



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

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

May 26, 2010

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 50 MW wood-burning electric generating facility

ORDER ON MOTION TO REOPEN HEARING, MOTION FOR RECONSIDERATION,
INTERVENTION MOTIONS AND MOTION TO EXTEND JUDICIAL APPEAL PERIOD

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I. INTRODUCTION

On August 22, 2008, the Department issued a final order pursuant to G.L. c. 40A, § 3 denying in its entirety the petition of Russell Biomass, LLC (“Company”) for zoning exemptions in connection with the Company’s proposal to build a 50 MW wood-burning electric generating facility (“plant”) in the Town of Russell. Russell Biomass LLC, D.T.E./D.P.U. 06-60 (August 22, 2008) (“August 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 proposed plant would have significant adverse traffic-related impacts on the Town, and that these impacts would not be outweighed by the plant’s public benefits (August 2008 Final Order at 82-83).¹

On September 9, 2008, Russell Biomass filed a motion for partial reconsideration of the August 2008 Final 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 35-foot height restriction and the 30-foot setback requirement of the by-laws (“height and setback exemptions”). On November 14, 2008, the Department issued a final order conditionally approving the height and setback exemptions. Russell Biomass LLC, D.T.E./D.P.U. 06-60-A (November 14, 2008) (“Reconsideration Order”). Specifically, the

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. August 2008 Final Order at 3.

Reconsideration Order provided, in relevant part, that the height and setback exemptions would be granted only if the Company first satisfied two 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 Reconsideration Order. In its compliance filing, the Company stated, among other things, that it now intends to use a new route for fuel deliveries -- Frog Hollow Road -- rather than the Main Street route reviewed by the Department in this proceeding. In response to the Company's compliance filing, on July 24, 2009, a group of 16 intervenors filed (1) a motion to re-open the hearing or, alternatively, for the initiation of a project change proceeding, based primarily on the access route change ("Motion to Reopen"); (2) a response to the Company's compliance filing; and (3) 23 new petitions to intervene. The Company submitted a reply to these filings on August 14, 2009 ("Company Reply").²

On December 4, 2009, the Department issued an Order on Compliance Filing. Russell Biomass LLC, D.T.E./D.P.U. 06-60-B (December 4, 2009) ("Compliance Order"). The Compliance Order found that the Company's compliance filing satisfied the fire protection-

² The intervenors filed a sur-reply on August 24, 2009, and the Company filed a motion to strike the sur-reply on August 25, 2009.

related condition in the Reconsideration Order, but did not satisfy the traffic-related condition, as the Company presented no evidence that the Town's zoning authority and the Company have entered into an agreement resolving project-related traffic issues to the satisfaction of the Town. The Company's compliance filing was denied without prejudice.

On December 24, 2009, the intervenors filed a motion for reconsideration with respect to the Compliance Order ("Motion for Reconsideration"). As with the intervenors' Motion to Reopen, the Motion for Reconsideration asserts that the proceeding should be reopened, or a project change proceeding initiated, because of the change in the proposed project's access route from Main Street to Frog Hollow Road. The intervenors' Motion for Reconsideration was paired with a motion to extend the judicial appeal period with respect to the Compliance Order ("Motion to Extend").

II. MOTION TO REOPEN/MOTION FOR RECONSIDERATION

A. The Intervenors

The intervenors assert that the hearings in this matter should be reopened or, alternatively, that the Department should initiate a project change proceeding (Motion to Reopen at 5-6; Motion for Reconsideration at 2). As grounds, the intervenors state primarily that the Company's proposal to use Frog Hollow Road rather than Main Street as the access route for the biomass plant is a material change to the project as reviewed by the Department. The intervenors assert that the Department cannot grant the height and setback exemptions, or any zoning exemptions, for the revised project since the Department has not reviewed and weighed the impacts of using Frog Hollow Road for fuel deliveries (Motion for Reconsideration at 5). The intervenors assert that the 23 individuals petitioning for intervenor

status would be substantially and specifically affected by use of the proposed Frog Hollow Road route, and thus should be allowed to participate as parties in the reopened or project change proceeding (id. at 1-2, 5).³

B. The Company

The Company acknowledges that the proposed substitution of the Frog Hollow route for the Main Street route is a significant change to the proposed project as reviewed by the Department (Company Reply at 2, 4). The Company states that it has filed a Notice of Project Change with MEPA and that MEPA has required the preparation of a Supplemental FEIR based on the route change (id. at 4). The Company notes that it has requested an amended Special Permit from the Russell Zoning Board of Appeals based on the route change, and “has made the appropriate filings with the Planning Board as well” (id. at 3-4).

