STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID E-183 115 kV TRANSMISSION LINE RELOCATION PROJECT	: : : :	**DOCKET NO. SB-2003-01**

DECISION AND ORDER

On February 9, 2018, the City of Providence (Providence); the Friends of India Point Park (FIPP); Procaccianti Companies, Inc. d/b/a The Hilton Garden Inn; and McMac, Inc. d/b/a The R.I. Seafood Festival (collectively referred to as Petitioners) moved the Energy Facility Siting Board (Board) for a stay of its January 17, 2018 order, specifically Order No. 123. In that order, the Board was acting pursuant to Section II-J of the May 25, 2004 Settlement Agreement, which the Board expressly made part of its October 29, 2004 Report and Order (2004 Order). The 2004 Order was the Board's final decision on the Narragansett Electric Company d/b/a National Grid's (Narragansett) application to modify and relocate the E-183 115 kV transmission line (E-183 Line). The proposed project in Narragansett's original application was expanded through the efforts of the three intervenors -- the City of Providence (Providence), the City of East Providence (East Providence), and then-Rhode Island Attorney General Patrick C. Lynch (Attorney General) -- to include certain conditions beyond the original alignment proposed by Narragansett. Those

conditions, approved as part of the license issued in 2004, added four additional alignments to be considered seriatum, beginning with the Underground Alignment.[1]

In the January 17, 2018 Order, the Board addressed the Underground Alignment and the Bridge Alignment North, both of which had been previously considered and were found to be not feasible, and approved the Joint Report and Motion filed by Narragansett and East Providence that sought approval to relocate the E-183 Line to the Bridge Alignment South alternative. The Petitioners herein, on January 29, 2018, petitioned the Rhode Island Supreme Court for a writ of certiorari to vacate and remand the January 17, 2018 Order. They subsequently moved the Board to stay its Order.

TRAVEL

On April 9, 2003, Narragansett filed a Notice of Intent Application with the Board seeking approval to modify and relocate a certain portion of its E-183 115 kV transmission line (Project). The application was filed under Rule 1.6(f) of the Board's Rules of Practice and Procedure (Rules) which, "for the modification or relocation of a power line with a capacity of 69 kV or more," allows for an abbreviated application and concomitant process, requiring a public hearing in one or more of the cities or towns affected and a determination within sixty days as to whether the project may significantly impact the environment or public health, safety, and welfare. If the Board concludes that a significant impact may occur, it must conduct a full review. However, if it does not so conclude, the project does not constitute an alteration and may proceed without further Board review.

Following Narragansett's filing, Providence, East Providence, and the Attorney General intervened. The Board convened public hearings in June, July, and August 2003. In addition to

[1] If all the additional alignments were found to be not feasibly, the original alignment would be used.

comments from numerous members of the public, at these hearings the Board received testimony from Narragansett's engineers, its environmental witness, and the chief engineer for the Rhode Island Department of Transportation. At the close of the fifth public hearing, on August 6, 2003, several intervenors stated an intention to move the proceeding into a full hearing requiring Narragansett to file a full detailed application and the Board to conduct a preliminary hearing and request advisory opinions.[2] They also sought to reserve their rights to present witnesses and evidence were the Board to deny their putative motions.

Approximately six weeks later, on September 30, 2003, the four parties filed a Stipulation and Consent Order (Stipulation) that provided a framework for further proceedings, specifically not including a full hearing or full proceeding. The Stipulation proposed that the Board request certain advisory opinions and that, following the Board's receipt of the opinions, the parties would provide prefiled testimony and the Board would conduct a final hearing for the Project.

At an Open Meeting on October 10, 2003, the Board discussed the Stipulation. With several minor modifications, the Board found the Stipulation reasonable and approved it. Subsequently, and in accordance with the parties' Stipulation, the Board sought and received advisory opinions from the Department of Health, the Department of Environmental Management, the Public Utilities Commission, the Statewide Planning Program, the Providence Planning Board, and the East Providence Planning Board. After the advisory opinions were filed, on February 26, 2004, the Attorney General submitted prefiled testimony and, on March 31, 2004, Narragansett provided prefiled testimony of eight witnesses. Shortly thereafter, the parties asked for postponement of the final hearing to allow them to discuss settlement.

