

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

Petition of Medway Grid, LLC for Approval to
Construct a Battery Energy Storage System
Pursuant to G.L. c. 164, § 69J¼, in Medway,
Massachusetts

)
)
)
)
)
)
)

EFSB 22-02

Petition of Medway Grid, LLC for Exemptions from
the Zoning Bylaw of the Town of Medway,
Massachusetts, Pursuant to G.L. c. 40A, § 3

)
)
)
)
)
)
)

D.P.U. 22-18

Petition of Medway Grid, LLC for Approval to
Construct a 345-kilovolt interconnection for its
proposed Battery Energy Storage System Pursuant
to G.L. c. 164, § 72, in Medway, Massachusetts

)
)
)
)
)
)
)

D.P.U. 22-19

TENTATIVE DECISION

Robert J. Shea, Esq.
Presiding Officer
April 26, 2023

On the Decision:

Joan Foster Evans, Esq.
Andrew Greene

APPEARANCES:

Andrew O. Kaplan, Esq.
Paul K. Connolly, Esq.
Pierce Atwood LLP
100 Summer Street
Boston, MA 02110
FOR: Medway Grid, LLC
Petitioner

Jeffrey M. Bernstein, Esq.
BCK Law, P.C.
P.O. Box 205
Woodstock, VT 05091
FOR: Town of Medway
Intervenor

David. S. Rosenzweig, Esq.
Michael J. Koehler, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, MA 02110
FOR: NSTAR Electric Company d/b/a Eversource Energy
Intervenor

Paul D. Yorkis, Representative
7 Independence Lane
Medway, MA 02053
FOR: Medway Enumerated Parties
Intervenor

Charles A. Myers
9 Curtis Lane
Medway, MA 02053
Pro Se
Limited Participant

Table of Contents

| | | |
|------|---|----|
| I. | Introduction..... | 1 |
| A. | The Proposed Project | 1 |
| B. | Description of the Project Site | 4 |
| C. | Procedural History..... | 6 |
| II. | Jurisdiction Pursuant to c. 164, § 69J¼ | 11 |
| A. | Introduction | 11 |
| B. | Standard of Review | 11 |
| C. | Positions of the Parties | 13 |
| 1. | The Company’s Position | 13 |
| 2. | MEP’s Position | 16 |
| 3. | Charles Myers’s Position..... | 16 |
| D. | Analysis and Findings | 17 |
| 1. | Siting Board Statutes | 17 |
| 2. | Other G.L. c. 164 Statutes | 21 |
| 3. | ISO-NE | 24 |
| 4. | Conclusion | 26 |
| III. | Referral Order and Department Review | 27 |
| IV. | Decision | 28 |

Pursuant to G.L. c. 164, § 69J¼, the Massachusetts Energy Facilities Siting Board (“Siting Board”) hereby [dismisses for lack of subject matter jurisdiction] the Petition of Medway Grid, LLC (“Medway Grid” or “Company”) to construct a 250 megawatt (“MW”), 500 megawatt-hour (“MWh”) battery energy storage system (“BESS”) and ancillary facilities to be located in Medway, Massachusetts. The Siting Board furthermore relinquishes its jurisdiction over the Company’s petitions filed pursuant to G.L. c. 164, § 72, and G.L. c. 40A, § 3. Said petitions will be decided by the Department of Public Utilities (“Department”).¹

I. INTRODUCTION

A. The Proposed Project

Medway Grid proposes to construct a BESS with a storage capacity of 500 MWh and a maximum discharge rate of 250 MW, its own new electric substation (“Project Substation”), and a transmission interconnection (“Transmission Interconnection”) linking the Project Substation to the nearby existing Eversource West Medway Substation (“Eversource Substation”) (collectively, the “Project”) (Exh. MG-2, at 1). The Project would be located in Medway, Massachusetts, immediately south of Milford Street (Route 109) (“Project Site”) (Exh. MG-2, at 6 and Figure 2-4). Most of the BESS equipment, measured by footprint, would be located close to the northern boundary of the Project Site (Exh. MG-2, at Figure 2-4). Other BESS equipment would sit immediately to the south of the larger-footprint group of equipment (Exh. MG-2, at Figure 2-4). The Project Substation would be located still further to the south, abutting the southern edge of the smaller-footprint group of equipment (Exh. MG-2, at Figure 2-4). The proposed Transmission Interconnection would originate at the southern end of the Project Substation (Exh. MG-2, at Figure 2-4).

In general, the BESS would charge when electricity supply is ample, store the electricity until times of peak demand, and then dispatch the electricity to the electric grid (Exh. MG-2, at 1). The BESS would use lithium-ion batteries, housed in approximately 140 above-ground Tesla Megapack enclosures for said storage (Exh. MG-2, at 2, 15). Each Megapack is approximately

¹. The Siting Board is concurrently issuing a decision on the limited issue of Siting Board jurisdiction in Cranberry Point, EFSB 21-02/D.P.U. 22-59.

28.9 feet long, 5.4 feet wide, and 9.2 feet tall (Exh. MG-7, at 3, n.5). Of the 10.6-acre Project Site, approximately 5.2 acres will be developed for the BESS and the Project Substation (Exh. MG-2, at 1).

The Project Substation would include equipment such as a 345 kV/34.5 kV main power transformer, switchgear, circuit breakers, disconnect switches, low and high buses, and a static mast (Exh. MG-2, at 16). At its tallest point, the static mast would be up to 65 feet high (Exh. MG-2, at 16). The Project Substation would take the power output from the BESS to 34.5 kV collection switchgear and step it up to a transmission voltage of 345 kV (Exh. MG-2, at 16). The step-up in voltage would enable the power from the BESS to be connected to the Eversource Substation via the proposed Transmission Interconnection (Exh. MG-2, at 16). During charging, the proposed Transmission Interconnection would carry electricity from the Eversource Substation back to the Project Substation where it will be stepped-down to 34.5 kV (Exh. MG-6, at 16-17). At this voltage, the electricity can then be routed to the BESS for storage (Exh. MG-6, at 17).

When operating, the BESS would produce audible noise (Exh. MG-7, at 10). Noise mitigation measures include use of low noise equipment, a 22-foot-tall sound attenuation barrier, and operational restrictions (40 percent fan speed and limiting the number of active units during the quietest periods, from midnight to 6 a.m.) (Exh. MG-7, at 10). The Company states that the Project will comply with the Massachusetts Department of Environmental Protection (“MassDEP”) Noise Policy at all property lines and at the nearest residences (Exh. MG-7, at 10). The BESS would be bounded by a combination of a minimum eight-foot-high security fence in certain sections (Exh. MG-2, at 2). The proposed sound attenuation barrier is approximately 1,280 feet in length, located along the north and east sides of the BESS (Exh. MG-2, at 2).

The proposed Transmission Interconnection would run underground approximately 1,465 feet south and west from the Project Site, crossing two Eversource-controlled parcels, before connecting with the Eversource Substation (Exhs. MG-7, at 1; MG-2, at 2). The proposed underground Transmission Interconnection line would require the clearing of vegetation up to 25-foot-wide along its 1,465-foot corridor (Exhs. MG-7, at 1; MG-2, at 2). An approximately 12-foot-wide gravel roadway would be installed over the underground transmission line within this 25-

