

# The Commonwealth of Massachusetts

## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 24-48

February 10, 2025

Petition of Park City Wind LLC pursuant to G.L. c. 40A, § 3, for Individual and Comprehensive Exemptions from the Operation of the Zoning Ordinance of the Town of Barnstable, Massachusetts.

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## I. INTRODUCTION

### A. Description of the Proposed Project

On April 5, 2024, pursuant to G.L. c. 40A, § 3, Park City Wind LLC (“Park City Wind” or the “Company”) filed a petition with the Department of Public Utilities (“Department”) for individual and comprehensive zoning exemptions from the operation of the Zoning Ordinance of the Town of Barnstable, Massachusetts (the “Barnstable Zoning Ordinance”) for an approximately one-acre parcel of land (the “Parcel”) located at 6 Shootflying Hill Road in the Town of Barnstable (the “Zoning Petition”) (Exh. PCWZ-1, at 1). The Company stated that the requested zoning exemptions are needed for the Parcel in connection with Park City Wind’s construction of a substation (“PCW Substation”) located at 8 Shootflying Hill Road, that Park City Wind is developing as part of the New England Wind 1 Connector (Exh. PCWZ-1, at 1). The New England Wind 1 Connector (or “PCW Project”) would ultimately interconnect the Company’s proposed offshore wind facility in federal waters to the New England electric grid at NSTAR Electric Company d/b/a Eversource Energy’s (“Eversource”) West Barnstable Substation (Exh. PCWZ-1, at 1). The PCW Project, including zoning exemptions for the PCW Substation, was approved by the Energy Facilities Siting Board (“Siting Board”) in EFSB 20.01/D.P.U. 20-56/20-57, issued on December 15, 2023 (“PCW Final Decision”) (Exh. PCWZ-1, at 1-2).<sup>1</sup> Park City Wind indicated that zoning exemptions would be required for the Company to build and use an access road on the Parcel which would serve the PCW Substation that will be constructed on the abutting parcel (Exh. PCWZ-1, at 2). The Zoning

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<sup>1</sup> See Section 1.C, below for the history of the Company’s proposal to use the Parcel for the PCW Substation and related zoning exemptions.

Petition for the Parcel seeks to obtain the same zoning exemptions for the Parcel that the Siting Board granted previously for the PCW Substation site (Exh. PCWZ-1, at 4-5, 14-24). See PCW Final Decision at 192, 207.

B. Procedural History

The Department docketed the Zoning Petition as D.P.U. 24-48. The Department conducted a hybrid public comment hearing for the Zoning Petition on June 18, 2024. The Company served a copy of the Notice of public comment hearing at least 14 days prior to the hearing on the following: (1) the Barnstable Town Council; the Barnstable town manager; the Barnstable town clerk; the Barnstable Planning Board and the planning board of every abutting city or town; the Barnstable Zoning Board of Appeals; the Barnstable Conservation Commission; and the Barnstable Department of Public Works; (2) all U.S. Mail addresses and persons owning real estate within three hundred feet of the lot line of the Parcel; and (3) owners of properties opposite the Parcel across any public or private street or way, abutters to the Parcel, and abutters to abutters within three hundred feet of the lot line of the Parcel, as they appear on the most recent applicable tax list of the Town of Barnstable. See Affidavit of Aaron Lang, June 18, 2024. At the public comment hearing, the Department heard comments from approximately 17 members of the community, Representative Steven Xiarhos, and Representative Kip Diggs. The Department also received approximately 100 written comments regarding the Zoning Petition. Most of the comments pertained to impacts related to the PCW Substation and the PCW Project as a whole; a few comments addressed the specific zoning exemptions at issue in this case.

The Department received three timely petitions to intervene and three timely requests for limited participant status. On September 20, 2024, the Department issued the Hearing Officer Ruling on Petitions to Intervene and for Limited Participant Status (“Ruling”). The Ruling allowed intervention status for the Town of Barnstable (“Town”). The Ruling denied intervention status to Lorenzo Queiroz and the Wequaquet Lake Protective Association (“WLPA”) but allowed them to participate as limited participants (Ruling at 14).<sup>2</sup> John C. Henderson also appealed the Ruling’s determination denying him limited participant status; on January 2, 2025, the Department denied the appeal as untimely. Park City Wind LLC, D.P.U. 24-48, Interlocutory Order on Appeal of Hearing Officer Ruling on Petitions to Intervene and For Limited Participant Status by John C. Henderson (January 2, 2025).

The Ruling included a section delineating the “Consideration of the Parcel in the PCW Final Decision,” which identified how the Parcel was previously analyzed within the PCW Final Decision (Ruling at 4-7). The Ruling identified the limited the scope of the Zoning Petition, noting that the Siting Board had considered impacts of the Parcel in connection to traffic, air, noise, and wetland and water resources as part of the PCW Final Decision (Ruling at 7). See PCW Final Decision at 132-135, 154-155. The Ruling indicated that the Siting Board determined that the impacts at the PCW Substation have been minimized, and that the impacts of the Parcel were addressed as part of the adjudication of the impacts of the entire PCW Project (Ruling at 7). See PCW Final Decision at 132-135, 154-155.

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<sup>2</sup> The Ruling also denied three petitions for limited participant status to Sandy Jones, Hector and Stacey Guenther, and John C. Henderson.

On September 23, 2024, the Department issued information requests. On October 4, 2024, the Company provided responses to the information requests. On November 19, 2024, the Department conducted an evidentiary hearing on the Zoning Petition. Present at the evidentiary hearing on behalf of the Company were three Company witnesses: Patrick Johnson, director of public affairs at Avangrid Renewables, LLC; Kenneth Fitzgerald, senior principal at Stantec Consulting Services, Inc.; and Holly Carlson-Johnson, associate at Epsilon Associates, Inc. The Town participated in cross examination but did not present any witnesses (Tr. 1, at 6-8). The Hearing Officer moved eleven exhibits into evidence; the record also includes nearly 600 exhibits from EFSB 20-01/D.P.U. 20-56/20-57 (see Ruling at n.2).<sup>3</sup> On December 3, 2024, the Department received the Company's brief on the Zoning Petition ("Company Brief").