[2] R.I. Gen. Laws § 42-98-8(a) and Rule 1.6(a) of the Board's Rules of Practice and Procedure list what is required to be included in every application to alter a major energy facility. Rule 1.7 sets forth a procedure for docketing and Rules 1.9, 1.11, and 1.12 provide for advisory opinions and a hearing process.

On May 25, 2004, the four parties filed a Settlement Agreement. On May 28, 2004, the Board conducted a hearing on the Settlement Agreement and approved it, accepting the proposed alternative alignments and procedures for deciding which one should be adopted, as well as the other aspects of the Settlement Agreement. The Settlement Agreement was incorporated into the Board's order, Order No. 54, which was issued on October 29, 2004.

The Board's 2004 Order constituted the granting of a license pursuant to R.I. Gen. Laws § 42-98-11. It provided for the Project to be completed in two phases: 1) Phase I was the overhead relocation of the E-183 Line between the east bank of the Providence River and the vicinity of proposed Pole No. 7, located southeast of the then Radisson Hotel, now Hilton Garden Inn; was a necessary prerequisite to the Department of Transportation's relocation of I-195; and was completed years ago[3] and 2) Phase II, at issue here, was described as the reconstruction of the E-183 Line from Franklin Square to the east bank of the Providence River and the relocation of the portion of the Line between the vicinity of Pole No. 7 and the Phillipsdale Tap Point in East Providence. Phase II remains undone. As noted above, the Board's 2004 order contained the four alternative alignments for Phase II. The alignments comprised, in order of preference, the Underground Alignment, Bridge Alignment North, Bridge Alignment South, and the Tockwotten Alignment. The first and preferred of those alignments was the Underground Alignment. The other three alignments were overhead.

The 2004 Order required the parties to carry out certain tasks. Narragansett was to complete a construction grade estimate. The Attorney General was to obtain clear and certain commitments for funding. Providence and East Providence were to obtain and convey to

[3] Phase I was required to be completed prior to the commencement of Phase II. The ends of the relocated Phase I of the E-183 Line were to be and were temporarily connected to the existing river crossings. The remainder of the Project was stalled after the completion of Phase I.

Narragansett the property rights necessary for siting the Underground Alignment. The Board Order provided for any incremental costs associated with the underground option (i.e. greater than the cost of Narragansett's proposed original alignment) to be paid by Providence and East Providence ratepayers with money that was withheld by Narragansett and not refunded to them from a prior settlement agreement on another matter. The Order provided that if the Underground Alternative could not be accomplished because it was not feasible, Narragansett would proceed with one of the other listed overhead alternatives, subject to the agreed-upon process set forth in the Order. Thus, if the Underground Alignment was determined to be not feasible, Narragansett would then proceed with the Bridge Alignment North. If the Bridge Alignment North was subsequently determined to be not feasible, Narragansett would then move to the Bridge Alignment South and so forth.[4] The order of alignment choices was set forth in detail in the Settlement Agreement that the parties provided to the Board for acceptance and incorporation into the final order.

As evidenced by these proceedings and the lengthy passage of time, the Underground Alignment was never accomplished. When the Board began conducting status conferences at the behest of East Providence in 2010, neither Providence nor East Providence had obtained and conveyed property to Narragansett. In fact, after property in Providence had been identified as the landing site required by Narragansett, the identified site was sold by its owner to a third party who was not informed of the land's possible fate by either the seller or the City of Providence.

After a series of status conferences revealing a dearth of progress, on October 22, 2014, upon the request of the other parties and the Board, Narragansett provided an updated construction estimate. The estimate indicated that the cost of the original estimate for the underground project had more than doubled from the original estimate. Between April 22, 2010 and October 12, 2016,

[4] Order No. 54, Settlement Agreement II-J.

while the Board convened numerous more status conferences, the parties unsuccessfully attempted to identify some satisfactory underground solution under the Settlement Agreement contained in the Board's 2004 Order. Ultimately, however, all the parties, including Providence, acknowledged the seemingly insurmountable serious risks of technical failure and extremely high costs associated with the underground alternative. Each party acknowledged on the record that the Underground Alignment was not feasible.[5]

On October 12, 2016, Narragansett and East Providence filed a Joint Report and Motion pursuant to Section II-J of the Settlement Agreement, which is part of the Board's 2004 Order and license. In the report, East Providence and Narragansett asserted that, based on all the engineering information that had been provided in numerous conferences and hearings, neither the Underground Alignment nor the Bridge Alignment North alternatives were feasible and requested that the Board approve the Bridge Alignment South. The Attorney General's November 2, 2016 response to the Joint Report and Motion clearly expressed its agreement stating that the Attorney General "believe[d] the Bridge Alignment South alternative represent[d] the most feasible cost-effective solution that accomplishes the goals of the Settlement Agreement" and "does not oppose the Joint Motion that National Grid and East Providence have filed with the [Board]."[6] The Joint Report and Motion also included a new schedule as was required by the 2004 Order.

