



Energy Facilities Siting Board

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ENERGY FACILITIES SITING BOARD NOTICE OF INQUIRY

On November 3, 1997, the Energy Facilities Siting Board ("Siting Board") announced that it would review the purpose and scope, and the fundamental standard of review for viability that the Siting Board uses in its review of petitions seeking to construct power plants. Therefore, as further explained below, the Siting Board seeks written comments from interested persons and will hold a public hearing regarding this issue at 10:00 a.m. on Monday, March 16, 1998.

I. BACKGROUND

The Siting Board has reviewed viability issues since the first time a Qualifying Facility ("QF") submitted a petition to the Siting Board for consideration. See Northeast Energy Associates, 16, DOMSC 335 (1987). In that case, the Siting Board stated that, in determining whether to approve the siting of a proposed QF facility, the petitioner must demonstrate that the project is likely to operate and produce energy over time. Id. at 363. The Siting Board reasoned that its review "goes beyond concerns for minimizing ratepayer risk" but rather "seeks to ensure that actual energy-production benefits will flow from the project that outweigh any adverse environmental impacts associated with siting and operating the facility." Id. at 364. Thereafter, the standard of review that has been used by the Siting Board focussed on viability over the life of QF contracts. See e.g., MASSPOWER, 20 DOMSC 301, 352 (1990); Altresco-Pittsfield, 17 DOMSC 351, 378 (1988). This standard of review was modified over time to accommodate projects that were not QFs and did not intend to hold long-term power sales contracts. See e.g., Enron Power Enterprise Corporation, 23 DOMSC 1, 89-90 (1991) ("Enron Decision"); Eastern Energy Corporation, 22 DOMSC 188, 295-299 (1991).

Presently, the Siting Board determines that a proposed non utility generator ("NUG") is likely to be a viable source of energy if (1) the project is reasonably likely to be financed and constructed so that the project will actually go into service as planned, and (2) the project is likely to operate and be a reliable, least-cost source of energy over the planned life of the proposed project. U.S. Generating Company, EFSB 96-4 at 71 (1997) ("Millennium Power Decision"); Dighton Power Associates, EFSB 96-3 at 24 (1997) ("Dighton Power Decision"); Berkshire Power Development, Inc., 4 DOMSB 221, 328 (1996) ("Berkshire Power Decision"). 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 frame and will be capable of meeting performance objectives. In order to meet the second test of viability, the proponent must establish (1) that the project is likely to be operated and maintained in a manner consistent with appropriate performance objectives,

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and (2) that the proponent's fuel acquisition strategy reasonably ensures low-cost, reliable energy resources over the planned life of the proposed project. Millennium Power Decision, EFSB 96-4 at 71-72; Dighton Power Decision, EFSB 96-3 at 24; Berkshire Power Decision, 4 DOMSB at 328.

The Siting Board has addressed specific issues relative to its viability standard as those issues were raised in particular cases. For example, in the Enron Decision the proponent asserted that "regulatory efficiencies" could be achieved if the Siting Board were to dispense with "certain parts" of its viability review "since the private sector's review of project viability prior to financing would be an adequate substitute." 23 DOMSC at 90. At that time, the Siting Board stated that it was "unwilling to delegate our responsibility for ensuring that a proposed project is viable to an after-the-fact review which is not incorporated into the Siting [Board's] record." Id.

Recently, the Siting Board addressed the public purpose underlying its viability review. The Siting Board noted that "[d]emonstrating that proposed facilities will remain competitive and reliable over time not only provides important security in meeting long term energy needs, but also provides assurances that such facilities will be as fully utilized over their planned lives as possible, thereby helping to minimize the future need for additional new construction and its associated cost and environmental impact." Berkshire Power Decision, 4 DOMSB, at 343.

In another recent case, U.S. Generating Company ("USGen") argued that the evidence required to demonstrate that an applicant meets the viability standard should be reconsidered and modified. Millennium Power Decision, EFSB 96-4 at 72. USGen specifically asserted that while the existing standard of review may still be applicable, the array of contracts that are used to demonstrate said standard is unnecessary in cases where an applicant has considerable experience in the development and operation of generating facilities. Id. at 72-73. In support, USGen raised issues relative to the confidentiality of the information used to determine viability, specifically the importance of flexibility in contract negotiations, and the highly competitive costing of the electricity produced for sale by independent power producers, especially those developing merchant power plants. Id. In a case that is currently under review, American National Power asserted that the standard of review for financiability, operations and fuel supply should acknowledge the evolution in both the power and fuel markets. American National Power--Bellingham, Petition of American National Power, Docket No. EFSB 97-1, at 4-2, 4-6, 4-12.

