

D.T.E. 98-33

Petition of Tennessee Gas Pipeline Company, pursuant to M.G.L. c. 40A, §3 for exemption in particular respects from the Zoning By-Laws of the Town of Agawam.

APPEARANCES: Harold W. Potter, Jr.

Dianne R. Phillips

Sherburne, Powers & Needham, P.C.

One Beacon Street

Boston, Massachusetts 02108

Petitioner

Donald M. Rheault, President

Agawam City Council

36 Main Street

Agawam, MA 01001

Intervenor

Daniel F. Keenan, Representative, Third Hampden District Commonwealth of Massachusetts

State House, Room 236

Boston, MA 02133-1054

Interested Person

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I. INTRODUCTION

On April 1, 1998, Tennessee Gas Pipeline Company ("Tennessee Gas" or "Company") petitioned the Department of Telecommunications and Energy ("Department") for an exemption from certain sections of the Zoning Ordinance of the Town of Agawam ("Town") pursuant to the powers vested in the Department by M.G.L. c. 40A, § 3 (Exh. TEN-1, at 1-5).⁽¹⁾ The Company has requested a zoning exemption in order to construct a new compressor building and appurtenances at the location of its existing compressor station No. 261 on Suffield Street in Agawam, Massachusetts (id.).⁽²⁾ Tennessee Gas has proposed to remove the existing compressor station and build the new compressor station on the foundation of the old one (Exh. TEN-3-1).

The Company is requesting, pursuant to G.L. c. 40A § 3, exemptions from the sections of the Agawam Zoning Ordinance titled Nonconforming Uses at § 180-7 and Permitted Uses at §180-37(Exh. TEN-1, at 2 and 3). Tennessee Gas asserts that its proposed compressor building would not conform to Agawam's Zoning Ordinance because it would be located in an Agricultural District and would not comply with applicable use restrictions (id.). Furthermore, Tennessee Gas asserts that Agawam's Zoning Ordinance would classify its facility as an existing nonconforming use, and therefore the project may not comply with restrictions regarding rebuilding and modifying a non-conforming use (id.).

Tennessee Gas maintains that it has the right to apply for a zoning exemption as it is a natural gas pipeline company as defined in Chapter 164 of the Massachusetts General Laws and is a public utility transporting natural gas in bulk to numerous Massachusetts and other New England local distribution companies (id. at 1).

II. PROCEDURAL HISTORY

The Department docketed the petition as D.T.E. 98-33. Pursuant to notice duly issued, the Department conducted a public hearing in Agawam on June 30, 1998 to afford interested persons an opportunity to be heard.⁽³⁾ The Department received a timely petition to intervene from Donald M. Rheault, President of the Agawam City Council, on behalf of the City Council, and a timely petition to participate as an interested person from Massachusetts State Representative Daniel F. Keenan. Tennessee Gas did not oppose the petition to intervene or the petition to participate as an interested person and they were duly allowed by the Department. The evidentiary hearing was held on August 27, 1998.

In support of its petition, the Company sponsored the testimony of two witnesses: Jesus Soto, Project Engineer and James D. Hartman, Property Rights Specialist. Intervenors who gave testimony included City Councilors Edward Caba, Robert A. Magovern and Gina-Marie Letellier.

III. STANDARD OF REVIEW

In its petition for a zoning exemption, the Company seeks approval under G.L. c. 40A, § 3, which, in pertinent part, provides:

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

by-law if, upon petition of the corporation, the [D]epartment of [T]elecommunications and [E]nergy 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....

Under this section, the company first must qualify as a public service corporation (see Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975)), and establish that it requires an exemption from the local zoning by-laws. The company then must demonstrate that the present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare.

In determining whether a company qualifies as a "public service corporation" for purposes of G.L. c. 40A, § 3, the Supreme Judicial Court 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 at 680.

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, at 685-686; Town of Truro v. Department of

Public Utilities, 365 Mass. 407 (1974). 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). 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 the State as a whole and upon the territory served by the applicant. Save the Bay at 685; New York Central Railroad at 592.

With respect to the particular 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. Martorano v. Department of Public Utilities, 401 Mass. 257, 265 (1987); New York Central Railroad, at 591; Wenham v. Department of Public Utilities, 333 Mass. 15, 17 (1955). 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. Martorano at 265; New York Central Railroad at 591; Wenham at 17.

