

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

	)	
Petition of Cape Wind Associates, LLC and	)	
Commonwealth Electric Company d/b/a NSTAR	)	
Electric for Approval to Construct Two 115 kV	)	EFSB 02-2C
Electric Transmission Lines Pursuant to	)	
G.L c. 164, § 69J	)	
	)	
 	)	
Petition of Cape Wind Associates, LLC for a	)	
Certificate of Environmental Impact and Public	)	EFSB 07-8B
Interest pursuant to G.L. c. 164, § 69K	)	
	)	

TENTATIVE DECISION

James A. Buckley,
Presiding Officer
March 29, 2016

On the Decision:
Andrew Greene

APPEARANCES: Dennis Duffy, Vice President
Charles R. Dougherty, Esq.
Cape Wind Associates, LLC
20 Park Plaza, Suite 320
Boston, Massachusetts 02116
FOR: Cape Wind Associates, LLC
Petitioner

Mary E. Grover, Esq.
Eversource Energy
800 Boylston Street, P1700
Boston, Massachusetts 02199-8003
FOR: Commonwealth Electric Company d/b/a NSTAR Electric
Petitioner

Charles S. McLaughlin, Jr., Esq.
Barnstable Town Hall
367 Main Street
Hyannis, MA 02601
FOR: Town of Barnstable
Intervenor

Charles M. Sabatt, Esq.
540 Main Street
Hyannis, MA 02601
FOR: Barnstable Fire District
Intervenor

Robert J. Munnelly, Jr., Esq.
Davis, Malm & D'Agostine, PC
One Boston Place
Boston, MA 02108
and

Laura G. Zagar, Esq.
Donald C. Baur, Esq.
Pam Anderson, Esq.
Stephanie Regenold, Esq.
Chris Chou, Esq.
Perkins Cole LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005
FOR: Alliance to Protect Nantucket Sound
Intervenor

David Ismay, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
FOR: Conservation Law Foundation
Intervenor

Gary R. Clayton
Vice President for Programs
Massachusetts Audubon Society
208 South Great Road
Lincoln, MA 01773
FOR: Massachusetts Audubon Society
Intervenor

Daniel O'Connell, President & CEO
Massachusetts Competitive Partnership (MACP)
535 Boylston Street, Top Floor
Boston, MA 02116
FOR: Massachusetts Competitive Partnership
Limited Participant

Angela Sanfilippo, Director
Massachusetts Fisherman's Partnership, Inc.
2 Blackburn Center
Gloucester, MA 01930
FOR: Massachusetts Fisherman's Partnership, Inc.
Limited Participant

TABLE OF CONTENTS

I. INTRODUCTION	1
A. Request for Extension	1
B. Prior Proceedings	1
1. Chapter 69J Petition to Construct Approval	1
2. 2008 Project Change, Project Extension, and Section 72 Approval.....	3
3. Certificate of Environmental Impact and Public Interest	5
4. 2014 Project Change	5
C. Procedural History of the 2015 Extension Request	6
II. STATUS OF THE WIND FARM AND THE PROJECT	7
A. Factual Changes	7
B. Judicial Proceedings.....	9
C. Power Purchase Agreements	10
D. Project Financing and Construction.....	12
E. Federal Permits	12
F. State, Local and Regional Permits.....	15
G. Project Cost	15
III. EXTENSION DECISION	16
A. Standard of Review	16
B. Position of the Parties.....	16
1. Cape Wind	16
2. The Alliance.....	18
3. Barnstable	19
4. Other Briefs and Comments.....	20
C. Analysis and Findings	20
1. Changes to Background Conditions and Regulatory Context	20
2. Reasonableness of the Extension Period.....	24
3. Conclusion	26

Pursuant to G.L. c. 164, § 69J, the Massachusetts Energy Facilities Siting Board (“Siting Board”) hereby DENIES the request of Cape Wind Associates, LLC (“Cape Wind” or “Company”) for a two-year extension of: (1) the Final Decision in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005) (“Original 2005 Approval”), and (2) the Final Decision in Cape Wind Associates, LLC, EFSB 07-8, 17 DOMSB 94 (May 27, 2009) (“2009 Certificate Approval,” together, the “Approvals”).

I. INTRODUCTION

A. Request for Extension

On April 7, 2015, Cape Wind requested a two-year extension (“2015 Extension Request”) of the two previously issued Siting Board approvals mentioned above, the Original 2005 Approval and the 2009 Certificate Approval, relating to a proposed subsea and on-shore transmission line intended to interconnect Cape Wind’s proposed off-shore wind farm in Nantucket Sound with the regional transmission grid at Barnstable Switching Station. The Approvals were set to expire on May 1, 2015, unless Cape Wind had begun construction of the transmission lines, for which the Approvals were granted, by that date. Cape Wind asserted that it could not begin construction by May 1, 2015 because of its inability to finance the transmission line project and wind farm (together, the “Cape Wind Project”), caused by an appeal of the Siting Board’s approval of a project change in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2B/EFSB 07-8A (November 17, 2014) (“2014 Project Change Approval”) (2015 Extension Request at 2).¹

B. Prior Proceedings

1. Chapter 69J Petition to Construct Approval

In the Original 2005 Approval, the Siting Board approved the construction by Cape Wind and Commonwealth Electric Company, d/b/a NSTAR Electric Company (“NSTAR”)² of two new

¹ The Town of Barnstable and the Barnstable Fire District submitted a notice of appeal to the Siting Board on December 5, 2014 and filed their appeal with the Supreme Judicial Court (“SJC”) on December 15, 2014 (“Barnstable Appeal”).

² NSTAR now does business as Eversource Energy.

115 kV electric transmission lines that would travel undersea beneath Nantucket Sound and Lewis Bay and underground in the Towns of Yarmouth and Barnstable on Cape Cod (the “Project”). The purpose of the Project is to interconnect Cape Wind’s proposed 130-turbine offshore wind-powered electric generating facility (468 megawatt total peak capacity) in Nantucket Sound (“wind farm”) with the regional electric grid. The transmission line route is approximately 18.4 miles in length, and would begin at the proposed wind farm on Horseshoe Shoal in Nantucket Sound, travel approximately 12.5 miles beneath Nantucket Sound and Lewis Bay, come ashore at the southern end of New Hampshire Avenue in Yarmouth, and then continue approximately 5.9 miles underground through Yarmouth and Barnstable to the Barnstable Switching Station. The 130-turbine wind farm itself, which would be located entirely in federal waters, is not subject to Siting Board jurisdiction.

Although the Final Decision was issued on May 11, 2005, the evidentiary record for the proceeding was closed on December 18, 2003. Original 2005 Approval at 7. The Original 2005 Approval contained a standard Siting Board condition imposing a time limitation of its approval: “Because the issues addressed in the Decision relative to this facility are subject to change over time, construction of the proposed facility must commence within three years of the date of the decision.” Id. at 135.

