

COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

In re: Park City Wind, LLC)	EFSB 20-01, DPU 20-56; 20-57
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**PETITION OF THE TOWN OF BARNSTABLE TO INTERVENE AS A PARTY
PURSUANT TO M.G.L. c. 30A, § 10 AND 980 CMR 1.05**

and

**MOTION TO RE-OPEN HEARING
PURSUANT TO 980 CMR 1.09(1)**

I. INTRODUCTION

The Town of Barnstable (“Town”) respectfully petitions to intervene as a Party in the above-entitled matter pursuant to M.G.L. c. 30A, § 10 and 980 CMR 1.05(1)(b).

Provided that the Town is admitted as a Party, the Town also respectfully moves to re-open the hearing in this matter pursuant to 980 CMR 1.09(1) for the purpose of receiving limited evidence, much of it documentary, on four narrow issues as more fully described below.

The Town acknowledges that the deadline for intervention in this proceeding was in the fall of 2020. However, good cause exists to allow the Town to intervene today, not to relitigate matters that the Presiding Officer has already heard, but rather to ensure that the Town can be heard on discrete matters that have arisen only due to the passage of time and that neither the project proponent nor the Town could have anticipated in 2020. Intervention will enhance the Board’s ability to ensure that the information before the Board is accurate and complete, and promote the public legitimacy of the Board’s proceedings by granting the municipality in which the project is proposed the right to be heard.

II. MOTION TO INTERVENE

a. The Town's Motion Complies With the Requirements of M.G.L. C. 30A, § 10 and 980 CMR. 1.05 (1)(B)

1. The Petitioner is the Town of Barnstable, a Massachusetts municipal corporation. The official address of the Town is c/o Barnstable Town Manager, Barnstable Town Hall, 367 Main Street, Hyannis, MA 02601.
2. The manner in which the Town is substantially and specifically affected by the proceeding includes, but is not limited to, the following:
 - A. The Petitioner, Park City Wind, LLC ("PCW"), seeks to lay its transmission cables in the Town's navigable waters, under and across the Town's beaches, and under the Town's public roads and lands.
 - B. PCW seeks to construct an electric substation in the village of Centerville and to connect that substation to a nearby NSTAR (d/b/a Eversource) substation at the junction of Oak Street and Route 6 in Barnstable.
 - C. PCW and the Town have executed a Host Community Agreement ("HCA"), which the Town seeks to have entered into the record of these proceedings. The Town also seeks to have the HCA's content adopted and incorporated by reference as the minimum standards for protection of environmental resources and public safety, particularly with respect to the construction, operation, maintenance and reporting requirements in connection with proposed substations, as part of any final decision which the Board may enter in this matter. The text of the HCA obligates the Town "to publicly support the [project] in its permitting, construction, operation, and maintenance" and obligates PCW "to support any motion or request made by the Town to the Siting Board to incorporate the conditions contained in [the HCA] as conditions of any Final Order of the Siting Board in the proceeding." HCA ¶¶ 8(c), 17.
 - D. PCW's proposed substation will contain equipment that is filled with substantial quantities of hazardous dielectric cooling fluids which, if released, will pose a significant risk to nearby surface waters and public water wells, as the proposed location of the substation is within a Groundwater Protection Zone where the storage of hazardous materials is prohibited under the Town Zoning Ordinance. The HCA sets industry-leading protocols, design standards, and other protections for the Town's water supply that the parties have agreed should control the design, construction, operation, and maintenance of the subject substation.

- E. With the Town’s full cooperation, PCW sought and received legislative approval under Article 97 of the Amendments to the Constitution of the Commonwealth for the Town to grant an easement under Town-owned recreational lands at Craigville Beach in the Village of Centerville.
- F. The Town’s Conservation Commission has held hearings on PCW’s Notice of Intent to construct its facilities within the boundaries of the Town. The Conservation Commission has issued and filed an Order of Conditions pursuant to M.G.L. c. 131, section 40, and the Town’s Wetlands Ordinance that will bind aspects of PCW’s construction, maintenance, repair, and monitoring activities for the life of these facilities.
- G. PCW seeks to override numerous Zoning Ordinances of the Town in order to enable its project to proceed.