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 (see Massachusetts Electric Company, D.P.U. 95-57, at 5 (1995) ("MECo, D.P.U. 95-57"); New England Power Company, D.P.U. 92-278/279/280, at 19-22 (1994) ("NEPCo, D.P.U. 92-278/279/280"); Tennessee Gas Pipeline Company, D.P.U. 85-207, at 6-9 (1986) ("Tennessee")); (2) the present or proposed use and any alternatives identified (see MECo, D.P.U. 95-57, at 6; NEPCo, D.P.U. 92-278/279/280, at 19; Tennessee, at 18-20); and (3) the environmental impacts or any other impacts of the present or proposed use (see MECo, D.P.U. 95-57, at 5-6; NEPCo, D.P.U. 92-278/279/280, at 20-23; Tennessee, at 20-25).

After examining these issues, the Department balances the interests of the general public against the local interest and determines whether the present or proposed use is reasonably necessary for the convenience or welfare of the public.⁽⁴⁾

IV. DESCRIPTION

A. Need for the Proposed Project

The Company stated that its existing compression facilities are inadequate to meet the demand for additional pressure to supply gas to the Berkshire Power Company, L.L.C.'s ("Berkshire Power") planned natural gas-fired power plant in Agawam (Exh. TEN-3, at 3).⁽⁵⁾

B. Impacts of the Proposed Project

In accordance with its responsibility to undertake a broad and balanced consideration of all aspects of the general public interest and welfare, the Department examines the impacts associated with the proposed project to identify any significant impacts that would likely occur during construction and operation of the compressor facility. In this case, potential impacts are limited to removal of hazardous substances during construction, noise during operation and land use.

1. Hazardous Substances

The Company stated that the existing compressor station contains concrete asbestos wall panels made from a material called Transite (id. at 2). Tennessee Gas stated that the panels are formed from a mixture containing asbestos and concrete, and asserted that the material is "non-friable"(id.).⁽⁶⁾ To prevent the possible spread of asbestos fibers during removal of the panels, Tennessee Gas proposes to encapsulate the Transite panels within a thin layer of latex encapsulant (id.). The Company would then unbolt the panels, carefully remove them from the building's steel frame, wrap them in 6 millimeter thick plastic material, mark them as "asbestos containing material" ("ACM") and dispose of them at the Connecticut Valley Sanitary Waste Landfill, a facility approved to accept ACM, located in Chicopee, Massachusetts (id.).

2. Noise

According to the Company's noise study, the project will result in an increase in noise levels during full load operation of 0.9 decibels, A-weighted ("dBA") along the north property line and 1.3 dBA along the southwest property line (Exh. TEN-3-6). To justify its assumption that full load operation represents an appropriate baseline for its noise study, the Company provided documentation that shows the existing compressor facilities run at full capacity on most of the days of the year (RR-DTE-5). The Company stated that the estimated noise levels would comply with the federal noise limit of 55 dBA and that the Company would guarantee compliance with this level at nearby noise sensitive areas (Tr. at 37).

3. Land Use

In regard to visual and land use impacts, the Company stated that the existing building will change very little from its existing dimensions and shape (Exh. TEN-3, at 2). The Company stated that the building will be located on the foundation of the old compressor station and will be approximately one foot shorter in height than the existing 22' 11 1/4" building (id.).

The only wetlands identified by the Company were associated with the pipeline portion of the work, and were well removed from the compressor station (RR-DTE-2C). The Company stated that the work is not within an historic district, nor does it pose any archeological concerns (Exh. TEN-2, at 4)⁽⁷⁾. Finally, the Company stated that the project will not generate traffic except a minor increase during construction (id.).

V. POSITIONS OF THE PARTIES

A. Tennessee Gas Pipeline Company

The Company contends that an exemption from the Agawam's Zoning Ordinance will enable the petitioner to upgrade an existing compressor station on its property to maintain the current level of service to its customers and to deliver natural gas to Berkshire Power in Agawam (Exh. TEN-1, at 2). Since the existing compressor building is located on Company property in an agricultural district pursuant to Agawam's Zoning Ordinance, demolition and reconstruction of the compressor building, even within the existing building foot print, is not permitted as a matter of right. (*id.* at 4). The Company contends that it has the right to seek exemption from the Zoning Ordinance by petition to the Department (*id.* at 1).

B. Agawam City Council

The City Council argued that the proposed project is not reasonably necessary for the convenience or welfare of the public because the proposed additional compression is needed solely to meet the requirements of Berkshire Power's generation facility and not to serve the Company's existing customers. (Tr. at 56). In addition, the City Council questioned Berkshire Power's need for additional compression by introducing Berkshire Power's Draft Environmental Impact Report from their Massachusetts Environmental Policy Act ("MEPA") filing (page 233, paragraph 2.2.8), which stated that additional compression would not be required (Public Hearing Tr. at 29). Finally, the City Council argued that the proposed Zoning Exemption would violate the Town's Home Rule Charter.

