

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD**

Petition of Energy Storage Resources, LLC
for a Jurisdiction Determination
Pursuant to R.I. Gen. Laws § 42-35-8

PETITION FOR DECLARATORY ORDER

In accordance with R.I. Gen. Laws § 42-35-8, Energy Storage Resources, LLC (the “Company”) hereby petitions the Rhode Island Energy Facility Siting Board (“EFSB”) for a declaration that its proposed 180-megawatt Energy Storage System in the Town of South Kingstown, Rhode Island is not subject to the jurisdiction of the EFSB because it is not a “major energy facility” as defined by the Energy Facility Siting Act, R.I. Gen. Laws § 42-98-3(d) (the “Act”), and Rule 1.3(16) of the EFSB’s Rules of Practice and Procedure. The proposed battery facility will not generate electricity, instead, it will merely store and release electricity.

Overview of the Project

The Company proposes to construct in South Kingstown the Narragansett Energy Storage Project which is a 180-megawatt battery storage facility that will utilize lithium-ion batteries for the storage of electricity (the “Project”). The purpose of the Project is to increase the reliability and efficiency of the electric grid by storing electricity generated during off-peak periods when there is a surplus of low-cost energy available and dispatching the electricity into the grid during peak periods, thereby providing a source of electricity at a time when that electricity will have the greatest value to the regional electric system by satisfying some of the heightened demand.

The Project will be connected to a substation that will be interconnected to the regional electric system via a tap line.¹

The Project is a series of storage containers, with inverters and transformers connected to each container. Within each container are racks of batteries that in aggregate total 3.5 – 4.5 megawatt hours of energy. Once the Project is in service, it will store electricity which has been created by other generating facilities at other locations for a short period of time until the electricity is released back onto the grid for consumption. During the charging cycle the Project will operate as a load on the electrical system because it will be using the electricity which has been created by other generation facilities to charge the batteries. During one full cycle of operation (during which time the battery starts at zero charge with very little electricity being stored, to full charge, back to zero charge) there is a net loss of 5 – 15% of total electricity due to system losses. The Project will not generate any additional megawatt hours of electricity during its operation.

Applicable Law

Pursuant to Rhode Island law, “[n]o person shall site, construct or alter a major energy facility within the state without first obtaining a license” from the EFSB. R.I. Gen. Laws § 42-98-4. A “major energy facility,” according to EFSB Rule 1.3(16), is defined as

any facility for the extraction, production, conversion and processing of coal; any facility for the generation of electricity capable of operating at a gross capacity of 40 megawatts or more; any transmission line with a design rating of 69 kV or over; facilities for the conversion, gasification, treatment, transfer or storage of liquefied natural and liquefied petroleum gases; any facility for the processing, enrichment, storage or disposal of nuclear fuels and nuclear byproducts; any facility for the refining of oil, gas or other petroleum products; any facility of 10

¹ The tap lines between the adjacent 115 kilovolt transmission line right-of-way and the substation will require a license from the EFSB.

megawatts or greater capacity for the generation of electricity by water power; any facility associated with the transfer of oil, gas or coal via pipeline and any energy facility project of the Rhode Island Port Authority and Economic Development Corporation.

(Emphasis added); see also R.I. Gen. Laws § 42-98-3. The rule expressly provides that a facility that is able to generate at least 40 megawatts of electricity is considered a “major energy facility” and is subject to EFSB jurisdiction. Id.

Although neither Rhode Island law nor the EFSB rules define the “generation of electricity,” statutory principles of construction are also used to interpret administrative rules. Murphy v. Zoning Bd. Of Review of S. Kingstown, 959 A.2d 535, 541 (R.I. 2008); see Caithness Rica Ltd. Partnership v. Malachowski, 619 A.2d 833, 838 (R.I. 1993). When the language of an administrative rule is clear and unambiguous, such language must be applied literally and cannot be interpreted or extended. Malachowski, 619 A.2d at 836 (citing State v. LaPlume, 375 A.2d 938, 944 (R.I. 1977)). The words of the rule must be given their plain and ordinary meanings as such meanings are presumed to be intended by the governing body. Malachowski, 619 A.2d at 836; Ellis v. R.I. Pub. Transit Auth., 586 A.2d 1055 (R.I. 1991).

The Rhode Island Supreme Court has “consistently prevented state administrative agencies from expanding their jurisdiction through strained interpretations of unambiguous statutes.” Malachowski, 619 A.2d at 836 (quashing EFSB decision asserting jurisdiction over petitioner’s proposed facility because the EFSB misconstrued clear and unambiguous language) (citing City of East Providence v. Public Utilities Comm’n, 566 A.2d 1305, 1308 (R.I. 1989)). Here, the Company seeks a ruling that the term “generation of electricity” is clear and unambiguous, and the storage of energy, like the Project, is not “generation.”