Providence, alone, objected to the Joint Report and Motion and requested additional time to evaluate an exhumed "underbridge alignment," something never included among accepted alternatives included in the Settlement. Although the Public Utilities Commission's advisory opinion found it was undisputed that the bridges were not designed to support attached

[5] Hr'g Tr. at 34-36 (Sept. 26, 2017).
[6] *See also* Hr'g Tr. at 30 (Sept. 26, 2017).

transmission lines, the Board permitted Providence the opportunity to explore again whether somehow this might prove a viable option.

On July 18, 2017, the Board received testimony confirming that the underbridge alignment was not a feasible option. The Board subsequently scheduled a September 26, 2017 hearing on Narragansett and East Providence's Joint Report and Motion. On the eve of that hearing, Providence submitted written acceptance of the Bridge Alignment South alternative, conditioned on Narragansett agreeing to underground the portion of the line passing alongside India Point Park, a completely new alternative, neither previously discussed nor considered for inclusion in the Settlement made part of the Board's 2004 Order. Because such configuration would require the construction of two transition stations, each occupying approximately one-half acre of land at either end of the buried line, Narragansett asked Providence to specifically identify what land to be used. Necessarily, one parcel would have to be on part of the property that, as previously noted, had been sold to another private party, left unaware of its imperiled status. The other would have to be somewhere within the confines of India Point Park. Narragansett also informed Providence that it did not believe the existing funds from Providence ratepayers, which Narragansett was still holding, would be sufficient to cover the total costs of the construction and undergrounding and asked how Providence intended to finance the new alternative.

East Providence objected to Providence's proposal. It asserted that Providence's new condition was inconsistent with the terms of the Settlement Agreement. And Providence acknowledged that it had not fully vetted the proposal to determine whether or not it was feasible nor considered whether it would conflict with the terms of the Settlement Agreement.[7]

[7] Hr'g Tr. at 32-33 (Sept. 26, 2017); Hr'g Tr. at 10 (Oct. 18, 2017).

On October 18, 2017, after considering the evidence and arguments heard that day and previously, the Board found that the Underground Alignment and the Bridge Alignment North were not feasible. Noting the benefits of the Bridge Alignment South, the Board approved the Bridge Alignment South and the proposed schedule, all according to the procedural format set out in the Settlement that the Parties asked the Board to approve and adopt. The Board set out its findings, approval, and proposed schedule in the written Order, No. 123, issued on January 17, 2018.

On January 29, 2018, Petitioners -- only one of whom, Providence, was a party to the Board's proceeding -- filed a Petition for Certiorari with the Rhode Island Supreme Court. On February 9, 2018, Petitioners filed a Motion to Stay the Board's January 17, 2018 Order. Narragansett and East Providence objected to the motion. The Board scheduled a hearing on the motion for March 27, 2018.

Less than twenty-four hours before the scheduled hearing, Petitioner FIPP filed a document entitled "Argument" with the Board. The filing advised the Board that FIPP's counsel, former Attorney General Patrick C. Lynch, a signatory to the Settlement Agreement, would not be present. The "Argument" criticized the other parties' attorneys as ineffective or self-serving, praised the Attorney General's earlier advocacy, and challenged the clear intent of the Settlement Agreement as well as the subsequent proceedings related to the agreed-upon alternative alignments. While the "Argument" included lengthy sections criticizing the performance of Attorneys Southgate, Lacouture, and Russo, FIPP's filing was devoid of any legal citations or cites to the record that would warrant granting a stay. Indeed, FIPP failed to provide any support for the requested stay beyond its cursory claim.

Narragansett's counsel filed a letter in response to "express [his] objection to and disappointment with former Attorney General Patrick Lynch's" filing and asserted that "the Argument steps beyond vigorous advocacy and into improper *ad hominem* attacks, which disregard ethical principles that are foundational to the profession of law and the judicial system." East Providence also provided a response to Petitioner FIPP's comments, identifying numerous misstatements contained throughout the filing.

