

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

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PUBLIC UTILITIES COMMISSION

IN RE: THE Narragansett Electric Company Notice
of Intent to Relocate Transmission Lines
In Providence and East Providence (E-183 115 kV
Transmission Line Relocation Project—A/C I-195
Relocation

Docket No. SB-2003-01

**MOTION FOR A STAY OF THE EFSB'S
ORDER DATED JANUARY 17, 2018**

Petitioners, the City of Providence (“Providence”), the Friends of India Point Park (the “FIPP”), a Rhode Island non-profit corporation; Procaccianti Companies, Inc., a Delaware corporation, d/b/a The Hilton Garden Inn (the “Hotel”); and McMac, Inc., a New York S corporation, d/b/a The R.I. Seafood Festival (the “Seafood Festival”) (collectively, the “Petitioners”), who have individually petitioned the Rhode Island Supreme Court pursuant to R.I. Gen. Laws § 42-98-12 for a writ of certiorari to remand the Energy Facility Siting Board’s (the “EFSB’s” or the “Board’s”) January 17, 2018 Order (the “January 17 Order”) in the above matter, hereby move for the entry of a stay of the Order pending a decision with respect to their pending Petition for Certiorari.

A copy of the Petition for Certiorari is attached as Exhibit A.

I. ARGUMENT

In *Narragansett Electric v. Harsch*, 367 A. 2d 195(1976) our Supreme Court stated that a stay will not be issued unless the party seeking the stay makes a "strong showing" that: (1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest.

All these criteria are met in the present case.

1. The Petitioners Will Prevail on the Merits

In its January 17 Order, the EFSB approved NG's October 9, 2003 application to relocate the high-voltage electrical power lines now crossing above the Providence and Seekonk Rivers, and rather than requiring that all or some of the lines be buried underground, the Board, in its three-page Order, summarily approved NG's plan to replace the deteriorating and unsightly overhead towers and other overhead structures currently in use with similarly unsightly (just newer) overhead towers and structures. Importantly, nowhere in the three-page order did the Board fulfill its duty to: (1) ensure that the approved relocation would "not cause unacceptable harm to the environment and will enhance the socio-economic fabric of the state." *See* RIGL § 42-98- 11(b)(3) and EFSB Rule 1.13(c)(1)(v); or (2) address the specific issues raised by the several state agency advisory opinions that argued that the power lines should be buried. *See* EFSB Rule (c)(2)(i).

In addition, the EFSB left the parties and the public mystified as to the factual basis for its conclusion that burying all or some of the lines was not feasible. This matter was pending before the Board since 2003; there is ample evidence in the record to support the conclusion that the underground alignment is technically feasible. This point would have become crystal clear if the EFSB had simply done its job and methodically reached its own independent conclusion as to feasibility.

Instead, the Board delegated the task while at the same time consistently conflating technical and financial feasibility, as well as technical feasibility and risk, without considering, or even inquiring about, the degree of risk and the possible ways it could be ameliorated. Thus, it is not surprising that in the end, the Board failed to render

a substantive or reasoned decision based upon actual findings with respect to feasibility, however defined.

Both the EFSB's failure to make the required findings and its lack of explanation for its conclusion would, standing alone, mandate that a Stay of the January 17 Order be granted. In their Petition for Certiorari in the Supreme Court, Petitioners cite *Sakonnet Rogers, Inc. v. Coastal Resources Management Council*, 536 A.2d 893 (R.I. 1988), which states that "[a]n administrative decision that fails to include findings of fact required by statute cannot be upheld," *id.* at 896, citing *East Greenwich Yacht Club v. Coastal Resources Management Council*, 118 R.I. 559, 569, 376 A.2d 682, 687 (1977). The Court made clear that "[e]ven if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and *for the reasons stated by the agency.*" *Id.* (emphasis added), quoting Professor Kenneth Culp Davis in 3 Davis, *Administrative Law Treatise*, § 14.29 at 128 (2d Ed. 1980).

