

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

In re:

The Narragansett Electric	:	
Company d/b/a National Grid	:	Docket No. SB-2008-002
Rhode Island Reliability Project	:	

TOWN OF JOHNSTON'S POST-FINAL HEARING BRIEF

The Town of Johnston (the "Town") hereby files its Post-Hearing Brief in the above-entitled matter.

The Town respectfully requests that the Energy Facility Siting Board ("EFSB") deny Narragansett Electric Company d/b/a National Grid's ("National Grid") instant Application to construct and alter major energy facilities in connection with the Rhode Island Reliability Project (the "Project") due to the fact that National Grid has failed to satisfy its burden of proving that the project will not harm the socio-economic fabric of the Town or that the impact on the public's health, safety, welfare justifies a waiver of the, otherwise, required permits needed to construct the Project within the Town.

Summary of Argument

The Town has raised a number of important issues with regard to the Project, which National Grid has simply and unilaterally chosen to ignore. By utilizing the term "ignore", the Town points to the fact that National Grid unilaterally chose not to undertake any analysis whatsoever despite the issues being raised by the Town and conflicting testimony being offered by National Grid's witnesses. If the EFSB likewise "ignores" the issues then, an extremely dangerous precedent will be established.

Said issues include:

- the accuracy of National Grid's contention that it is safe to build structures right up to the edge of the "Right of Way";
- the danger posed by electrical induction and/or other electrostatic effects along the edge of the "Right of Way"; and
- the property tax impact of the Project on the Town.

These were issues raised by the Town prior to any filing by National Grid for zoning relief. Yet, the Town has not had the benefit of an answer, any analysis, or any independent review. National Grid has simply taken the position that they are not looking at these issues. Thus, the Town is left with trying to finance its own analysis or worse, financing an appeal. The Town does not carry the burden of proof – National Grid carries the burden of proof, which cannot be satisfied by ignoring the concerns of the Town.

National Grid has admittedly failed to even undertake any analysis whatsoever to address the Town's concerns. Despite, a substantial break in the proceedings during which National Grid undertook additional EMF studies, National Grid has not retained any experts qualified to give an opinion regarding the dangers posed by electrical induction and/or other electrostatic effects along the edge of the Right of Way. Further, National Grid has admittedly failed to even consider the impact on possible land uses beyond the edge of the Right of Way. Thus, National Grid has not retained an expert to analyze or opine as to the accuracy of National Grid's contention that it is absolutely safe to build structures up to the edge of the Right of Way.

Finally, the EFSB heard three separate opinions as to the amount of property taxes that the Town would receive as a result of the Project. Each of the opinions varied widely both in the estimated amount of taxes, as well as the method of calculation. Thus, the amount of property tax that the Town will receive as a result of the Project is not clear.

The precedent sought to be established by National Grid is that the concerns of the host community can be ignored unless and until the host community commits the funds necessary to prove its case. If the host community does not “prove its case”, then National Grid moves forward. However, the host community does not have the burden of proving its case. Legitimate issues have been raised and National Grid cannot be allowed to push such issues aside without undertaking any independent analysis whatsoever.

Accordingly, the Town respectfully requests that the EFSB deny the instant Application up and until National Grid commissions an independent analysis as to: (1) the safety of building structures right up to the edge of the Right of Way; (2) the dangers posed by electrical induction and/or other electrostatic effects along the edge of the Right of Way; and (3) the impacts of the project on further, potential land uses along the Right of Way . Further, in light of the varying tax estimates, the Statewide Planning Program should be ordered to issue an additional opinion regarding property taxes to the Town.

Pertinent Factual Background

The Rhode Island Reliability Project

On or about September 8, 2008, National Grid filed an Application with the EFSB to construct and alter major energy facilities (the “Application”). Under the Rhode Island Reliability Project, National Grid proposed to construct a new 345 kilovolt transmission line, relocate and reconstruct an existing 115 kV transmission lines, and add equipment to existing substations. The project is known as the Rhode Island Reliability Project.