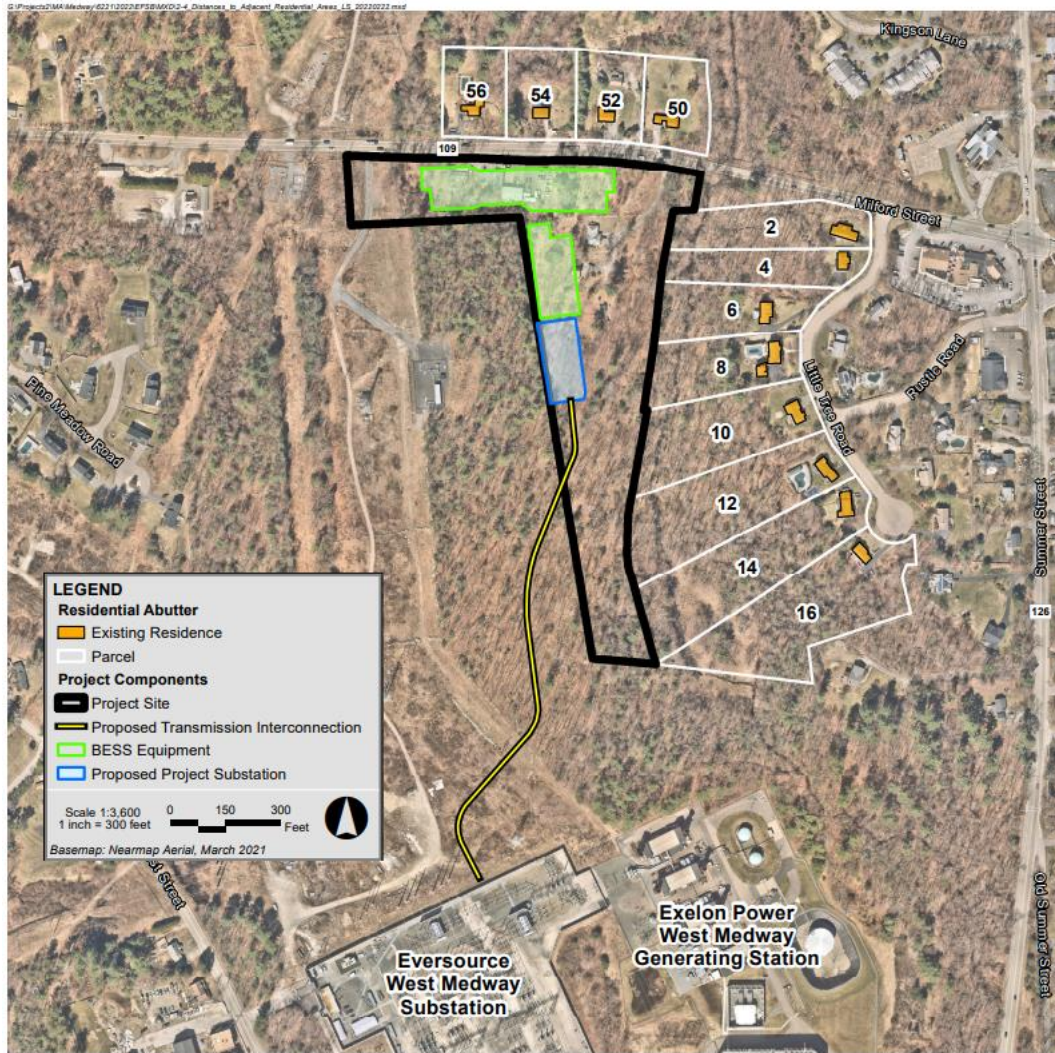
foot-wide corridor to provide permanent access to the Transmission Interconnection (Exh. MG-2, at 2).

The Project will require some upgrades to existing Eversource interconnection facilities, undertaken by Eversource, in order for the Project to be interconnected at the Eversource Substation (Exh. MG-2, at 20). These interconnection upgrades will include the installation of a new 345 kV breaker, 345 kV breaker disconnects, a 345 kV line terminal disconnect, a line terminal structure, coupling capacitor voltage transformers, lightning arresters, as well as associated civil work and wiring and protection and control equipment (Exh. MG-2, at 20). These interconnection upgrades will take place within the walls of the existing substation (Exh. MG-2, at 20).

When the Petition was filed, Eversource indicated that it would need to install some additional upgrades in order for Medway Grid's power to be fully deliverable in the Southeastern New England ("SENE") capacity zone (Exh. MG-2, at 21; Eversource Brief at 2, n.2). These upgrades include increasing clearances on line 325 (to increase the line's operating temperature) in order to achieve the required thermal rating on the line (Exh. MG-2, at 21; Eversource Brief at 2, n.2). Eversource now states that such work is not necessary (RR-EFSB-4; Eversource Brief at 2, n.2). Therefore, Eversource is not relying upon Medway Grid's zoning exemptions for Eversource's project-related construction (RR-EFSB-4; Eversource Brief at 2, n.2). The Project was awarded a capacity supply contract from ISO New England ("ISO-NE") via the Forward Capacity Auction ("FCA") 15 for the SENE capacity zone (Exhs. MG-1, at 4; MG-2, at 1).² The Project must be constructed and capable of supplying energy by June 1, 2024 (Exhs. MG-2, at 1; EFSB-Z-4).

² Sam Lines, Senior Vice President for Eastern Markets, Eolian, testified that Medway Grid's parent entity is Astral Infrastructure Holdings, LLC ("Astral") (Tr. 1, at 40). Astral is a "fully controlled entity under Eolian, L.P." (Tr. 1, at 40).

Figure 1: Medway Grid Project Site.



Adapted from: Exh. MG-2, fig. 2-4.

B. Description of the Project Site

The Project Site is approximately 10.6 acres in size (Exh. MG-2, at 6). Of this area, approximately 0.85 acres has been previously developed by three existing residences and an existing automotive repair facility (Exh. MG-2, at 6). The previously developed area abuts Milford Street (Route 109) which constitutes the Project Site’s northern boundary (Exh. MG-2, at 6, and Figure 2-1). Most of the remaining approximately 9.76 acres is located to the south of the

previously developed area and consists in large part of forested upland and wetlands (Exh. MG-2, at 6, Figures 2-2 and 2-3).

The Eversource Substation and the Exelon Corporation West Medway Generating Station (“Exelon Generating Station”) are located approximately 460 to 500 feet from the Project Site’s southern boundary (Exh. MG-2, at 6, 12, Figure 2-2, Figure 2-4). An existing Eversource transmission corridor connects the West Medway Substation to the Project Site (Exh. MG-2, at 6, Figure 2-2, Figure 2-4). A perennial stream (Center Brook) runs near that eastern boundary of the Project Site (Exh. MG-2, at 6 and Figure 2-2). Eight residences on Little Tree Road, located to the east of Center Brook, range from 260 feet to 595 feet from the Project Site’s eastern parcel boundary (Exh. MG-6, at 12 and Figure 2-4). There are four additional residence structures across Milford Street (Route 109) to the north, ranging from 105 to 115 feet from the Project Site parcel (Exh. MG-6 and Figure 2-4).

The Project Site is currently zoned as a Residential/Agricultural district (AR-II district) (Exh. MG-3, at 7). Under the Town of Medway Zoning Bylaws, an energy storage system is not a permitted use in this zoning district (Exh. MG-3, at 7, and Att. 1, at 47-52). Furthermore, Section 5.2(B) of the Town of Medway Zoning Bylaw expressly prohibits use variances (Exh. MG-3, at 7, and Att. 1, at 39-40). In addition, the AR-II district limits the height of structures to 35 feet (Exh. MG-3, at 8, and Att. 1, at 70). The proposed Project Substation, described below, would contain components which would significantly exceed this height (Exh. MG-3, at 8, and Attachment 1, at 70).