But the Board also blatantly violated mandatory statutory procedures and rules applicable to the consideration of applications such as NG's by abdicating its statutory duty and, through its approval of a private agreement between NG, Providence and EP, illegally delegating and essentially privatizing the non-delegable task of evaluating the feasibility of alternative approaches to the requested relocation of the power lines. Indeed, the Board did not even attempt to conceal the fact that it had allowed itself to be removed from the process. As candidly explained by EFSB Chairwoman Curran, "I think it's important to keep clear that we, the Board, are not advocating or supporting anything . . . This is up to the parties." EFSB February 16, 2017 Tr. at 11; *see also* EFSB October 18, 2017 Tr. at 64

(Chairwoman Curran stating "[s]o I just want to be clear that we're dealing with an agreement and a settlement from four parties that was agreed to in 2004.").

By abdicating its own legally mandated responsibility and in attempting to delegate its statutory authority, the Board, which the General Assembly has made the "**the sole, final, binding, and determinative**" regulatory decision-maker in connection with such matters, *see* RJGL § 42-98-12(a) (emphasis added), violated the non-delegation doctrine, a doctrine which, as the Supreme Court noted in *Newport Court Club Associates Town Council of the Town of Middletown*, 800 A.2d 405,416 (R.I. 2002), provides "the assurance that duly authorized, politically accountable officials make fundamental policy decisions." *Id.* (citing *Bourque v. Dettore*, 589 A.2d 815, 817 (R.I.1991)). Thus, the January 17 Order cannot easily be cured.

In fact, after sitting idly by for almost fifteen years, during which time: (1) Providence and East Providence ("EP"), the state Attorney General (the "AG"), the General Assembly, as well as numerous state and municipal agencies and members of the public (2,100 of whom signed a petition) all agreed that the power lines should be buried underground; and (2) great effort was made to provide adequate funding to bury the lines, including two amendments to the state's Siting Act, *see* RIGL § 42-98-1.1, it took the EFSB a mere three pages to squander a once-in-a-lifetime opportunity to enhance the aesthetic, economic and recreational value of the Providence/EP waterfront, which is a significant state asset, and to remove the perception that India Point Park is a "utility company right of way," to paraphrase a former Superintendent of the Providence Parks Department.

Thus, Petitioners can make the required "strong showing" of success at the Supreme Court level on the merits, and therefore this prong of the *Harsch* analysis is satisfied.

2. Failing to Stay the January 17 Order Will Cause Irreparable Harm to Petitioners and the Public Interest

There is no dispute that the relocation plan approved by the EFSB, i.e., the “South Bridge Alignment,” would move the high-voltage overhead waterfront power lines from the soccer field in India Point Park to the popular George Redman Linear Park over the Seekonk River, adjacent to I-195. As the moving parties have made clear in written and oral submissions to the Board, this would mean that:

- (a) power lines would continue to obstruct water views along the I-195 entrance to the City, an entrance which is used by some 60 million cars a year, and thus would continue to discourage people – including some of the roughly 10 million people who travel through Providence on their way to the Cape and the Islands – from stopping in Rhode Island;
- (b) the significant aesthetic, economic and recreational enhancement of the state’s signature shoreline at the head of the Narragansett Bay – which includes the Newport ferry landing and waterfront parks at India Point, Bold Point, Corliss Landing and the George Redman Linear Park bridge – would be prevented; and
- (c) unsightly power lines would surround the renovated Hilton Garden Inn on all sides of its water views, obstructing all of its vistas of the City’s shoreline.

See, e.g., FIPP’s October 16, 2017 *Amicus Curiae Brief in Support of the City of Providence’s Motion to Extend the Time for Briefing* at 2-3.

The Affidavit of David Riley, President of the Friends of India Point Park submitted in support of the Petition for Certiorari states that:

“[t]he FIPP has publicized the widely recognized fact, confirmed by multiple studies, that proximity to high-voltage power lines can significantly reduce property values, sometimes by as much as 30%, and that leaving the waterfront power lines overhead will therefore reduce both property values of waterfront parcels and the tax bases of Providence and East Providence, for generations to come, causing long-term, avoidable damage to the State’s economy.”

See Exhibit B to the Petition for Certiorari (attached as Exhibit A), ¶ 8 at 3.