VI. ANALYSIS AND FINDINGS

Tennessee Gas is a natural gas pipeline company as defined in Chapter 164, § 1, organized for the purpose of distributing and selling gas within the Commonwealth. See Tennessee Gas Pipeline Company, D.P.U. 85-207 (1986), D.P.U. 91-54 (1991) and D.P.U. 91-247 (1992). Accordingly, the Company qualifies as a public service corporation and is eligible to petition the Department for an exemption from a local zoning ordinance pursuant to G.L. c. 40A, § 3.⁽⁸⁾

G.L. c. 40A, § 3, authorizes the Department to grant to public service corporations exemptions from local zoning ordinances or by-laws if the Department determines that the exemption is required and finds that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public. With respect to the Company's petition pursuant to G.L. c. 40A, § 3, the Company seeks exemptions from the sections of the Zoning Ordinance of the Town of Agawam titled Nonconforming Uses at

§ 180-7 and Permitted Uses at § 180-37 (Exh. TEN-1, at 2-3). Section 180-7 limits the extent to which one can rebuild and make modifications to an existing non-conforming use. Section 180-37 limits work in agricultural areas to the construction of buildings for farm activities and or selling of farm products, and the construction of residences in zoned areas A-1 and A-2. Based on its review, the Department concludes that these sections of the ordinance could impede construction and implementation of the Company's proposed project. Therefore, the Department finds that the Company's proposed project requires the petitioned exemptions from the operation of said sections of the Zoning Ordinance of the Town of Agawam.

Under G.L. c. 40A, § 3, the Department must examine whether the Company's proposed use of the land and structures as set forth in its petition is reasonably necessary for the convenience and welfare of the public. In determining whether the proposed project is reasonably necessary for the convenience or welfare of the public, the Department first examines the need for, or the public benefits of, the present or proposed use. The Department then examines the environmental and other impacts of the project, and considers the identified alternatives. Finally, the Department must balance the interest of the general public against the local interest.⁽⁹⁾

Regarding the need for, or the public benefits of, the proposed use, the Energy Facilities Siting Board has already determined that the Berkshire Power facility will provide a necessary energy supply for the commonwealth and has issued a decision approving the power plant. Berkshire Power Decision, 4 DOMSB at 221 (1996). Here, the Company has submitted testimony demonstrating that modifications to its compressor station are necessary because of (1) the increased demand for natural gas to supply the power plant, and (2) the need for a facility that can house sophisticated computer equipment related to the operation of a gas compression facility (TEN-2, at 2 and 3). Consequently, the Department finds that the compression facility is integral to the contracted operation of Tennessee's pipeline system to supply Berkshire Power's generation facility, and therefore is needed.

The Department recognizes that Berkshire Power indicated at an early stage of the MEPA process that its proposed project would not require additional compression. However, two notices of project change have since been filed with the Executive Office of Environmental Affairs ("EOEA") that include the new compression requirements and EOEA issued a Certificate of Adequacy on these Notices of Project Change on May 22, 1998. The Department therefore relies on this updated information for its analysis of the need for the compressor station. The Department finds that the upgraded compressor station will provide public benefits by providing a reliable supply of gas for the Berkshire Power facility. The Department also finds that by providing fuel to the Berkshire Power facility, the project will provide a public benefit by contributing to a necessary energy supply for the Commonwealth.

The record indicates that the Company has considered and developed plans to minimize and to mitigate when necessary, possible environmental impacts including hazardous

waste, noise and land use. Specifically, the Company has developed an appropriate plan for the removal and disposal of asbestos from the existing compressor station and has minimized land use impacts by reusing the existing foundation of the old compressor station, and avoiding wetlands or other environmentally sensitive areas. In addition, the Company has demonstrated that operation of the new compressor station in place of its existing compressor station, will increase noise levels at the property line by a maximum of 1.3 dBA, well within the Massachusetts Department of Environmental Protection's 10 dBA noise standard.

Accordingly, the Department finds that the public interest in constructing the compressor station in Agawam outweighs any environmental impacts to the local community. Therefore, the Department finds the proposed project is necessary for the public convenience or welfare of the public. In addition, the Department finds that all feasible measures have been taken to avoid or minimize impacts, and that the project is in compliance with the Massachusetts Environmental Policy Act (M.G.L., c. 30, §§. 61-62H) and with its implementing regulations (301 C.M.R., § 11.00).