In the Town, the Project involved National Grid relocating the existing 115 kV transmission line and the construction of a new 345 kV transmission line within National Grid’s 5.5 mile long Right of Way that runs through the Town (the “Right of Way”).

From the Outset, the Town Requested that National Grid Provide Information Regarding the Safety of Activities in the Vicinity of the Right of Way

In late 2008, prior to National Grid seeking any zoning relief from the Town, Town Officials contacted National Grid in an attempt to determine National Grid's standards and/or recommendations relative to placing structures along or near the edge of the Right of Way. *See* Prefiled Testimony of Makram H. Megali, P.E. at p.2.

National Grid's response was that developers should obtain National Grid approval "in the event there are transmission lines in the vicinity of the proposed building." *Id.*

In or about March 2009, two months before any hearings on National Grid's request for zoning relief and in response to National Grid's suggestion, Town Officials sent National Grid, a building application where the building envelope would be within 20 feet of the edge of the Right of Way. *Id.* at p. 3. National Grid responded that since the structures would be located outside the Right of Way, the construction would have "no impact" **on the rights of National Grid.** *Id.* at p. 3. Thus, National Grid did not have any "issues with the proposed development". *Id.*

National Grid's response was of no assistance to the Town. *Id.* The Town was obviously aware that the structures would be placed outside of the Right of Way. Rather, the Town was inquiring as to whether there were any safety concerns with placing structures along or in the vicinity of the edge of the Right of Way. *Id.* The Town attempted to follow up with **no** response from National Grid.

The Town Boards Express Safety Concerns at Public Hearings

In connection with the Project, the EFSB ordered that the Town Zoning Board of Review and the Town Planning Board (the "Town Boards"), render advisory opinions as to whether the

Project would meet the requirements of all applicable zoning ordinances and whether the required special use permits and/or variances should be granted.

The Town Boards held public hearings regarding the Project on May 19, 2009, May 25, 2009 and September 4, 2009 (the "Hearings").

At the Hearings, the Town Boards heard testimony of National Grid experts, William H. Bailey, PhD, David Beron, P.E., Susan Molberg, PWS and Webster A. Collins, MAI, CRE FRICS.

At the Hearings, the Town Boards, as well as Town Officials, expressed safety concerns relative to construction of various types of buildings, antennas, swimming pools and other various structures along or near the edge of the Right of Way.

Mr. Beron testified on behalf of National Grid that the Project had been designed in accordance with the National Electrical Safety Code ("NESC"), and thus, it was safe to build any structure right up to the edge of the Right of Way. *See* EFSB Hearing Transcript dated October 19, 2009 at p. 9 L14-L24.

Dr. Bailey then testified on behalf of National Grid and stated, in direct contradiction with Mr. Beron, that before a resident is permitted to build structures up to the edge of the Right of Way, "it would be prudent to check with National Grid and see if they had any specific recommendations based upon their experiences and practices." *See* Prefiled Testimony of Makram H. Megali, P.E. at p. 5.

Dr. Bailey also testified that National Grid had not performed any electrical induction studies in the Town relative to the Project, despite the fact that other power companies, such as the Bonneville Power Administration, have enacted safety regulations to deal with this issue. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 17-19.

The Town Boards were provided with exhibits which demonstrated that Town Officials, as far back as late 2008, attempted to get guidance from National Grid as to the issue of building structures within twenty feet of the edge of the Right of Way in light of the pending Project. National Grid failed to provide any meaningful response. *See* EFSB Transcript at Pages 22-23, 35-36; Prefiled Testimony of Makram H. Megali, P.E. at pp.1-4.

**Town Engages an Expert to Opine as to the Safety of
Building to the Edge of the Right of Way**

As a result of Town Boards' safety concerns regarding building up to the edge of the Right of Way, the Town engaged Edward G. McGavran, III, P.E. Mr. McGavran was engaged to opine whether it would be safe and advisable to build structures right up to the edge of the Right of Way in light of the proposed 115 kV high voltage transmission lines being located between 28 feet to 35 feet from the edge of the Right of Way.¹

After reviewing available documentation, Mr. McGavran opined that the contention that it is safe to build any structure up until the edge of the right away is not "completely accurate". *See* Page 1 of Mr. McGavran's Written Testimony attached as Exhibit A to the Town's Joint Advisory Opinion ("McGavran Testimony").