According to Merriam-Webster Dictionary, to generate means “to bring into existence.”² Generation includes creating electric power from sources of primary energy such as oil, coal, natural gas, biofuels, waste, nuclear, hydro and renewables. The Company’s proposed Project will only take electricity that has already been generated, store it and then dispatch it into the grid at a time when the product is most useful to the grid. It will not generate electricity. Rather, the Project will only have the ability to retain electricity generated by other third-party generators. The release of the pre-existing electricity cannot reasonably be considered generation as electricity can only be “generated” once.³

Moreover, in addition to the fact that an energy storage facility is not included in the clear and unambiguous definition of a “major energy facility”, the definition does include facilities that store gases and nuclear fuels and byproducts. Rule 1.3(16) (“facilities for the . . . storage of liquefied natural and liquefied petroleum gases; any facility for the . . . storage . . . of nuclear fuels and nuclear byproducts.”) The inclusion of these other types of storage facilities within the definition of a “major energy facility,” coupled with the intentional omission of electricity storage, further supports the Company’s position that battery storage facilities are not subject to EFSB jurisdiction. If the intention was to also include battery storage facilities within the EFSB’s jurisdiction, the Rule would have so stated. See In re Plaza Resort at Palmas, Inc., 741 F.3d 269, 277 (1st Cir. 2014) (the maxim “*expressio unius est exclusio alterius* . . . tells us that when a legislature ‘includes particular language in one section of a statute but omits it in another . . . it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.’”) (quoting Russello v. U.S., 464 U.S. 16, 23 (1983)).

² Generate Definition, Merriam-Webster, <https://www.merriam-webster.com/dictionary/generate> (last visited April 5, 2019).

³ As noted, battery storage facilities operate at a net loss because some power is consumed during the charging process.

In Malachowski, the Rhode Island Supreme Court had an opportunity to consider the definition of a “major energy facility” relating to the generation of electricity. 619 A.2d at 836. There, Caithness RICA Limited Partnership, Newbay Corporation, and Rhode Island Cogeneration Associates, L.P. (collectively, “Petitioners”) sought to construct and operate a combined-cycle cogeneration facility in East Providence, generating 72.5 megawatts of electricity. Id. at 835. Petitioners also planned to sell process steam to an adjacent manufacturing plant. Id. Realizing its proposed generation facility would be below the then-80-megawatt threshold set forth in the EFSB rules to place it within its jurisdiction, Petitioners sought licenses from other state and local agencies.⁴ Id. As a result, the EFSB opened an investigation to determine if it had jurisdiction over the project. Id. A majority of the EFSB concluded that it did. Id. It held that the amount of steam being produced and sold to the manufacturing plant should be converted into megawatts and included in determining the proposed facility’s gross electric generating capacity. Id. After this conversion, the generating facility “generated” an amount greater than 80 megawatts—thus placing the project under the EFSB’s jurisdiction.⁵

Petitioners filed a petition for a writ of certiorari to the Supreme Court. Id. at 838. The Supreme Court granted certiorari and quashed the EFSB order which had concluded that the EFSB had jurisdiction over the project. Id. The Supreme Court noted that

⁴ Rhode Island law, and consequently the EFSB rules, have since been amended to require a minimum generation capacity of 40 megawatts. See EFSB Rule 1.3(16); see also R.I. Gen. Laws § 42-98-3.

⁵ The EFSB rejected Petitioners’ argument that the addition of several design elements prevented the facility from exceeding the siting act’s 80-megawatt jurisdictional threshold. According to the EFSB, because these measures were not in place when its investigation began they would not be considered. The Supreme Court concluded that the EFSB should have evaluated the facility’s gross electric capacity as of the time of the EFSB’s jurisdiction hearing, which was below the 80-megawatt threshold.

by expressly stating that the [Energy Facility Siting Act] applies only to electric generating facilities, the General Assembly clearly indicated that the EFSB's jurisdiction would be premised on a facility's electric output.⁶ Nowhere in the siting act does the General Assembly remotely imply that the energy value of steam should be arithmetically converted into megawatts and included in determining a facility's gross electric generating capacity.

Id. at 836. According to the Supreme Court, and critical to its ultimate decision, the term "megawatt" is clear and is "commonly understood to be a measurement of electricity." Id. at 836. It was not persuaded by the EFSB's steam theory. Id. It found that "such an interpretation of the . . . [A]ct ignores the statute's plain and ordinary meaning in an attempt to impermissibly expand the EFSB's jurisdiction to encompass [Petitioners'] facility."

The Company respectfully submits that, in the same manner that it was inappropriate for the EFSB to include "other types" of energy generated in a generation facility not specifically articulated in the Rule to reach the threshold 80-megawatts requirement to obtain jurisdiction over the project in Malachowski, it would be inappropriate in this instance for the EFSB to include "other types" of electricity facilities not specifically articulated in the Rule (i.e., storage) to support jurisdiction. It is the Company's position that the clear and unambiguous language in Rule 1.3(16) standing alone supports its contention that the Project is not subject to EFSB jurisdiction and that the EFSB need not go any further.

