

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

SUFFOLK, ss.

SJC-12997

TOWN OF SUDBURY, PROTECT SUDBURY, INC.

Petitioners - Appellants,

v.

MASSACHUSETTS ENERGY FACILITIES SITING BOARD,

Respondent - Appellee.

On Reservation and Report from
the Supreme Judicial Court for Suffolk County

(On Appeal from a Final Decision of the Energy Facilities Siting
Board in EFSB 17-02/D.P.U. 17-82/83)

BRIEF OF *AMICUS CURIAE*,
NEW ENGLAND POWER COMPANY D/B/A NATIONAL GRID

Dated: February 5, 2021

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CORPORATE DISCLOSURE STATEMENTS

New England Power Company is owned by National Grid USA. National Grid USA is owned by various holding companies which are all owned by National Grid plc. National Grid plc is a private, investor-owned electric and gas utility that is traded on the New York Stock Exchange (NYSE: NGG). No publicly held corporation directly owns more than 10% of National Grid plc's outstanding ordinary shares.

Rule 17(c) (5) DECLARATION

Neither party, nor their counsel, authored this brief in part or in whole. Neither party, nor their counsel, contributed money that was intended to fund the preparation or submission of this brief. National Grid has not represented one of the parties to the present appeal in any other proceeding involving similar issues, nor in any proceeding that is at issue in the present appeal.

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INTERESTS OF AMICUS CURIAE

New England Power Company d/b/a National Grid ("NEP" or "National Grid"), is an "electric company" as defined in G.L. c. 164, § 1, and, as such, is authorized to transmit and distribute electricity within the Commonwealth. National Grid has a direct, immediate interest in the outcome of this case because a decision to overturn the final decision of the Massachusetts Energy Facilities Siting Board ("EFSB" or "Board") on the grounds advanced by the Town of Sudbury ("Town") and Protect Sudbury, Inc. ("PS") would have profoundly negative effects on National Grid's ability to timely, efficiently, and cost-effectively secure approval for and place into service the energy infrastructure needed to reliably serve its customers.¹

National Grid respectfully submits this brief in response to the Court's September 2, 2020 solicitation of amicus briefs to assist the Court in addressing the following issues:

Whether the final decision of the Energy Facilities Siting Board approving, with conditions, (a) a new underground transmission line located primarily in Sudbury and Hudson, within an inactive Massachusetts Bay Transportation right-of-way ("ROW") and an in-street segment; and (b) individual and comprehensive zoning

¹ National Grid affiliate Boston Gas Company also occasionally files applications with the Board for approval of jurisdictional facilities to upgrade its gas distribution system. The Board applies the same standard of review to jurisdictional gas projects and, therefore, the outcome of this case would also affect the cost and reliability of the gas distribution system.

exemptions from the zoning bylaws of the towns of Sudbury, Hudson, and Stow should be set aside.

STATEMENT OF FACTS

National Grid owns and operates an electric transmission system consisting of an integrated network of high-voltage overhead lines and underground/underwater cables.² These lines and cables transmit large volumes of power from generation plants over long distances via linear rights-of-way held in fee or by easement. Maintaining the continued reliability of this system requires that National Grid regularly appear before the Board. On average, each year National Grid submits to the Board one or two applications for approval to construct an energy facility and has submitted sixteen such applications in the past ten years. In these application proceedings, NEP bears the burden of establishing that its proposed project is needed and is, on balance, superior to alternatives in terms of reliability, environmental impacts and cost. NEP has sustained that burden in much the same way that NSTAR Electric Company d/b/a Eversource Energy ("Eversource") did here, including the

² The term "transmission" is defined in G.L. c. 164, § 1 as "the delivery of power over lines that operate at a voltage level typically equal to or greater than 69,000 volts from generating facilities across interconnected high voltage lines to where it enters a distribution system."

submission of the needs assessments of the Independent System Operator of New England, Inc. ("ISO-NE")³ as evidence of need; the evaluation of evidence regarding impacts to both the natural and social (or built) environment; and comparison of alternatives using conceptual-level cost estimates (-25%/+50%).

