



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.T.E./D.P.U. 06-60-B

December 4, 2009

Petition of Russell Biomass LLC pursuant to G.L. c. 40A, § 3 for exemption from the zoning by-laws of the Town of Russell to construct and operate a wood-burning electric generating facility.

ORDER ON COMPLIANCE FILING

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I. INTRODUCTION AND PROCEDURAL HISTORY

In June 2006, Russell Biomass LLC (“Russell Biomass” or “Company”) filed a petition with the Department pursuant to G.L. c. 40A, § 3, seeking certain individual exemptions and a comprehensive exemption from the Town of Russell zoning by-laws. The Company sought the exemptions in connection with its proposal to construct and operate a 50-MW wood-fueled electric generating facility in Russell (“plant”). On August 22, 2008, the Department issued an Order denying the Company’s zoning exemption petition, Russell Biomass, D.P.U. 06-60 (August 22, 2008) (“Final Order”). The Department denied the petition primarily on the ground that the Company’s proposed use of Main Street in Russell as the access road for fuel deliveries to the plant would have significant adverse traffic-related impacts on the Town, and that these impacts would not be outweighed by the proposed plant’s public benefits (Final Order at 82-83).¹

On September 9, 2008, Russell Biomass filed a motion for partial reconsideration of the Department’s Order. Specifically, Russell Biomass requested that the Department reconsider its denial of the Company’s requested exemptions from Section 3.2 of the by-laws, i.e., the by-laws’ 35-foot height restriction and the by-laws’ 30-foot setback requirement (“Section 3.2 exemptions”). On November 14, 2008, the Department issued an Order conditionally approving the Section 3.2 exemptions, Russell Biomass, D.P.U. 06-60-A (November 14,

¹ The project as reviewed by the Department would require approximately 2,000 tons per day of wood-fuel to be supplied to the plant by tractor-trailer trucks traveling down Main Street five days a week, with an average of 150-160 and a maximum of 240 truck trips per day. Final Order at 3.

2008) (“Reconsideration Order”). The Reconsideration Order provided, in relevant part, that final granting of the exemptions from the height and setback requirements is subject to two pre-conditions:

Russell Biomass’ Motion for reconsideration requesting exemptions from Section 3.2 of the Town of Russell’s Zoning By-laws for the Russell Biomass Project structures that require height and setback requirements is granted, conditioned upon an agreement between the Town of Russell zoning authority and the Company that would resolve the traffic issues to the satisfaction of the Town. Should such an agreement be reached, Russell Biomass shall make a compliance filing with the Department within 30 days of its execution providing the agreement as well as a description of the outcome of discussions regarding fire protection.

Reconsideration Order at 13 (emphasis added).

On June 24, 2009, Russell Biomass submitted a compliance filing with respect to the two conditions in the Department’s Reconsideration Order (“Compliance Filing”). In the Compliance Filing, the Company requests that the Department “confirm the granting of unconditional and final exemptions” from the height and setback requirements of by-laws Section 3.2 (Compliance Filing at 1). The Town of Russell Planning Board, a member of the Russell Board of Selectmen, and the Russell Fire Chief filed oppositions to the Compliance Filing. On August 14, 2009, the Company filed a reply to the opposition (“Company Reply”).²

² Several Russell residents also filed oppositions to the Compliance Filing. The Department focuses here on the comments by Town officials, as the conditions in the Reconsideration Order pertain to an agreement and discussions between the Company and Town officials.

II. POSITIONS OF THE PARTIES

A. Company

With respect to the condition in the Reconsideration Order regarding resolution of traffic issues, the Company states in its Compliance Filing that it now proposes to use Frog Hollow Road in Russell, rather than Main Street, as the access road to the proposed plant (“proposed Frog Hollow route”) (Compliance Filing at 2).³ The Company states that it presented the proposed Frog Hollow route to the Russell Board of Selectmen at a Town Meeting on April 28, 2009. The Company states that at a subsequent public meeting on May 26, 2009, the Selectmen “unanimously voted to approve the [Frog Hollow route]” (id at 2-3). In support of its statement, the Company has attached to its Compliance Filing a May 26, 2009 letter to William Hull of Russell Biomass, signed by Dennis Moran, Chairman of the Russell Board of Selectmen (“Moran letter”). The Moran letter states in relevant part that

[To] the extent that the Board of Selectmen has jurisdiction over this matter, the board favors your proposal because we believe the use of the proposed [Frog Hollow] route addresses the concerns that town residents and the Board of Selectmen have regarding project-related traffic on Main Street and is in the best interest of the Town.