Condition D of the Original 2005 Approval required that, prior to construction of the transmission lines, Cape Wind submit copies of all permits required for it “to begin installation of the wind farm equipment in Nantucket Sound.” Id. at 133. The Siting Board imposed Condition D to assure that its approval of the Project satisfied the Siting Board’s Standard of Review for finding need for a transmission line proposed to interconnect a new generating facility to the regional grid. That Standard of Review requires an applicant to show: (1) that the transmission system is inadequate to interconnect the new or expanded generator; and (2) that the new or expanded generator is likely to be available to contribute to the regional energy supply. Id. at 16. The Siting Board explained that the two findings would work to “establish that a transmission line, with the attendant costs and potential construction and permanent impacts, is not built unnecessarily.” Id.

To demonstrate that the proposed generator is available to contribute to the regional energy supply, the Siting Board stated that if a generator either exists or is under construction, then “the availability showing will be deemed to have been made.” Id. at 17. If a generator is planned and subject to the Siting Board’s jurisdiction, the Siting Board stated that the availability showing could be made when the Siting Board approves the generation facility. Id. For a generating facility, like the wind farm, that is neither under construction nor subject to the Siting Board’s jurisdiction, the Siting Board found that the showing must “be made on a case-by-case basis based on indicators of project progress (e.g., progress in permitting or obtaining project financing).” Id.

The Siting Board noted that the environmental permitting for the wind farm was in the early stages at the time of the Original 2005 Decision, and that the Army Corps of Engineers (then the lead federal agency for a joint environmental review in collaboration with state and regional agencies) had not yet issued a Draft Environmental Impact Statement (“DEIS”) (id. at 20). The Siting Board therefore decided that it could not yet find that the wind farm would be available to contribute to the regional energy supply (id.). The Siting Board concluded that because of “the complexity of the federal, state and local permitting process . . . , that acquisition of all permits required to begin installation of wind farm equipment in Nantucket Sound” would be necessary to make the availability finding (id. at 20-21). Accordingly, the Siting Board imposed Condition D in its approval of the Project.

On February 23, 2012, Cape Wind submitted a filing to the Siting Board that Cape Wind claimed demonstrated compliance with Condition D. Over the next several months, the Siting Board sought additional information and Cape Wind made some supplemental filings. By letter on September 14, 2012, the Director of the Siting Division acknowledged that, with the February 23, 2012 and supplemental filings, Cape Wind had complied with Condition D.

2. 2008 Project Change, Project Extension, and Section 72 Approval

On May 1, 2008, the Siting Board extended the deadline by which Cape Wind was required to begin construction for an additional three-year period, through May 1, 2011. Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (“2008 Project Change and Extension Approval”). Cape Wind requested the extension during the course of a proceeding in which it sought approval of four proposed changes

to the Project as approved in the Original 2005 Approval and approval under G.L. c. 164, § 72.³ In its letter requesting the extension, Cape Wind asserted that construction of the Project would be delayed because of amendments to federal law in 2005 that changed the lead federal agency conducting the environmental review of the wind farm from the Army Corps of Engineers to the Minerals Management Service (“MMS”), thus delaying the issuance of the DEIS. In addition, Cape Wind cited the Cape Cod Commission’s denial of Cape Wind’s Application for Development of Regional Impact (“DRI”) for the Project (Cape Wind Letter of November 19, 2007 in EFSB 02-2A/D.T.E. 02-53).

After reviewing a handful of changes in background conditions and applicable regulations, the Siting Board found that the changes did not alter the underlying assumptions upon which the Siting Board based its Original 2005 Approval. 2008 Project Change and Extension Approval at 18. The Siting Board also found that the request for a three-year extension was reasonable in that Cape Wind did not initiate any of the delays and that a “three-year extension would achieve general consistency of timing requirements among the EIS review, DRI approval, and other federal, state and local permits.” *Id.* at 19. The Siting Board also approved the Section 72 petition that was considered in this proceeding, following issuance of the Massachusetts Environmental Policy Act (“MEPA”) Final Environmental Impact Report (“FEIR”).⁴

Following the 2008 Project Change and Extension Approval, the May 1, 2011 deadline for beginning construction of the Project was extended for four additional years by operation of two laws enacted by the General Court, the Permit Extension Act (Acts of 2010, c. 240, § 173) and the Jobs Act (Acts of 2012, c. 238, § 75).

³ Cape Wind filed the request for Section 72 approval with the petitions reviewed in the Original 2005 Decision. This matter, referred by the Department of Public Utilities to the Siting Board for review, could not be decided until the conclusion of the Massachusetts Environmental Policy Act review, which occurred with issuance of a Certificate on the Final Environmental Impact Report on March 29, 2007.

⁴ The Section 72 approval granted by the Siting Board is incorporated and co-terminus with the Original 2005 Approval, as subsequently extended.

3. Certificate of Environmental Impact and Public Interest

In 2009, the Siting Board granted a Certificate of Environmental Impact and Public Interest (“Certificate”) for the Project, containing nine state and local permits identified by Cape Wind as necessary for Project construction. In the 2009 Certificate Approval, the Siting Board stated that, in accordance with G.L. c. 164, § 69K, the Certificate “shall be in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility and it acts in the place of the nine permits referenced below.” 2009 Certificate Approval, Exhibit A at 1. The Siting Board found that: the Project was needed; granting a Certificate containing approvals for the Project was compatible with considerations of environmental protection, public health and safety; the Project might not conform with the regional and local laws and regulations, but that it was reasonable to exempt the Project from these requirements, and; issuing a Certificate would serve the public interest and convenience.⁵ Id. at 29-30. The four state approvals submitted to the Siting Board during the proceeding by the relevant jurisdictional state agencies were incorporated into the Certificate (2009 Certificate Approval at 35-37, Exhibit A at 2-3).

The Siting Board noted that the May 1, 2011 deadline established by the 2008 Project Change and Extension Approval was unchanged by the Certificate. Id., Exhibit A at 3. The Siting Board added that each of the nine permits and approvals contained in the Certificate also would expire on May 1, 2011. Id., Exhibit A at 3-4. The Certificate expiration date was likewise extended for four years by operation of the Permit Extension Act and the Jobs Act.

4. 2014 Project Change

On August 8, 2014, Cape Wind and NSTAR again asked the Siting Board to approve a change to the Project. This change involved installation of additional equipment at the Barnstable Switching Station, including additional circuit breakers, shunt reactors and harmonic filters. The new equipment was required as a result of a new interconnection study by ISO-New England. The

⁵ In the 2009 Certificate Approval, the Original 2005 Approval served as the foundation for the Siting Board’s findings of: need; compatibility with environmental protection and public health and safety; and that the public convenience and necessity required the construction and operation of the Project. 2009 Certificate Approval at 13-14, 21-24, and 27-28.

Original 2005 Approval had called for new equipment at the Switching Station but within the existing fence line. With the additional equipment, the Switching Station area would need to be expanded by 1.9 acres. After further inquiry, including hearings, the Siting Board approved the Project change on November 17, 2014. The Siting Board imposed six additional conditions on Cape Wind and NSTAR to mitigate impacts caused by the Project change. 2014 Project Change Approval at 21. The Company did not seek an extension of the Siting Board's approvals in this proceeding nor did the Siting Board provide one. Thus, all Project approvals and permits granted by the Siting Board, prior to and including the 2014 Project Change Approval, would expire by May 1, 2015 unless the Company commenced construction of the Project by that date.