C. Consideration of the Parcel in the PCW Final Decision

When the Company initially filed on May 20, 2020, for approval to construct the PCW Project with the Siting Board, and the related PCW Project zoning exemption request with the Department, the Company had not yet identified its intended use of the Parcel at 6 Shootflying Hill Road. The description of the PCW Substation in the Notice of Adjudication for the PCW Project proceeding and the PCW Project zoning petition identified only the PCW Substation at 8 Shootflying Hill Road. PCW Final Decision at 178, n.134. Park City Wind first introduced the

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<sup>3</sup> The Company requested incorporation of the EFSB 20-01/D.P.U. 20-56/20-57 record into the Zoning Petition by reference (Exh. PCWZ-1, at 5). The Department hereby finds that the record for EFSB 20-01/D.P.U. 20-56/20-57 is incorporated by reference into this proceeding. 220 CMR 1.10(3). The Department notes that all exhibits with the prefixes "PCWZ" or "DPU" refer to evidence from the current proceeding, while those with the prefixes "PCW," "VW," or "EFSB" refer to evidence from the prior Siting Board proceeding, EFSB 20-01/D.P.U. 20-56/20-57.

Parcel into the consolidated PCW Project proceeding on July 14, 2021 (approximately one year after initial petitions were filed for the Project) in a PCW Substation design update, which stated that the Company had secured an option to purchase the Parcel and that the Parcel could be used for part of the PCW Substation (Exh. VW-10). The Company's update did not request zoning exemptions for the Parcel; the Company requested zoning relief for the Parcel in its brief on July 1, 2022. PCW Final Decision at 178, n.134, 13. Thus, the Siting Board did not include the Parcel in the definition of the PCW Project for which it could grant zoning exemptions. PCW Final Decision at 1, 178, n.134. Accordingly, the PCW Final Decision explicitly excluded zoning relief for the Parcel because such relief had not been properly noticed, although the Siting Board granted the Company's requests for zoning exemptions for the PCW Substation in the PCW Project. PCW Final Decision at 192, 207, 224.

Although the PCW Final Decision declined to consider zoning exemptions for the Parcel due to insufficient notice, the use and benefit of the Parcel, and impacts related to its use, were described in the record and included within the scope of analysis and evaluation of the PCW Substation in the PCW Final Decision. See PCW Final Decision at 178, n.134, 210, n.147. The PCW Final Decision and the underlying record in the proceeding reflect the Siting Board's understanding of the Company's intended use of the Parcel in conjunction with the PCW Substation. Further, the PCW Final Decision also reflects consideration of the Parcel within the scope of the PCW Substation's impacts, including those related to traffic, air emissions, noise, wetland and water resources, land use, visual impacts, and safety and hazardous waste issues, inclusive of the Parcel. See PCW Final Decision at 122, 131-133, n.95, 135, 178, n.134, 210, n.147.

For example, in the PCW Final Decision, the Siting Board discussed the Parcel and indicated that use of the Parcel as the entrance to the PCW Substation would avoid the need to re-grade the PCW Substation to ten feet above its current elevation to gain access directly from Shootflying Hill Road. PCW Final Decision at 122. The Company asserted that using the Parcel for access would avoid the need to import fill and the potential construction-related traffic impacts associated with transporting the imported fill. PCW Final Decision at 131. The Company's use of the Parcel to access the PCW Substation would allow the Company to reduce the elevation of the PCW Substation, instead of increasing the elevation for access directly from Shootflying Hill Road. PCW Final Decision at 131. The Company estimated that the reduction in the PCW Substation elevation would result in the need to export approximately two-thirds of the volume of fill that the Company would have otherwise needed to import for the original PCW Substation design at a higher elevation. PCW Final Decision at 131. The Siting Board estimated the number of truck trips at the lower elevation to be 2,080, versus the approximate 3,120 truck trips required to fill the PCW Substation at the higher elevation. PCW Final Decision at 131-132, n.95.

The Siting Board considered the traffic impacts of trucks leaving and entering the PCW Substation via the access road on the Parcel. PCW Final Decision at 135. The Siting Board noted that the Company provided maps of potential truck routes, which show the trucks entering and exiting the site from the proposed access road on the Parcel (RR-EFSB-42, Att. 1 & 2). See PCW Final Decision at 132, n.96, 135. The route depicted shows the trucks would enter and exit from Route 6 East and West without crossing in front of any residences or going past the PCW Substation at any point (RR-EFSB-42, Att. 1 & 2). See PCW Final Decision at 132, 135. The



Siting Board has required, and the Company has indicated it will implement, a Traffic Management Plan regarding truck trips and present it to the Town for review and approval prior to construction. PCW Final Decision at 131, 135. The Company has committed to coordinating with the Town on reducing the potential impacts of the fill removal trucks at the PCW Substation site. PCW Final Decision at 135. The Company has stated it will coordinate truck routes and frequency with the Town to mitigate potential traffic impacts; the Company also committed to avoiding concentrated truck trips during peak hour traffic. PCW Final Decision at 131, 135.

The Company additionally included the Parcel in conjunction with the PCW Substation as part of the Massachusetts Environmental Policy Act (“MEPA”) process (Exh. PCWZ-1, at 9). The Final Environmental Impact Report (“FEIR”) for the PCW Project identified the additional use of the Parcel as a change from the Draft Environmental Impact Report (“DEIR”) (Exhs. VW-11, at 1-4; PCW-12, at 8). The FEIR identified the inclusion of the Parcel as a benefit to the PCW Substation; specifically, the Parcel permits a wider turning radius for construction vehicles and emergency vehicles; the Parcel will move the entrance to the PCW Substation farther away from residences west of the PCW Substation; and vehicular access from the Parcel will reduce PCW Substation elevations by up to ten feet compared to the DEIR design (Exhs. VW-11, at 1-4 to 1-10; PCW-12, at 8). The traffic impacts, as described above, were adjudicated by the Siting Board as part of the PCW Final Decision and were deemed to have been adequately described, evaluated, and mitigated. PCW Final Decision at 135.