On November 15, 2021, the Town of Medway held a special town meeting at which it imposed a temporary moratorium on the construction of BESS in the Energy Resources zoning district (ER district) (Exh. EFSB-Z-24(b)(i)(S)). The next year, at a special town meeting held on November 14, 2022, the Town enacted Article 15 (Exhs. EFSB-Z-24(b)(ii)(S); EFSB-Z-24(S) Att. 9, at 12). This article would segregate BESS into two tiers (Exh. EFSB-Z-24(S) Att. 9, at 15). Tier 1 would have an aggregate energy capacity of less than one MWh; and Tier 2 would have an aggregate energy capacity of more than one MWh (Exh. EFSB-Z-24(S) Att. 9, at 15). The Project at 500 MWh would therefore be classified as Tier 2. Article 15 would also add a new provision to the Medway Zoning Ordinance, section 8.12 (Exh. EFSB-Z-24(S) Att. 9, at

13-21). This new section would allow Tier 2 facilities to be constructed only by special permit and only with “major site review” (Exh. EFSB-Z-24(S) Att. 9, at 16). The Company argues that this article would preclude construction of the Project at its intended site (Exh. EFSB-Z-24(S) Att. 9, at 16).³

C. Procedural History

On February 25, 2022, the Company filed with the Siting Board a petition to construct the Project pursuant to G.L. c. 164, § 69J¼ (“Petition to Construct”). On the same day, the Company filed two petitions with the Department. The first was a petition pursuant to G.L. c. 40A, § 3, seeking certain individual exemptions and a comprehensive exemption from the Town of Medway Zoning Bylaws (“Zoning Petition”). The second was a petition pursuant to G.L. c. 164, § 72, seeking approval to construct an underground transmission line (“Section 72 Petition”). The Siting Board docketed the Section 69J¼ petition as EFSB 22-02. The Department docketed the Zoning Petition and the Section 72 Petition as D.P.U. 22-18 and 22-19, respectively. On April 4, 2023, the Chairman of the Department, acting pursuant to G.L. c. 164, § 69H(2), issued a referral and consolidation order referring the Zoning Petition and the Section 72 Petition to the Siting Board for review and decision together with the Petition to Construct. The Siting Board accordingly conducted a single adjudicatory proceeding and developed a single evidentiary record with respect to the Petitions as a consolidated docket EFSB 22-02/D.P.U. 22-18/22-19.

On March 18, 2022, the Secretary of the Executive Office of Energy and Environmental Affairs (“Secretary” and “EEA,” respectively), acting pursuant to the Massachusetts Environmental Policy Act (“MEPA”),⁴ issued a certificate on the Company’s Expanded Environmental Notification Form (“EENF Certificate”) (Exh. MG-5). The EENF Certificate required the Company to file a Single Environmental Impact Report (“SEIR”) (Exh. MG-5, at 1). The Company submitted its SEIR to MEPA on August 31, 2022 (Exh. MG-6, at 1). On October

³ Article 15 is still being reviewed by the Office of the Attorney General.

⁴ The acronym “MEPA” also refers to the Office that administers said act: i.e., the Massachusetts Environmental Policy Act Office.

18, 2022, the Secretary issued a certificate on the SEIR finding that it “adequately and properly complies with MEPA and its implementing regulations” (Exh. MG-7, at 1).

The Siting Board conducted a remote public comment hearing via Zoom on July 13, 2022. Prior to the hearing, the Siting Board directed the Company to provide notice as follows:

1. To publish a Notice of Public Comment Hearing/Notice of Adjudication once a week for a minimum of two consecutive weeks in the Milford Daily News and The Boston Globe. The first publication was to be made at least fourteen days before the hearing.
2. To send the Notice electronically, at least two weeks prior to the public comment hearing, to the Medway Town Clerk’s Office for posting on the Town’s website, to remain posted on the website until the close of the written comment period.
3. To send a hard copy of the Notice for posting at the Medway Town Clerk’s Office and the Medway Public Library no later than two weeks prior to the public comment hearing, to remain posted in the Clerk’s office and library until the close of the written comment period.
4. To make copies of the Petitions, including attachments, available for public review at the Medway Town Clerk’s office and in the Medway Public Library beginning at least two weeks before the public comment hearing, to remain available to the public until the Siting Board issues a final decision.
5. To post copies of the Notice, Petitions, and attachments on the Company’s website in a prominent location, to remain available for public review on said website until the Siting Board issues a final decision.
6. To mail a copy of the Notice to abutters, owners of land directly opposite on any public or private street or way, abutters to the abutters, and all owners of property within one-half mile of the property line of the Project Site.
7. To mail a copy of the Notice to all U.S. Mail Addresses within one-half-mile of the property line of the Project Site, as those U.S. Mail Addresses have been identified through Mass GIS or other similar database.

8. To mail all documents so that they are received by June 28, 2022, two weeks prior to the public comment hearing.
9. To serve a copy of the Notice on the Medway Planning Board, and the planning boards of each abutting town (Millis, Norfolk, Franklin, Bellingham, Milford, and Holliston).
10. To serve a copy of the Notice on the Board of Selectmen, Town Manager, Zoning Board of Appeals, Department of Public Works, and Conservation Commission for the Town of Medway.
11. To mail a copy of the enclosed Notice to counsel for the Town of Medway: Jeffrey M. Bernstein, Esq., BCK Law, P.C., P.O. Box 205, Woodstock, VT 05091.

At the remote public comment hearing, the Company made a presentation regarding the Project. Various Medway municipal officials and members of the public offered comments and asked questions. The questions addressed the risk of fire, the Siting Board approval process, the distinction between energy storage and energy generation, and the financial benefits of the Project to Medway.

There are no mapped Environmental Justice (“EJ”) populations within one mile of the proposed Project (Exh. MG-2, at 67). There are several mapped areas of EJ populations in Milford and Franklin, Massachusetts, that are within five miles of the proposed Project; however the Project does not impact air quality (Exh. MG-2, at 67). The Project does not require MEPA’s enhanced public involvement protocols or enhanced analysis of potential project impacts on environmental justice populations (Exh. MG-2, at 67). Given the demographic data and project impact thresholds in the surrounding area of the Project, the Siting Board did not require either enhanced public participation or enhanced analysis of impacts and mitigation under the EEA Environmental Justice Policy; translation/interpretation in languages other than English was neither required by, nor requested under, the Language Access policies of the Commonwealth. The Siting Board created a [comprehensive public information website](#) for the Project, including notices of hearings and recorded video thereof, public participation information, Project and related information, and links to the Company’s petitions.

The intervention deadline in the proceeding was Wednesday, July 27, 2022. The Siting Board received four timely motions to intervene, filed by the Town of Medway, Eversource, an unincorporated association by the name of “Medway Enumerated Parties” (“MEP”), and Charles Myers, a Medway resident. On October 20, 2022, the Presiding Officer issued a ruling allowing intervention by the Town of Medway, Eversource, and MEP. The ruling denied Charles Myers’s motion to intervene but allowed him to be a limited participant.

On February 25, 2022, the Company submitted pre-filed testimony from seven witnesses: (1) Justin Adams, Vice President of Permitting, Eolian; (2) A.J. Jablonowski, Principal, Epsilon Associates, Inc.; (3) Benjamin Cotts, Ph.D., Principal Engineer, Exponent; (4) Marc Bergeron, Principal, Epsilon Associates, Inc.; (5) Robert D. O’Neal, Managing Principal, Epsilon Associates, Inc.; (6) Christina Wolf, Director of Development for the Medway Grid Energy Storage Project; and (7) Jason Kneldhans, Director of Energy Storage Solutions for Medway Grid’s Energy Storage Project. On January 4, 2023, the Town of Medway submitted the pre-filed testimony of Medway Town Manager Michael Boynton.

The Siting Board issued two rounds of Information Requests to the Company and one round of Information Requests to the Town of Medway. The Town issued a set of Information Requests to the Company. In response to an Information Request from the Siting Board, the Company filed a Host Community Agreement between itself and the Town of Medway dated September 7, 2022 (Exh. EFSB-G-26(1)).

On December 28, 2022, the Company informed the Siting Board that Ms. Wolf and Mr. Knedlhans would not be available for cross-examination at the evidentiary hearing. Justin Adams, who had already submitted pre-filed testimony, would testify as to Ms. Wolf’s areas of expertise. Jason Yedinak, the Company’s Senior Vice President, would testify as to the areas of Mr. Knedlhans’s areas of expertise. On February 2, 2023, the Company submitted pre-filed testimony from Jason Yedinak; Ryan Callahan, a Senior Consultant Acoustic Engineer with Epsilon Associates, Inc.; Samuel Lines, Senior Vice-President for Eastern Markets at Eolian, L.P.; and Paul Rogers, a former Lieutenant in the New York City Fire Department and the founder of Energy Safety Response Group.