C. Procedural History of the 2015 Extension Request

As noted above, on April 7, 2015, Cape Wind submitted a request to the Siting Board for a two-year extension (through May 1, 2017) of the Original 2005 Approval and the 2009 Certificate Approval. In an Action by Consent issued on April 30, 2015, the Siting Board found that there was insufficient time for the Siting Board to evaluate and issue a Final Decision regarding the merits of the 2015 Extension Request before the May 1, 2015 deadline. Accordingly, the Siting Board granted an interim extension of the Approvals until such time as the Siting Board could review the matter and issue a Final Decision regarding the 2015 Extension Request.⁶

Also on April 30, 2015, the Presiding Officer issued a procedural order that allowed parties to file responses to Cape Wind's Request for Extension by May 21, 2015, and for Cape Wind to file a reply to any responses by June 4, 2015. The Alliance to Protect Nantucket Sound, Inc. ("Alliance"), the Town of Barnstable and Barnstable Fire District (collectively referred to as "Barnstable"), the Massachusetts Fishermen's Partnership, and the Massachusetts Competitive

⁶ In its 2015 Extension Request, Cape Wind requests a two-year extension of the Original 2005 Approval and the 2009 Certificate Approval. The Siting Board notes that it has issued two additional approvals for the Company's proposed Project: the 2008 Project Change and Extension Approval (which also includes the Section 72 approval) and the 2014 Project Change Approval, both of which are co-terminus and incorporated with the Original 2005 Approval. 2008 Project Change and Extension Approval at 25; 2014 Project Change, at 20-21. Thus, an extension of the Original 2005 Approval, as requested by Cape Wind, would extend these subsequent Project change approvals as well, making a separate extension request unnecessary.

Partnership, each filed responses opposing Cape Wind's request to extend the Approvals, while Cape Wind maintained that the 2015 Extension Request meets the Siting Board's Standard of Review and warrants approval.

On December 18, 2015, the Presiding Officer submitted written interrogatories to Cape Wind and issued a procedural schedule. The procedural schedule called for evidentiary hearings in late January 2016 and allowed Cape Wind and the other parties to present witnesses at the hearings, subject to prehearing procedure established by the Presiding Officer. The Siting Board held a prehearing conference on January 20, 2016, and evidentiary hearings on January 22 and 25, 2016. Cape Wind presented the testimony of Craig D. Olmsted, Vice President of Projects, who manages technical and environmental issues for Cape Wind (Tr. at 20) and Dennis J. Duffy, Vice President of Regulatory Affairs and internal legal counsel for Cape Wind (Tr. at 23); the Alliance presented the testimony of Kurt G. Strunk, Vice President, National Economic Research Associates (Tr. at 317-318). Briefs and reply briefs were submitted on February 12 and 19, 2016, respectively.

II. STATUS OF THE WIND FARM AND THE PROJECT

A. Factual Changes

Siting Board staff issued a set of Information Requests to Cape Wind concerning each of the findings made by the Siting Board that led it to approve the Project (with conditions) in the Original 2005 Approval and whether any underlying facts had changed. The topics included: the condition of the existing transmission system (Exh. EFSB CW-25); permitting status for the wind farm (Exh. EFSB CW-26); transmission project alternatives (Exh. EFSB CW-27); route alternatives (Exh. EFSB CW-28); Project-caused marine construction impacts, including direct impacts from sand and sediment disturbance (Exh. EFSB CW-29); indirect impacts such as impacts to submerged vegetation (Exh. EFSB CW-30); impacts to shellfish (Exh. EFSB CW-31); impacts to finfish and marine protected species (Exh. EFSB CW-32); impacts to protected shorebirds (Exh. EFSB CW-33); impacts to marine archaeology and navigation (Exh. EFSB CW-34); Project-caused land construction impacts (Exh. EFSB CW-35); and Project-caused permanent impacts such as land use, visual impact and electro-magnetic fields ("EMFs") (Exh. EFSB CW-36).

In response to all but one of the Information Requests, Cape Wind responded by referring to and attaching an Information Request response from Cape Wind's response to an identical question asked by Siting Board staff in the 2008 Project Change and Extension Approval proceeding. Each of the attached IR responses, all dated October 10, 2007, described factual changes as a result of the four proposed Project changes and additional permitting of the Project that had occurred since the Original 2005 Approval. Each Information Request response in the current investigation concluded with a statement that none of the other facts concerning environmental impacts had changed. The response to Exh. EFSB CW-31, concerning impacts to shellfish, was simply that none of facts discussed about shellfish had changed (Exh. EFSB CW-31).

The response to a question about impacts to protected coastal shorebirds (Exh. EFSB CW-33) included an attached letter of July 17, 2007 from the Assistant Director of the Massachusetts Division of Fisheries & Wildlife. In the letter, the Assistant Director stated that the Natural Heritage and Endangered Species Program ("NHESP") determined that the Project would not result in any prohibited "take" of any state-listed rare species (*id.*).⁷ The Assistant Director added that the Project "may be subject to further review if no physical work is commenced within three-years from the date of issuance of this determination, or if there is a change to the project." *Id.* Mr. Olmsted stated that Cape Wind had not contacted the Division of Fisheries & Wildlife since the July 17, 2007 letter was issued to inquire if the Division believes further review of this issue is necessary (RR-7).

The Siting Board staff also asked Cape Wind about any changes to the facts relied upon by the Siting Board with respect to its decision to grant each of the nine permits and approvals in the 2009 Certificate Approval. Cape Wind's response was identical to all nine of the Information Requests: "There have been no relevant changes to [Cape Wind's] proposal or positions, and we are aware of no further factual developments that would be responsive to the request." Exh. EFSB CW-37 through Exh. EFSB CW-45. Mr. Olmsted testified that the analysis that he went through in responding to these Information Requests was to review the 2009 Certificate

⁷ Pursuant to the Massachusetts Endangered Species Act (G.L. c. 131A), the NHESP is part of the Division of Fisheries & Wildlife.

Approval and the facts as stated in the decision and that he “saw no facts there that I was aware that would have been relevant” (Tr. at 120-121). Mr. Olmsted later added that, in addition to reviewing the Certificate decision, he has been involved with the Cape Wind Project for 16 years so that he has more than a general knowledge of the Project (Tr. at 293). He noted that he has “been supervising studies done up until a year or so ago” and has “participated in all the discussions and contractors’ planning over these many years” (*id.*). He concluded that “it is unlikely that a substantive change in any of [the background conditions] would have occurred without having come to my attention” (Tr. at 293-294).

Mr. Olmsted testified that in his review of the 2009 Certificate Approval, he did not review the underlying regulations of each of the state, regional and local agencies that normally would have issued the nine permits granted by the Siting Board in that decision (Tr. at 121-122). Mr. Duffy opined that such review would not be proper because the Siting Board becomes the issuing agency when it grants a Certificate (Tr. at 122-123).