Mr. McGavran expressed concern that freestanding accessory structures and vertical elements on improvements located adjacent to the Right of Way could contact the transmission lines, if they were to fail. *See* McGavran Testimony at pp. 2-3.

Additionally, Mr. McGavran expressed concern relative to static discharges along metal buildings and/or structures located along the right-of-way which are not properly grounded. *See*

¹ National Grid limited the Town to a \$5,000 budget to preliminarily explore the issue.

id. Finally Mr. McGavran expressed concern relative to swimming pools and construction equipment being placed along the edge of the right-of-way. *See id.*

Mr. McGavran further opined that the NESC, on which National Grid relied, is a minimum standard for the siting of transmission lines. Mr. McGavran instead suggested a mandatory 50 foot space from the centerline of any 115 kV structure to the edge of the right-of-way as recommended by the Rural Utility Service at RUS Bulletin 1724E-200 (2005 Ed.).

Mr. McGavran stated that it is advisable that the EFSB not approve the Project without the EFSB imposing a set back from the edge of the Right of Way of 20 feet for any new construction. *See McGavran Testimony at p. 3.*

Despite the McGavran Testimony, National Grid failed to retain any expert to testify before the Town Boards qualified to offer an opinion as to whether, in light of the Project, it would be safe for the Town to authorize the placement of structures within 20 feet of the Right of Way.

On or about September 4, 2009, as a result of National Grid's failure to address the Town Boards' safety concerns, the Town Boards issued an advisory opinion to the EFSB denying the Dimensional and Use Variances and Special Use Permit requested by National Grid. *See Town Boards' Joint Advisory Opinion.*

National Grid Fails to Address the Town's Concerns before the EFSB

At the October 19, 2009, Final Hearing as to those issues related to the Town of Johnston before the EFSB (the "Final Hearing"), National Grid's testimony further evidenced an absolute failure to address the Town's safety concerns.

Mr. Beron testified that despite National Grid's commitment on the record before the Town Boards to provide examples of similar projects in which National Grid was involved,

including safety concerns due to proximity to the edge of the Right of Way, National Grid had failed to make any effort to provide this information to the Town. *See* EFSB Final Hearing Transcript dated October 19, 2009 at pp. 12-16.

Mr. Beron further testified that despite the Town's inquiries of National Grid regarding the possible dangers of electrical induction, that electrical induction studies had not been performed in the Town relative to the Project. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 17-19.

Mr. Beron further testified that National Grid did not perform **any** studies relating to potential electrostatic effects, because National Grid did not do any modeling for electrostatic current relative to the Project. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 26-29, 38-39.

Additionally, Mr. Beron testified that National Grid had done no modeling to determine the risk of shock to non-electrified buildings along the Right of Way which present the risk of discharging electric shocks. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 31-33.

Impact on Town's Future Construction

At the EFSB hearings, the Town introduced evidence regarding the Town's B-3 Zone which the Town Comprehensive Plan provides should be established in certain areas along the Right of Way. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 40-41.

The EFSB heard testimony that the B-3 Zone allows accessory structures and/or vertical elements at a height that could impact the power lines if they were to fall. When National Grid was asked whether it had given any consideration to this possibility, National Grid informed the EFSB that it had not given any consideration whatsoever to land uses outside the edge of the Right of Way. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 42,45-47.

Finally, National Grid responded in the affirmative when asked whether the reason that these potential impacts in the B-3 Zone were not considered by National Grid, was because National Grid “simply came to the conclusion that if you stayed within the existing Right of Way, there would be no adverse impact outside of the existing Right of Way.” *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 47 and 48.