In NEP's experience, the Board's task in achieving its statutory mandate to select the superior alternative is neither formulaic nor rigid. The facts of each project differ and after carefully examining and weighing the evidence of need, impacts, cost and reliability, the Board makes reasoned judgments as to which alternative is, on balance, superior. This sometimes has resulted in the Board approving a more costly route that had fewer impacts and/or better reliability advantages,⁴ and at other

³ ISO-NE was created in 1997 by the Federal Energy Regulatory Commission to operate the New England region's electric transmission system; to design, run and oversee energy markets; and to conduct studies, analyses and planning to make sure New England's electricity needs will be met over the next 10 years. See ISO-NE "Our Three Critical Roles", <https://www.iso-ne.com/about/what-we-do/three-roles/>.

⁴ See, e.g., Colonial Gas Company d/b/a National Grid, EFSB 18-01, D.P.U. 18-03 (2019) (rejecting "significantly less expensive" alternative route with "comparable environmental impacts" because "it offers significantly lower reliability and operational benefits"); NSTAR Electric Energy Co. d/b/a Eversource Energy and New England Power Co. d/b/a National Grid, EFSB 15-04, D.P.U. 15-140/15-141 (2018) (approving more expensive Primary Route due, in part, to greater environmental impacts of Noticed Alternative Route).

times the opposite, the approval of a project that was less costly but slightly more impactful.⁵

In terms of need, most of NEP's siting applications involved so-called reliability projects, meaning that following a thorough, deliberate and iterative stakeholder process, ISO-NE determined that the project was needed to maintain the reliability of the electrical system serving the New England region. In each of those applications, NEP, without exception, relied heavily on ISO-NE's need assessment to sustain its burden of demonstrating that the project was needed. For its part, the Board has always found ISO-NE's need determination to be reliable and owed considerable weight. Importantly, however, the Board has never found ISO-NE's decision alone to be sufficient evidence of need. Rather, the Board always made its own inquiry via discovery and cross-examination of Company witnesses and other experts, including ISO-NE, as it did here.

National Grid was a member of the Working Group formed and led by ISO-NE that ultimately recommended a new transmission

⁵ See New England Power Company d/b/a National Grid, EFSB 10-1, D.P.U. 10-107/10-108 (2012) (approving project with somewhat greater environmental impacts because of cost and reliability advantages). The Board has also imposed additional costs where it thought doing so was justified to mitigate impacts. See New England Power Company d/b/a National Grid, EFSB 13-2, D.P.U. 13-151, 13-152 (2014) (required NEP to design and install equipment to reduce electromagnetic field levels at manhole locations).

line between Sudbury and Hudson. The Working Group's goal was to identify reliability-based transmission needs in the Greater Boston study area and to develop solutions to address each need. That study was a multi-year process during which the needs assessment was updated several times to account for changes to the system and expected load requirements. On multiple occasions during this study period, the Working Group presented to the ISO-NE Planning Advisory Committee ("PAC")⁶ the recommended set of projects to address the identified transmission system issues, including a new line from Sudbury to Hudson. The PAC reviewed the efficacy of these recommended projects to meet the needs as well as the costs of the projects and their various alternatives. These cost estimates also were independently reviewed by a third-party expert retained by ISO-NE. In sum, ISO's identification of need and its selection of the Sudbury-Hudson project as the preferred solution was the culmination of a careful, deliberate, robust

⁶ The PAC is an open stakeholder forum that provides input and feedback to ISO-NE on the regional system planning process. PAC members include, but are not limited to, generators, marketers, participating transmission owners, load serving entities, merchant transmission owners, governmental representatives, state agencies, public interest groups and consultants. See <https://www.iso-ne.com/committees/planning/planning-advisory/>.