VII. ORDER

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

ORDERED: That the Tennessee Gas Pipeline Company's petition be allowed and that the proposed compressor station and appurtenances, as described in the Company's exhibits on file with the Department, be exempt from the operation of the following sections of the Zoning Ordinance of the Town of Agawam, pursuant to G.L. c. 40A § 3 to the extent such facilities are used for the compression of natural gas:

Article I § 180-7, page 18013-18014 and Article VII, § 180-37, page 18038 of the Zoning Ordinance of the Town of Agawam; and it is

FURTHER ORDERED: That the Tennessee Gas Pipeline Company shall implement all mitigation measures proposed by the Company in this proceeding; and it is

FURTHER ORDERED: That the Tennessee Gas Pipeline Company notify the Department of any significant changes in the planned timing, design or environmental impacts of the proposed project as described above; and it is

FURTHER ORDERED: That the Tennessee Gas Pipeline Company shall obtain all other governmental approvals necessary for this project before its construction commences; and it is FURTHER ORDERED: That the Secretary of the Department shall transmit a certified copy of this Order to the Clerk of the Town of Agawam; and that Tennessee Gas shall serve a copy of this Order upon the Conservation Commission, Planning Board, and each member of the City Council of the Town of Agawam within five business days of its issuance and shall certify to the Secretary of the Department within ten business days of its issuance that such service has been accomplished.

By Order of the Department,

Janet Gail Besser, Chair

James Connolly, Commissioner

W. Robert Keating, Commissioner

Eugene Sullivan, Commissioner

Paul B. Vasington, Commissioner

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 may be filed with the Secretary of the Commission within twenty days after the date of service for 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 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.

(Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. The Zoning By-Law for the Town of Agawam is contained in Chapter 180 of the Code of the Town of Agawam and is known as the "Zoning Ordinance" of the Town.

2. In addition, Tennessee Gas proposes to construct (1) a meter station at the site of the Berkshire Power Company's ("Berkshire Power") proposed generating facility in Agawam, Massachusetts and (2) a 1.57 mile gas pipeline that would connect the proposed compressor station and meter station (RR-DTE-2C). The Company stated that Agawam's Zoning Ordinance does not apply to these project components and that the Federal Energy Regulatory Commission ("FERC") approved the compressor station, meter station and pipeline under blanket authorization in FERC Docket No. CP82-413-000 on June 11, 1998 (Exhs. TEN-1 at Att. C; TEN-2, at 2 and 4).

3. The Department also conducted a site visit to the Company's facilities on June 30, 1998.

4. In addition, the Massachusetts Environmental Policy Act ("MEPA") provides that "[a]ny determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact." G.L. c. 30, § 61. Pursuant to 301 C.M.R. § 11.01(3), these findings are necessary when an Environmental Impact Report ("EIR") is submitted by a company to the Executive Office of Environmental Affairs ("EOEA"), and should be based on such EIR. Where an EIR is not required, c. 30, § 61 findings are not necessary (301 C.M.R. § 11.01(3)).

Since this project did involve an EIR, the Department must determine whether the project complies with the MEPA at M.G.L., c.30 §§. 61-62H and with its implementing regulations (301 C.M.R. § 11.00). The chronology of the MEPA review is as follows: Berkshire Power submitted an Environmental Notification Form ("ENF") in March 1995; EOEA issued a certificate on the ENF on April 21, 1995 and required Berkshire Power to file a Draft Environmental Impact Report ("DEIR"); Berkshire Power filed its DEIR in August 1995; EOEA issued a certificate of adequacy on the DEIR on August 22, 1995; Berkshire Power filed its Final Environmental Impact Report ("FEIR") in January 1996;

and EOEa issued a certificate of adequacy on the FEIR on March 1, 1996. In addition, two notices of project change were filed with EOEa that included the compressor station and changes to the alignment of the interconnecting pipeline. EOEa issued a certificate of adequacy on the notices of project change on May 22, 1998.

5. The Energy Facilities Siting Board approved the petition for the Berkshire Power plant on June 19, 1996. Berkshire Power Decision, 4 DOMSB at 221.

6. Non-friable refers to a material that is not easily crushed into particles/powder.

7. In a letter dated May 29, 1998, the Massachusetts Historical Commission ("MHC") stated the project is unlikely to contain significant historic or archeological resources and that no further MHC review was required in accordance with Massachusetts General Laws, Chapter 9, Sections 26-27C, as amended by Chapter 254 of the Acts of 1988 (950 C.M.R. § 71) and MEPA. (EOEA # 10287).

8. The City Council's assertion that this proceeding violates the Town's Home Rule Charter conflicts with G.L. c. 40A, § 3 which clearly authorizes the Department to grant zoning exemptions to public service corporations under certain circumstances.

9. The Department notes that members of the Agawam City Council, as well as a number of citizens of the Town of Agawam expressed opposition to the Berkshire Power Project. (Public Hearing Tr. at 44 to 61, Tr. at 9 to 59). However, the Berkshire Power Project is not within the limited scope of this case.