiency purposes (p. 68);
- that the Massachusetts reference forecast is an appropriate base case forecast for use in an analysis of Massachusetts demand for the years 1996 to 2007 (p. 78);

- that the Massachusetts linear regression forecast and the Massachusetts CAGR regression forecast provide acceptable forecasts for use in an analysis of Massachusetts demand, while recognizing that the forecast methodologies are not sophisticated and that possible adjustments may be needed to reflect DSM trends over the forecast period (p. 79);
- that the Massachusetts expected value forecast is an acceptable forecast for use in an analysis of Massachusetts demand, but should not constitute a base case forecast (p. 80);
- that the Massachusetts end-year CAGR forecast provides an acceptable forecast for use in an analysis of Massachusetts demand (p. 81);
- that (1) an adjustment of the Massachusetts base DSM forecast by 8.4 percent of the increment over 1992 levels is reasonable for purposes of this review; (2) the Company's Massachusetts high DSM forecast should be adjusted to represent Massachusetts' prorated share of the 1992 CELT high DSM case, and (3) the Company's Massachusetts low DSM forecast should be adjusted to represent Massachusetts' prorated share of the 1992 CELT low DSM case (p. 83);
- that the Company's reserve margin for the years 1998 through 2000 should be adjusted as follows: (1) 21.5 percent for 1998; (2) 21 percent for 1999; and (3) 20.5 percent for 2000 (p. 86);
- that the Massachusetts high supply forecast should be adjusted to include 30 MW of the uncommitted capacity of NUG projects that are existing or under construction (p. 87);
- that (1) the Massachusetts base supply case represents a reasonable base supply forecast for the purposes of this review, (2) the Massachusetts low supply case represents a reasonable low supply forecast for the purposes of this review, and (3) the Massachusetts high supply case, as adjusted by 30 MW of the uncommitted capacity of NUG projects that are existing or under construction, represents a reasonable high supply forecast for the purposes of this review (p. 87);

- that the Company's Massachusetts supply contingency analysis provides an acceptable basis for assessing the potential range of Massachusetts utility capacity positions that might arise over the forecast period (p. 88);
- a need for 170 MW or more of additional energy resources in Massachusetts for reliability purposes beginning in 1997 (p. 92);
- that the Company's need analysis, including its need forecasts and contingency forecasts, as adjusted, for Massachusetts and New England, demonstrate that Massachusetts' need for 170 MW of additional capacity clearly will occur earlier than New England's need for the same (p. 92);
- the Company has failed to establish need for the proposed project based on transmission system reliability grounds (p. 97);
- that Altresco has demonstrated that the proposed project would provide short-term environmental benefits to Massachusetts based on reduction of air pollutant emissions from generating units in Massachusetts (p. 102);
- that Altresco has not demonstrated that the proposed project would provide long-term environmental benefits to Massachusetts based on reduction of air pollutant emissions from generating units in Massachusetts (p. 102);
- that Altresco has not demonstrated a significant improvement in air quality in Lynn due to the displacement of GE steam production (p. 102); and
- that Altresco has failed to establish that the proposed project is needed on environmental grounds (p. 102).