The Siting Board evaluated the vehicle-related air impacts during construction based on vehicles entering the PCW Substation from the Parcel. PCW Final Decision at 135. The Siting Board has required, and the Company has stated it will implement, emissions and dust mitigation

measures during construction to minimize vehicle-related air impacts. PCW Final Decision at 131, 135. Therefore, the Siting Board has previously adjudicated air impacts related to the Parcel and found them to be mitigated with the above measures. PCW Final Decision at 135.

The noise impacts of the PCW Substation, inclusive of the Parcel in the PCW Substation design, were also part of the Siting Board's analysis (Exh. VW-11, at 1-14 to 1-16). PCW Final Decision at 136-138. The sound level modeling for the PCW Project was updated in the FEIR to ensure that the reduced site elevation and additional retaining walls would not increase sound level impacts in the community as compared to the impacts of the original PCW Substation design (Exh. VW-11, at 1-14). Additionally, the Siting Board reviewed the Company's supplemental noise modeling based on increased sound wall heights that accommodate the elevation reduction resulting from use of the Parcel (see RR-EFSB-34). The Company has committed to mitigating construction noise impacts for the entire PCW Project and the Siting Board specifically noted construction-related noise mitigation provisions that would apply to the PCW Substation inclusive of the use of the Parcel. PCW Final Decision at 155. The Company will establish a Construction Management Plan that includes measures to minimize construction-related impacts, including noise. PCW Final Decision at 155. Therefore, the Siting Board has previously adjudicated noise impacts related to the Parcel and found they have been mitigated with the approved measures. PCW Final Decision at 155.

The Siting Board considered wetland and water resource impacts relating to stormwater, erosion, sedimentation, and other fluid containment needs relating to construction and operation of the PCW Substation. PCW Final Decision at 133. The use of the Parcel was included within the PCW Substation design as approved (Exh. VW-11, at Fig. 1-5, 1-6, 1-7). PCW Final

Decision at 132-135. The Parcel, which was included in the revised PCW Substation design within the FEIR, will reduce impervious area at the PCW Substation by 0.4 acres compared with the original design, and the roads at the PCW Substation and Parcel will consist of pervious gravel surfaces (Exhs. VW-11, at 1-10, Table 1-1; PCW-12, at 8). The Siting Board considered containment measures for the PCW Substation; the Company stated that it would place spill containment kits and spill control accessories strategically around the PCW Substation and train operators to use and deploy the equipment. PCW Final Decision at 127. The Company added that it would retain a licensed third-party spill response contractor on call as part of the Company's emergency spill response plan, and the Company will also have a Spill Prevention, Control, and Countermeasure ("SPCC") Plan that covers all aspects of the PCW Project construction and operation that could result in the release of a pollutant. PCW Final Decision at 127. The Company has indicated that the SPCC Plan will cover all aspects of Project construction and operation that could potentially result in the release of a pollutant, including dielectric fluid (Exh. EFSB-W-18). See PCW Final Decision at 126, 133.

The Company will develop a Stormwater Management Plan for the PCW Substation which includes an Erosion and Sedimentation Plan that describes how the Company would contain all potential sedimentation and erosion that might occur during substation construction and the best management practices to minimize offsite pollution, including disposal methods for construction debris, erosion control, dust control, and disturbed surface maintenance practices; the Parcel would be included as an offsite location and would be subject to the best management practices during construction (Exh. VW-11, Att. F). PCW Final Decision at 127. The Parcel was an integral part of the design of the PCW Substation, and the Company included the Parcel

in evidence presented to the Siting Board. PCW Final Decision at 132-135. Therefore, the Siting Board has previously adjudicated wetland and water resource impacts related to the Parcel and found the impacts have been mitigated with the above measures. PCW Final Decision at 132-135.

D. Scope of D.P.U. 24-48

The Hearing Officer Ruling identified the scope of the D.P.U. 24-48 proceeding (see Ruling at 7). The Department recognizes that the Siting Board's PCW Final Decision contemplated and understood the use of the Parcel for access to the PCW Substation and included specific findings relating to use of the Parcel in this manner. See PCW Final Decision at 131-135. The Siting Board considered several features that relate directly to the use of the Parcel as an access road which include spill containment kits with training on how to use them, an SPCC Plan, Traffic Management Plans, emission and dust mitigation measures related to transportation, and Stormwater Management Plans. See PCW Final Decision at 127, 133, 135. The Siting Board considered impacts of the Parcel in connection with traffic, air, noise, and wetland and water resources. See PCW Final Decision at 132-135, 154-155. The Siting Board determined that the impacts at the PCW Substation have been mitigated with the approved measures in the PCW Final Decision and the Parcel was addressed as part of the adjudication of these impacts. PCW Final Decision at 132-135, 154-155. Therefore, the Department will not reconsider or relitigate those numerous aspects of the Parcel already considered by the Siting Board (Ruling at 7). The Department's review of the Parcel in this proceeding is limited in scope to the few remaining issues necessary to consider whether to grant the requested zoning relief for the Parcel that have not been reviewed and adjudicated previously by the Siting Board.

II. REQUEST FOR INDIVIDUAL ZONING EXEMPTIONS PURSUANT TO G.L. C. 40A, § 3

A. Standard of Review

G.L. c. 40A, § 3 provides, in relevant part, that

Land or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or bylaw if, upon petition of the corporation, the [Department] shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public ...

