

September 15, 1999

D.T.E. 99-35

Petition of Western Massachusetts Electric Company, pursuant to G.L. c. 40A, § 3, for an exemption from the Zoning By-Laws of the Town of Agawam, Massachusetts, for the purposes of constructing a new substation.

APPEARANCES: Stephen Klionsky, Esq.

Western Massachusetts Electric Company

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FOR: WESTERN MASSACHUSETTS ELECTRIC COMPANY

Petitioner

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FOR: BERKSHIRE POWER DEVELOPMENT, INC. Intervenor

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FOR: TOWN OF AGAWAM

Intervenor

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Intervenor

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FOR: THERESA LECRENSKI AND FIVE STAR TRANSPORTATION, INC.

Appellant

Louis J. Russo

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FOR: CONCERNED CITIZENS AND BUSINESSES OF AGAWAM

Appellant

**INTERLOCUTORY ORDER DENYING CONCERNED CITIZENS AND
BUSINESSES OF AGAWAM AND THERESA LECRENSKI AND FIVE STAR
TRANSPORTATION, INC. APPEALS OF HEARING OFFICER RULING
DENYING INTERVENTION**

I. INTRODUCTION

On March 30, 1999, the Department of Telecommunications and Energy ("Department") received a petition ("Petition") from Western Massachusetts Electric Company ("WMECo" or "Company") pursuant to Massachusetts General Laws, Chapter 40A, seeking an exemption from the provisions of the Zoning By-Law of the Town of Agawam ("Town") to construct an electric substation ("substation" or

"switchyard") and eight (8) new transmission line pole structures necessary to serve the Berkshire Power Development, Inc. electric generating facility. A Public Hearing in this matter was held on May 27, 1999.

The Department received seven Petitions to Intervene in this case. On June 29, 1999 the Hearing Officer issued a ruling ("Ruling") that allowed three and denied four of the intervention petitions. Among the petitions denied were those of Theresa Lecrenski and Five Star Transportation, Inc. ("Lecrenski et al.") and Concerned Citizens and Businesses of Agawam ("CCBA") (Hearing Officer Ruling at 5 and 6). The Ruling stated that, pursuant to 220 C.M.R. § 106(6)(d)(3), any aggrieved party may appeal the Ruling to the Commission by filing a written appeal with supporting documentation within one week of the date of the Ruling. The Hearing Officer Ruling was mailed to parties on July 1, 1999.

On July 6, 1999, the Hearing Officer received a telephone message from Louis Russo, the signatory of the CCBA petition, indicating that he did not receive his copy of the Hearing Officer Ruling until July 6, 1999 and seeking additional time to file an appeal to the Commission. In response, the Hearing Officer left a message for Mr. Russo granting CCBA an extension of time until July 8, 1999 in which to file its appeal.

On July 12, 1999 the Department received appeals of the Hearing Officer Ruling from Lecrenski et al. and CCBA, each of which was dated and post-marked on July 9, 1999.⁽⁴⁾ On July 19, 1999, WMECo filed its Response in Support of the Hearing Officer's Ruling Rejecting the Intervention Petition of Lecrenski et al. WMECo did not file a response to CCBA's appeal.II. APPEALS

- o Hearing Officer Ruling

The Ruling denied both the Lecrenski et al. and CCBA Petitions to Intervene on the grounds that the petitioners failed to demonstrate that they were substantially and specifically affected by the proceeding (Ruling at 5-7).

With respect to the Lecrenski et al. Petition to Intervene, the Ruling found that the allegations of increased "visual blight" and "visual pollution" were too general to serve as a basis for a finding that Lecrenski et al. could be substantially and specifically affected, particularly since the property of Lecrenski et al. currently serves as a school and charter bus depot (id. at 6). The Ruling also noted that the assertion of Lecrenski et al. about loss of a buffer zone between the Berkshire Power Development plant and abutters failed to support an assertion of being substantially and specifically affected, since the plant lies between the property of Lecrenski et al. and the site of the proposed switchyard (id.).

With respect to the CCBA Petition to Intervene, the Ruling noted that CCBA raised three grounds in support of its petition to intervene: (1) the detrimental effect of the proposed transmission lines and pole structures on abutter property values; (2) the

hazards and dangers of operating the L.V. Heliport in proximity to the proposed switchyard; and (3) the alleged designation of the proposed site as a "buffer zone" in Berkshire Power Development,

EFSB 95-1 (1996) and Berkshire Power Development, D.P.U. 96-104 (1997) (*id.*). The Ruling denied intervention on the first ground based on the commercial and industrial nature of the area and the location of the proposed switchyard site on a wedge of property between existing transmission lines and the generating facility (*id.* at 6 to 7).⁽²⁾ The Hearing Officer denied intervention on the second and third grounds because CCBA's petition did not state why or how it would be substantially and specifically affected either by construction in the alleged buffer zone or by an increase in risk associated with the Heliport (*id.* at 7).

o Position of Lecrenski et al.