b. Good Cause Exists to Allow the Town’s Intervention at This Time and There Would Be No Prejudice to Any Party

At the time this proceeding began in 2020, and through the fall 2020 deadline for intervention, the Town and a predecessor entity to PCW were parties to a first Host Community Agreement. That agreement was ultimately restated and updated and memorialized in a May 2022 Second Host Community Agreement (the “HCA”). The HCA provides strong protections for the Town and committed the Parties to, among other things, “notify the other [Party] of any facts, circumstances, information, or developments that a reasonable observer would deem material to the Town’s or PCW’s interests, including, without limitation, environmental considerations.” HCA ¶ 15.

Relying on the comprehensive nature of the HCA and its strong disclosure requirements, the Town did not intervene by the fall 2020 deadline. This decision was based on the Town’s reasonable belief that the project would proceed apace and construction would commence in a timely manner. That belief, while reasonable at the time, has proven to be inaccurate. The passage of time and the project’s current status present three reasons that demonstrate good cause for the Board to allow intervention.¹

¹ The Town suggests that the Board adopt a “good cause” standard for allowing intervention at this time. The fall 2020 deadline was not statutory or regulatory in nature; rather, it was established by the Board in its notice of adjudication. Accordingly, 980 CMR 1.03(7) governing time limits “prescribed or allowed in 980 CMR” does not apply, and an extension of

First, with PCW's Power Purchase Agreement (PPA) with Connecticut utilities voluntarily and recently terminated, the entire purpose of the HCA and the project has been called into question. The Town entered into the HCA and declined to intervene in this proceeding in 2020 in part because PCW held the promise of timely contributing renewable energy to the regional grid. That flow of renewable energy is no longer imminent, and the delay in the construction schedule will have significant negative impacts on the Town, including environmental and financial impacts, that could be mitigated by the Board.

The Town and PCW had coordinated efforts for the construction of sewers by the Town, to be immediately followed by PCW's installation of its cable and conduit. This work was to take place in the spring of 2024, including permitting and financing of the sewer installation through the State Revolving Fund. While PCW reportedly will re-bid in Connecticut, Rhode Island, and Massachusetts procurements,² the only bid selection date currently reported by the media is the Massachusetts award anticipated in June 2024. Any award will be followed by contract negotiations, Department of Public Utilities review and approval of the contract in Massachusetts (and possibly Rhode Island and Connecticut). Financing will then need to be finalized, equipment ordered, to be followed by commencement of actual construction. These efforts could easily consume another 18 – 24 months, if not longer.

The Town has embarked on the first phase of sewer installations pursuant to a Comprehensive Wastewater Management Plan ("CWMP") approved by the Department of Environmental Protection ("MassDEP"). Because PCW's preferred upland cable route is in part identical to the Town's sewer installation route, PCW requested, and the Town agreed to re-prioritize its sewer installation schedule to advance the Centerville sewer installations to be coincident with PCW's intended (but now impossible) 2024-2025 construction schedule. The coordinated construction project called for by the HCA would thereby avoid having to excavate major roadways twice at great inconvenience to the public and at significantly increased costs to both PCW and the Town.

The delay to PCW's intended schedule caused by the termination of PCW's PPA, the need to re-bid, etc. will likely require that the Town revert to its prior schedule in order to stay on track with CWMP performance dates and with very aggressive timelines imposed by MassDEP's recently revised Title V septic regulations. The Town cannot stand by indefinitely while PCW considers and pursues its options over an indefinite time period. The failure of the Town to meet construction deadlines required by the CWMP and the new Title V regulations could have

time may be granted even though the original deadline has passed. Even if 980 CMR 1.03(7) did apply, the Presiding Officer may waive its requirements for good cause. 980 CMR 1.02(1).

² See "Supplemental Brief of Park City Wind, October 13, 2023, page 3, filed in the instant matter.

significant financial consequences for the Town and its residents and could reinvigorate new litigation against the Town.