C. Analysis and Finding

There are indications in the record that Russell Biomass is now pursuing the Frog Hollow Road access route alternative in certain other forums, such as MEPA. In its Compliance Filing with the Department, the Company stated that it intends to use the Frog Hollow Road access and is in the process of having discussions with the Town about the use of this alternative route. However, the Company has not filed a notice of project change or any

³ The intervenors also assert that the Department’s use of information contained in the Company’s compliance filing has the legal effect of automatically reopening the hearing. The Supreme Judicial Court has found, however, that compliance filings do not reopen a hearing or otherwise affect the finality of a final decision. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 448 Mass. 45 (2006); Box Pond Association v. Energy Facilities Siting Board, 435 Mass. 408 (2001) (final decisions of Energy Facilities Siting Board are final even though subject to conditions and applicant’s subsequent compliance filings).

other detailed information about this possible routing alternative with the Department. As a matter of fairness to the parties, and as a matter of administrative efficiency, the Department seeks to avoid the initiation of a project change proceeding based on a proposal that may be modified, or even abandoned, as the Company continues to develop and discuss its proposal with the Town. Thus, we find that it is premature for the Department to initiate a project change proceeding on the use of the Frog Hollow route. Consequently, the Department finds that the intervenors' Motion to Reopen, Motion for Reconsideration, and petitions for intervention are not yet sufficiently ripe for the Department to act upon. The motions and petitions are denied without prejudice.

The Department notes that future actions or inaction by the Company may render a project change proceeding either ripe or moot. Should the Company submit a compliance filing containing a proposal for the use of Frog Hollow Road (or any other alternative to the Main Street route reviewed by the Department), the Department would initiate a project change proceeding to determine whether the height and setback exemptions should be granted. On the other hand, should the Company submit a compliance filing containing an agreement with the Town to use Main Street, it is unlikely that there would be any need for a project change proceeding because the Department has reviewed the use of Main Street in this proceeding. Finally, should the Company decline to further pursue the height and setback exemptions from the Department, or to seek any other relief from the Department for the proposed project, there would be no need for a project change proceeding or any other Department action regarding the project.

The Company asserts that the Department lacks authority to consider a project change in a zoning exemption proceeding. This is not the case. The Department has not had a previous occasion to consider a project change in the context of a zoning exemption proceeding. However, nothing precludes the Department from doing so. See, e.g., New England Power Company, D.P.U. 09-27/09-28, at 58 (March 26, 2010) (the applicant “shall notify the Department of any significant changes in the planned timing, design or environmental impacts of the proposed project as described above”); Western Massachusetts Electric Company, D.P.U. 09-24/09-25, at 42 (March 19, 2010).

III. MOTION TO EXTEND JUDICIAL APPEAL PERIOD

A. Standard of Review

General Law c. 25, § 5, provides in pertinent part that a petition for appeal of a Department order must be filed with the Department no later than 20 days after service of the order “or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling.” See also 220 C.M.R. § 1.11(11). The 20-day appeal period indicates a clear intention on the part of the legislature to ensure that the decision to appeal a final order of the Department be made expeditiously. Nunnally, D.P.U. 92-34-A at 4, 9-10 (1993); see also Silvia v. Laurie, 594 F. 2d 892, 893 (1st Cir. 1978). The Department’s procedural rule, 220 C.M.R. § 1.11(11), states that reasonable extensions shall be granted upon a showing of good cause. The Department has stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company, D.P.U. 90-335-A at 4 (1992). Whether good cause has been shown “is determined in the context of any underlying statutory or regulatory requirement, and

is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.” Id. The filing of a motion for extension of the judicial appeal period automatically tolls the appeal period for the movant until the Department has ruled on the motion. Nandy, D.P.U. 94-AD-4-A at 6 n.6 (1994); Nunnally, D.P.U. 92-34-A at 6 n.6 (1993).

B. ANALYSIS AND FINDINGS

In their Motion to Extend, the intervenors state simply that they are seeking an extension of the 20-day judicial appeal period in order to afford the parties “a reasonable period of time to respond to [the intervenors’] Motion for Reconsideration” (Motion to Extend at 2).

The Department infers from the intervenors’ statement that they are seeking a ruling on their Motion for Reconsideration before determining whether to appeal the Compliance Order.

The Department has stated that the mere filing of a motion for reconsideration is insufficient to toll the time period for filing an appeal of a Department Order. Fall River Gas Company, D.P.U. 89-199-A (1989). In addition, the Department finds that the intervenors have not alleged sufficiently unique circumstances to warrant the exercise of the Department’s discretion in departing from the express terms of G.L. c. 25, § 5. Boston Edison Company, D.T.E. 05-85 (2006). We therefore find that the intervenors have not established good cause for an extension of the appeal period. Accordingly, the Motion to Extend is denied. However, the Department will allow the intervenors seven days from the date of this Order to file an appeal.

IV. ORDER

Accordingly, it is hereby

ORDERED: That the intervenors' motion to reopen the hearing, or alternatively, for the initiation of a project change proceeding is denied without prejudice; and it is

FURTHER ORDERED: That the intervenors' motion for reconsideration is denied without prejudice; and it is

FURTHER ORDERED : that the 23 intervention petitions filed on July 24, 2009 are denied without prejudice; and it is

FURTHER ORDERED That the Company's motion to strike the intervenors' sur-reply is denied ; and it is

FURTHER ORDERED That the intervenors' motion to extend the judicial appeal period relative to the December 4, 2009 Order on Compliance Filing is denied.

By Order of the Department,

Paul J. Hibbard, Chairman

Tim Woolf, Commissioner

Jollette 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).