To provide FIPP an opportunity to be heard, the Board rescheduled the hearing on Petitioner's Motion for Stay for April 12, 2018. Less than twenty-four hours prior to that hearing, Petitioners filed a Motion to Stay with the Rhode Island Supreme Court and challenged the Board's jurisdiction to hear the pending motion.

DECISION

On April 12, 2018, the Board heard oral argument on Petitioners' Motion to Stay. Petitioners asserted that since a Petition for Certiorari had been filed with the Rhode Island Supreme Court, the Board was without jurisdiction to hear and rule on the Motion to Stay that Petitioners had filed on February 9, 2018. In support of their jurisdictional challenge, Petitioners cited Rule 11 of the Rhode Island Supreme Court Rules of Appellate Procedure (Appellate Rules) and *Thompson v. Thompson*, 973 A.2d 499 (R.I. 2009)*(Thompson)*. When questioned why, if they believed the Board lacked jurisdiction, Petitioners had filed the Motion to Stay with the Board in the first instance and failed to raise their jurisdictional challenge until the eve of hearing, they reported that they "were covering the bases" and that "a further reading of Rule 11 of the Supreme Court Rules of Appellate Procedure as well as the Thompson versus Thompson case [had] convinced [them]" the Board was devoid of jurisdiction.[8]

[8] Hr'g Tr. at 5 (Apr. 12, 2018).

Narragansett flatly rejected the Petitioners' jurisdictional challenge, referring the Board to Rule 8 of the Appellate Rules. East Providence also refuted the Petitioners' position and interpretation of the Appellate Rules.

Based on the unambiguous language of Rules 8 and 11 of the Appellate Rules, the Board found that it had jurisdiction to hear the Motion for Stay. Rule 8 specifically addresses motions to stay. Rule 8 requires a motion for stay be first filed in the lower court. Petitioners failed to even mention Rule 8.

The Board also found Petitioners' citation to and reliance on *Thompson* to be misplaced. In *Thompson,* the Court held that "once an appeal has been docketed in the [Supreme] Court, the party seeking entry of an order *pursuant to Rule 7* must request a remand to the lower court." *Thompson*, 973 A.2d at 514 (emphasis added). *Thompson* is clearly distinguishable from the situation here. Neither *Thompson* nor any of the cases cited by the Court in *Thompson* dealt with motions to stay. The Board rejects the arguments posed by Petitioners. The Board had jurisdiction to hear and rule on the motion.

In addition to failing on their jurisdictional claim, Petitioners have failed to establish any of the elements required for the Board to issue a stay. First, the Petitioners made no showing of a strong likelihood they will prevail on the merits. As explained earlier, the Board entered an order on October 29, 2004 that addressed each of the issues mandated by R.I. Gen. Laws §42-98-11.[9] Notwithstanding their efforts to connect their complaints to the Board's January 17, 2018 Order, Petitioners' real challenge is with the 2004 Order. There the Board found that Narragansett's

[9] SB-2003-01, Order 54 (Oct. 29, 2004). One might also note that the proceeding leading to the Board's 2004 Order was based on a modified version of the expedited proceeding applicable to the modification or relocation of transmission lines. Rule 1.6(f), Board's Rules of Practice and Procedure. Therefore, it is questionable whether the Board was actually required to conform with all the requirements of the Energy Facility Siting Act. The Board might have found that the Project did not constitute an alteration.

proposed project, which included the four alternative alignments proffered by all the parties, was needed, cost justified, would not result in unacceptable environmental harm, and would enhance the socio-economic fabric of the State. The Board reviewed in detail the evidence and addressed each of the advisory opinions it had received accepting each. The Board's approval of the application and Settlement Agreement constituted the license for Narragansett to proceed according to the terms set forth in Order No. 54.[10]