National Grid’s Expert Report Related to Line Clearances Did Not Take Into Consideration the Effects Outside of the Right of Way or Address Town’s Concerns Regarding Building Along the Edge of the Right of Way

Joseph Drouin, the project engineer for the Project, testified at the EFSB Hearings regarding his report on the minimum clearances for the transmission lines along the Right of Way. In compiling this important report, Drouin was not informed that the Town had raised issues regarding induction. *See* EFSB Hearing Transcript dated October 19, 2009 at p.73.

National Grid did not have Drouin prepare any report related to the safe design and construction of structures right along the edge of the Right of Way. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 75 and 76.

Further, Mr. Drouin testified that his report was based solely on his opinion on engineering knowledge of risk of failure of the system, lines and structures, and not on the risk of exposure of a human being to EMF or stray charges. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 93 and 94.

ARGUMENT

I. National Grid Has Not Met Its Burden of Proof that the Project Impact on the Public Health, Safety and Welfare of the Town Justifies The Granting of the Application

Rhode Island General Laws Section 42-98-11, provides the factors which the EFSB must consider in deciding whether to grant an application under the Energy Facility Siting Act. The

statute places the burden on the “applicant” to prove that among other things, the public health, safety, welfare, security of the impacted community “justifies” the waiver of the applicants need to meet with requirements relative to permits and variances. *See* R.I. Gen. Laws § 42-98-11(b).

In the instant matter, National Grid has failed to meet its burden of proof.

Throughout the hearings before Town Boards and the EFSB, the Town raised safety concerns. The safety concerns generally revolve around whether National Grid’s contention that it is safe to build right up to the edge of the Right of Way is correct, or whether certain safety precautions are necessary. *See e.g.* EFSB Hearing Transcript dated October 19, 2009 at pp. 8-12; McGavran Testimony at pp. 1-3.

The Town has raised legitimate concerns regarding: possible electrical induction from structures located along the Right of Way, the safety of swimming pools and other open water along the edge of the Right of Way, the safety of erecting accessory structures such as towers, antennas, and the safety of erecting vertical elements on improvements such as chimneys and signs along the Right of Way. *See* McGavran Testimony at pp. 2-3.

Further the Town provided testimony regarding other locations throughout the United States and the world that have restrictions on certain structures located as far as 150 feet from certain power lines. *See* Prefiled Testimony of Makram H. Megali, P.E. at p.4.

National Grid has failed to provide any meaningful response to these concerns raised by the Town. Further, National Grid has failed to even retain appropriate experts, to conduct necessary modeling, or to conduct any study or analysis whatsoever which would be necessary to address the Town’s concerns. *See* EFSB Hearing Transcript dated October 19, 2009 at pp. 17-19.

Thus, the Town has clearly raised numerous safety issues.

The Town does not have the burden of proving that the Project is going to certainly damage the public health, safety, welfare, security of its citizens. Rather, it is National Grid who has the burden to present evidence before the EFSB that the Project will not harm the safety, welfare and security of the impacted community. Accordingly, the Town respectfully requests that the EFSB deny National Grid's application until it has satisfactorily addressed the Town's safety concerns regarding whether it is safe to build structures right up to the edge of the Right of Way.

II. Cities and Towns in Rhode Island Do Not Have the Financial Wherewithal to Fully Participate in the Review of Energy Facility Siting Applications

The procedure before the EFSB to review energy facility siting applications has resulted in Rhode Island cities and towns being left with no avenue to have meaningful input in the design of energy facility projects.

By the time cities and towns have a chance to review an energy facility project, the design process is already well underway. Further, cities and towns simply do not have the expertise and/or funding available to conduct a meaningful review of complicated energy facility siting applications.

In the instant matter, the Town has raised numerous issues with respect to the impact of the Project. Further, the Town Boards and Town officials have been unsuccessful in obtaining a clear answer as to whether it is safe and/or advisable to build structures right up to the edge of the Right of Way.

Instead, the Town has received conflicting answers that appear to be designed to ensure that National Grid has no liability with respect to their response. Further, National Grid has dismissed the Town's safety concerns without hiring an expert to adequately deal with them.