Moran letter at 1. The Company asserts that the Selectmen letter fulfils the condition in the Reconsideration Order that traffic issues be resolved (Compliance Filing at 1,4).

³ According to the Company, the proposed Frog Hollow route would start at the proposed plant, cross over the existing Main Street bridge and turn onto Frog Hollow Road, continuing on a to-be-built one mile extension of Frog Hollow Road, and connecting with Route 20 just north of Mountain Laurel Drive (Compliance Filing at 2).

With respect to the condition in the Reconsideration Order regarding fire protection, the Company states that it has consulted with the Russell Fire Chief and, at his direction, has had consultants prepare an initial analysis of fire protection requirements applicable to the proposed plant (“fire protection study”) (Compliance Filing at 3). Both the Company and its consultants acknowledge that the fire protection study is a preliminary analysis intended “to facilitate the discussion process” and is only a “first step” in the process of designing the appropriate fire protection systems for the proposed plant (Company Reply at 4). The fire protection study, for example, provides in relevant part:

If the proposed facility ultimately is built, it will be necessary to continue consultations between the Company, its design and construction contractor, and the Russell Fire Chief during the final design process to ensure that fire prevention and protection requirements per NFPA and State regulations are incorporated into the plant’s design and operation requirements.

Compliance Filing, Att 3, Exec. Summary at 1.

The Company states that it has submitted the fire protection study to the Russell Fire Chief for review and that the Company will continue its discussions with the Fire Chief and the Town “to ensure the Facility is designed and operated in conformance with all applicable federal and state fire protection requirements” (Compliance Filing at 4).

B. Town of Russell

Nancy Mezger, one of three members of the Russell Board of Selectmen, disputes the Company’s statement that the Selectmen unanimously approved the proposed Frog Hollow route at the May 26 public meeting or in the Moran letter. In a letter submitted to the

Department, dated June 28, 2009 (“Mezger letter”), Selectman Mezger states that she neither signed the Moran letter nor voted to approve the proposed Frog Hollow route. She states that that she did not do so because traffic issues “would [not] be solved by using the proposed alternative route, because the proposed route would adversely affect the residents on River Road and Frog Hollow Road” (Mezger letter at 2). She states further that the Moran letter “does not represent a vote nor a consensus of the select board. There is no agreement between the selectmen of the Town of Russell and Russell Biomass LLC approving the alternative route” (id.).

The Town of Russell Planning Board submitted a letter dated July 14, 2009, signed by all three of its members (“Planning Board letter”). The Planning Board states that the Town has not approved the Frog Hollow route (Planning Board letter at 1). The Planning Board notes that the use of the Frog Hollow route would require Planning Board approval, and that the Company has yet to approach the Board regarding such approval (Planning Board letter at 1). Specifically, the Planning Board states “Russell Biomass has not yet come before the Planning Board, as required by Town By-Law. The residents of Russell have not voted to approve this road, nor has a Town meeting been scheduled to do so” (id.).

With respect to fire protection, the Russell Fire Chief, Mr. Morrissey, submitted two letters, one dated dated July 6, 2009 (“July 6 letter”) and one dated July 15, 2009 (“July 15 letter”). Chief Morrissey lists a number of substantive concerns with the fire protection study prepared by the Company. He states that “at this point, it is my position that Russell Biomass has not presented the Town of Russell Fire Department with an all hazards/risk analysis as

identified in the Department of Public Utilities order of November 14, 2008”(July 15 letter at 2). Chief Morrissey concludes that the submitted fire protection study does not satisfy the condition in the reconsideration Order regarding the preparation of a fire protection plan, but rather “is the first step” in the Company’s fire protection analysis for the proposed biomass plant (July 6 letter at 1).