Thus, a petitioner seeking exemption from a local zoning bylaw under G.L. c. 40A, § 3 must meet three criteria. First, the petitioner must qualify as a public service corporation. Vineyard Wind, LLC, D.P.U. 21-08, at 5 (2021) (“Vineyard Wind”); NSTAR Electric Company d/b/a Eversource Energy, D.P.U. 18-21, at 4 (2019) (“Westfield”); NSTAR Electric Company d/b/a Eversource Energy, D.P.U. 17-147, at 6 (2019) (“K Street Substation”); Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975) (“Save the Bay”). Second, the petitioner must demonstrate that its present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare. Vineyard Wind at 6; Westfield at 5-6; K Street Substation at 7-8; Boston Gas Company, D.T.E. 00-24, at 3 (2001) (“Boston Gas”). Finally, the petitioner must establish that it requires exemption from the zoning ordinance or bylaw. Vineyard Wind at 6; Westfield at 6-7; K Street Substation at 8-9.

Additionally, the Department favors the resolution of local issues on a local level whenever possible, to reduce concern regarding any intrusion on home rule. The Department has determined that the most effective approach is for a petitioner to consult with local officials regarding its project before seeking zoning exemptions pursuant to G.L. c. 40A, § 3. Cranberry

Point Energy Storage, LLC, D.P.U. 22-59, at 21 (2023) (“Cranberry Point”); Medway Grid, LLC, D.P.U. 22-18/22-19, at 18 (2023) (“Medway Grid”). Thus, the Department encourages petitioners to consult with local officials and, in some circumstances, to apply for local zoning permits, before seeking zoning exemptions from the Department under G.L. c. 40A, § 3.

Cranberry Point at 21; Medway Grid at 18.

B. Public Service Corporation Status

1. Standard of Review

In determining whether a petitioner qualifies as a “public service corporation” for the purposes of G.L. c. 40A, § 3, the Massachusetts Supreme Judicial Court (“SJC”) has stated:

among the pertinent considerations are whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.

Save the Bay, 366 Mass. at 667, 680; see also Westfield at 4; Vineyard Wind at 133; NSTAR Electric Company d/b/a Eversource Energy, D.P.U. 18-155, at 11 (2020) (“Oak Bluffs”).

The Department interprets this list not as a test, but rather as guidance to ensure that the intent of G.L. c. 40A, § 3 will be realized, i.e., that a present or proposed use of land or structure that is determined by the Department to be “reasonably necessary for the convenience or welfare of the public” not be foreclosed due to local opposition. See Berkshire Power Development, Inc., D.P.U. 96-104, at 30 (1997) (“Berkshire Power”); Save the Bay, 366 Mass. at 685-686. The Department has interpreted the “pertinent considerations” as a “flexible set of criteria which allow the Department to respond to changes in the environment in which the industries it regulates operate and still provide for the public welfare.” Westfield at 4; Berkshire Power at 30;

see also Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U./D.T.E. 95- 59-B/95-80/95-112/96-113, at 6 (1998) (“Nextel”). The Department has determined that it is not necessary for a petitioner to demonstrate the existence of “an appropriate franchise” to establish public service corporation status. See Berkshire Power at 31.

2. Analysis and Findings

In the PCW Final Decision, the Siting Board found that Park City Wind qualified as a Massachusetts public service corporation for the purposes of G.L. c. 40A, § 3. PCW Final Decision at 173. The Department likewise finds that Park City Wind qualifies as a Massachusetts public service corporation for the purposes of G.L. c. 40A, § 3.

C. Public Convenience and Welfare

1. Standard of Review

In determining whether the present or proposed use is reasonably necessary for the public convenience or welfare, the Department must balance the interests of the general public against the local interest. Save the Bay, 366 Mass. at 680; Town of Truro v. Department of Public Utilities, 365 Mass. 407, 409 (1974) (“Town of Truro”); K Street Substation at 7. Specifically, the Department is empowered and required to undertake “a broad and balanced consideration of all aspects of the general public interest and welfare and not merely [make an] examination of the local and individual interests which might be affected.” New York Central Railroad v. Department of Public Utilities, 347 Mass. 586, 592 (1964) (“NY Central Railroad”); K Street Substation at 7; Hopkinton LNG, D.P.U. 17-114, at 10 (2018) (“Hopkinton LNG”). When reviewing a petition for a zoning exemption under G.L. c. 40A, § 3, the Department is empowered and required to consider the public effects of the requested exemption in

Massachusetts as a whole and upon the territory served by the applicant. Save the Bay, 366 Mass at 685; NY Central Railroad, 347 Mass at 592.

With respect to the site chosen by a petitioner, G.L. c. 40A, § 3 does not require the petitioner to demonstrate that its preferred site is the best possible alternative, nor does the statute require the Department to consider and reject every possible alternative site presented. Rather, the availability of alternative sites, the efforts necessary to secure them, and the relative advantages and disadvantages of those sites are matters of fact bearing solely upon the main issue of whether the preferred site is reasonably necessary for the convenience or welfare of the public. Martarano v. Department of Public Utilities, 401 Mass. 257, 265 (1987); NY Central Railroad, 347 Mass. at 591.

Therefore, when making a determination as to whether a petitioner's present or proposed use is reasonably necessary for the public convenience or welfare, the Department examines (1) the need for, or public benefits of, the present or proposed use; (2) the present or proposed use and any alternatives or alternative sites identified; and (3) the environmental impacts or any other impacts of the present or proposed use. The Department then balances the interests of the general public against the local interest and determines whether the present or proposed use of the land or structures is reasonably necessary for the convenience or welfare of the public. Boston Gas at 2-6; Tennessee Gas at 5-6.

## 2. Need for or Public Benefit of Use

The PCW Final Decision found that the Company established that the PCW Project will promote the public convenience or welfare. PCW Final Decision at 176. The Siting Board found the PCW Project is superior to the other alternatives evaluated with respect to meeting the



identified need and providing a reliable energy supply for the Commonwealth with minimum impact on the environment at the lowest possible cost. PCW Final Decision at 176-177. To construct the PCW Substation as approved in the PCW Final Decision, which the Siting Board considered superior to alternatives lacking the Parcel as an access road (see Section II.3.C below), the Company must construct an access road on the Parcel. PCW Final Decision at 132. Therefore, the Department finds that there is a need for and benefit of the access road on the Parcel to construct the PCW Substation at the elevation approved in the PCW Final Decision.