The FIPP has also publicized the widespread public concern about the health effects of exposure to electromagnetic fields (EMF) emanating from high-voltage power lines, fears which have been recognized as a factor in reducing the property values of parcels proximate to or with views of high-voltage wires. Such fears may reduce the value and marketability of several of the parcels that the I-195 Commission seeks to sell. For example, the Providence Children's Museum rejected then-Providence Mayor Vincent Cianci's offer of free land in India Point Park for a new building because of public concerns about EMF exposure, as reported in the Providence Journal in 1993 and confirmed in public testimony in 2003 by then Museum Director Janice O'Donnell." *See id.*, ¶ 9 at 3-4.

Thus, if the January 17 Order is not stayed, the stated purpose of the FIPP, which is "to promote, protect, maintain, improve and expand India Point Park and areas in proximity to the Seekonk River, the Providence River and Narragansett Bay," (*see* FIPP Articles of Incorporation at 1), would be directly undermined. The FIPP would sustain the type of "concrete and particularized" injury that is the legal equivalent of "irreparable harm." *See Conservation Law Foundation, Inc. v. American Recycled Materials, Inc.*, 2017 WL 2622737 slip op at 2-3 (D. MA, June 16, 2017) ("[i]t has long been established that harms to aesthetic and recreational interests are injuries in fact for standing purposes and rise above a mere speculative prospect of harm").

Michael A. Voccola is the Corporate Vice President and Associate General Counsel at Procaccianti Companies, Inc., the owner of the Hilton Garden Inn. He states in his Affidavit in support of the Petition for Certiorari:

"[i]f the relocation approved by the January 17 Order were to be implemented, NG's high-voltage power lines would virtually surround the Hotel and obstruct views of Narragansett Bay and the City's shoreline from within the renovated Hotel, as well as the views of the Hotel from I-195 and other locations. In my professional opinion

and based upon my experience in the hotel industry and in valuing commercial real estate, the recently approved relocation plan would make the Hotel less attractive to potential customers, result in a decrease in the number of annual bookings, and thus negatively impact both the income generated by the Hotel as well as the commercial value of the property, all to the economic detriment of the Company.”

See Voccola Affidavit, attached to the Petition for Certiorari as Exhibit C.

The Affidavit of T.J. McNulty, President of the R.I. Seafood Festival evidences that the Festival, which has been one of the most active organizations associated with the FIPP, will sustain a “concrete and particularized” economic injury as a direct result of the January 17 Order. He states that:

“implementing the relocation plan approved by the Board in its Order would not only squander a once-in-a lifetime opportunity to enhance the aesthetic, economic and recreational value of the Park. Such enhancements would result in increased attendance at the annual seafood festivals and other events in the Park. This [relocation plan] would be an incalculable loss to the public at large, as well as a more specific and calculable economic loss to the many individuals and businesses who participate in events in the Park, by, among other things, selling food and other products, and/or performing.”

See McNulty Affidavit, attached to the Petition for Certiorari as Exhibit D.

These affidavits provide evidence constituting the very definition of irreparable harm to the public interest.

3. No Substantial Harm Will Come to the Public Interest or the Other Parties if the Stay Is Granted

There is no question that the public interest will benefit from the granting of a stay in this matter. The harm will occur if National Grid's plan to leave the lines overhead goes forward. Leaving them overhead along India Point Park and the linear park across the Seekonk would continue to depress property values on the East Providence waterfront parcels because the wires would be in plain view as people look across the narrow Seekonk River to Providence and up the river to the linear park. Many studies indicate property value losses of 10-30 percent for parcels

with a view of high voltage wires, including substantial losses when wires are 300-2,500 feet away. National Grid's proposal would leave wires within these ranges of the East Providence waterfront parcels.

Finally, little time need be spent to establish that no substantial harm will result to National Grid or East Providence in the event the Motion to Stay is granted. This matter has been pending before the Board for nearly fifteen years; therefore preserving the status quo for a few months and delaying the implementation of the schedule approved by the January 17 Order while this case is pending at the appellate level is a relatively insignificant amount of time.

To the anticipated argument from National Grid that “substantial harm” will result from the granting of a Stay, the opposite is actually true. After fifteen years of discussion and after \$18 million has already been raised to enable the burying of the high-voltage waterfront power lines, there is simply no justification for the Board to take immediate action implementing the South Bridge Alignment Proposal. For any party to expend time and resources while the matter is pending before the Supreme Court would be wasteful and unnecessary, and would only serve to take the initial steps in preventing the state from obtaining the lasting benefits of increased tourism and economic development.