III. ANALYSIS AND FINDINGS

A. Traffic Issues

The record shows that that the Company has decided to substitute Frog Hollow Road for Main Street as the truck access route for the proposed biomass plant.⁴ See Compliance Filing at 2. However, the record fails to support a finding that the Moran letter attached to the Compliance Filing constitutes an agreement between the Company and the Town resolving traffic issues.⁵ Furthermore, the Company has not reached any agreement regarding this proposal with the Town’s zoning authority as required by the November 14 Reconsideration Order.⁶ The Department consequently finds that the Company’s Compliance Filing with respect to traffic issues is premature and denies the Company’s Compliance Filing with respect

⁴ In this Order, the Department makes no finding regarding whether this change in the project access road constitutes a project modification requiring Department review.

⁵ The Department notes that the Moran letter does not represent an agreement between the entire Board of Selectmen and the Company. The Metzger letter confirms such a finding.

⁶ We note that the zoning by-laws require site plan approval for the project from the Planning Board. The Planning Board states that it has not considered or approved the use of the proposed Frog Hollow route. See Planning Board letter at 1.

to traffic issues without prejudice. The Company should re-submit a traffic compliance filing once it has reached agreement with the Town zoning authority that would resolve traffic issues to the satisfaction of the Town.⁷

B. Fire Protection

With respect to fire protection, the Reconsideration Order requires the Company to provide “a description of the outcome of discussions” with the Town on this subject. The Company’s Compliance Filing includes an initial fire protection study for the proposed project, states that the Russell Fire Chief has been provided with a copy of the study, and states that the Company has had discussions with the Russell Fire Chief regarding the study. Compliance Filing at 3. The Fire Chief has noted omissions and deficiencies in the study. July 6 letter at 1; July 15 letter at 2. However, both the Company and the consultants who prepared the fire protection study agree that the study is a preliminary assessment of applicable fire safety requirements and that additional analysis will be needed as the project progresses through the design stage. The Company has committed in the Compliance Filing to continued consultations with the Fire Chief. Compliance Filing at 4.

It was the intent of the Reconsideration Order that fire protection matters relative to the proposed project be resolved at the local level.⁸ The record indicates that the Company and the

⁷ The Special Permit issued for the project in 2005, which was the subject of the underlying proceeding (D.P.U. 06-60), required approval from both the Zoning Board of Appeals and the Planning Board. See Final Order at 6 and n.4.

Town are taking positive steps in this direction. Accordingly, the Compliance Filing with respect to fire protection accordingly is accepted. As stated in the Compliance Filing, the Department expects that the Company will continue to work with Fire Department to develop and finalize a fire protection plan for the proposed plant. Thus, at such time as the Company re-submits a compliance filing with respect to the resolution of traffic issues, the Department directs the Company to provide an update on its preparation of a fire protection plan.

IV. ORDER

Accordingly, it is hereby

ORDERED: That the Company has not satisfied the traffic-related condition in the Reconsideration Order. To satisfy that condition, the Company shall re-submit a traffic compliance filing once it has reached agreement with the Town zoning authority that would resolve traffic issues to the satisfaction of the Town; and it is

FURTHER ORDERED: That the Company has satisfied the fire safety-related condition of the November 14, 2008 Reconsideration Order, but shall provide in any subsequent compliance filing an update on its preparation of a fire protection plan for the proposed plant; and it is

FURTHER ORDERED : That the Company's request that the Department grant unconditional exemptions from the height and setback requirements of Russell zoning bylaws

⁸ The Department notes that the Town has yet to issue a Special Permit for the project, which could contain conditions pertaining to fire protection. Nothing in this Order forecloses this option for the Town.

Section 3.2 is denied without prejudice, on the ground that the June 24, 2009 Compliance Filing does not satisfy the condition in the November 14, 2008 Reconsideration Order with respect to the resolution of traffic issues.

By Order of the Department,

Paul J. Hibbard, Chairman

Tim Woolf, Commissioner

Jolette A. Westbrook, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).