The Lecrenski *et al.* appeal requests reconsideration of the Hearing Officer Ruling. The appeal restates the allegations contained in the Petition to Intervene of Lecrenski *et al.*, namely, that Lecrenski owns parcels of real estate which abut the lands upon which WMECo seeks to establish a new 115KV switching station, and that these properties will be substantially and specifically affected by the granting of WMECo's request for a zoning exemption (Lecrenski *et al.* Appeal at 1). The Lecrenski *et al.* appeal also reasserts the allegation that a portion of the area on which the switching station is to be constructed was defined as an "environmental buffer zone" pursuant to Berkshire Power Development, Inc., EFSB 95-1 (1995) ("Berkshire Power Decision"), and argues that the Ruling's conclusion that the power plant lies between the Lecrenski property and the site of the proposed switching station "does not take into consideration the previous EFSB order" (*id.* at 2).⁽³⁾ The Lecrenski *et al.* appeal also reasserts allegations of "visual blight" from the Lecrenski *et al.* Petition for Intervention, states that the switching station site is in part surrounded by "residential and low-impact commercial structures", and argues that the additional blight caused by the proposed transmission poles will adversely affect their property values (*id.*)

C. Position of WMECo in Response to Appeal of Lecrenski et al

The WMECo response states that the Department should uphold the Ruling because: (1) Lecrenski *et al.* failed to file their appeal in a timely manner; and (2) the Ruling correctly held that Lecrenski *et al.* failed to describe how they may be substantially and specifically affected by this proceeding (WMECo Response at 1). WMECo notes that the Lecrenski *et al.* appeal does not dispute that the Berkshire power plant lies between the Lecrenski *et al.* properties and the site of the proposed substation, and does not explain how they would be affected by the development of a buffer zone that does not abut their properties (*id.* at 3). In addition, WMECo states that Lecrenski *et al.* has failed to explain how the substation will cause a "visual blight" given the commercial/industrial nature of the area, and fails to demonstrate that it will be substantially and specifically affected by new transmission lines that are located

between existing transmission lines and the Berkshire generating facility (id.). WMECo concludes by asserting that Lecrenski et al. have failed to show that the Hearing Officer committed any error in denying their Petition to Intervene, and that the Commission should uphold the Ruling (id. at 4).

D. Position of CCBA

The CCBA appeal asserts that the instant proceeding is an extension of the Berkshire Power Decision and argues that CCBA, as an intervenor in that proceeding and

D.P.U. 96-104, has standing to intervene in this proceeding (CCBA Appeal at 1). CCBA asserts that, since the property which is subject to this proceeding is owned by Berkshire Power Development and is subject to the conditions set forth in the Berkshire Power Decision, alteration of the project is subject to Departmental approval (id.). CCBA cites excerpts from the Berkshire Power Decision to support its contention that Berkshire and/or WMECo, by extension of that decision, will not be in compliance with the conditions of that decision if the relief sought in this proceeding is granted (id. at 1,2). CCBA also states that it disagrees with the Hearing Officer determination that property value losses are an insufficient basis for intervention and indicates its intention to present evidence that its membership "has lost value on their property" (id. at 2). Finally, CCBA notes that the Introduction section of the Ruling erroneously identifies Dean Harrison rather than Lea Vergnani as the owner of L.V. Heliport and Hampton Fence Supply (id.).

E. Standard of Review

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Boston Edison, 375 Mass. at 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for

late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the Hearing Officer's ruling. See Bay State Gas Company, D.P.U. 95-52, at 2 Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient and orderly fashion.⁽⁴⁾

F. Analysis and Findings

- Timeliness of Appeals

Before turning to the substance of the Lecrenski et al. and CCBA appeals, the Department must address the question of whether these appeals were timely filed. The Department finds that, although the Hearing Officer Ruling was dated June 29, 1999, it was not actually mailed until July 1, 1999, and that the Hearing Officer acted properly when he extended the time in which to file an appeal of his Ruling from July 6, 1999 to July 8, 1999. Since the Lecrenski et al. and CCBA appeals did not reach the Department's offices by that date, and in fact were dated and postmarked on July 9, 1999, they are not timely filed. Neither appeal states any good cause for late filing as required by 220 C.M.R. § 1.01(4); consequently, pursuant to Department regulations both appeals should be denied as late filed. However, because the appeals raise issues that warrant Department comment, the Department has determined that it is appropriate to address the merits of both appeals.