Recognizing that changes in the scope of the viability review in one particular decision would pertain to all potential future applicants, the Siting Board has stated that "we are hesitant to set forth a specific level of experience that would exempt applicants from a review of their contracts without first hearing arguments from other interested parties as to how such a change might affect the relative competitiveness of potential facility developers, and thus the level of competition in the electric market in Massachusetts." Millennium

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Power Decision, EFSB 96-4 at 74. Further, the Siting Board stated, in order to solicit a full range of comments on the appropriate purpose and scope of inquiry, the Siting Board would issue a notice of inquiry.

On November 25, 1997, the statute governing the Siting Board and its scope of review regarding generating facility plants was amended. The effective date of the relevant portions of the Electric Restructuring Act is February 25, 1998. The Electric Restructuring Act alters the mandate of Siting Board review so that the Siting Board "shall review only the environmental impacts of generating facilities, consistent with the commonwealth's policy of allowing market forces to determine the need for and cost of such facilities." St. 1997, c. 164, § 204.

II. REQUEST FOR COMMENTS

In light of these statutory and market changes, the Siting Board therefore requests comments on the appropriate purpose, scope, and standard for its review of the viability of proposed generating facilities. In addition to general comments on these topics, the Siting Board seeks responses to the following specific questions. If you have experience with the practices of other states with similar statutes, please include a discussion of such practices where appropriate. Comments should be submitted no later than the close of business February 27, 1998 to the following address:

Jolette Westbrook, Hearing Officer
Energy Facilities Siting Board
100 Cambridge Street, Rm. 1200
Boston, MA 02202
(617) 305-3525

1. The Electric Restructuring Act both narrowed the scope of the Siting Board's review of generating facilities, by limiting it to "the environmental impacts of generating facilities", and broadened it by enumerating specific new impacts which the Siting Board must review, including "the local and regional land use impact, local and regional cumulative health impact, ... wetlands impact, ... [and] visual impact" of proposed generating facilities. St. 1997, c. 164, §§ 204, 210. Please comment on the appropriate purpose and scope of the Siting Board's review of generating facility viability in light of these changes.

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2. Please discuss the necessary scope and standard of review for a viability review intended to accomplish each of the following purposes. What evidence would the Siting Board need to require from developers in each instance?
 - a. To ensure that a facility "will be as fully utilized over [its] planned [life] as possible, thereby helping to minimize the future need for additional new construction and its associated cost and environmental impact" (Berkshire Power Decision, 4 DOMSB at 343);
 - b. "[T]o ensure that actual energy-production benefits will flow from the project that outweigh any adverse environmental impacts associated with siting and operating the facility" (Northeast Energy Associates, 16 DOMSC at 364);
 - c. To ensure that a developer has the resources to fulfill its obligations to the community and the Commonwealth, including compliance with conditions imposed by the Siting Board or other agencies to minimize the environmental impacts of the facility; and
 - d. To allow the Siting Board to make the best use of its resources by focussing its review on projects with a reasonable likelihood of being constructed.

You may also comment on the nexus between each listed purpose and the Siting Board's statute, as currently in effect and as revised by the Electric Restructuring Act.

3. Please discuss how changes in the electric industry, particularly the emergence of merchant power plants which may not enter into long-term power sales contracts prior to construction, would affect the Siting Board's review of the four traditional components of viability: financiability, construction, operation and maintenance, and fuel supply.
4. Please discuss whether and how the Siting Board should assess the viability of a proposed generating facility in light of potential resource constraints, as when multiple projects are proposed using the same fuel supply route or water resource.

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5. USGen has suggested that applicants with experience in the development of generating facilities should be exempted from certain portions of the traditional viability review (specifically, the submission of engineering, procurement and construction, operation and maintenance, and fuel supply contracts) based on that expertise. Please comment generally on this proposal, and specifically address:
 - a. the type and level of experience that would be necessary to provide the Siting Board with confidence that a proponent's experience could be applied to a proposed project;
 - b. the evidence that would be needed to make such a determination; and
 - c. the potential anti-competitive effects, if any, of exempting some applicants from requirements with which other applicants must comply.
6. What steps could the Siting Board take to minimize the submission of competitively sensitive information as part of its review of generating facility viability?
7. Please provide any additional comments that may be pertinent to the Siting Board's examination of its standard of review for viability.

III. PUBLIC HEARING

After comments have been received by the Siting Board, the Siting Board will make available copies of the comments upon request. Thereafter, the Siting Board will conduct a public hearing to discuss issues raised by commentators in this Notice of Inquiry. The public hearing will be held on Monday, March 16, 1998, at 10:00 a.m. in the offices of the Department of Telecommunications and Energy, Main Hearing Room, 12th Floor, 100 Cambridge Street, Boston, Massachusetts. If you wish to participate in the public hearing please contact the Hearing Officer by March 9, 1998 in order to allow us to prepare a schedule of speakers.

Consent Communication #12

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Communication was received from Energy
Facilities Siting Board, transmitting
notice of a public hearing at 10:00 A.M.
on March 16, 1998 regarding its review
of petitions seeking to construct
power plants.

In City Council February 23, 1998

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