The Siting Board conducted three days of remote evidentiary hearings, on February 9, 10, and 13, 2023. The Company presented eight witnesses for cross-examination. These witnesses included the four people who had submitted their pre-filed testimony on February 2, 2023: Jason Yedinak, Senior Vice President of Investments, Eolian; Sam Lines, Senior Vice President for Eastern Markets, Eolian; Ryan Callahan, Senior Consultant, Epsilon Associates, Inc.; and Paul Rogers, co-founder of Energy Safety Response Group. In addition, four of the seven people who had submitted pre-filed testimony with the initial filing were also present for cross-examination: Justin Adams, Vice President of Permitting, Eolian; Marc Bergeron, Principal, Epsilon Associates, Inc.; A.J. Jablonowski, Principal, Epsilon Associates, Inc.; Benjamin Cotts, Ph.D., Principal Engineer, Exponent. Robert D. O'Neal, the Managing Principal at Epsilon Associates, had submitted pre-filed testimony with the initial filing, but he was not present at cross-examination. The Town of Medway's witness, Michael Boynton, Medway Town Manager, was also present for cross-examination.

More than 300 exhibits were introduced into evidence, including the Company's Petitions, the pre-filed written testimony of the Company's witnesses, the pre-filed written testimony of the Town of Medway's witness, the Company's responses to Information Requests and Record Requests issued by the Siting Board and MEP, and the Town's response to the Siting Board's Information Requests. The Company, the Town, Eversource, MEP, and Charles Myers filed initial briefs on March 17, 2023. The Company, the Town, and Mr. Myers filed one reply brief each on March 31, 2023. MEP filed two reply briefs on that date, a reply to the Town of Medway ("MEP Reply Brief to Town"), and one reply to Medway Grid ("MEP Reply Brief to Medway Grid").

After the conclusion of evidentiary hearings and the filing of briefs, Siting Board staff drafted a Tentative Decision regarding the question of whether the Siting Board has jurisdiction to review the BESS pursuant to G.L. 164, § 69J¼. On April 26, 2023, staff served a copy of the Tentative Decision on the Siting Board and all parties and the limited participant for review and comment. Notice of the Siting Board meeting was provided electronically in English, Spanish, Portuguese, Mandarin Chinese, Vietnamese, and Haitian Creole and sent to community-based organizations as well as the service list. The parties and limited participant were given until May

5, 2023, to file written comments. The Siting Board received timely written comments from the Company, Eversource, MEP, the Town of Medway, and Charles Myers.

The Siting Board conducted a remote public meeting to consider the Tentative Decision on May 10, 2023. [Identify who provided oral comments.] After deliberation, the Board directed staff to prepare a Final Decision dismissing the Section 69J¼ petition for lack of subject matter jurisdiction.

II. JURISDICTION PURSUANT TO C. 164, § 69J¼

A. Introduction

The question as to whether the Siting Board has jurisdiction over BESS has been raised in both the Cranberry Point and Medway Grid proceedings. Both proceedings are fully briefed, and the question of jurisdiction is before the Board. As the question of jurisdiction is foundational to the Siting Board's review of these projects, the Siting Board determines that it is appropriate to address jurisdiction at this stage in the proceedings.

Below, the Siting Board reviews its statutes for authority from the Legislature. Where the Siting Board statutes do not provide clear direction from the Legislature, the Siting Board looks to other sections of G.L. c. 164 for insight into the Legislature's intended treatment of BESS. The Siting Board also reviews ISO-NE treatment of BESS, which applies to the two BESS projects in these dockets. The Siting Board concludes that given the lack of explicit authority, and different energy processes involved in generating and storing energy, the Legislature has not granted authority over BESS projects to the Siting Board.

B. Standard of Review

Interpretation of a statute necessarily begins with the statutory text itself, because “[e]lementary rules of statutory construction require that each statute be interpreted as enacted.” Commonwealth v. Gore, [366 Mass. 351](#), 354 (1974). The Supreme Judicial Court (“SJC”) reviews de novo questions concerning the meaning of an agency's enabling statute. See Commerce Ins. Co. v. Commissioner of Ins., [447 Mass. 478](#), 481 (2006). “[W]here the statute's meaning is clear and unambiguous, [the SJC will] give effect to the Legislature's expressed intent.” Providence & Worcester R.R. v. Energy Facilities Siting Board, [453 Mass. 135](#), 141 (2009). If the SJC

concludes, however, that the statutory language is "sufficiently ambiguous to support multiple, rational interpretations," Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., [454 Mass. 174](#), 186 (2009), then it will "look to the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Entergy Nuclear Generation Co. v. Department of Env'tl. Protection, [459 Mass. 319](#), 329 (2011). Kain v. Department of Environmental Protection, [474 Mass. 278](#) (2016); Engie Gas and LNG v. Department of Public Utilities, [475 Mass. 191](#), 199 (2016).

An administrative agency has "a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation." Moot v. Department of Env'tl. Protection, [448 Mass. 340](#), 346 (2007),⁵ quoting Levy v. Board of Registration & Discipline in Med., [378 Mass. 519](#), 525 (1979). Nonetheless, statutory interpretation is ultimately the duty of the courts, and for that reason, the "principle of according weight to an agency's discretion ... is one of deference, not abdication, and [the] court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable" (citations and quotations omitted). Moot, [448 Mass. at 340](#), 346. Kain, [474 Mass. 278](#) (2016); Engie Gas, [475 Mass. 191](#), 199 (2016).

We are guided by two well-established principles of statutory construction. First, where the same word is used in different parts of a statute, it "should be given the same meaning ... barring some plain contrary indication." TM Buckley/North LLC v. Assessors of Greenfield, [453 Mass. 404](#), 408 (2009), quoting Connolly v. Division of Pub. Employee Retirement Admin., [415 Mass. 800](#), 802-803 (1993). Second, "all words of a statute are to be given their ordinary and usual meaning" and we construe "each clause or phrase [...] with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose." Worcester v. College Hill Props., LLC, [465 Mass. 134](#), 139 (2013), quoting Selectmen of Topsfield v. State Racing Comm'n, [324 Mass. 309](#), 312-

⁵ Moot v. Department of Env'tl. Protection, [448 Mass. 340](#), 346 (2007), was superseded in part by statute, "An Act relative to the licensing requirements for certain tidelands," St. 2007, c. 168, § 1, as recognized in Moot v. Department of Env'tl. Protection, [456 Mass. 309](#) (2010).

313 (1949). Kain v. DEP, [474 Mass. 278](#), 287 (2016); Engie Gas, [475 Mass. 191](#), 199 (2016); Providence and Worcester R.R. Co. v. Energy Facilities Siting Board, [453 Mass. 135](#), 142 (2009).

C. Positions of the Parties

In their briefs, the Company, MEP, and Charles Myers all addressed the issue of whether the Siting Board has jurisdiction over the Project. Eversource's initial brief assumes that the Siting Board has jurisdiction over the Project. The Town of Medway does not address jurisdiction in either its initial or reply briefs.

1. The Company's Position

The Company argues that the Project would constitute a "generating facility," as defined by statute, G.L. c. 164, § 69G (Company Brief at 12). Furthermore, the Company asserts that G.L. c. 164, § 69J^{1/4}, gives the Siting Board jurisdiction over generating facilities (Company Brief at 12). Therefore, the Company argues, the Siting Board has jurisdiction over the Project (Company Brief at 12). Furthermore, the Company argues that the Siting Board accepted jurisdiction over the Project when it docketed the matter, ruled on intervention, held hearings, issued discovery, and accepted briefs (Company Reply Brief at 2).

The Company asserts that pursuant to G.L. c. 164, § 69G, a generating facility is defined by two essential characteristics: (a) it must be a "generating unit," and (b) it must be designed for or capable of operating at 100 MW or more (Company Brief at 12). Given that the Project BESS has a nameplate capacity of 250 MW, the Company argues, it clearly possesses the second characteristic (Company Brief at 12). According to the Company, the BESS itself would constitute the "generating unit," while the rest of the Project would fall within the scope of ancillary structures that are included in the Section 69G definition of a "generating facility" (Company Brief at 12). In support of the argument that the Project is a "generating unit," the Company notes the ways in which the Project would act as a de facto generator (Company Brief at 12--13).