The Order incorporated the steps the intervenors proposed and the parties agreed should be used to accomplish the proposed project and the process to be followed if any approved alternatives, beginning with the Underground Alignment, were found to be not feasible. The deadline by which to appeal Order No. 54 was November 8, 2004. No one appealed Order 54. Now, almost fifteen years later, Petitioners, none of whom but Providence were parties to the original proceedings,[11] although they, including FIPP, could have intervened and participated as full parties, are dissatisfied with the Board's Order and all of the alternatives that were approved and agreed to by all the parties in 2004 except for the Underground Alignment. Providence was a party, participated in the proceedings, and signed the Settlement Agreement that became part of the 2004 Order, Order No. 54. Providence acknowledged that the parties were bound by Order No. 54 and the Settlement Agreement.[12] But Providence now contends that the 2004 order was a private agreement between Narragansett, East Providence, and Providence that illegally delegated and privatized the Board's role to evaluate the feasibility of the alternative approaches. This

[10] R.I. Gen. Laws § 42-98-11(b).
[11] As noted earlier, former Attorney General Lynch was a party and signatory to the Settlement Agreement but in his official capacity. On this motion and the appeal he is representing FIPP.
[12] Hr'g Tr. at 46 (Mar. 2, 2017). Ms. Southgate: "[t]hose of us who are at the table are bound by a settlement agreement that we signed more than a decade ago which outlined really only four alternatives...."

argument is being made almost fifteen years after the Order entered. Providence and the other petitioners are long out of time to challenge the terms of 2004 Order, Order 54.

In support of their motion for a stay of the January 17, 2018 Order, the Petitioners rely on, inter alia, information that Petitioner FIPP sought to portray as evidence through affidavit and an amicus curiae brief that was never part of the record in any of the proceedings before the Board.[13] None of this is evidence before the Board.[14] Petitioners make a number of statements that are unsupported by the record. They assert, for example, that "there is ample evidence in the record to support the conclusion that the underground alignment is technically feasible."[15] They contend that because it found that the Underground Alignment was not feasible, the Board somehow failed to do its job. But the record includes a detailed, technical report discussing both the high risk of failure and estimated $34 million costs associated with the Underground Alignment. Moreover, the independent peer review, which was insisted upon by the intervenors, Providence, East Providence, and the Attorney General, confirmed the initial report's findings.

Petitioners also assert that the Board'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."[16] This statement is not accurate. Again, the 2004 Order, Order No. 54, made the required findings of fact and conclusions of law and addressed each of the Advisory Opinions as required by law. There is no scenario or interpretation of the Board's mandate or evidence that persuades the Board that Petitioners are likely to prevail on the merits. Indeed, in 2004, the intervenors abandoned their avowed intention to force the Board to provide a full hearing and file

[13] *See* Motion For A Stay of the EFSB's Order (Jan. 17, 2018).
[14] *See Rhode Island Consumers' Council v. Smith*, 302 A.2d 757, 774-775 (R.I. 1973).
[15] Motion For A Stay of the EFSB's Order at 2 (Jan. 17, 2018).
[16] *Id.* at 3.

a detailed application once the Board agreed to consider the Settlement as part of the final order including the format for assessing the alignments proffered by the parties.

Petitioners' argument that they will suffer irreparable harm if a stay is not granted is equally unpersuasive. They claim that property values and views will be impacted if a stay is not granted. But surely the existing power lines have already exerted whatever impact a similar alignment might have on property values and views. Moreover, credible evidence showed that the Bridge Alignment South alternative will be an improvement over the current situation, as part of the proposal is to remove an existing pole from India Point Park. Additionally, construction is not scheduled to begin until July 15, 2019, which provides more than one year for Petitioners' case to be heard and decided.

Petitioners have also failed to convince the Board that granting a stay will not cause substantial harm to other interested parties. East Providence represented that delay has already caused it to forgo development opportunities and lose tax revenue and that it risks losing more if the project is delayed further. The Board finds that the continued delay of this project that would invariably result if a stay were granted will result in substantial harm to East Providence.

Finally, Petitioners have failed to demonstrate that not granting a stay will harm the public interest. Overhead lines already run along India Point Park. Moving the lines outside the Park and replacing the overhead lines across the Seekonk River not only will not harm the public interest but, in fact, will be an improvement over the current configuration.

Based on the above stated findings and conclusions, the Board denies Petitioners' Motion for a Stay.

Accordingly, it is hereby

(135) ORDERED:

The Motion for a Stay is denied.

EFFECTIVE AT WARWICK, RHODE ISLAND ON APRIL 18, 2018 PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED JUNE 1, 2018.

ENERGY FACILITY SITING BOARD

Margaret E. Curran, Chairperson

Janet Coit, Member