and comprehensive process that involved the input of a wide group of stakeholders and experts.⁷

In terms of cost, NEP's applications to the Board, almost without exception, have included conceptual-level estimates (-25%/+50%) for the preferred project and the alternatives. As Eversource did here, NEP customarily submits a more refined cost estimate ($\pm 25\%$) later in the proceeding after engineering, design and field investigation has progressed further. Also like Eversource did here, NEP only refines its estimate for the preferred project, not each project alternative. Even if refining the cost estimates for each alternative were possible, doing so would be profoundly disruptive in terms of costs to customers, resources and schedule.

As a threshold matter, there are major obstacles to further refinement of estimates. Among these obstacles is the fact that achieving a planning level estimate ($\pm 25\%$) requires consultation with permitting agencies and a detailed understanding of property acquisition needs. In NEP's experience, agencies from

⁷ As noted by the Town and PS, the so-called NEP Alternative was evaluated as a possible solution during the planning process. It was further evaluated by the Board and ultimately rejected because the Sudbury-Hudson project was less costly, had greater reliability benefits and comparable impacts. Even if NEP preferred its project, which it did not, NEP does not dispute that Board's decision was well-grounded on record evidence and reasonable based on the facts presented.

which the company needs to acquire permits and/or property rights, in particular the MBTA and MassDOT, will only consider the single project that the company proposes to build. Because of their limited resources, they are generally not able to review and provide feedback on multiple, hypothetical project alternatives. For this reason, NEP strongly doubts that it, or any applicant, would be able to gather all the information necessary to refine the cost estimates for multiple alternatives.

Even if that were possible, the additional cost, effort and delay would be overwhelming. In practical terms, refining a cost estimate from -25%/+50% to $\pm 25\%$ requires progressing engineering and design from approximately 20-25% complete to approximately 75% complete. This is not merely drawing more detailed plans on a page. Rather, it involves a massive effort to gather data through field investigations that include, but are by no means limited to, traffic and abutter counts; soil borings and testing of the thermal properties of soils; visual simulations; geotechnical reviews; identification of sensitive receptors, like schools, along various routes; preparation of mapping and plan profiles for all options; evaluating high-risk areas where there may be shallow bedrock or congested underground utilities; land surveying; calculating structural loading; calculating

material costs; consulting with agencies and even initiating the permit process; evaluating bridge, highway and river crossings; talking to property owners regarding acquisition of rights. The list goes on. This level of effort is costly, time-consuming and requires a large, dedicated team of employees and consultants. Multiplying this level of effort by the number of project alternatives (and perhaps further by each alternate route for each project alternative) would not only multiply costs and create significant delays, but it likely would require changes in how National Grid does business, starting with increasing the number of full-time employees. This additional cost and effort would be for little or no benefit. It would simply add to the cost paid by NEP's ratepayers through rates overseen by federal and state regulators and would delay needed reinforcements to the transmission system that are designed to ensure reliable service to customers.

NEP designs its cost estimates to incorporate consistent assumptions and contingencies across all alternatives in order to create confidence that the baseline estimates accurately identify the least cost alternatives. For instance, a change in the assumed price of steel will affect each estimate similarly. Thus, its conceptual estimates, including the one it prepared

for the NEP Alternative, are a reliable basis for comparison of alternatives.

National Grid adopts the statement of the case and statement of facts set forth in the briefs of Defendant/Appellee Eversource and the Attorney General to the extent the facts relate to the questions raised by the Court's amicus request and addressed in this brief, and to the extent they detail the procedural history of this matter.

ARGUMENT

National Grid agrees with Eversource and the Office of the Attorney General that the Board's decision was sound and consistent with its statutory mandates and precedent and should be upheld. National Grid offers the following arguments to assist the Court in understanding the consequences of opponents' challenge and why it must fail.