- Substance of Appeals

Although the Lecrenski et al. and CCBA appeals have been denied as late filed, the Department finds it appropriate to address the merits of the Lecrenski et al. and CCBA Petitions to Intervene, as well as certain of the issues raised in the Lecrenski et al. and CCBA appeals.

- Lecrenski et al.

The Department has reviewed the Lecrenski et al. Petition to Intervene, and finds that it fails to demonstrate that the petitioners may be substantially and specifically affected by this proceeding. The petitioner's allegations of increased "visual blight" and "visual pollution" are too general to serve as a basis for such a finding in the absence of some evidence or reasoned argument showing how the construction of nearby switching facilities and poles would interfere with the current commercial use of the property by Lecrenski et al. as a school and charter bus depot. No such evidence or argument appears in the Lecrenski et al. Petition to Intervene.

Similarly, although the Lecrenski et al. Petition to Intervene raises concerns about the loss of a "buffer zone" between the Berkshire generating facility and its abutters, it contains no evidence or reasoned argument showing how Lecrenski et al. would be affected by the loss of the buffer zone. Given the relative locations of the Lecrenski et al. properties, the Berkshire generating facility, and the proposed switchyard,⁽⁵⁾ we are unable to conclude that Lecrenski et al. would be substantially affected by the loss of the buffer zone.

The Department finds that the Ruling denying intervention to Lecrenski et al. is supported by the record in this case and that no errors of fact or law occurred which warrant reversal of that decision. Consequently, the Ruling as to Lecrenski et al. is upheld notwithstanding our concurrent decision to dismiss this appeal on grounds that it was untimely filed. Accordingly, if we were ruling on the merits of the Lecrenski et al. appeal, it would be denied for the reasons stated.

▪ CCBA

The Department has reviewed the CCBA Petition to Intervene and finds that it fails to demonstrate that CCBA may be substantially and specifically affected by this proceeding. Although the CCBA Petition to Intervene alleges that construction of the substation would result in property value losses to abutters, it fails to indicate any specific person or property that it purports to represent and further fails to describe how such persons or properties could be substantially and specifically affected by the proposed construction. The CCBA letterhead refers only to a Post Office Box located in Feeding Hills, Massachusetts and not a specific property location that could be identified in relation to the site of the proposed switchyard. The record supports a finding that property uses in the immediate vicinity of the proposed switchyard are commercial and industrial and that a high voltage transmission line already traverses the switchyard site. CCBA's failure to state how current or future uses of any properties would be adversely affected, such as to reduce property values, provides no basis for reversal of the Ruling denying intervention to CCBA. Similarly, the CCBA Petition to Intervene does not demonstrate how the petitioner would be substantially and specifically affected by construction in the alleged buffer zone or by the proposed switchyard's proximity to the L.V. Heliport.

In its appeal, CCBA places great weight on the fact that it was an intervenor in EFSB 95-1 and D.P.U. 96-104, and characterizes this proceeding as an extension of EFSB 95-1. The Department notes that, as a matter of law, petitioners for intervention must meet the burden of showing the manner in which they are substantially and specifically affected by a proceeding each time they wish to intervene in a case. 220 C.M.R. § 1.03(1)(b); see also G.L. c. 30A, § 10. Moreover, this proceeding is in no sense an extension either of EFSB 95-1 or of

D.P.U. 96-104. Those cases dealt with the proposal of Berkshire Power Development to construct a power plant and ancillary facilities. This case concerns the proposal of

WMECo to construct a switchyard and interconnecting transmission line. Thus, this proceeding differs from the previous two both in petitioner and, significantly, in subject matter. We therefore see no inconsistency between the Ruling and the intervention rulings in EFSB 95-1

and D.P.U. 96-104.⁽⁶⁾

The Department finds that the Ruling denying intervention to CCBA is supported by the record in this case and that no errors of fact or law occurred which warrant reversal of that decision. Consequently, the Ruling as to CCBA is upheld on substantive grounds, notwithstanding our concurrent decision to dismiss this appeal on procedural grounds that it was untimely filed. Accordingly, if we were ruling on the merits of the CCBA appeal, it would be denied for the reasons stated.

III. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Appeal of Theresa Lecrenski and Five Star Transportation, Inc. from the Hearing Officer's Ruling Denying their of Petition to Intervention is denied, and it is

FURTHER ORDERED: That the Appeal of Concerned Citizens and Businesses of Agawam from the Hearing Officer's Ruling Denying their of Petition to Intervention is denied, and it is

FURTHER ORDERED: That the Hearing Officer issue an amended copy of his

June 29, 1999 Ruling to correct errors in the identification of certain petitioners whose names were inadvertently transposed.

By Order of the Department,

Janet Gail Besser, Chair

James Connolly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Commissioner

Paul B. Vasington, Commissioner