

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

In re: Petition of Energy Storage :
Resources, LLC for a Jurisdictional : **Docket No. SB-2019-02**
Determination Pursuant to :
R.I. Gen. Laws § 42-35-8 :

**THE DIVISION OF PUBLIC UTILITIES AND CARRIERS COMMENTS
RELATING TO ENERGY STORAGE RESOURCES, LLC'S PETITION FOR
DECLARATORY ORDER**

Energy Storage Resources, LLC (ESR or Petitioner) has filed the instant petition seeking a declaration from the Energy Facility Siting Board (EFSB) as to whether its 180 MW energy storage system to be located in the Town of South Kingstown is subject to EFSB jurisdiction.¹ The Division of Public Utilities and Carriers (DPUC) provides the following comments relating to this discreet issue.

To answer the question of jurisdiction, we must look to applicable statutory and decisional law, together with the EFSB's Rules of Practice and Procedure (the Rules). The potential issues beyond the jurisdictional issue framed here are not ripe for review; will lead to speculation; are beyond the scope of the EFSB's jurisdiction; and otherwise relate to matters best left to the legislature.

¹ Petition of Energy Storage Resources, LLC at p. 1.

APPLICABLE LAW

The powers and duties of the EFSB are enumerated in R.I. Gen. Laws § 42-98-7 (a) (1) which states *inter alia* that: [t]he siting board is the licensing and permitting authority for all licenses, permits, assents, or variances which, under any statute of the state or ordinance of any political subdivision of the state, would be required for siting, construction or alteration of a major energy facility in the state.

Furthermore, pursuant to R.I. Gen. Laws § 42-98-7 (e) [t] he siting board's proceedings shall in all respects comply with the requirements of the Administrative Procedures Act, chapter 35 of this title, except where otherwise explicitly provided.²

² The R.I. Gen. Laws § 42-35-15. of the administrative procedures act provides. (a) Any person, including any small business, who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy.....

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error or law;

The operative question to be answered for the EFSB to confer jurisdiction over the subject matter of this case is whether the 180 MW energy storage facility is a “major energy facility” in accordance with the definition set-forth in R.I. Gen. Laws § 42-98-3(d) and EFSB Rule 1.3(16) stating that:

“Major energy facility” means facilities for the extraction, production, conversion, and processing of coal; facilities for the generation of electricity designed or capable of operating at a gross capacity of forty (40) megawatts or more; transmission lines of sixty-nine (69) Kv or over; facilities for the conversion, gasification, treatment, transfer, or storage of liquified natural and liquified petroleum gases; facilities for the processing, enrichment, storage, or disposal of nuclear fuels or nuclear byproducts; facilities for the refining of oil, gas, or other petroleum products; facilities of ten (10) megawatts or greater capacity for the generation of electricity by water power, and facilities associated with the transfer of oil, gas, and coal via pipeline; any energy facility project of the Rhode Island economic development corporation; the board may promulgate regulations to further define “major energy facility” to the extent further definition is required to carry out the purpose of this chapter, provided that any waste to energy facility shall not be deemed a major energy facility for the purposes of this chapter.

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- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
 - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

DISCUSSION

The project in question here is described as a “series of containers, with inverters and transformers connected to each container.”³ The containers contain racks of batteries that total in aggregate is a total of 3.5-4.5 megawatt hours of energy.⁴ This project will store electricity from other generating facilities at other offsite locations and release it back into the grid for consumption.⁵ The project will be connected to a substation that will be interconnected to the regional electric system through a tap line.⁶

In construing the scope of the EFSB’s jurisdiction and the definition of major energy facility, the statute here must be interpreted, and we need look no further than the next several cases, to do so. First, in Gott v. Norberg, 417 A.2d 1352, 1356 (R.I. 1980) the court opined that [w]e must give effect to ascertainable legislative intent whenever it is within legislative competence. *Citing, Vaudreuil v. Nelson Engineering and Construction Co.*, R.I., 399 A.2d 1220 (1979). The Court noted in an earlier ruling of Daniels Tobacco Co. v. Norberg, 114 R.I. 502, 335 A.2d 636, 639 (1975), that the Legislature intended to deny interest on cigarette-tax refunds in the absence of an express provision. The Court in Daniels supra explained its denial of the plaintiffs’ contention, finding that the repealed statute applied “only to taxes assessed on tobacco products and not on cigarettes, and that consequently no legislative intent (had) ever been evidenced

³ Petition of Energy Storage Resources, LLC at p. 2.

⁴ *Id.*

⁵ Petition of Energy Storage Resources, LLC at p. 2.

⁶ Petition of Energy Storage Resources, LLC at p. 2.

to award interest on refunds of a cigarette tax * * *." *Id.* at 507, 335 A.2d at 639. Finally, the court in Daniels Tobacco Co. v. Norberg, determined that the Legislature's failure to provide for interest specifically on cigarette-tax refunds evidenced intent to deny interest on such refunds. *Id.*

Similarly, there is no reference to energy storage facilities within the definition of major energy facility of R.I. Gen. Laws § 42-98-3(d) or EFSB Rule 1.3(16). The statute and rule deal specifically with electrical generating facilities, electrical transmission facilities for conversion, gasification treatment, transfer, or storage of liquified natural and liquified petroleum gases; any facility for [processing, enrichment, storage or disposal of nuclear fuels and nuclear fuels and nuclear byproducts; facilities for the refining of oil, gas, or other petroleum products; facilities of ten (10) megawatts or greater capacity for the generation of electricity by water power, and facilities associated with the transfer of oil, gas, and coal via pipeline; any energy facility project of the Rhode Island economic development corporation.... The Division therefore asserts that the battery storage facilities described here cannot be construed as a major energy facility because they are not electrical generating facilities or other specifically defined facility contemplated by the relevant definition.

There is simply no reference to energy storage facilities within R.I. Gen. Laws § 42-98-3(d) or EFSB Rule 1.3(16) and the term should not be read into an otherwise clear and unambiguous statutory section or rule. See, Burke-Tarr Co. v. Ferland Corp., 719 A.2d 1014, 1018 (R.I. 1999). The Court in Burke-Tarr Co., *supra*. reasoned that subterranean water lines could not be read into

a statute which prohibited one from obtaining an easement by prescription for “telegraph, telephone, electric or other posts, wires, or apparatus” holding that “the language of that statute was conspicuously devoid of any reference to subterranean water lines, and hence bears no resemblance to the utilities that are mentioned”. *Id*

CONCLUSION

For the foregoing reasons, the Division respectfully concludes that because electrical storage facilities cannot be interpreted as being one of the enumerated facilities or uses within the definition of major energy facility, the EFSB has no jurisdiction over the energy storage facilities in the Petition, absent legislative mandate.

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By its attorney,



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Dated: July 15, 2019

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