I. The Court Should Preserve the Board's Authority and Expertise to Achieve the Right Balance Under the Circumstances.

As a threshold matter, it is important to highlight what the parties do not dispute: The Board's obligation is to evaluate whether an applicant has established that, *on balance*, its proposed project is superior to alternative approaches in terms of reliability, cost, and environmental impact, and in its ability to address the identified need. G.L. c. 164, §§ 69H,

69J. As Eversource and the Attorney General have laid out in detail, given the broad authority granted to the Board by the Legislature and the specialized knowledge resident in the Board, this Court has always preserved the Board's discretion in weighing these factors. It should continue to do so here.

The opponents advocate for a novel approach that would severely curb the Board's ability to apply its expertise and exercise its discretion to achieve the appropriate balance that the facts and circumstances require. The opponents' argument that the Board must elevate environmental impacts over other considerations exemplifies their strategy, which is as follows: (i) cherry-pick precedent in which the Board selected a higher-cost alternative because of its greater environmental and/or reliability advantages; (ii) declare that these cases establish a "principle" that the avoidance of environmental impacts is paramount; and then (iii) contend that the Board abused its discretion by violating its own "principle." PS Br. at 57-58.⁸ The fatal flaw in this argument is that there is Board precedent that cuts the other way, revealing that the opponents' so-called "principle" is a mirage. NEP's Hampden County Reliability

⁸ Notably, PS's argument implicitly concedes that the MBTA Underground Route is more costly. PS Br at 57. Later, when convenient, it argues that the MBTA Underground Route actually may be less costly. PS Br. at 56. PS cannot have it both ways.

Project is one such example. See New England Power Company d/b/a National Grid, EFSB 10-1, D.P.U. 10-107/10-108 (2012). There, the Board approved a project with somewhat greater environmental impacts than the alternatives in order to achieve greater reliability:

While Alternative 5A meets the reliability criteria, the Project relies on a new 115 kV line which provides a more robust solution with both higher capacity and greater thermal rating than the refurbished O-15S line, with additional flexibility to accommodate future system growth. ... Given the comparable costs, and the enhanced reliability and capacity benefits of the Project over Alternative 5A, the overall benefits of the Project outweigh the slight environmental advantage of Alternative 5A. Accordingly, the Siting Board finds that the construction of the Project is preferable to the identified project alternatives with respect to providing a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

Id. at 35.

Unsurprisingly, because the Board's evaluation is so fact-intensive and project-specific, the balance that it achieves does not always tip the same way. NEP works hard to propose projects that are both the least costly and least impactful ways of satisfying the identified need. But those goals do not always align, and the Board's precedent reflects the flexibility and reasoned judgments that are inherent in achieving the appropriate balance in each unique application. The Court should

reject PS's effort to concoct rigid principles from cherry-picked precedent.

The opponents' argument that the Board must weigh impacts to the natural environment more heavily than impacts to the built environment is similarly flawed. PS Br. at 30-32. NEP agrees with Eversource and the Attorney General that there is no sound legal basis for this argument. And as a practical matter, one can easily imagine that the abutters to the All-Street Alternative in this case could have the exact opposite view from the Town and PS and believe that intrusive construction impacts that disrupt their commutes and the quiet enjoyment of their homes far outweigh the cutting of trees on an abandoned railroad right-of-way. Simply stated, different stakeholders value different things. These project-specific factors should be left to the Board to weigh and evaluate. But the opponents are asking the Court to pick winners and losers in the debate over which impacts are most important.

The Court should decline that invitation. For the Court to do otherwise would embolden future opponents to bring their particular grievances to this Court in the hopes that the Court would again substitute its judgment for the Board's.

II. A Determination that ISO-NE's Need Assessments Are Unreliable Would Have Potentially Grave Consequences.

Eversource and the Attorney General expertly defend the Board's decision on need and NEP does not offer further argument on the merits of that decision. From a policy perspective, the Court should consider the consequences of overturning the Board's need decision on the grounds advanced by the Town and PS.