B. Judicial Proceedings

The Barnstable Appeal was entered at the SJC on December 15, 2014 and docketed as SJ-2014-0508. The Siting Board transmitted the administrative record to the SJC on March 10, 2015, but the case has not been reserved and reported to the full court and the schedule for briefing and oral argument has not been established as of yet (Exhs. EFSB CW-2, EFSB CW-3). Until the SJC establishes such a schedule, it is difficult for Cape Wind to estimate a date for the SJC to decide the appeal. Cape Wind stated that based upon “SJC’s typical practice and schedule, it is reasonable” to expect a decision in approximately 12-18 months (2015 Extension Request at 2). The last action taken by the Court was granting Cape Wind’s Motion to Intervene on May 11, 2015 (Tr. at 98). Cape Wind has not taken any action, such as filing a motion for expedited treatment, which might prompt the SJC to establish a schedule or otherwise move the appeal to decision (Tr. at 98-99). Even though Cape Wind viewed the chances of the appellants prevailing as slim, it noted that potential investors may still be hesitant to finance the Cape Wind Project with the Barnstable appeal still pending (Tr. at 100-101).⁸

⁸ Despite his acknowledgement of the importance of resolving the Barnstable appeal before Project financing could occur, Mr. Duffy explained that Cape Wind’s limited efforts to

In its Information Request responses and during the hearings, Cape Wind's witnesses added a federal court appeal (Public Employees for Environmental Responsibility v. Hopper, Case No. 14-5301 in the United States Court of Appeals for the D.C. Circuit) to the list of judicial proceedings that is preventing Cape Wind from financing the Cape Wind Project (Exh. EFSB CW-2; Tr. at 99). This case is an appeal from a decision in the U.S. District Court upholding the Bureau of Ocean Energy Management's ("BOEM")⁹ approval of Cape Wind's offshore lease for the wind farm and its Construction and Operations Plan ("COP") for the facility (Exh. EFSB CW-2). The appeal has been briefed fully and argued orally in February 2016 (*id.*). Cape Wind expects a decision by May 2016 (*id.*). Mr. Duffy stated that the appeal of BOEM's administrative actions is probably the most important appeal to resolve in order to secure financing for the Cape Wind Project (Tr. at 40, 95).

C. Power Purchase Agreements

As a result of the Green Communities Act (Acts of 2008, c. 169) ("GCA"), Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid ("National Grid") and NSTAR Electric Company d/b/a Eversource Energy ("Eversource") entered into Power Purchase Agreements ("PPAs") with Cape Wind for 50 percent and 27.5 percent, respectively, of the wind farm's output (Exh. EFSB CW-4, Attachments A and B). Pursuant to Section 83 of the GCA, the Department of Public Utilities approved the PPA with National Grid on November 10, 2010¹⁰ and the PPA with Eversource on November 26, 2012.¹¹

On December 31, 2014, Cape Wind sent a letter to National Grid and Eversource that Cape Wind would not be able to achieve certain milestones under the PPAs related to financing and commencing construction of the wind farm (Exh. EFSB CW-6, Attachment). Cape Wind asserted

move the case forward reflect the fact that Cape Wind "is merely an intervenor in the case. The Siting Board is the defendant" (Tr. at 98).

⁹ MMS was split into three new agencies within the Department of the Interior, including BOEM (Tr. at 50, 182; Exh. EFSB CW-57, Attachment).

¹⁰ Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid , D.P.U. 10-54 (2010).

¹¹ NSTAR Electric Company, D.P.U. 12-30 (2012).

that it was excused from achieving these milestones by operation of the Force Majeure clauses of the PPAs (id.). In Cape Wind's view, the Force Majeure event was "extended, unprecedented and relentless litigation by the Alliance." Id. On January 6, 2015, National Grid and Eversource separately notified Cape Wind that they were terminating the PPAs because of Cape Wind's failure to achieve the financing and construction milestones (id.). Correspondence between the contracting parties indicated that National Grid and Eversource did not consider relentless litigation to be a valid Force Majeure event, whereas Cape Wind did (id.). Cape Wind also asserted that National Grid and Eversource's January 6, 2015 letter violated the Dispute Resolution procedure called for in the PPAs (id.). While Cape Wind contended that the PPAs were valid and enforceable, the Company did not undertake any formal legal action to enforce them (Exh. EFSB CW-7). During the hearings, Cape Wind continued to assert that the PPAs were enforceable (Tr. at 74-75).

By letter on February 10, 2016, Cape Wind informed National Grid and Eversource Energy that the respective PPAs with Cape Wind were terminated (Attachment Exh. EFSB CW-2, Third Supplement). Accordingly, Cape Wind no longer has an existing contractual arrangement for sale of the energy or capacity to be produced by the wind farm. Before Cape Wind could obtain financing and begin construction, Cape Wind would likely need to enter some sort of contractual arrangement for the power produced by the wind farm (Tr. at 48-49). Mr. Duffy added that it would be "highly unusual for a renewable energy project of any kind to be financed without some sort of off-take arrangement" (Tr. at 107).

Mr. Duffy testified that legislation pending before the General Court could provide Cape Wind and other offshore wind power developers with the opportunity to participate in solicitations for off-take arrangements sufficient to obtain financing (Tr. at 35-36, 110; Exh. EFSB CW-9). With the PPAs terminated, pending legislation represents the only "concrete or firm" off-take possibility for Cape Wind at this time (Tr. at 108). Mr. Duffy observed that without PPAs or another off-take agreement, lending institutions would be unlikely to provide financing for the Cape Wind Project, and that it could not be built as a "merchant generator," that is, exposed to risks in the wholesale energy markets without long-term contracts (Tr. at 48-49). Mr. Strunk,

testifying for the Alliance, opined that Cape Wind would require specific legislation to realize any off-take arrangements (Tr. at 330).

D. Project Financing and Construction

After the appeals are resolved, assuming Cape Wind prevails, Cape Wind would need to complete its financing of the wind farm and Project. Mr. Olmsted testified that Cape Wind had about 85 percent of the necessary financing in place by December 2014 (Tr. at 42). However, because of the uncertain status of the PPAs, in early 2015 Cape Wind suspended its arrangement of financing for the Cape Wind Project (Exh. EFSB CW-14). Although Mr. Olmsted could not estimate how long it would take to complete financing if the DC Circuit Court appeal were favorably concluded (and presumably Cape Wind achieved an adequate off-take arrangement,) he indicated that Cape Wind would reengage potential financing counterparties at that time (Exh. EFSB CW-1).

Even after closing on construction financing, Cape Wind witnesses stated that the lead time for ordering, manufacturing and delivery of wind turbines and other major components would be approximately one year (RR-5, Attachment 3, page 3, Attachment 7, page 2). With all the issues that remain outstanding, Mr. Olmsted stated that he could not produce a reliable schedule for the Cape Wind Project (Tr. at 29-30, Exh. EFSB CW-1).

E. Federal Permits

Considerable testimony during the hearings concerned the current status of the federal permits that are needed to construct and operate the wind farm. While Cape Wind was in possession of all necessary permits in 2012, its witnesses conceded that some of the permits had lapsed or expired. By letter on February 26, 2015 to BOEM, Cape Wind requested a two-year suspension of its offshore lease (Exh. Alliance-8). On July 24, 2015, BOEM approved the suspension for two years, or until July 24, 2017 (Exh. EFSB CW-57, Attachment). BOEM imposed some conditions on Cape Wind, including a prohibition from any construction or installations activities related to the lease during the suspension period (*id.*, Attachment at 2).¹²

¹² BOEM denied Cape Wind's request to suspend its obligation to pay rent during the suspension period, in part to provide Cape Wind an incentive to develop the lease with "due diligence" (Exh. EFSB CW-57, Attachment at 2).