First, the Company represents, the BESS will participate in the ISO-NE marketplace as a "Generator Asset" (Company Brief at 12). According to the Company, the ISO-NE tariff defines a "Generator Asset" as "a device (or collection of devices) that is capable of injecting real power

onto the grid” (Company Brief at 12). According to the Company, ISO-NE “has implemented a technology-neutral market construct” (Company Brief at 13). Under this construct, the Company asserts, “a storage facility registers as a dispatchable Generator Asset” (Company Brief at 13).

Second, the Company represents that the Project “has been designed to participate in ISO-NE’s” FCM within the SENE capacity zone (Company Brief at 12, citing Exh. MG-2). The Company represents that “ISO-NE awarded Medway Grid a capacity contract in the FCA 15, based upon its ability to provide 250 MWs/500 MWhs of capacity at the most affordable price” (Company Brief at 56).

Third, the Company asserts that the Project has registered as a “Generator per NEPOOL GIS system” (Company Brief at 13, citing Exh. EFSB-J-2). Fourth and last, the Company represents that “Eversource and Medway Grid anticipate entering into a Large Generator Interconnection Agreement for this Project to proceed” (Company Brief at 13, citing Exh. EFSB-G-13).

Based on these assertions, the Company argues that the Project should be deemed to qualify as a “generating unit” or a “generation facility” and Siting Board jurisdiction over the Project would be appropriate (Company Brief at 13-14).

In addition, Medway Grid also emphasizes the practical disadvantages that would result from the Board denying jurisdiction over its petitions (Company Reply Brief at 2-4). Denying Board jurisdiction over the Project, the Company argues, would render it unable to meet its ISO-NE obligations (Company Brief at 2). Consequently, the Company asserts, the need for capacity in the SENE region – which the Project is designed to fulfill, and which ISO-NE has identified – would go unmet (Company Reply Brief at 2). The damage that would be caused by potentially derailing the Project, Medway Grid asserts, makes it “too late in this process to be arguing over EFSB’s jurisdiction” (Company Reply Brief at 2).

Furthermore, Medway Grid notes that the case of Cranberry Point Energy Storage, LLC, EFSB 21-02/D.P.U. 22-59 (“Cranberry Point”) presents the same jurisdictional issues as the present case; and it is also pending before the Board (Company Reply Brief at 2, n.1). The Project and the Cranberry Point project together, the Company represents, could provide 800 MWh of storage in the SENE region (Company Reply Brief at 2, n.3). By denying jurisdiction in both

cases, the Company argues, the Board would make it impossible for the Commonwealth to reach its “goal to procure 1,000 MWh of energy storage by 2025” (Company Reply Brief at 2, n.3).

The Company asserts that MEP’s reliance on the Rhode Island decision, Energy Storage Resources, and the New York decision, Petition of AES Energy Storage, is misplaced (Company Reply Brief at 3-4).⁶ In Energy Storage Resources, the Company argues, the scope of inquiry by the Rhode Island Energy Facilities Siting Board (“RI EFSB”) was limited to whether a particular energy storage facility constituted a “major energy facility” as that term is defined in Rhode Island statutes (Company Reply Brief at 2). That issue, the Company asserts, is not similar to the key issue in the present case: whether a facility that operates “as a generator supplying capacity to the regional grid” falls within Siting Board jurisdiction (Company Reply Brief at 2-3). The Company further asserts that “ISO-NE, NEPOOL, and Eversource all understand and acknowledge that the facility [i.e., the Project] is operating as a generator” (Company Reply Brief at 3).

With respect to the New York decision, Petition of AES Energy Storage, the Company asserts that “the New York Public Service Commission *has* taken jurisdiction over energy storage facilities” (Company Reply Brief at 3; emphasis in the original). In support thereof, the Company cites to New York State Public Service Law Section 68 and 16 New York Codes, Rules and Regulations 21.3 (Company Reply Brief at 3).

Finally, the Company represents that FERC “has found that when an energy storage company sells electric energy at wholesale, the facility is deemed to be a generating facility” (Company Reply Brief at 4). In support, Medway Grid cites as follows: “see, e.g., Marengo

⁶ MEP attached two decisions to its initial brief in this matter: The Rhode Island decision attached to the MEP Brief was rendered by the RI EFSB and is captioned: In re: Petition of Energy Storage Resources, LLC for a Jurisdictional Determination Pursuant to R.I. Gen. Laws § 42-35-8, docket number SB-2019-02 (2020) (RI EFSB found that an energy storage facility is not a “major energy facility” as defined by the applicable Rhode Island statute). The New York decision referenced by MEP was issued by the New York Board on Electric Generation Siting and the Environment (“NY Siting Board”). It is captioned Petition of AES Energy Storage, LLC for a Declaratory Ruling that Battery-Based Energy Storage Facilities Are Not Subject to Article 10 of the PSL, Case 13-F-0287 (2014) (the NY Siting Board concluded that, “stand-alone, battery-based, energy storage facilities not associated with the development of new electric generating facilities are not subject to the Board’s jurisdiction).

Battery Storage, LLC, EG19-19-000 (Nov. 13, 2018) (an energy storage facility that provides only frequency regulation services is a generator); Engie 2020 ProjectCo-NH1 LLC, Docket No. EG22-15-000 (Oct. 27, 2021) (battery energy storage facility used to provide peak shaving services in addition to making wholesale sales of ancillary services is a generator); KEI Mass Energy Storage I, LLC, Docket No. EG21-121-000 (Apr. 12, 2021) (battery energy storage facility used to provide peak shaving services in addition to making wholesale sales of ancillary services is a generator).”

2. MEP’s Position

MEP argues that if the Project is not an “energy generation facility,” then the Siting Board has no jurisdiction over it (MEP Brief at 1). MEP asserts that the Project would simply purchase energy, store it, and then dispatch it to the grid (MEP Reply Brief to Medway Grid at 4-5). At no point, MEP argues, would the Project actually produce electricity (MEP Reply Brief to Medway Grid at 5).

MEP represents that the director of permitting for Medway Grid’s parent company has stated that “What we do is standalone utilities scale battery energy storage systems” (MEP Brief at 1).⁷ MEP also asserts that “New York and Rhode Island” have issued decisions holding that a BESS is not an energy generation facility (MEP Brief at 1). Copies of these decisions are attached to the MEP brief.

3. Charles Myers’s Position

Charles Myers asserts that the BESS should not be considered a generator for two reasons. First, the BESS will be a net consumer of energy, not a net generator (Myers’ Brief at 19-20). Second, Mr. Myers quotes Tom Kruger, Vice-President of Permitting for the Company, as saying “we are not generating [,] we are batteries” (Myers’s Brief at 20, citing Exh. MEP-45, at 2).

⁷ The quoted language is found in exhibit MEP-45(S)(A-1), which includes the minutes of a meeting of a Planning and Zoning Commission of an unspecified municipality dated December 11, 2019. In that exhibit, Mr. Kruger does not represent that he is the director of permitting for Medway Grid’s parent company (Exh. MEP-45(S)(A-2) at 2). Rather, Mr. Kruger represents that he is the director of permitting for Able Grid Energy Solutions LLC which, Mr. Kruger represents, is the parent company for Madero Grid LLC (Exh. MEP-45(S)(A-2) at 2).

D. Analysis and Findings

1. Siting Board Statutes

The Siting Board only has such powers as have been expressly or impliedly delegated by the Legislature. Engie Gas and LNG v. DPU, [475 Mass. 191](#) (2016), citing Entergy Nuclear Generation Co. v. Department of Env'tl. Protection, [459 Mass. 319](#), 331 (2011) ("Where ... the scope of agency authority is at issue, we must determine whether the agency is acting within the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission" [quotation and citation omitted]). Here, the Siting Board's jurisdiction is defined in G.L. c. 164, §§ 69G-69S ("Siting statutes"). See also 980 CMR 2.02. Specifically, the Legislature has delegated authority to the Board, inter alia, to approve or reject petitions for construction of "facilities." G.L. c. 164, § 69H. The Board's governing statutes define the types of energy infrastructure that constitute a "facility".⁸ G.L. c. 164, § 69G. BESS is not explicitly included on the list of facilities over which the Siting Board has jurisdiction, nor is BESS explicitly excluded. See G.L. c. 164, § 69G.