### 3. Alternative Sites Explored

In the PCW Final Decision, the Siting Board considered the alternative approach of not using the Parcel as access to the PCW Substation and concluded that access using the Parcel is superior to not using the Parcel. PCW Final Decision at 132. The Siting Board conditioned the construction of the PCW Substation on the use of the Parcel for access to the PCW Substation. PCW Final Decision at 132. The Department agrees with the findings of the Siting Board regarding alternatives explored and the superiority of the PCW Substation design, inclusive of the access road on the Parcel.

### 4. Impacts of the Proposed Use

As described above in Section I.C and the Ruling, most impacts of the Parcel were considered as part of the PCW Substation design. PCW Final Decision at 131-135. The Siting Board considered impacts of the Parcel in connection to traffic, air, noise, and wetland and water resources. PCW Final Decision at 132-135, 154-155. The Siting Board determined that these impacts of the PCW Substation design, which include the use of the Parcel as an access road, have been mitigated, provided the Company complies with all applicable conditions. PCW Final

Decision at 244. Additionally, the Company has stated the Parcel will not contain any substation equipment or other electrical infrastructure and will be used solely for an access road to the PCW Substation (Company Brief at 2-3; Exh. PCWZ-1, at 2).

During the Siting Board proceeding, the Company did not provide renderings of the visual impacts of use of the Parcel; therefore, the Department examined the visual impacts of use of the Parcel in this proceeding. The Parcel, as part of the PCW Substation design, contributes to the mitigation of visual impacts of the PCW Substation. The Parcel allows the PCW Substation to be graded approximately ten feet below the original proposed design; the reduction in elevation of the PCW Substation design is factored into the noise impacts of the equipment and visual impacts of the sound walls to be constructed within the PCW Substation. PCW Final Decision at 140, 155, 228. After construction is complete, the entrance to the PCW Substation would include a proposed buffer (Exh. DPU-V-1(1)). See Figures 1-4 below for comparisons of the view from Shootflying Hill Road under present conditions, and simulated conditions after one year, five years, and ten years of growth.

**Figure 1: Existing View of Parcel**



**Figure 2: Parcel Simulated Conditions, Year 1 of Growth**



**Figure 3: Parcel Simulated Conditions, 5 Years of Growth****Figure 4: Parcel Simulated Conditions, 10 Years of Growth**

Source for Figures 1-4: Exh. DPU-V-1(1).

The visual impacts of the Parcel are limited to the northern exposure on Shootflying Hill Road. See PCW Final Decision at 129. The simulated visual conditions and screening of the Parcel are similar to those of the PCW Substation (compare Exh. DPU-V-1(1) to Exh. VW-8).

The abutters to the Parcel (a Cape Cod Chamber of Commerce building), across Shootflying Hill Road, have not expressed any concerns regarding the PCW Project, or the Parcel, and did not participate in these proceedings. See PCW Final Decision at 138, n.101. The Company additionally identified the existing tree line and with the proposed plantings on the Parcel (Exh. DPU-LU-1(1)). The record shows that the visual impacts of the Parcel would be reduced as vegetative buffers grow over time (Exh. DPU-V-1(1)). See PCW Final Decision at 129. The Department finds that the visual impacts of the use of the Parcel have been mitigated by the proposed plantings.

The Department concludes that with the Parcel's compliance with: (1) all applicable federal, state, and local laws and regulations; (2) the avoidance, minimization, and mitigation measures that Park City Wind has stated it will implement during the PCW Substation construction and operation; and (3) the Department's conditions as set forth below and in the applicable Siting Board Conditions in the PCW Final Decision, the impacts of the Parcel will be minimized. See PCW Final Decision at 224-227.

#### 5. Conclusion on Public Convenience and Welfare

Based on the (1) need for or public benefit of the use; (2) alternatives explored; and (3) impacts of the proposed use, the Department finds here, consistent with findings made in the PCW Final Decision, that the access road on the Parcel for the PCW Substation is necessary for the purpose alleged; the benefits of the Parcel as access to the PCW Substation to the general public exceed the local impacts; and the Parcel as access to the PCW Substation is reasonably necessary for the convenience or welfare of the public, and is consistent with the public interest. See also PCW Final Decision at 176-177.

D. Individual Exemptions Required

1. Standard of Review

In determining whether exemption from a particular provision of a zoning bylaw is “required” for purposes of G.L. c. 40A, § 3, the Department makes a determination whether the exemption is necessary to allow construction or operation of the petitioner’s project. K Street Substation at 8; Hopkinton LNG at 10; Tennessee Gas Company, D.P.U. 92-261, at 20-21 (1993). It is a petitioner’s burden to identify the individual zoning provisions applicable to the project and then to establish on the record that exemption from each of those provisions is required:

The Company is both in a better position to identify its needs, and has the responsibility to fully plead its own case . . . The Department fully expects that, henceforth, all public service corporations seeking exemptions under [G.L.] c. 40A, § 3 will identify fully and in a timely manner all exemptions that are necessary for the corporation to proceed with its proposed activities, so that the Department is provided ample opportunity to investigate the need for the required exemptions.

New York Cellular Geographic Service Area, Inc., D.P.U. 94-44, at 18 (1995); K Street Substation at 9; Hopkinton LNG at 10.