Mr. Duffy was not certain whether BOEM's decision to suspend Cape Wind's lease triggered any requirements under the National Environmental Policy Act ("NEPA") (Tr. at 264).

BOEM approved Cape Wind's Construction and Operation Plan ("COP") on April 18, 2011. Mr. Olmsted asserted that the COP remains valid, but acknowledged that Cape Wind has to make some modifications to it (Exhs. EFSB CW-48, EFSB CW-51). He said that Cape Wind had already proposed to change its onsite staging area from Quonset, Rhode Island to the Commonwealth's \$100 million New Bedford port facility, a modification request still pending before BOEM (Exh. EFSB CW-48; Tr. 260-264). At this point, however, Cape Wind has canceled its lease agreements with the New Bedford facility (known as the "South Coast Marine Commerce Terminal") and the Quonset port facility in Rhode Island (Exh. EFSB CW-46). Mr. Duffy opined that either facility would still be interested in serving as the wind farm's construction base when a construction schedule could become better defined (*id.*). The COP also includes an oil spill response plan ("OSRP") that calls for Cape Wind to respond to a spill from a port facility in Falmouth (Tr. at 138). Cape Wind had a purchase and sale agreement for a marina in Falmouth that would serve multiple purposes, including as a base of operations under its OSRP (*id.*). Mr. Duffy said that Cape Wind terminated the purchase and sale agreement (Exh. EFSB CW-47). Cape Wind will have to modify its COP to the extent it changes the port facilities that serve as construction and operation bases for the wind farm (Tr. at 127). Cape Wind and the Alliance disagree as to whether approvals for such COP modifications are routine or difficult, including whether such modifications will trigger additional NEPA compliance requirements (Exhs. EFSB CW-48, EFSB CW-51; Alliance Brief at 7).

Cape Wind's Clean Air Act Permit, needed for construction period emissions, expired on September 30, 2015 because construction of the wind farm did not begin by that date (Exhs. EFSB CW-23, EFSB CW-55). Mr. Olmsted stated that because EPA regulations limit the duration for such air permits, Cape Wind would wait to renew its air permit until its actual construction schedule becomes more certain (Exh. EFSB CW-55). The air permit that Cape Wind submitted with its Condition D compliance letter of February 23, 2012 was valid for 18 months from the effective date of the permit, and EPA could extend the permit for another 18 months upon a showing that the extension is justified (Cape Wind letter of February 23, 2012, Attachment A,

Permit #6 at 1, submitted as a compliance filing regarding both the Original 2005 Approval and the 2009 Certificate Approval).

Cape Wind needs renewal of its incidental take authorization under the Marine Mammal Protection Act (“MMPA”), which by statute is valid for only one year (Exhs. EFSB CW-23, EFSB CW-54). Cape Wind needs an incidental take authorization for both pre-construction surveys and construction. Mr. Olmsted said Cape Wind would seek renewal in the normal course of project development when the actual construction schedule becomes certain (Exh. EFSB CW-54).

Cape Wind’s Federal Aviation Administration (“FAA”) No Hazard Determination expired on August 10, 2015 (Tr. at 178-179). Cape Wind will need to submit a new application for a determination with the FAA before construction begins (Tr. at 180). However, Cape Wind and the Alliance disagree on the meaning of “construction” in this context. Cape Wind takes the position that it would need a No Hazard Determination only when its turbines are of sufficient height to invoke FAA jurisdiction, which Mr. Duffy said would not occur until Cape Wind’s second construction season (Tr. at 179-180). The Alliance stated that the BOEM lease requires Cape Wind to hold the No Hazard Determination when it commences construction of the wind farm (Tr. at 181-183). Mr. Duffy acknowledged that the FAA could require that Cape Wind perform a new aeronautical study as part of its new application (Tr. at 181-182).

The Final EIS, issued by MMS in 2009, is now more than five years old (Tr. at 123). The Council on Environmental Quality (“CEQ”) (a part of the Executive Office of the President established by NEPA to assist federal agencies in performing their NEPA responsibilities) has issued guidance stating that if a proposal subject to an EIS requirement has not been implemented after more than five years, then the proposal should be examined to determine whether an EIS supplement should be prepared (Exh. EFSB CW-56, Tr. at 123). Cape Wind reported that BOEM has prepared three supplemental environmental reviews since the MMS completed the EIS (Exh. EFSB CW-56; Tr. at 125-126). Each of the three supplemental reviews was performed as an Environmental Assessment (“EA”). Mr. Duffy opined that if BOEM were to conclude that any future decisions related to the wind farm could have significant environmental impacts, then BOEM would likely require another EA rather than an EIS (id.).

F. State, Local and Regional Permits

As noted above, Cape Wind stated that there have been no changes in facts attributed to the Company or otherwise referenced in the Original 2005 Approval or the 2009 Certificate Approval decisions with regard to state, local and regional permits and approvals included in the Certificate. Mr. Duffy also noted that with the inclusion of the nine state, local and regional permits and approvals in the Certificate issued by the Siting Board, there was no need for Cape Wind to review any regulatory changes that might have otherwise affected such permits and approvals, if issued by the respective agencies rather than the Siting Board (Tr. at 122-123). Although he did not conduct a specific evaluation of possible changes in background conditions or the regulations at the local, state, and regional agencies that would ordinarily issue permits and approvals included in the Certificate, Mr. Olmsted indicated that he is familiar with this information and did not believe that any significant changes had taken place (Tr. 122-123; Tr. 293-294). He attributed his command of this information to his involvement with the Cape Wind Project for the past 16 years, and his role in supervising studies done for Cape Wind until a year ago (Tr. at 292-294).

G. Project Cost

Cape Wind testified that the cost of the Project has been reduced since the Original 2005 Approval. In 2005, the cost of all jurisdictional transmission facilities was estimated at \$79.5 million (Exh. EFSB CW-15). Mr. Duffy testified that the current cost estimate of those facilities was now only \$63 million, largely due to a 50 percent reduction in the price of copper (*id.*; Tr. at 34). He added that cost reductions would affect the alternative transmission solutions to the Project and route alternatives to the preferred route proportionately, so the Project would remain less costly than project and route alternatives considered in the Original 2005 Approval (Tr. at 114-115). Mr. Duffy also testified that some of the costs associated with the wind farm were likewise significantly lower than at the time the PPAs were negotiated in 2010 and 2012, given decreases in the cost of raw materials like copper and steel and the costs of foundations (Tr. at 35; Exh. EFSB CW-15). The cost of wind turbines in the global market has also gone down because of the more favorable exchange rate for the dollar compared to other currencies (Tr. at 35; Exh. EFSB CW-15).