Where the Legislature enumerates certain powers, it is presumed that powers not so enumerated or reasonably implied are not delegated by the Legislature. See Providence & Worcester R.R. v. Energy Facilities Siting Board, [453 Mass. 135](#) (2009) (Legislature granted the Siting Board eminent domain authority to take land needed for new oil pipelines only; therefore, the Board lacked eminent domain jurisdiction over land containing existing oil pipelines); Life Insurance Association of Massachusetts v. Commissioner of Insurance, [403 Mass. 410](#) (1988) ("When the Legislature has wanted the commissioner to have the authority to issue regulations, it has said so expressly"); Commissioner of Revenue v. Marr Scaffolding Co., Inc., [414 Mass. 489](#), 493 (1993) ("An administrative agency has no inherent or common law authority to do anything. An administrative board may act only to the extent that it has express or implied statutory authority to do so").

⁸ Section 69G defines the following types of facilities: generating units 100 MW or more; certain new transmission lines and ancillary structures which are integral parts of the operation of any transmission line; certain structures for the manufacturing or storage of gas; and certain new gas pipelines.

The Legislature's omission of BESS as an explicit category of Board-jurisdictional facilities in G.L. c. 164, § 69G, could be determinative in finding a lack of Board jurisdiction for BESS projects. It seems reasonable to conclude that since the Siting statutes were adopted initially in 1973, and last updated significantly in the 1997 Restructuring Act, they reflect an electric system when BESS technology was not a significant type of electrical infrastructure.⁹ As BESS technology has become an emerging and significant form of energy infrastructure, the Legislature has introduced BESS incentives and directives elsewhere in Chapter 164, but not in Siting statutes. The Legislature could have addressed this gap but has not done so to date. See Alliance v. Energy Facilities Siting Board, [457 Mass. 663](#), 673 (2010) ([w]e presume that the Legislature acts with full knowledge of existing laws).

While acknowledging that the Legislature has not specifically included BESS in the list of jurisdictional facilities, Medway Grid argues that the Siting Board has jurisdiction over BESS because it has the characteristics of a “generating facility”: it is over 100 MW and the Project would act as a generator. Specifically, Medway Grid asserts that the BESS will participate in the ISO-NE marketplace as a “Generator Asset”, ISO-NE awarded Medway Grid a capacity contract in the FCA 15, the Project has registered as a “Generator per NEPOOL GIS system”, and Eversource and Medway Grid anticipate entering into a Large Generator Interconnection Agreement. ¹⁰

⁹ The Energy Facilities Siting Council was formed in 1973. St. 1973, c. 1232. The Legislature reorganized the agency into the Energy Facilities Siting Board in 1992. St. 1992, c. 141. The Siting Board's statutory framework was further revised to create a separate review statute for generating facilities pursuant to the Electric Restructuring Act in 1997. St. 1997, c. 164. As noted in the *State of Charge* (2016) “To date, energy storage in Massachusetts has primarily been limited to Pumped Hydro Storage...(.)” Utility-scale battery energy storage systems have only in recent years achieved technical and commercial feasibility and significant market interest. In fact, no BESS projects were presented to the Board or the Department for any type of siting review until 2019. See Cranberry Point, EFSB 19-01.

¹⁰ Although the parties did not address the possibility that that BESS could be considered a jurisdictional electric transmission line, which may include an ancillary structure integral to its operation, ISO-NE has proposed a tariff revision to FERC to treat certain BESS projects as transmission assets. See Section III.D.3.

G.L. c. 164, § 69G gives the Siting Board jurisdiction over a “generating facility,” defined as “any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.” G.L. c. 164, §69G. The term “generating unit” is not defined in the Siting statutes. However, other areas of the Siting statutes address various aspects of generation and storage, and we look to these statutes for evidence of how the Legislature may have intended BESS to fit into the Siting Board’s statutory scheme. Specifically, the Siting Board reviews fuel sources in its statutes relating to generating, and statutory references to storage, and finds that none of these references address the concept of BESS.

While the Siting Board statute regarding generating facilities does refer to several types of primary energy sources and fuels that are typically associated with electric power generation, the statute does not provide an exhaustive listing of such energy sources and fuels, nor does it specify any exclusions. Siting statute references to fuel and primary energy sources used in generating electricity do not explicitly reference BESS. For example, the requirements in G.L. c. 164, § 69J¼ for Technology Performance Standards reflect “emission rates achievable by state of the art *fossil fuel* generating and control technologies. G.L. c. 164, § 69J¼ (emphasis added). G.L. c. 164, § 69I includes provisions for the Board to review long-range forecasts of electric and gas companies.¹¹ Section 69I provides insights on the types of electric generating facilities that were once included in the Siting Board forecast reviews, including “*other sources of electrical power or gas, including facilities which operate on solar or geothermal energy and wind or facilities which operate on the principle of cogeneration or hydrogeneration...*”. See G.L. c. 164, § 69I (emphasis added). Hydrogeneration is further addressed in G.L. c. 164, § 69H½, giving the Board authority to coordinate the permitting and licensing of hydropower generating facilities and defining

¹¹ Massachusetts electric companies are now exempt from the requirements of G.L. c. 164, § 69I. Electric Restructuring Act; D.T.E. 98-84A.

“hydropower generating facility” as any electrical or mechanical power generating unit whose power source is water flow and which is not a facility as defined in Section 69G.¹²

To date, the Siting Board has not been asked to issue an approval to construct hydroelectric facilities.¹³ Existing large-scale hydroelectric facilities (over 100 MW) in Massachusetts are exclusively pumped storage units and all of these units pre-date the establishment of the Energy Facilities Siting Council. In a 2008 Advisory Ruling, the Board looked at the question of whether it had jurisdiction over a project that would increase the capacity of an existing pumped storage hydro facility by 66 MW in light of the Board’s generating facility authority. Because the capacity increase was less than the Board’s 100 MW threshold, the Board concluded that it did not have jurisdiction over the project. Bear Swamp Power Company, LLC Advisory Ruling (June 13, 2008).¹⁴

The Siting Board’s statutes also address fuel storage including: storage of gas (definition of facility includes “a unit, including associated buildings and structures, designed for and capable of the manufacture or storage of gas; see also 980 CMR 1.01); storage of oil (definition of oil facility includes “any new unit... designed for, or capable of, the refining, storage or more than five hundred thousand barrels... of oil). G.L. c. 164, § 69G. None of these fuel storage facilities refers to BESS or is applicable to the concept of BESS.

In summary, Siting Board statutes do not explicitly reference BESS as a type of facility over which the Siting Board has jurisdiction. In addition, other statutes that define Siting Board jurisdiction do not provide a clear indication of what the Legislature may have intended for BESS

¹² G.L. c. 164, § 69H½ provides the Siting Board with statutory authority to both intervene in FERC hydroelectric licensing proceedings as a coordinating agency for other state and local permit agencies, and also issue a written decision that is deemed equivalent to a final state or local agency approval, permit, license, certificate or permission – if subject of an appeal.

¹³ It is possible that the Siting Board is pre-empted by FERC jurisdiction from issuing an approval to construct hydroelectric facilities.

¹⁴ The Board’s decision, below, that it does not have generating facility jurisdiction over BESS does not preclude possible jurisdiction by the Board over other types of generating facilities reliant on energy storage technologies such as pumped storage hydroelectric.

treatment or whether BESS should be treated as a type of generating facility. While jurisdiction over BESS would be consistent with the Siting Board's overall mandate, because the Siting statutes are inconclusive regarding BESS jurisdiction, the Board considers other statutes in Chapter 164 for indicia of legislative intent.

2. Other G.L. c. 164 Statutes

As noted above, the Siting statutes do not define “generating unit” or “generating.” In the past when the Siting statutes were ambiguous or lacked explicit direction, the Siting Board looked to other sections of G.L. c. 164 for insight into legislative intent. See Harbor Electric Energy Company, EFSB 17-03, Determination of Jurisdiction (2017) (Board looked to definition of “transmission” in G.L. c. 164, § 1, to assess jurisdiction over submarine cable). G.L. c. 164, § 1, includes definitions that apply to all of Chapter 164, including the Siting statutes.