2. Position of the Company

The Company seeks individual exemptions as well as a comprehensive exemption from the Barnstable Zoning Ordinance (Exh. PCWZ-1, at 4-5; 14-24). The Company states that it seeks the same individual exemptions from the Barnstable Zoning Ordinance for the Parcel that it received for the PCW Substation in the PCW Final Decision (Company Brief at 12-16; Exh. PCWZ-1, at 17-21, citing PCW Final Decision at 179-192, 207). The Company indicates the requested zoning exemptions are necessary because Massachusetts law requires that the land

used to access another parcel be zoned, or have obtained zoning relief, consistent with the zoning that allows the use of the accessed parcel. See Beale v. Plan. Bd. of Rockland, 423 Mass. 690, 693-694 (1996) (“Beale”). The Parcel must therefore be zoned or receive zoning relief consistent with the PCW Substation to accommodate access. Table 1, below, identifies the individual zoning exemptions requested by the Company, which parallel the zoning exemptions sought by PCW, and granted by the Siting Board, for the PCW Substation site.

**Table 1: Parcel – Requested Individual Zoning Exemptions from the Town of Barnstable Zoning Ordinance: Summary of Company’s Position.**

<b>Zoning Provision from which Exemption is Requested</b>	<b>Local Zoning Relief Required</b>	<b>Why Exemption is Required</b>	<b>Citation to <u>PCW Final Decision</u> Granting Individual Zoning Relief at the PCW Substation</b>
<b>Use Regulations</b> Section 240-13	Use Variance	A use variance is or may be required because Section 240-13 does not expressly allow public utility uses in the RF-1 (Residential) district, the district in which the Parcel is located. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	<u>PCW Final Decision</u> at 179, 182-84, 192, 207.
<b>Use Regulations</b> Section 240-14	Use Variance	A use variance is or may be required because Section 240-14 does not expressly allow public utility uses in the RF and RF-1 (Residential) districts, the district in which the Parcel is located. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	<u>PCW Final Decision</u> at 179, 182-85, 192, 207.

Zoning Provision from which Exemption is Requested	Local Zoning Relief Required	Why Exemption is Required	Citation to <u>PCW Final Decision</u> Granting Individual Zoning Relief at the PCW Substation
Use Regulations Section 240-7.A	Use Variance	A use variance is or may be required because Section 240-7 prohibits the use of any building or premises “for any purpose except in conformity with all of the regulations herein specified for the district in which it is located,” and public utility uses are not expressly allowed in the RF-1 district. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	<u>PCW Final Decision</u> at 179, 184-85, 192, 207.
Groundwater Protection Overlay District Sections 240-35.F(2), (3), and (4)	Use Variance	The Parcel is located in the Groundwater Protection Overlay District. Public utility uses are not expressly allowed in the underlying RF-1 district, thus a use variance would be required to allow such a use in the Groundwater Protection Overlay District. In addition, in the Groundwater Protection Overlay District, uses that generate, treat, store or dispose of hazardous waste that is subject to G.L. c. 21C and 310 CMR 30.000 are prohibited. Furthermore, the Groundwater Protection Overlay District limits the total area of a lot that can be rendered impervious by the installation of buildings, structures, and paved surfaces ( <u>i.e.</u> , not more than 50 percent of the upland area if all runoff is recharged on site, or the greater of 15 percent of the lot areas or 2,500 square feet if less than all runoff is recharged on site), and requires that a	<u>PCW Final Decision</u> at 179-80, 182-84, 192, 207.



<b>Zoning Provision from which Exemption is Requested</b>	<b>Local Zoning Relief Required</b>	<b>Why Exemption is Required</b>	<b><u>Citation to PCW Final Decision</u> Granting Individual Zoning Relief at the PCW Substation</b>
		minimum of 30 percent of the total upland area be retained in its natural state. To the extent the Parcel could be found not to comply with these requirements relating to hazardous waste and substances, a use variance would be required. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	
<b>Minimum Yard Setbacks</b> Sections 240-13 and 240-14	Dimensional Variance	A dimensional variance is or may be required because it is unclear whether the Project will comply with the minimum yard setbacks under the Barnstable Zoning Ordinance. If the Project does not comply with the minimum yard setbacks, a variance would be required. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	<u>PCW Final Decision</u> at 180-84, 192, 207.
<b>Signs</b> Article VII, Sections 240-61.D and 240-63	Variance	Danger and warning signs are prohibited in any district, thus a variance would be required for the necessary danger and safety signs normally posted on property used for similar purposes. Signs may be necessary on the Parcel, particularly because the Parcel will host the vehicular access to the substation. The legal standard for obtaining a variance is difficult to meet. Variances are a	<u>PCW Final Decision</u> at 181, 186, 192, 207.

<b>Zoning Provision from which Exemption is Requested</b>	<b>Local Zoning Relief Required</b>	<b>Why Exemption is Required</b>	<b>Citation to <u>PCW Final Decision</u> Granting Individual Zoning Relief at the PCW Substation</b>
		disfavored form of relief and, even if granted, are subject to appeal.	
<b>Prohibited Uses</b> Section 240-10.A	Use Variance	Any use that is injurious, noxious or offensive by reason of odor, fumes, dust, smoke, vibration, noise, lighting, or other cause is prohibited. As it would be utilized for access road purposes, the Parcel may generate sound, light, or vibration that subjectively may be deemed injurious, noxious or offensive. Thus, a variance would or may be required. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	<u>PCW Final Decision</u> at 180, 184-85, 192, 207.
<b>Site Plan Review</b> Article IX, Sections 240- 98 through 240-105	Site Plan Approval	Site Plan approval requires Parcel compliance with all applicable requirements of the Barnstable Ordinance, and the Parcel cannot meet all such requirements or is subject to significant uncertainty with respect to their ability to meet such requirements. Park City Wind must have the discretion to design the Parcel and site layout in a manner consistent with established industry standards. Site Plan approval is discretionary and, even if granted, is subject to appeal.	<u>PCW Final Decision</u> at 181, 188-89, 192, 207.
<b>Performance Bonds</b>	Variance	The performance bond requirements are not defined in the Barnstable Ordinance and are set on a project-by-project basis	<u>PCW Final Decision</u>