III. EXTENSION DECISION

A. Standard of Review

In evaluating the 2015 Extension Request, the Siting Board will balance the interests of the public, the Company, and the parties to the proceeding, to determine whether good cause exists to extend the Approvals. Brockton Power, LLC, EFSB 99-1A, 14 DOMSB 140, 149 (2003); Sithe West Medway Development LLC, EFSB 98-10, 14 DOMSB 14, 17 (2003). To determine whether good cause exists for an extension, the Siting Board will determine: (1) whether there have been changes either in background conditions (e.g., land use surrounding the project) or applicable regulations, sufficient to alter the underlying assumptions upon which the Siting Board based its approvals; and (2) whether the length of the requested extension is reasonable. Only after such an inquiry will the Siting Board have sufficient information to balance the interests of the public, the parties, and the Company. Brockton Power, LLC, EFSB 99-1A, 14 DOMSB 140, 149 (2003); Sithe West Medway Development LLC, EFSB 98-10, 14 DOMSB 14, 17 (2003).

B. Position of the Parties

1. Cape Wind

In its Initial Brief, Cape Wind asserts that the “evidence confirms that [Cape Wind’s] request is in full compliance with the EFSB’s well-established standard applicable to extensions of previously granted approvals” (Cape Wind Brief at 1). Cape Wind notes that BOEM has granted its own two-year extension by suspending the offshore lease for two years (*id.* at 2). In addition, Cape Wind argues that the Alliance and Barnstable (collectively referred to as the “Opponents” by Cape Wind) should not be rewarded by deliberately causing the Project to be delayed and then objecting to an extension made necessary by that very delay (*id.*).

Cape Wind notes that Mr. Olmsted reviewed the assumptions and findings in the Approvals, and based upon his considerable knowledge of the Project, concluded that background conditions had not changed in a way that would alter any of the Siting Board’s assumptions and findings (Cape Wind Brief at 4-5). Cape Wind argues that the Siting Board agreed that its assumptions and findings were not changed in November 2014 when it issued the 2014 Project Change Approval (Cape Wind Brief at 3-4). Cape Wind adds that the Opponents did not allege any changes to background conditions and that the record confirms that there have been no

changes to background conditions (id. at 4). Cape Wind claims that its conclusion of no changes in background conditions is validated by the NEPA process conducted by BOEM, including the Final EIS in January of 2009 and three EAs approved by BOEM in 2010, 2011, and 2014 (id. at 5-6).

Cape Wind argues that the Siting Board's review of background conditions is restricted to environmental impacts, and that inquiry into the need of the Project, while proper in the initial review by the Siting Board, is not proper when considering an extension request (Cape Wind Brief at 20-21). In addition, Cape Wind asserts that the Opponents' evidence and arguments relating to the obstacles facing the wind farm are not relevant to the Siting Board's Standard of Review in this proceeding, and in any event, given the wind farm's proposed location in federal waters, are beyond the scope of the Siting Board's authority (Cape Wind Brief at 12, 20-21).¹³

Cape Wind asserts that it meets the second element of the Standard of Review by showing that the requested two-year extension is reasonable (id. at 9). The two pending appeals have an uncertain timeline, and then financing and ordering equipment must occur before construction begins, making "a two-year period a reasonable, if not modest, request" (id. at 9-10). In Cape Wind's view, the BOEM lease extension and the ISO-New England two-year extension of some of the milestones required by its interconnection agreement confirm the reasonableness of its Siting Board request (id. at 11-12).¹⁴

Cape Wind states that it will "do all within its control to commence construction sooner than by the end of the requested two-year extension period" but if it cannot, it likely would qualify for another extension (id. at 10). In its Reply Brief, Cape Wind goes even further and suggests that, if Siting Board believes Opponents will be able to delay beyond May 2017, then the Siting Board should grant a longer extension to avoid the potential for repeated extensions (Cape Wind Reply Brief at 4).

¹³ Although not relevant to this proceeding in Cape Wind's view, it disagrees with the Opponents' assessments that the obstacles facing the Cape Wind Project are insurmountable (Cape Wind Brief at 12-20).

¹⁴ ISO-New England granted Cape Wind a two-year extension of the deadline for it to achieve commercial operation status under its interconnection agreement (Tr. at 291, 295; Cape Wind Exhibit-1, and Cape Wind Exhibit-2).

2. The Alliance

The Alliance argues that Cape Wind has not offered any credible evidence that it will be able to begin construction of the Cape Wind Project by May 1, 2017 (Alliance Brief at 1-3). In the view of the Alliance, the evidence shows that Cape Wind currently lacks many of the federal permits needed to construct the wind farm, and that Cape Wind has not shown that it will be able to obtain the necessary permits, an off-take arrangement or construction financing at any time, much less by May 1, 2017 (Alliance Brief at 3-10).

The Alliance agrees with the Presiding Officer that it is proper in this proceeding for the Siting Board to examine the likelihood that the wind farm would contribute to the regional energy supply (Alliance Brief at 12-13). The Alliance notes that once the Siting Board found that Cape Wind satisfied Condition D, no further legal impediments would prevent the Company from constructing the Project, even if the wind farm does not go forward, despite Cape Wind's assurances to the contrary (Alliance Brief at 13-14). As such, the Alliance asserts that the Siting Board must re-evaluate its approvals to guard against the construction of unneeded transmission facilities.

The Alliance contends that Cape Wind's lack of progress in financing and permitting the wind farm is a changed condition that the Siting Board should consider in deciding this case (id.). Even when the Company had the PPAs, it could not complete project financing, and now the PPAs are terminated (id. at 15-18). Many of the federal permits require renewal or even re-application; some require additional NEPA review, either EAs or supplemental EISs; and all may be subject to further judicial review (id. at 24-43).

The Alliance points out that Cape Wind's proposed extension date was only 15 months away when initial briefs were filed, and it contends the evidence indicates that it is impossible for Cape Wind to begin construction by May 1, 2017 (id. at 45). The Alliance argues that Cape Wind has not even attempted to demonstrate that the length of its request is reasonable, as shown by its witnesses' refusal to prepare a current project schedule (id.). The Alliance concludes that this failure, by itself, warrants denial of the 2015 Extension Request (id.). The Alliance adds that denial is also warranted because Cape Wind has been given multiple extensions by the Siting Board and the legislature, which make the record the Siting Board is being asked to rely on in this

proceeding stale – especially the record relating to the 2009 Certificate Approval that the Siting Board used to override regional and local permitting agencies (id. at 46-47). The Alliance notes that, with each year that passes since the Certificate issuance in 2009, “the risk increases that there will be material changes occurring in environmental, health or safety-related conditions or applicable laws that should be considered” (id. at 47).

In its Reply Brief, the Alliance asserts that the Siting Board should deny the extension because background conditions have changed such that the evidence indicates that the wind farm is not likely to contribute to the regional energy supply (Alliance Reply Brief at 6-19). The Alliance responds that Cape Wind’s claim that the length of its request is “modest” does not make it reasonable (id. at 19-20). The Alliance states under such reasoning, Cape Wind could achieve an infinite number of short, yet unrealistic extensions (id. at 20).