The Town argues that the reliability of the regional electric transmission system that underpins the entire economy of New England should not be based on conservative planning principles. See Sudbury Br. at 31-36. The Town could not be more off base. ISO-NE's use of a "worst-case scenario" to test the reliability of the electrical system - specifically the use of 90/10 load conditions and the loss of critical system elements - is sound and particularly appropriate given the dire consequences that would be associated with prolonged customer outages.⁹ Moreover, it is consistent with the Board's obligation

⁹ The deleterious effects of prolonged outages likely need no elaboration, but they certainly could include loss of ability to heat and cool homes and buildings; loss of refrigeration; loss of ability to cook; business disruption and closings; damage to property and equipment; and loss of life. Notably, the Commonwealth has adopted "strategic electrification" as one means of achieving its climate change goals. See *Massachusetts Comprehensive Energy Plan*, Dept. of Energy Resources (Dec. 12, 2018). "Strategic electrification" involves, among other things, the adoption of electric-based heating by single-family homes and the increased use of electric vehicles. The likely result of

to ensure that the Commonwealth benefits from a reliable electric system.

NEP believes that if the Town prevails in arguing that ISO-NE's system planning is unreliable, then the reliability of the region's electric transmission system will suffer. Such a ruling could lead ISO-NE to adopt a less conservative approach; or to the Board discounting, or perhaps even ignoring, ISO-NE's needs assessment; or to more frequent challenges to future reliability projects. Whatever form it takes, the practical consequence of ruling that ISO-NE's need assessments are unreliable would put the regional electric transmission system at increased risk that needed infrastructure would not be in place when a contingency event occurred. The responses to that scenario could involve forced brown-outs and/or large payments to otherwise dormant generators to produce power to maintain reliability.¹⁰

implementing this strategy will be an *increased* demand for electricity, not a flat or decreasing demand, as the opponents and amicus Fee contend. And, of course, as citizens and businesses become more reliant on electricity, the effects of outages would become more severe.

¹⁰ This refers to a Reliability Agreement made between ISO-NE and a generator owner whereby an approved generator continues to operate, even when it is not economical to do so, to ensure system reliability, and whereby the generation owner recovers the fixed costs for this operation. See https://www.iso-ne.com/participate/support/glossary-acronyms/#reliability_agreement.

Ultimately, the region would have a less reliable and more expensive system; an outcome that would be the exact opposite of the Board's mandate and the Legislature's intent. The Court should not upset the careful coordination that exists between ISO-NE and the Board that ensures and maintains a reliable electric grid in the region.

The Town's argument that ISO-NE's need assessments are unreliable is contrary to public interest and should be rejected.

III. The Opponents' Effort to Rewrite the Cost Standard of Review Is Unsupportable.

NEP stands in complete agreement with Eversource and the Attorney General in defending the Board's findings on cost. The Town and PS again promote an excessively rigid standard that finds no statutory support, departs from the Board's long-standing practice and is totally unworkable from a practical perspective. Further, PS concedes that in terms of cost there is no clearly superior alternative that the Board ignored.

a. The Opponents' Novel "True Cost" Standard Is Baseless and Inconsistent With the Board's Mandate and Precedent.

PS effectively asks this Court to rewrite the Board's "lowest possible cost" statutory standard of review. PS first defines "lowest possible cost" to mean the project's "true

cost," PS Br. at 49, which PS then contends can be determined only by comparing the proposed project's cost against each alternative at a $\pm 25\%$ level. This argument should be rejected.