Second, despite the broad disclosure requirements in the HCA, PCW failed to notify the Town of a material change in use of 2 Short Beach Road, Centerville, a residentially zoned parcel on the Centerville River. Given the type and duration of construction proposed at this site, the Town does not support this proposed use. The environmental impacts of PCW's proposal, which are not covered by the HCA, are an appropriate area of inquiry for the Board and could be the subject of conditions attached to a final decision.

The change in PCW's use of 2 Short Beach Road, Centerville is, beyond debate, a material change that has short and long-term environmental consequences. The Town Manager first learned of this proposed change in June 2023, when PCW filed a Notice of Intent ("NOI") under the state Wetlands Protection Act and the Town's Wetlands Ordinance with the Town's Conservation Commission to use 2 Short Beach Road as a staging area to tunnel under the Centerville River. The filing of the NOI occurred 12 months after the Board had concluded hearings and closed the record. This failure of notice prejudiced the Town's interests because, by the time that the Town Manager learned of the changes in staging and drilling plans, the Board's public hearing process had closed without this material change having been considered as part of the record. This significant environmental impact is worthy of the Board's consideration, and the Town is best positioned to provide the Board with accurate and complete information regarding the proposed use of 2 Short Beach Road.

Early in the Town Manager's consultations with PCW's predecessor, Vineyard Wind, its staff represented that all underground drilling from Craigville Beach to a point north of the Centerville River would be staged from Craigville Beach. The Town Manager relied on this representation and on the obligation of PCW under the HCA to notify him of material changes to the tunneling. Instead, without informing the Town, PCW redesigned its drilling plan under the Centerville River so that it will be staged from 2 Short Beach Road, a lot within a residential subdivision, on the banks of the Centerville River, and immediately next to a highly utilized bike and walking path. The deep excavation will consume virtually the entire residential lot and will require closing the bike and walking path for an extended time. The proposed duration of the proposed construction is also of concern as this is a residential neighborhood.

When this issue was brought to the attention of PCW by the Town, PCW at first denied that it had failed to notify the Town Manager of the proposed change. However, after checking its meeting notes, PCW confirmed that PCW had indeed failed to notify the Town Manager of this material change. Had the Town Manager been notified, the Town would have opposed this change before the Board earlier.

Third, on September 13, 2023, the National Heritage and Endangered Species Program within the state Division of Fisheries and Wildlife (“NHESP”) issued a permit to the Town under the Massachusetts Endangered Species Act (“MESA”) that applies in part to the PCW shore landing site³. The permit bans the take of endangered species, which occupy the landing site seasonally, and establishes management obligations for the Town. The Board should consider whether PCW’s MESA and other permits and its proposed construction activities may cause a violation of the Town’s MESA permit or otherwise violate the Town’s MESA permit, and the Board should impose appropriate conditions to ensure a take or any other permit violation does not occur. This MESA permit did not exist at the outset of this proceeding.

The Board should weigh this significant good cause against the potential for prejudice to other parties. Potential prejudice is minimal. As discussed, PCW has voluntarily terminated its PPA with Connecticut utilities. It appears that Massachusetts will be accepting bids in its Round Four offshore energy procurement until January 2024. It also appears that Massachusetts will not select a winning bid before June 2024.

Further, the Board has not rendered a decision on the merits of this matter, and as recently as October 13, 2023, PCW was actively responding to Board Record Requests with the filing of an extensive brief on the effects of its PPA termination. With at least eight months until a bid is selected under the fourth procurement, the Board has ample time to re-open the record, hold a relatively brief hearing to consider the merits of the Town’s opposition to the use of 2 Short Beach Road for staging, and to amend any draft decision accordingly.

For its part, the Town would be prepared to move quickly into hearings after consultation with the hearing officer. The necessity of receiving evidence on these new issues, combined with the Town’s unique ability to assist the Board in gathering that evidence and ensuring that local voices are fully heard far outweigh any potential prejudice to any existing party to this proceeding.

III. MOTION TO REOPEN HEARING

Should the Board allow intervention, the Town moves that the Presiding Officer reopen the hearing in this matter to address four discrete issues: (1) whether to establish performance deadlines to require PCW to demonstrate its ability to timely contribute renewable energy to the regional grid via permits, PPAs, and financing in view of the termination of the PPA with Connecticut; (2) the increased environmental impacts resulting from (a) PCW’s apparent inability to coordinate construction with the Town’s sewer work; and (b) PCW’s new proposed

³ The Town’s MESA permit and conditions are attached as Exhibit 1.

use of 2 Short Beach Road; (3) coordination of conditions in any final decision with the Town's MESA permit; and (4) incorporation of the HCA in the conditions of any final decision.