3. Barnstable

Barnstable argues that Cape Wind bears the burden of proof in this proceeding, yet the Company “has utterly failed” to do so (Barnstable Brief at 2). Barnstable contends that Mr. Olmsted’s testimony demonstrates that Cape Wind did not adequately review the background conditions of the Approvals (id. at 3). In Barnstable’s view, this lack of due diligence is particularly troubling as to the state permits issued by the 2009 Certificate Approval, as those permits included ongoing mandates, updates, or conditions imposed by the underlying agencies that have not been observed by Cape Wind (id. at 2-3). For example, Barnstable asserts that, without the Falmouth marina facility, Cape Wind no longer has an adequate OSRP, a requirement of the 401 Water Quality Certificate, one of the nine permits granted by the Siting Board in the 2009 Certificate Approval (id. at 4-5). Barnstable also questions whether Cape Wind has fulfilled the requirements of its Chapter 91 License, including the payment of specified fees (id. at 4-5).

In its Reply Brief, Barnstable argues that, with the PPAs now terminated, Cape Wind is not likely to obtain any off-take arrangement (Barnstable Reply Brief at 1-3). Barnstable asserts that Cape Wind’s requested extension date is unrealistic, and that the Company has presented the Siting Board with no credible evidence that would allow the Siting Board to find the length of the request to be reasonable (id. at 8-9).

4. Other Briefs and Comments

Massachusetts Fishermen's Partnership, Inc. and the Massachusetts Competitive Partnership filed briefs, both arguing that Cape Wind had failed to meet the applicable Standard of Review and that the 2015 Extension Request should be denied.¹⁵ In January 2016, the Mayor of New Bedford, Conservation Law Foundation, Massachusetts Audubon, and the Environmental League of Massachusetts submitted comments supporting Cape Wind's request for extension. Also in January 2016, the Cape Cod Commission filed comments opposing the extension.

C. Analysis and Findings

1. Changes to Background Conditions and Regulatory Context

All parties agree that changes to the environmental impacts caused by the Project would be "background conditions" that should be considered in determining whether the assumptions and findings made by the Siting Board in its earlier Approvals are still valid. Cape Wind is correct that Mr. Olmsted testified that he knew of no facts related to the Project that would alter any of the Siting Board's assumptions and findings, and that the Alliance and Barnstable did not offer any evidence that the Project will cause more, or even any different, environmental impacts. This evidence, and lack of evidence, leads Cape Wind to conclude that background conditions have not changed the Siting Board's analysis related to environmental impacts.

The problem with Cape Wind's position is that the evidence it has provided regarding the absence of changes in background conditions relied upon by the Siting Board in its Approvals is devoid of rigor or detailed analysis. In Mr. Olmsted's responses to Information Requests pertaining to background conditions, the answers are superficial and conclusory and reveal no specific collection of any environmental data or updated analysis of environmental information presented to or considered by the Siting Board in its Approvals. Instead, Cape Wind offered only the general impressions of Mr. Olmsted, who acknowledged that he did not do any additional

¹⁵ In May 2015, both Massachusetts Fishermen's Partnership, Inc. and the Massachusetts Competitive Partnership filed petitions to participate as limited participants and comments opposing the Extension Request. Both petitions to participate as limited participants are granted. On January 15, 2016, the Town of Yarmouth requested to participate as a limited participant. The Town of Yarmouth's limited participant request is also granted.

investigation of the Project's background conditions on land or undersea for the 2015 Extension Request, and instead, simply relied on general knowledge from his long tenure with the Project.

Similarly, Cape Wind did not contact other state agencies to determine whether background conditions in the areas of expertise relevant to those agencies (e.g., endangered species) had changed, or whether applicable laws or regulations had changed. For instance, even though the 2007 NHESP determination of no "take" of any state-listed rare species includes a statement that the Division of Fisheries and Wildlife may want to review its determination if construction does not start within three years, Cape Wind did not contact the Division about any additional review of the NHESP determination, even though almost eight years had elapsed by the time the 2015 Extension Request was filed.

Also troubling is Cape Wind's failure to contact the state agencies with jurisdictional responsibility relating to the four state permits granted by the 2009 Certificate Approval, or at least to review the underlying regulations and either indicate that the Project still satisfies the relevant agency regulations or that the Siting Board should now exempt Cape Wind from complying with them pursuant to an extension of the Certificate. In no way did the Siting Board previously exempt the Project from complying with the applicable state regulations; the 2009 Certificate Approval simply adopted the permits as submitted by the Massachusetts Department of Environmental Protection ("MassDEP") and the Executive Office of Transportation, now reorganized as the Massachusetts Department of Transportation ("MassDOT") (G.L. c. 6C, §§1-73). 2009 Certificate Approval Exhibit A, at 3. Because the Siting Board did not exempt Cape Wind from MassDEP and MassDOT requirements in granting the Certificate, Mr. Duffy was mistaken when he concluded that the Company did not need to evaluate the current MassDEP and MassDOT regulations and determine whether they presented any changes that could affect the Project.

Cape Wind's assertion that the 2014 Project Change Approval supports its conclusion that background conditions have not changed is also misplaced. In that proceeding, Cape Wind proposed some changes to Barnstable Switching Station made necessary by a new interconnection study by ISO-New England. However, the Siting Board's investigation of the Project Change was limited only to an examination of how the changes at the switching station would affect the

balance of reliability, cost and environmental impacts previously found. The Siting Board did not review the surrounding conditions of two proposed transmission lines beyond the entry point to the switching station.

While considering whether the proposed changes would cause additional impacts, the Siting Board did gather evidence about the current “background conditions” associated with the Barnstable Switching Station, and found that those conditions had changed since the earlier Siting Board proceedings. A new residential apartment development that would abut the station was then under construction, and potential new residents could have been impacted (2014 Project Change Approval at 7-8). In addition, considerable tree clearing had occurred in anticipation of the apartment construction (id.). The Siting Board did consider these new background conditions associated with the Switching Station. However, the Siting Board did not consider whether the background conditions of the entire Project had changed in a way that would alter the assumptions and findings of the Siting Board in its earlier decisions.

Cape Wind also asserts that the Siting Board’s existing Standard of Review precludes examination of non-environmental findings relied upon by the Siting Board in its Original 2005 Approval, such as those related to the need for the Project. As a consequence, Cape Wind objected to evidence introduced on the subject of federal permits and financing of the Cape Wind Project. However, such evidence is relevant to finding that the wind farm, as the interconnecting generating facility, is likely to contribute to the regional energy supply – a necessary finding in the Original 2005 Approval intended to prevent the proposed transmission lines from being built unnecessarily.

Cape Wind’s narrow reading of the term “background conditions” is misplaced. The Siting Board imposes time limits on its approvals for the construction of energy facilities in recognition of the fact that the passage of time could alter some or even many of the Siting Board’s key findings or assumptions. Cape Wind does not offer any compelling reason why such potential changes should be restricted to changes associated with environmental impacts. Indeed, logic dictates that “background conditions” should not be so limited. Obviously, if an energy facility is no longer needed three years after the Siting Board approved its construction, the Siting Board should not extend its approval of the facility, even if environmental impacts are unchanged. Accordingly, the Board does not agree that “background conditions” in its Standard of Review are

restricted to environmental conditions, and the Presiding Officer was correct to gather evidence relevant to whether the wind farm is likely to contribute to the regional energy supply.

In the Original 2005 Approval, the Siting Board stated that, because the wind farm was in the early stages of the permitting process, the Siting Board “cannot yet find that the wind farm will be available to contribute to the regional energy supply.” Original 2005 Approval at 20. To make such a finding, the Siting Board concluded that Cape Wind would have to acquire “all permits required ... to begin installation of wind farm equipment in Nantucket Sound.” Id. at 20-21. As mentioned above, this requirement became Condition D, and the Siting Board determined on September 14, 2012 that Cape Wind satisfied the Condition.