Thus, the Town of Johnston (as with all towns and cities throughout Rhode Island) is stuck in a situation in which it has no forum in which to meaningfully address its safety concerns before the EFSB approves an energy facility siting project.

Accordingly, the Town respectfully requests that the EFSB deny the Application until National Grid adequately addresses the safety concerns of the Town.

III. The EFSB Cannot Make a Decision on the Socio-Economic Impact of the Project Until the Taxes to be Paid by National Grid Are Clarified

Rhode Island General Laws Section 42-98-11(b)(3) require the EFSB to determine that “the proposed facility will not cause unacceptable harm to the environment and will enhance the socio-economic fabric of the state.” Further, the Preliminary Decision and Order issued by the EFSB on or about December 19, 2008, regarding the instant Project, requires that the EFSB consider the “tax benefits to the Towns”. *See* Preliminary Decision and Order at p.13.

At the EFSB hearings and before the Town Boards, National Grid indicated that the tax benefit from the Project to the Town would be approximately \$1 million per year. The Statewide Planning Program Advisory Opinion estimated the yearly property tax to the Town as a result of the Project at approximately \$1.2 million (the “Statewide Planning Estimate”).

At the EFSB Hearings, testimony was provided by the Town indicating that both National Grid’s and Statewide Planning’s estimate of property taxes were significantly in error. *See* Prefiled Testimony of Timothy Chapman Esq. at P. 2-3.

National Grid contends that the Property should be taxed as real estate at approximately \$18.00 per \$1,000.00, while the Town has contended that the Project should be taxed as personal

property at approximately \$56.00 per \$1,000.00.² See EFSB Hearing Transcript dated October 19, 2009 at pp. 131; Prefiled Testimony of Timothy Chapman Esq. at P. 2.

Further, the EFSB heard testimony that the Statewide Planning Estimate is in error because it inexplicably treated a large portion of Project costs as existing construction and thus, incorrectly depreciated a significant amount of the Project costs. See Prefiled Testimony of Timothy Chapman Esq. at P. 3.

The EFSB heard testimony that the Town believes it should receive approximately \$2,650,000 per year in personal property taxes from National Grid as a result of the Project. *Id.*

Accordingly, the Town respectfully suggests that the record is not complete with regards to the property tax to be paid to the Town as result of the Project.

Thus, the EFSB cannot make an accurate determination as to the tax benefits and/or economic benefits of the Project to the Town without a clarification as to the property taxes to be paid to the Town as a result of the Project.

Therefore, in light of the varied testimony before the EFSB, the Town respectfully requests that the EFSB remand the instant matter to Statewide Planning for a determination of the property taxes to be paid as a result of the Project.

Conclusion

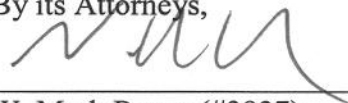
If the instant matter is not remanded to Statewide Planning and National Grid is not forced to adequately address the Town's safety concerns, a dangerous precedent will be set which will undermine the intent of the Energy Facility Siting Act. The Energy Facility Siting Act was

² The Superior Court, in the matter styled *Narragansett Electric Company v. Michael Minardi, et al*, P.C. 08-6981, , has ruled in favor of the Town in this regard. National Grid's appeal of this matter to the Supreme Court is currently pending.

designed to streamline the energy facility siting process. If cities and towns are not able to have their concerns addressed in the application process before the EFSB, cities and towns will be forced to litigate these concerns in the courts. This litigation will be costly to the cities and towns, and it will delay National Grid's ability to supply power to the region. Thus, it is vital that the Town's welfare, safety, and socio-economic concerns be addressed in this forum.

WHEREFORE, the Town respectfully requests that the EFSB deny the instant Application.

Town of Johnson
By its Attorneys,



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Dated: June __, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the within was served via e-mail upon the attached on this __ day of June, 2010:



**SB-2008-2 Narragansett Electric Co. – RI Reliability Project Application
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