1. Performance Deadlines

The HCA sets forth in its "Statement of Purpose" that:

The Town wishes to support PCW in launching this important project, which will contribute to the region's renewable energy supply and bring significant revenue to the Town.

The Town's support for this project was based in part on its understanding that this project will timely contribute to the region's renewable energy supply. At the time the HCA was executed, PCW had a valid PPA. That is no longer true. Accordingly, neither the Commonwealth of Massachusetts, the Board, nor the Town should indefinitely be held to a commitment to burden Town property with easements or grants of location for a project whose financial viability is uncertain.

In response to the Board's recent Records Request inquiry to PCW on exactly this question, PCW's October 13, 2023, supplemental brief to the Board argued that PCW's permitting accomplishments were sufficient evidence of progress to justify that the EFSB issue a decision in that case. PCW's response, however, begs the larger question, i.e., when will PCW be able to demonstrate its ability to meet intent of the HCA's Statement of Purpose clause of the HCA as well as its obligation to the Commonwealth to demonstrate that it will contribute to the region's renewable energy supply?

The sense of urgency that PCW argues in its brief is seriously undermined by reported statements by Avangrid's Chief Executive Officer (CEO). In a recent article in Commonwealthbeacon.org, headlined "Avangrid says it terminated offshore wind contracts at 'minimum cost'", Avangrid's CEO, Pedro Azgara, was asked whether the company could rebid the terminated projects at rates acceptable to both Avangrid [PCW's parent company] and utility ratepayers. Azgara reportedly responded that the answer will be determined "on a case-by-case basis". Specifically, he was quoted in the article as saying:

We will [not] run risk. We're not going to put in danger the financial health of the company. That's it.

Will this continue? Well, sometimes things stop for a year, *sometimes they stop for five years or three years*. [Emphasis supplied.] But in our case what we're not going to do at all is to put at risk billions of dollars coming from our shareholders and lenders and basically get not only angry but get Iberdrola [the parent

company of Avangrid] in danger. That's not how we do business. In our case, we will go case by case.⁴

The Board has recently issued a Record Request to PCW with respect to the effect of PCW's termination of its PPA in Connecticut. Most certainly, the PPA termination is a change in 'background conditions'⁵ that occurred outside of the existing record, which would and should affect the Board's assumptions and conclusions as it crafts a final decision in this case.

In light of these realities, it is the Town's position that the Board should set a performance date for PCW to demonstrate that it has all federal permits in hand, that it has a valid and binding Power Purchase Agreement for its renewable energy output, and that it has binding financial commitments sufficient to assure the Board that the project will be completed in a timely manner. Failing such a demonstration and applying the Cape Wind permit extension standard⁶, the Board should consider whether the Board's proceedings in this matter should continue or be terminated. Alternatively, should the Board issue a decision approving the certificate, the approval should be contingent upon such a demonstration by a date certain after which the Board's certificate should lapse.

PCW's termination of its PPA last month is clearly a material development that warrants re-opening hearings to determine whether changed circumstances outside of the current record should modify the Board's assumptions that PCW would be able to timely deliver renewable energy to the regional grid following any final decision of the Board. As part of such reexamination, the Town will urge that performance dates be set for PCW to demonstrate to the Board that its project will come online and be available to deliver renewable energy to the grid by a date certain.

If PCW wins the competitive bid and is able to proceed to the next steps in the process, the start of project construction is at least two years away, and probably longer. However, the resulting negative impacts to the Town's vital sewer installation schedule as part of the Town's MassDEP-approved Comprehensive Wastewater Management Plan must be better understood. It

⁴ See <https://commonwealthbeacon.org/environment/avangrid-says-it-terminated-offshore-wind-contracts-at-minimum-cost/>

⁵ The Siting Board must consider whether "background conditions" have changed to such an extent that further inquiry is warranted. If changes alter in any substantive way either the assumptions or conclusions reached in the Board's analysis of the project's environmental impacts in the underlying proceeding, then additional proceedings are appropriate. See EFSB 02-2B/EFSB 07-8A, Final Decision November 17, 2014, page 5.