The evidence in this proceeding still precludes a finding that the wind farm is likely to contribute to the regional energy supply. Several of the federal permits have lapsed or expired. By Cape Wind’s own admission, the appeal in the D.C. Circuit Court of Appeals of the BOEM offshore lease, as well as the Barnstable appeal, need to be resolved before Cape Wind will be able to finance the wind farm. Financing also depends on Cape Wind obtaining some sort of off-take arrangement for the power generated by the wind farm, although pending legislation in the General Court is currently the only opportunity Cape Wind sees for any such arrangement. Such legislation may provide Cape Wind with only the opportunity to compete against other potential bidders, not a guarantee of new PPAs to replace the ones that Cape Wind belatedly has acknowledged are no longer in effect after thirteen months of its assertions to the contrary without taking any legal action to affirm its view.

It should be obvious that Condition D has failed to serve its intended purpose. Cape Wind satisfied the Condition in 2012, and presently, the wind farm does not seem likely to contribute to the regional energy supply. Nevertheless, the Siting Board does not agree with the Alliance and Barnstable that the inability to make a finding that the wind farm is likely to contribute to the regional energy supply by itself warrants a denial of an extension to construct the transmission lines necessary to interconnect the wind farm. Even though Condition D failed to achieve its intended purpose, the Siting Board is confident that it could devise another condition in this proceeding that would adequately protect against the Project being built unnecessarily.

Unlike the prior Project extension granted by the Siting Board in the 2008 Project Change and Extension Approval, the present request involves more than just Section 69J – it is the first request ever presented to the Siting Board to extend a Certificate decision. The Siting Board has never extended any permit that it has issued using its authority under G.L. c. 164, § 69K. As discussed above, Cape Wind’s examination of the “background conditions” of the Certificate permits should have considered the underlying regulations behind the four state permits that the Siting Board did not “override.” As to the five local and regional permits for which the Siting Board did override the relevant issuing agencies, the Siting Board would be reluctant to extend those permits more than seven years after its Certificate decision, especially without greater analysis of the underlying regulatory requirements and issues than offered by Cape Wind in this proceeding.

As discussed above, Cape Wind’s proffered evidence that the “background conditions” relevant to the Siting Board’s review of the Project have not changed is unpersuasive. However, before the Siting Board can decide whether to grant the 2015 Extension Request, we must also consider the second part of the Standard of Review, that is, whether the length of the requested exemption is reasonable.

2. Reasonableness of the Extension Period

The evidence presented in this case is overwhelming that the requested extension until May 1, 2017 is not adequate given the numerous obstacles presently facing the Cape Wind Project. Almost half of the requested extension period has now elapsed since the Action by Consent was issued, and yet resolution of the obstacles that impede Project construction (and the Cape Wind Project, in general) seems even more distant with the termination of the PPAs, and regression by Cape Wind in its permitting and financing of the Cape Wind Project. Cape Wind hopes the D.C. Circuit decides the BOEM lease appeal by May, but the Barnstable Appeal is not any closer to decision than when the 2015 Extension Request was filed. Cape Wind’s acknowledged lack of effort in attempting to expedite the SJC’s review of the Barnstable Appeal is both misguided and bewildering, and illustrates a complete lack of diligence in resolving what it claims in the 2015 Extension Request is the fundamental impediment to development of the Project. Compounding these difficulties is the strong possibility, as noted by the Alliance, of further legal action against

the Cape Wind Project regarding the Company's future attempts to modify, update and cure various permit deficiencies that have arisen in recent years.

Regardless of the pending and prospective appeals, the Cape Wind Project's financing depends on an off-take arrangement, and pending legislation is the only option for that put forward by Cape Wind. Not only must that legislation be enacted, but then a bid process must be developed, conducted, and won by Cape Wind. After that, Cape Wind would presumably be in a better position to secure its needed project financing, for which Cape Wind is hopeful that prior financial commitments to fund the Cape Wind Project could be restored. Following that milestone, the lead time for ordering, manufacturing and delivery of the wind turbine components would add another year before the construction of the wind farm could begin in earnest.

While Cape Wind insists that May 1, 2017 remains a reasonable extension period, it cannot provide any project schedule that it considers reliable. Indeed, in its brief, Cape Wind seems to realize that May 1, 2017 may not be a realistic extension period because it also mentions it would likely qualify for additional extensions after that date (Cape Wind Brief at 10). In its Reply Brief, Cape Wind goes even further and suggests that, if the Siting Board believes that construction might be delayed beyond May 1, 2017, then the Siting Board should grant an even longer extension period to avoid the need for repeated extension requests (Cape Wind Reply Brief at 4). The lack of progress, and indeed regression, during Cape Wind's interim extension over the past year (pursuant to the Action By Consent) are instructive. Under the interim extension, the Siting Board has already provided almost half of the time sought by Cape Wind with the 2015 Extension Request, and yet the Cape Wind Project appears no more likely to contribute to the regional energy supply than the day the 2015 Extension Request was filed.

The 2015 Extension Request is vastly different than Cape Wind's first extension in 2008 and the other extension requests cited above as Siting Board precedent. Those requests occurred just before the initial three-year approval condition had lapsed. In this proceeding, more than twelve years have passed since the evidentiary record closed in the Original 2005 Approval, and almost eleven years since the Final Decision itself. And yet, the requested extension, that would bring us to twelve years after the Original 2005 Approval appears unlikely and insufficient to enable the Company to commence construction of the Project in tandem with the wind farm also

moving forward. Moreover, as correctly noted by the Alliance, having satisfied Condition D in the Original 2005 Approval, Cape Wind could potentially build the transmission line, even if the wind farm were not built. Although Cape Wind contends it would be commercially implausible, this scenario presents precisely the potential outcome that the Siting Board took pains to avoid in its prior decisions – an unnecessary transmission line with its attendant costs and potential construction and permanent impacts.

In view of the considerations above, the Siting Board finds that an extension to May 1, 2017 would be unreasonable. At this time, Cape Wind needs a lengthy, almost open-ended extension period. An open-ended extension obviously would be unreasonable. Any extension of the magnitude needed here, especially in light of the minimal investigation and review by Cape Wind for this proceeding, likewise would be unreasonable.

The Siting Board's statutory mission is to provide a reliable energy supply with a minimum impact on the environment at the lowest possible cost. G.L. c. 164, §§ 69H and 69J. In doing so, the Siting Board must conduct a thorough examination of the facts and carefully balance its statutory objectives. At some point, such as where the Siting Board now stands with respect to the Project, the validity of record used in that examination becomes unreliable and untenable with the prolonged passage of time. In such extreme circumstances, as in this proceeding, extensions of prior approvals must cease and a project proponent must start the process anew for a project to merit Siting Board approval.

3. Conclusion

After considering all the evidence in this proceeding, and balancing the interests of the Company, the parties and the public, the Siting Board denies the 2015 Extension Request.

_____/s/
James A. Buckley
Presiding Officer

Dated this 29th of March, 2016