For example, section 1 of Chapter 164 defines “Generation” as the *act or process of transforming other forms of energy* into electric energy or the amount of electric energy so produced. (Emphasis added.) “Generation facility”, is defined as “a plant or equipment used to *produce, manufacture or otherwise generate electricity* and which is not a transmission facility or an energy storage system procured by a distribution company for support in delivering energy services to end users.”¹⁵ G.L. c. 164, § 1 (emphasis added). “Generation service” is defined as “the provision of generation and related services to a customer.” G.L. c. 164, § 1. A “wholesale generation company” is defined as a company engaged in the business of producing, manufacturing or generating electricity for sale at wholesale only. G.L. c. 164, § 1. See also “Renewable energy” (does not include BESS in its list of “existing or emerging non-fossil fuel energy sources or technologies,” although this is not an exhaustive list); “Small power production facility” (a facility which is any electrical generating unit which produces electric energy solely by the use, as a primary energy source, of fuels not including BESS). G.L. c. 164, § 1. Compare

¹⁵ The definition of “generation facility” explicitly excludes energy storage systems procured by distribution companies. This exclusion could be viewed as necessary if energy storage systems were viewed as “generation” and could therefore violate the Electric Restructuring Act’s prohibition on distribution companies owning generation assets (with minor exceptions, such as solar resources).

“distributed energy resource” (small-scale power generation *or* storage technology). G.L. c. 164, § 1 (emphasis added). The generation statutes appear to contemplate energy that is the product of transformation of other forms of energy, or energy that is produced or manufactured.

In order to assess whether BESS falls within the G.L. c. 164, § 1 definition of “generation,” we must first note how battery storage functions. As a matter of physics, batteries do not actually store electrical energy (*i.e.*, they don’t collect electrons from the grid, store the electrons and then later send those same electrons back) (Exhs. EFSB-Z-1; EFSB-Z-23; Tr. 210-216). Instead, batteries convert electrical energy into chemical energy (colloquially referred to as “charging”), store the chemical energy, and then later transform the chemicals into electrical energy when the connected external circuit calls for electricity (colloquially referred to as “discharging”) (Exhs. EFSB-Z-1; EFSB-Z-23; Tr. 210-216). While as a physical matter, batteries do involve energy “transformation,” the use of the word “transform” by the Legislature was likely grounded in a more conventional understanding at the time that generation involves the use of primary energy sources (such as fossil fuels, flowing water, other renewable sources) that are transformed into electrical energy through combustion, mechanical, or physical processes.¹⁶

In comparison to the definition of “generation,” G.L. c. 164, § 1 defines “energy storage system” as a commercially available technology that is *capable of absorbing energy, storing it for a period of time and thereafter dispatching the energy* and which may be owned by an electric distribution company; provided, however, that an energy storage system shall: (i) reduce the emission of greenhouse gases; (ii) reduce demand for peak electrical generation; (iii) defer or substitute for an investment in generation, transmission or distribution assets; or (iv) improve the reliable operation of the electrical transmission or distribution grid; and provided further, that an energy storage system shall: (1) use mechanical, chemical or thermal processes to *store energy that was generated for use at a later time*; (2) *store* thermal energy for direct heating or cooling *use at a later time* in a manner that avoids the need to use electricity at that later time; (3) use

¹⁶ G.L. c. 164, § 69G, was first created by a statute enacted in 1973. St. 1973, c. 1232, § 1. It has been amended in 1974, 1975, 1982, 1992, and 1997. G.L. c. 164, § 69G. The statute, therefore, was formulated before the evolution of modern battery storage technology. For a history of the evolution of energy storage, *see State of Charge* at 2.

mechanical, chemical or thermal processes to *store energy generated from renewable resources for use at a later time*; or (4) use mechanical, chemical or thermal processes to capture or harness waste electricity and *to store the waste electricity generated from mechanical processes for delivery at a later time* (emphasis added).¹⁷

The contention has been made that since a battery “transforms” electrical energy into chemical energy (during charging) and from chemical energy back into electrical energy (during discharging), BESS processes are within the definition of “generation” under G.L. c. 164, § 1. The BESS performs more than one function, depending on whether it is charging or discharging. Merriam Webster defines “transform” as “to change in composition or structure; to change the outward form or appearance of; to change in character or condition, convert.” New Collegiate Dictionary, Merriam Webster (1981) at 1231. It can be argued that a BESS “transforms” electrical energy into electrochemical forms of energy during charging, and from electrochemical energy into electrical energy during discharging, consistent with the definition of generation.

However, as stated above, under the statutory definition of energy storage system, an energy storage system stores energy, including energy generated from renewable resources or energy generated from mechanical processes, instead of “producing, manufacturing or otherwise generating” electricity. G.L. c. 164, § 1. This definition of energy storage systems appears to consider the energy so stored to be generated elsewhere. In addition, the definition says that energy storage systems “defer or substitute for an investment in generation, transmission or distribution assets” G.L. c. 164, § 1. Plainly, if an energy storage systems is substituting for a

¹⁷ The definition of “energy storage systems” was added by St. 2016, c. 188, the Energy Diversity Act. The Act revised the rules for distribution company procurement of long term contracts for renewable energy to allow for long term contracts for clean energy generation resources to be paired with energy storage systems. The Act also required DOER to set targets for electric companies to procure energy dispatched from battery energy storage systems. The Legislature did not address whether or how its provisions for battery energy storage systems related to the Siting Board’s jurisdiction.

generation asset, it is not considered to be such an asset but a different type of system. It appears that G.L. c. 164, § 1, treats generation and storage as different types of energy processes.^{18,19}

3. ISO-NE

Cranberry Point and Medway Grid argue that the Siting Board should treat BESS consistently with ISO-NE's treatment of BESS (Medway Grid Brief at 14-15; Medway Grid Reply Brief at 3). ISO-NE treats BESS as a generation resource for purposes of wholesale markets and interconnection (Exh. MG-2, at 3). Battery storage resources currently compete in the ISO-NE Wholesale Energy Markets (Day-Ahead and Real-Time), FCM, and Ancillary service markets (Exh. MG-2, at 3). More than 700 MW of BESS projects secured capacity supply obligations in the most recent FCA, for the years 2025-2026 (FCA16). ISO-NE states that "storage" can participate as both a Generator or Demand and Capacity Resource.^{20,21}

¹⁸ In carrying out other sections of Chapter 164, the Department has reviewed BESS as distribution level assets. For example, the Department approved two battery storage demonstration programs in the Cape Cod area for Eversource in the Company's 2017 base distribution rate case. See [D.P.U. 17-05](#). These demonstration projects are a 5 MW/20 MWh project in Oak Bluffs, Martha's Vineyard, and a 25 MW/38 MWh project in Provincetown. See <https://www.mass.gov/info-details/utility-scale-battery-energy-storage>.

¹⁹ The Siting Board notes that DOER treats BESS as a distinct energy resource. At DOER, battery storage systems are eligible to participate in the Clean Peak Energy Standard program as Qualified Energy Storage Clean Peak Resources. The Qualified Energy Storage designation is its own class of resource, distinct from renewable Generation Units and Demand Response Resources. While not explicitly stating so, DOER appears to treat energy storage as a distinct resource from generation resources for purposes of setting energy storage targets. See <https://www.mass.gov/doc/clean-peak-resource-eligibility-requirements/download>; <https://www.masscec.com/clean-peak-standard-cps>; <https://www.mass.gov/doc/ess-guideline-clean-final-092221/download>.

²⁰ <https://www.iso-ne.com/markets-operations/markets/forward-capacity-market/fcm-participation-guide/qualification-process-for-new-demand-resources>.

²¹ <https://www.iso-ne.com/static-assets/documents/2017/04/20170411-webinar-energy-storage.pdf#page=34>.