II. CONCLUSION

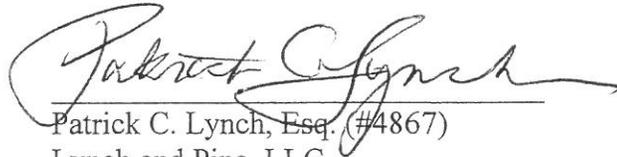
For all the above reasons, Petitioners' Motion to Stay should be granted.

THE CITY OF PROVIDENCE,
By its attorney,



Jeffrey B. Pine, Esq. (# 2278)
Lynch and Pine, LLC
One Park Row, 5th Floor
Providence, R.I. 02903
Tel: 401-274-3311
jpine@lynchpine.com

THE FRIENDS OF INDIA POINT PARK,
PROCACCIANTI COMPANIES, INC.,
d/b/a the Hilton Garden Inn, and McMAC, INC.,
d/b/a The R.I. Seafood Festival,
By their attorney,

A handwritten signature in cursive script that reads "Patrick C. Lynch". The signature is written in black ink and is positioned above a horizontal line.

Patrick C. Lynch, Esq. (#4867)
Lynch and Pine, LLC
One Park Row, 5th Floor
Providence, R.I. 02903
Tel: 401-274-3311
plynch@PatrickLynchGroup.com

CERTIFICATE OF SERVICE

I hereby certify that on this 9th of February, 2018, I caused a true copy of the within Response to be delivered by electronic and/or first class mail to:

Todd Bianco, Coordinator
Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888
todd.bianco@puc.ri.gov; margaret.curran@puc.ri.gov
patricia.lucarelli@puc.ri.gov; kathleen.mignanelli@puc.ri.gov

Peter V. Lacouture, Esq.
Robinson & Cole LLP
One Financial Plaza, Suite 1430
Providence, RI 02903-2485
placouture@rc.com

National Grid
jennifer.hutchinson@nationalgrid.com
mark.rielly@nationalgrid.com
joanne.scanlon@nationalgrid.com

Department of Attorney General
150 South Main Street
Providence, RI 02903
lwold@riag.ri.gov
jmunoz@riag.ri.gov
dmacrae@riag.ri.gov

Division of Public Utilities & Carriers
thomas.kogut@dpuc.ri.gov; jon.hagopian@dpuc.ri.gov
steve.scialabba@dpuc.ri.gov; joseph.shilling@dpuc.ri.gov;

Janet Coit, Director
Dept. of Environmental Management
235 Promenade Street
Providence, RI 02908
janet.coit@dem.ri.gov; jayna.maguire@dem.ri.gov

Parag Agrawal
Department of Administration
One Capitol Hill, 3rd Floor
Providence, RI 02903
parag.agrawal@doa.ri.gov; catherine.pitassi@doa.ri.gov

Adrienne G. Southgate
Deputy City Solicitor
444 Westminister Street, Suite 200
Providence, RI 02903
asouthgate@providenceri.gov

RI Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888
cynthia.wilsonfrias@puc.ri.gov; alan.nault@puc.ri.gov

Division of Public Utilities and Carriers
John J. Spirito, Esq.
john.spirito@puc.ri.gov

Gregory Dias, Esq.,
City Solicitor City of East Providence
145 Taunton Avenue
East Providence, RI 02914-4505
gdias@cityofeastprov.com; jboyle@cityofeastprov.com

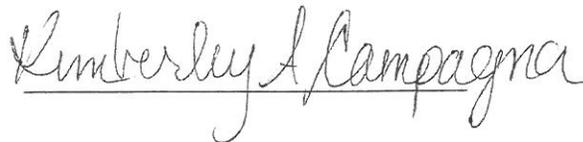
Mark W. Russo, Esq.
Ferrucci Russo P.C.
55 Pine Street, 4th Floor
Providence, RI 02903
mrusso@frlawri.com; wsmith@frlawri.com

Terence Tierney, Esq.
tierneylaw@yahoo.com

Seth H. Handy, Esq.
seth@handylawllc.com

Amar Singh
amar@indiarestaurant.com

Nick Ucci, OER
nicholas.ucci@energvr.ri.gov


Kimberley A. Campagna