⁶ Notably, in Malachowski, the parties did not dispute that the proposed facility generated electricity. Instead, the entire case related to whether the Act's 80-megawatt threshold was met. Therefore, the Supreme Court only reached the issue of the proposed facility's output because generation was not at issue. Accordingly, its use of the term "output" in its analysis presupposes the facility generates electricity.

Other Considerations:

However, it is worth noting that other states that have permitted and sited battery storage projects have also treated them differently than facilities that actually generate electricity. For instance, New York law defines a “major electric generating facility” as:

An electric generating facility with a nameplate generating capacity of twenty-five megawatts or more, including electric transmission line and fuel gas transmission line interconnections . . . and including ancillary features located on the facility site such as roads, railroads, switchyards, fuel or energy storage or regulation facilities, solid waste disposal areas, waste treatment and disposal facilities, and similar facilities.⁷

Like Rhode Island, New York does not include stand-alone battery storage facilities in its definition.⁸ The New York Board on Electric Generation Siting and the Environment specifically held in 2014 that “standalone, battery-based, energy storage facilities” are not subject to its jurisdiction.⁹ Instead, a battery storage facility proposed in New York must undergo local siting and permitting. In a recent attempt to provide building owners and project developers with an understanding of the permitting and interconnection requirements and approval processes for a battery storage facility in New York City, a process guide was created. The process guide outlines the steps needed to take to obtain proper licensing and permitting at all state and local levels.¹⁰ Additionally, a battery storage facility is also found to be

⁷ Rules and Regulations of the State of New York, Title 16, Public Service, Chapter X, Subchapter A, Sec. 1000.2(v).

⁸ The New York law definition of a “major generating facility” does include “energy storage,” however, that reference is limited to an “ancillary feature[] located on [a generating] facility.” See id.

⁹ State of New York Board on Generation Siting and the Environment, Case 13-F-0287 *Declaratory Ruling on Applicability of Article 10 of the PSL to Battery-Based Energy Storage Facilities*, dated January 24, 2014.

¹⁰ Energy Storage System Permitting and Interconnection Process Guide For New York City Lithium-Ion Outdoor Systems, Smart Distributed Generation Hub, April 2018, (available at

distinguishable from a generation facility under California law. See California Public Utilities Code, Chapter 7.7, § 2835.

Moreover, the Rhode Island Public Utilities Commission (the “RIPUC”) recently approved an Energy Storage Demonstration program whereby the state’s utility will own and operate at least one energy storage system.¹¹ Notably, state law specifically prohibits electric distribution companies “from . . . owning, operating, or controlling generating facilities,” R.I.G.L. § 39-1-27(d). By allowing the state’s utility to own and operate an energy storage facility, the RIPUC presumably concluded that energy storage facilities are not generation facilities.

Historically, there have been components of projects that are not typically subject to EFSB jurisdiction, such as substations that operate at or above 69kV, but become jurisdictional because they are “integral and dedicated to the energy generating process.”¹² Such components are also known as ancillary facilities.¹³ Ancillary facilities are those that are required for the “major energy facility” to operate. For example, a new substation that is required for a new or upgraded transmission line to operate is an ancillary facility. The Project is not an ancillary facility as it operates independently of a major energy facility.

Ultimately, while the EFSB has no authority to license facilities that are not “major energy facilities,” R.I. Gen. Laws § 42-98-4, the Project will be reviewed at the local level for consistency with applicable zoning ordinances. In addition, wetlands, safety, construction

https://nysolarmap.com/media/1911/lithium-ion_energy-storage-systems-permitting-process-guide-final4_26v1.pdf.

¹¹ RIPUC Docket Nos. 4770 and 4780.

¹² In re The Narragansett Electric Company and New England Power Company (Manchester Street Station Repowering Project), Docket No. SB-89-1, Final Report and Order, p. 14 (Order No. 12, December 17, 1990).

¹³ Id.

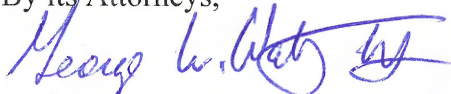

impacts and the like will be analyzed as is consistent with commercial development. Similarly, the Project's interconnection will be vetted through the usual ISO-New England, Inc. process in concert with the local transmission company, thereby ensuring the proper functioning and reliability of the regional electric system.

Conclusion

For the reasons stated herein, the Company respectfully requests that the EFSB issue a Declaratory Order pursuant to R.I. Gen Laws § 42-35-8 that the Narragansett Energy Storage Project is not subject to the EFSB jurisdiction because it is not a major energy facility.

Respectfully submitted,

ENERGY STORAGE RESOURCES, LLC
By its Attorneys,

George W. Watson, III
Leticia C. Pimentel
Robinson & Cole LLP
One Financial Plaza, Suite 1430
Providence, RI 02903
(401) 709-3314