According to ISO-NE, battery storage projects made up 20 percent of proposed generating capacity in the ISO-NE Interconnection Queue as of May 2020.²² Under Schedule 22 of the Open Access Transmission Tariff (OATT), the Large Generator Interconnection Procedure’s definition of a Generating Facility includes “[an] Interconnection Customer’s device for the [...] storage for later injection of electricity.”²³ Currently, battery storage is treated as a “market resource alternative” in ISO interconnection processes.²⁴

In December 2022, ISO-NE filed proposed revisions to its OATT for electric storage facilities to be considered transmission assets under certain limited situations (SATO A Filing).²⁵ ISO-NE posits that there may be situations and system needs that are more efficiently and cost-effectively addressed by electric storage facilities serving as transmission assets.²⁶

It is informative to view BESS through the lens of ISO-NE, as these rules will apply to the Projects. However, the manner in which ISO-NE treats BESS resources is not determinative as to whether the Legislature granted the Siting Board jurisdiction over BESS. See NSTAR Electric Company, EFSB 10-2/D.P.U. 10-131/10-132, at 28 (2012) (differentiating the roles of ISO-NE and Siting Board). Ultimately it is the statutes applicable to the Siting Board which define its jurisdiction.

²² <https://www.iso-ne.com/about/what-we-do/in-depth/batteries-as-energy-storage-in-new-england>.

²³ https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_2/sch22/sch_22_lgip.pdf.

²⁴ A “Market Resource Alternative” is defined as a [supply](#)-side (generation) or [demand](#)-side resource that is an alternative to a regulated [transmission](#) solution for meeting an ISO transmission system [reliability](#) need. https://www.iso-ne.com/participate/support/glossary-acronyms/#supply_resource.

²⁵ https://www.iso-ne.com/static-assets/documents/2022/12/satoa_filing_part_1.pdf

²⁶ For example, ISO states that “[e]nergy storage facilities, such as SATOAs, that may be capable of quickly providing or absorbing real power to balance power generation versus load, providing their dynamic reactive power to quickly respond to fluctuations in voltage, and meet other needs that may be required for system restoration could be uniquely positioned to help restore the system.” (Attachment 3 of SATOA Filing, Prefiled Testimony of Brent Oberlin).

4. Conclusion

The Siting Board looks to its enabling statutes to determine whether the Legislature has provided it with the authority necessary to exercise jurisdiction over BESS. Review of these statutes indicates that the Legislature did not provide express authority to do so. BESS is not explicitly included in the list of facilities that are subject to Siting Board jurisdiction. The Siting statutes do not provide clear guidance as to whether a BESS is a “generating facility” and therefore, subject to Siting Board jurisdiction. The Siting statutes do not define “generating” or “generating unit” nor do they provide clear guidance on whether “generating unit” includes BESS. Review of other statutes governing the Siting Board, including statutes governing generating facilities, also do not provide clear guidance on Siting Board jurisdiction over a BESS. To the extent there is any guidance provided by the definitions of “energy storage system”, “generation” and “generation facility” in G.L. c. 164, § 1, they seem to reflect a legislative intent that “generation” and “storage” are distinct energy processes. Given the lack of explicit authority, and different energy processes involved in generating and storing energy, the Siting Board finds that the Legislature did not grant jurisdiction over BESS to the Siting Board.²⁷

Of course, if the Legislature determines that Siting Board review of BESS projects is necessary or advantageous, the Legislature may choose to grant to the Siting Board clear and unambiguous authority to review BESS facilities. Indeed, doing so would be consistent with the Siting Board’s general statutory mandate, to “implement the provisions contained in sections 69H to 69Q, inclusive, so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.” G.L. c. 164, § 69H. A BESS is a large energy facility, and a key component of the energy system, which was the central focus of the Siting Board’s regulatory genesis. BESS assets are deployed in part to assist with reliability of the electric grid, a central consideration of the Siting Board. Siting Board review of BESS projects would include site selection, environmental impacts to both the natural and built environments during construction and operation, safety, compliance with state policies, and interconnection with

²⁷ Without authority over BESS projects, action by the Siting Board to approve or deny a BESS project would be ultra vires.

the electrical grid.²⁸ Siting Board review of BESS facilities would focus expertise and resources on BESS facilities that may not be available to local communities. In addition, Siting Board review of BESS would provide consistency of treatment throughout the state. These considerations are squarely within the expertise, and consistent with the purpose, of the Siting Board.

However, because the statutes as they stand today do not grant the Siting Board jurisdiction over BESS facilities, the Siting Board dismisses the Petition to Construct for lack of subject matter jurisdiction. See Massachusetts Rules of Civil Procedure Rule 12(b)(1) (motion to dismiss for a lack of subject matter jurisdiction); G.L. c. 30A, § 14(7)(b) (allowing a reviewing court to set aside an agency decision if it is in “excess of the statutory authority or jurisdiction of the agency”).

III. REFERRAL ORDER AND DEPARTMENT REVIEW

On April 4, 2023, the Chairman of the Department, acting pursuant to G.L. c. 164, §69H(2) and 980 CMR 1.09(3), issued a referral and consolidation order referring the Zoning Petition (D.P.U. 22-18) and the Section 72 Petition (D.P.U. 22-19) to the Siting Board for review and decision together with the Petition to Construct (EFSB 22-02). The Siting Board accordingly conducted a single adjudicatory proceeding and developed a single evidentiary record with respect to the Petitions as a consolidated docket EFSB 22-02/D.P.U. 22-18/22-19.

In light of the Siting Board’s determination that the proposed Medway Grid Project does not constitute a generating facility consistent with the definition of G.L. c. 164, § 69G, and that the Siting Board does not have jurisdiction to review the proposed Project consistent with the requirements of G.L. c. 164, § 69J¼ , the Siting Board is returning all matters related to D.P.U. 22-18 and D.P.U. 22-19 to the Department for appropriate disposition.

The Department will make a determination of: (1) each issue of fact or law necessary to a final Order pursuant to G.L. c. 40A, § 3, for Medway Grid’s Zoning Petition for several individual

²⁸ Siting Board jurisdiction over BESS would include authority to issue Certificates of Environmental Impact and Public Interest to BESS projects that have received Siting Board approval, pursuant to G.L. c. 164, §§ 69K – 69O.

and a comprehensive exemption from the operation of the Town of Medway Zoning Bylaw in D.P.U. 22-18, and (2) each issue of fact or law necessary for a final Order pursuant to G.L. c. 164, § 72, Medway Grid's Section 72 Petition for authority to construct and operate new transmission facilities. The Department is concurrently issuing with this Final Decision: (1) a procedural order; (2) an Order of Notice, and (3) a Notice of Adjudication for the Department proceeding in this matter.

IV. DECISION

For the reasons set forth above, the Siting Board concludes that it [does not] have jurisdiction pursuant to G.L. c. 164, §§ 69G, 69J¼ over the Project. Therefore, the Siting Board [dismisses] the Petition to Construct.



Robert J. Shea, Esq.
Presiding Officer

Dated this 26th day of April 2023

[APPROVED] by a vote of the Energy Facilities Siting Board at its meeting on May 10, 2023, by the members present and voting. Voting [for/against/abstain] the Tentative Decision **as amended:**

Rebecca L. Tepper, Secretary, Executive Office of Energy and Environmental Affairs and Chair, Energy Facilities Siting Board;

James Van Nostrand, Chair, Department of Public Utilities;

Cecile M. Fraser, Commissioner, Department of Public Utilities;

Elizabeth Mahony, Commissioner, Department of Energy Resources;

Bonnie Heiple, Commissioner, Department of Environmental Protection;

Jonathan Cosco, General Counsel and designee for the Secretary of the Executive Office of Housing and Economic Development;

Joseph C. Bonfiglio, Public Member, Labor;

Brian Casey, Public Member, Energy;

Crystal Johnson, Public Member, Environmental.

Rebecca L. Tepper, Secretary of Energy and Environmental Affairs and Chair of the Siting Board

Dated this day of May 2023

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. Massachusetts G.L., Chapter 25, Sec. 5; G.L. Chapter 164, Sec. 69P.