<b>Zoning Provision from which Exemption is Requested</b>	<b>Local Zoning Relief Required</b>	<b>Why Exemption is Required</b>	<b>Citation to <u>PCW Final Decision</u> Granting Individual Zoning Relief at the PCW Substation</b>
Section 240-124.A		by the Building Commissioner. Because the amount of the bonds is unfixed and there is no process for how these determinations are to be made, the potential for delay is great. A variance would be required, but the legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	at 181, 189-90, 192, 207.
<b>Occupancy Permits</b> Section 240-124.B	Variance	Under the Barnstable Zoning Ordinance, “no premises . . . shall be occupied or used without an occupancy permit signed by the Building Commissioner.” The Ordinance further provides that such permit “shall not issue until the premises . . . and its uses . . . comply in all respects with the [Barnstable Zoning Ordinance].” Because the use of the Parcel for an access road is not a use expressly allowed in the underlying RF-1 district, a variance would be required before the Building Commissioner could issue an occupancy permit, but the legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal.	<u>PCW Final Decision</u> at 182, 190-92, 207.
<b>Off-Street Parking</b>	Variance/ Special Permit	Under the Barnstable Zoning Ordinance, the minimum number of parking spaces is determined by the Building Commissioner. Because the Building Commissioner has discretion to impose	<u>PCW Final Decision</u> at 182, 186-88, 192, 207.

<b>Zoning Provision from which Exemption is Requested</b>	<b>Local Zoning Relief Required</b>	<b>Why Exemption is Required</b>	<b>Citation to PCW Final Decision Granting Individual Zoning Relief at the PCW Substation</b>
Article VI, Sections 240-48 through 240-58		parking requirements inconsistent with the proposed PCW Substation, a special permit (with respect to number of parking spaces) or variance (with respect to other requirements) may be required. The legal standard for obtaining a variance is difficult to meet. Variances are a disfavored form of relief and, even if granted, are subject to appeal. A special permit can only be issued after a public hearing, is discretionary, and if granted, is subject to appeal.	

Sources: Exh. PCWZ-1, at 17-21; Company Brief at 12-16.

3. Consultation with Municipal Officials and Community Outreach.

Park City Wind states it has consulted extensively with the Town (Company Brief at 7; Exh. PCWZ-1, at 23). The Company states that it advised the Town prior to filing the Zoning Petition and that the Town has not expressed concerns or objections regarding the requested zoning exemptions for the Parcel (Company Brief at 7; Tr. 1, at 13). Additionally, the Town has agreed to support the zoning exemptions as indicated in the Host Community Agreement (“HCA”) (see Exhs. EFSB-G-14(S)(1), at 7-8; DPU-G-1(1)).

4. Position of the Company.

The Company states the zoning exemptions for the Parcel are needed for consistency with the PCW Substation site, but also indicates that the Company requires the requested exemptions for the Parcel itself (Company Brief at 19-20). See Beale, 423 Mass. at 693-94.

5. Analysis and Findings

a. Individual Exemptions

In the PCW Final Decision, the Company received exemptions related to the PCW Substation for use restrictions, minimum yard dimensional restrictions, signage prohibitions, anti-nuisance provisions, site plan review requirements, performance bond requirements, occupancy permit provisions, and off-street parking provisions. PCW Final Decision at 178-192, 207. The Company requests the same exemptions for the Parcel as received for the PCW Substation (Exh. PCWZ-1, at 21-22). To construct and operate the PCW Substation as approved by the PCW Final Decision, the Parcel must receive the same zoning exemptions as previously approved for the PCW Substation (Company Brief at 16-17). See Beale, 423 Mass. at 693-694. Consistent with the Siting Board's findings in the PCW Final Decision, the Department finds that all of the individual exemptions granted for the PCW Substation, as indicated in Table 1 above, are required for the Parcel.

b. Municipal Consultation

The Department favors the resolution of local issues on a local level whenever possible to reduce concern regarding any intrusion on home rule. Oak Bluffs at 65; K-Street Substation at 16; Russell at 60-65. The Department has determined that the most effective approach for doing so is for applicants to consult with local officials regarding their projects before seeking zoning exemptions pursuant to G.L. c. 40A, §3. Oak Bluffs at 65; NSTAR Electric Company, D.P.U. 14-55/14-56, at 41 (2015). The Company has continued to engage in discussions with the Town (Exh. PCWZ-1, at 9). The finding of the Department in the present matter is consistent with the finding of the Siting Board in the PCW Final Decision, and the Department finds that

Park City Wind engaged in good faith consultations with the Town with respect to the Company's zoning exemption requests. See PCW Final Decision at 205-207.

E. Conclusion on Request for Individual Zoning Exemptions

As described above, the Department finds that: (1) Park City Wind is a public service corporation; (2) the proposed use is reasonably necessary for the public convenience and welfare; and (3) the specifically identified zoning exemptions are required for purposes of G.L. c. 40A, § 3. Additionally, the Department finds that the Company engaged in good faith discussions with the Town of Barnstable. Accordingly, the Department grants the individual zoning exemptions as set forth in the Zoning Petition. See PCW Final Decision at 207-208.

III. COMPREHENSIVE ZONING EXEMPTION

A. Standard of Review

The Department considers requests for a comprehensive zoning exemption on a case-by-case basis. Westfield at 54; Hopkinton LNG, at 73; Princeton Municipal Light Department, D.T.E./D.P.U. 06-11, at 37 (2007) ("Princeton"). The Department will not consider the number of exemptions required as a sole basis for granting a comprehensive exemption. Princeton at 37. Rather, the Department will consider a request for comprehensive zoning relief only when issuance of a comprehensive exemption would avoid substantial public harm. Westfield at 54; K Street Substation at 41; Hopkinton LNG at 73.