⁶ The Cape Wind permit extension proceedings, EFSB 02-2C/EFSB 07-8B, affirmed that the PPA's offtake agreements and financing commitments are 'background conditions' relevant to determining whether a project will be available to contribute to the region's renewable energy needs. Cape Wind final decision, at page 22.

is unacceptable for PCW to expect the Town to wait for PCW to start construction, or for PCW to assume that it can proceed unilaterally with its project, to be followed at some point by the Town's sewer installation. The impacts to the Town residents and businesses that would result from two road projects on the same road would be completely unacceptable. The Town asks that the EFSB provide clarity to and resolve these conflicting needs. Alternatively, if PCW does not win the competitive bid, the Board should require specific timelines and deadlines for PCW's timely delivery of renewable energy to the grid.

2. Environmental Impacts

In order to carry out its statutory responsibilities, the Board must assess the environmental impacts of a proposed project. The delay in construction and the apparent inability of PCW to coordinate with the Town's sewer work will result in increased environmental impact. PCW's new proposed use of 2 Short Beach Road will also result in increased environmental impact. The Board should have a full record before it on these issues before making any decision. The Town is best positioned to help the Board assemble that record.

3. MESA Permit

The Town recently entered into a 5-year NHESP protection plan under the Massachusetts Endangered Species Act ("MESA") for endangered species which frequent Craigville Beach, including the extensive area where PCW will make landfall. The Town is concerned that PCW's proposed construction activities at Craigville Beach will cause a "take" or otherwise violate the Town's obligations under the MESA permit and requests that there be appropriate conditions imposed to ensure that that does not happen.

The Town requests that the Board re-open hearings in order to reconcile potentially conflicting permit conditions that may be included in the Board's final decision, and to ensure that a prohibited "take" or other permit violation will not occur.

4. HCA Incorporation

The Host Community Agreement should be entered in evidence before the Board, and its substantive content should be adopted as part of any final decision of the Board that allows Park City's project to proceed. The HCA expressly contemplates that the Town may request, and PCW will not oppose the entry and the Board's adoption of the HCA in its decision. The HCA provides,

PCW agrees to support any motion or request made by the Town to the Siting Board to incorporate the conditions contained in this Agreement as conditions of

any Final Order of the Siting Board in the proceedings. HCA, Section 17, page 16.

The content of the HCA is substantive and extensive. The HCA has independent legal standing and may be enforced contractually. Therefore, the Board should officially be informed of its content so as to avoid direct conflicts between the HCA and the Board's prospective decision and to reinforce, as minimum standards, the agreed upon provisions, as expressly contemplated by the HCA. To the extent more stringent conditions are warranted, the Board should treat the HCA as minimum standards for protection of environmental resources and public safety, particularly with respect to the construction, operation, maintenance and reporting requirements in connection with proposed substations.

* * * *

Even if the Town were not allowed to intervene, the importance of the issues raised here would warrant re-opening of hearings. Because no final decision in this matter has been issued, and because PCW has no valid PPA in place, the Town should be granted the opportunity to intervene because intervention will not delay PCW from proceeding if its bid is successful.

This petition lists a number of issues that qualify the Town as a necessary party in interest. As the host community with now-extensive experience with wind projects including the Vineyard Wind and Cape Wind proceedings, the Town has previously been allowed to intervene in past wind proceedings as a party. In the instant matter, the Town has demonstrated that its interests qualify it for intervention, especially to address new matters that should be part of the record and included any decision that the Board may issue.

Respectfully,

/s/ Charles S. McLaughlin, Jr.

Charles S. McLaughlin, Jr.

Senior Counsel

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Town of Barnstable

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508-862-4620

Date: November 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the above document filed on behalf of the Town of Barnstable upon the attached Service List by electronic mail in accordance with the requirements of 980 CMR §1.03(4).

/s/ Marylou Fair

Marylou Fair
Town of Barnstable
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November 20, 2023