There is no statutory foundation or Board precedent supporting this novel notion of "true cost." PS falsely contends that the Board has given transmission owners an "explicit directive to use more defined estimates" as if it had renounced conceptual estimates. PS Br. at 50 (citing, *inter alia*, Petition of New England Power Company d/b/a National Grid, EFSB 13-2, D.P.U. 13-151/13-152, at 2 fn. 2 (2014)). In the cases cited by PS, the Board "encourage[d]," but did not explicitly direct, applicants to file more refined estimates. And the Board gave no indication whatsoever that it was directing applicants to submit refined estimates for each project alternative.¹¹ Clearly, the Board has the expertise and experience to compare conceptual and planning grade cost estimates and the Board's reasonable judgments should not be second-guessed by the Court.

b. Requiring Planning Grade Estimates for Each Alternative Is Practically Impossible.

The opponents' argument that applicants should progress the engineering and design of each alternative to the point where planning-grade ($\pm 25\%$) cost estimates would be possible is

¹¹ The Board, of course, has the authority to request additional information as it deems necessary to evaluate cost.

totally impractical and unworkable. The Board correctly points out in its decision that its review "takes place at a relatively early stage in the engineering design of a particular project." Decision at 175. As a result, NEP typically submits a conceptual cost estimate with its application followed by a planning grade estimate during the proceeding.

As noted *supra*, refining a cost estimate from -25%/+50% to $\pm 25\%$ is a massive undertaking. The time, money and effort required to advance just the proposed project to this level is substantial. Requiring applicants to multiply that effort by the number of alternatives (and perhaps again by the number of alternative routes), as the opponents advocate, would effect such a dramatic change as to effectively alter the business model of the utility. And the benefit for this would be minor since cost estimates, even at a conceptual level, are designed so that changes are consistent across alternatives.

c. PS's Concession That the Costs Are "Virtually Identical" Defeats Its Own Argument.

Twice in its brief, PS concedes that the estimates are "virtually identical," PS at 21, and "virtually [the] same across a wide range." PS Br. at 39. This means that the Board was not presented with record evidence of an alternative that was "clearly superior" in terms of cost. The Court, therefore,

must defer to the Board's authority and expertise in achieving the appropriate balance under the circumstances.

PS might assert that more refined estimates would expose meaningful differences in costs (in favor of another alternative, of course). But that is pure speculation that finds no support in the record and cannot be the basis for the Court to overturn the Board's well-reasoned decision, particularly where the Board acted consistently with its long-standing practice of evaluating alternatives on the basis of conceptual estimates.

d. NEP's Conceptual Cost Estimate Was Reliable.

Lastly in terms of cost estimates, NEP rejects PS's argument that its cost estimate for the NEP Alternative was "cursory," "inaccurate" and/or "incomplete." PS Br. at 17. NEP's cost estimate for the NEP Alternative used a methodology approved by and consistent with ISO-NE and industry stakeholders; was based on a clear scope of work; and included assessments of the duration and cost of each project activity based on input from subject matter experts within the company. The estimate was thorough, accurate and complete.

In closing, a successful appeal here would do more than overturn this one decision; rather, it would (i) overturn

established precedent; (ii) inject confusion and uncertainty into siting proceedings regarding how utilities must carry their burden of proof before the Board; and (iii) embolden opponents. Taken together, opponents' success here ultimately would mean a more costly, less reliable regional electrical transmission system.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs submitted by the Eversource and the Attorney General, the Court should affirm the decision of the Board.

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CERTIFICATE OF COMPLIANCE

I, Rachel C. Thomas, certify that the foregoing brief complies with the rules of court that pertain to filing of briefs, including but not limited to Mass. R. App. P. 16, 17 and 20. Rule 21 is not applicable to this brief. For purposes of the length limitation of Rule 20, this brief contains 3,988 non-excluded words and uses Courier New 12-point font in Microsoft Office Word 2016.

/s/ Rachel C. Thomas

CERTIFICATE OF SERVICE

I, Rachel C. Thomas, certify that on February 5, 2021, I electronically filed the foregoing brief and addendum via the Court's electronic filing system, which sent notification of such filing to all counsel for Plaintiff-Appellant and Defendants-Appellees registered therein, including:

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