B. Company Position

According to the Company, the Department should grant a comprehensive zoning exemption for the Parcel for the same reasons the PCW Substation was granted a comprehensive zoning exemption (Company Brief at 20-21, citing PCW Final Decision at 210). The Company

emphasizes the Parcel will include a necessary access road for the PCW Substation which is a critical element of the New England Wind 1 Connector which, in turn, would collectively contribute to a reliable energy supply for the Commonwealth (Company Brief at 21; Exh. PCWZ-1, at 24). The Company states that the Parcel is integral and necessary to the New England Wind 1 Connector and cannot be separated from the permitting and construction schedule of the PCW Substation, and the Parcel faces the same permitting challenges, complexities, and risks associated with the substation and other elements of the New England Wind 1 Connector (Company Brief at 21; Exh. PCWZ-1, at 24). The Company acknowledges that the Parcel would not involve zoning requirements of multiple municipalities, but there is a possibility of inconsistent zoning for the Parcel and the PCW Substation if the Department does not grant a comprehensive zoning exemption for the Parcel, which would conflict with Beale (Company Brief at 21, citing Beale, 423 Mass at 693-94). The Company lastly states that it has engaged extensively with the Town regarding zoning exemptions for the New England Wind 1 Connector and has executed an HCA in which the Town agreed to not oppose zoning exemptions. The Town has not objected to the comprehensive zoning relief requested by the Company (Company Brief at 21).

C. Analysis and Findings

With respect to the Company's request for a comprehensive exemption from the Barnstable Zoning Ordinance, in the PCW Final Decision, the Siting Board found that the issuance of a comprehensive zoning exemption could avoid substantial public harm by serving to prevent a delay in the construction and operation of the PCW Project. The Siting Board's finding is consistent with the Department's standard of review for the granting of a

comprehensive zoning exemption. PCW Final Decision at 210. The Department finds the request for a comprehensive exemption that includes the Parcel, as part of the PCW Project, does not alter this analysis, and we make the same determination as the Siting Board. The Parcel must be constructed on the same schedule as the PCW Substation. Accordingly, the Department finds that a grant of a comprehensive zoning exemption would avoid the substantial public harm of delayed construction and, therefore, the Department grants the Company's request for a comprehensive zoning exemption.

#### IV. SECTION 61 FINDINGS

As set forth in Section II.C.4, above, the environmental impacts of the access road on the Parcel would be similar to the environmental impacts analyzed and conditioned by the Siting Board in the PCW Final Decision for the PCW Substation. The Company included the Parcel in conjunction with the PCW Substation as part of the MEPA process (Exh. VW-11, at 1-4). The FEIR for the PCW Project identified the additional use of the Parcel as a change from the DEIR (Exhs. VW-11, at 1-4; PCW-12, at 8). The FEIR identified the inclusion of the Parcel as a benefit to the PCW Substation; specifically, the Parcel permits a wider turning radius for construction vehicles and emergency vehicles; the Parcel will move the entrance to the site farther away from residences west of the site; and vehicular access from the Parcel will reduce PCW Substation elevations by up to ten feet compared to the DEIR design (Exhs. VW-11, at 1-4 to 1-10; PCW-12, at 8).

In the PCW Final Decision, in accordance with MEPA, the Siting Board found that all feasible measures have been taken to avoid or minimize the environmental impacts of the PCW Project. G.L. c. 30, § 61; 301 CMR 11.12(5). PCW Final Decision at 213, citing Exh. PCW-12,



at 1. The Department reaches the same conclusion that all feasible measures have been taken to avoid or minimize the environmental impacts with respect to the Parcel as access to the PCW Substation.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is hereby

ORDERED: That the petition of Park City Wind seeking the individual exemptions for the Parcel set forth in Table 1 above from the operation of the Barnstable Zoning Ordinance is granted; and it is

FURTHER ORDERED: That the petition of Park City Wind seeking a comprehensive exemption from the operation of the Barnstable Zoning Ordinance for the Parcel is granted; and it is

FURTHER ORDERED: That Park City Wind coordinate with municipal and state officials and affected property owners in Barnstable to minimize any noise, visual, traffic, or other local impacts associated with the access road on the Parcel; and it is

FURTHER ORDERED: That Park City Wind and its contractors and subcontractors comply with all applicable state and local regulations for which Park City Wind has not received an exemption; and it is

FURTHER ORDERED: That Park City Wind obtain all other governmental approvals necessary for the construction of the access road on the Parcel; and it is

FURTHER ORDERED: That within 90 days of the completion of the access road on the Parcel, Park City Wind shall submit a report to the Department documenting compliance with all

conditions contained in this Order, noting any outstanding conditions yet to be satisfied and the expected date and status of such resolution; and it is

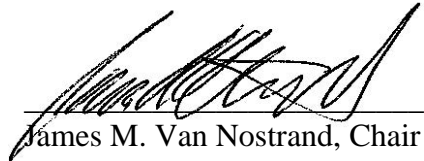
FURTHER ORDERED: That Park City Wind or its successors in interest shall comply with all other directives contained in the Order; and it is

FURTHER ORDERED: That Park City Wind or its successors in interest notify the Department of any changes other than minor variations to construction on the Parcel so that the Department may decide whether to inquire further into a particular issue; and it is

FURTHER ORDERED: That because the issues addressed in this Order relative to this Project are subject to change over time, construction of the Project must commence within three years of the date of this Order; and it is

FURTHER ORDERED: That the Secretary of the Department shall transmit a copy of this Order and the Section 61 findings herein to the Executive Office of Energy and Environmental Affairs; and that Park City Wind shall serve a copy of this Order on the Town of Barnstable Board of Selectmen, the Town of Barnstable Planning Board, and the Town of Barnstable Zoning Board of Appeals, within five days of its issuance; and that Park City Wind certify to the Secretary of the Department within ten business days of its issuance that such service has been accomplished, and that said certification be served upon the Hearing Officer to this proceeding.

By Order of the Department:



James M. Van Nostrand, Chair



Cecile Fraser, Commissioner



Staci Rubin, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission 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 Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission 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. G.L. c. 25, § 5.