

MASSACHUSETTS SUPREME JUDICIAL COURT

Box Pond Ass'n v. Energy Facilities Siting Board

435 Mass. 408 (2001) · Decided November 23, 2001

SUMMARY

The Massachusetts Supreme Judicial Court affirmed the Energy Facilities Siting Board’s approval of IDC Bellingham, LLC’s proposed natural-gas-fired electric generating facility. The court rejected challenges concerning the denial of a continuance, quashing of a subpoena for a withdrawn noise expert, limited consideration of that expert’s testimony, exclusion of additional noise evidence in a compliance proceeding, and refusal to reopen the record regarding air-pollution-control technology. The court applied deferential review and found no legal error, abuse of discretion, or lack of substantial evidence.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Cowin, J.
JURISDICTION	Massachusetts
DECIDED	November 23, 2001
DISPOSITION	affirmed
PROCEDURAL POSTURE	Intervenors appealed the Energy Facilities Siting Board's decisions approving IDC Bellingham, LLC's proposed electric generating facility and later compliance filing. The single justice consolidated and reserved the appeals for the full Supreme Judicial Court.
STANDARD OF REVIEW	The court reviews board decisions under G. L. c. 25, § 5, and G. L. c. 164, § 69P, and will uphold them unless they reflect an error of law, lack substantial evidentiary support, are arbitrary or capricious, constitute an abuse of discretion, or are otherwise not in accordance with law. The court gives substantial deference to the board's expertise and experience. Evidentiary and reopening decisions are reviewed for abuse of discretion or denial of substantial justice, and an agency's interpretation of its own regulations is disturbed only if patently wrong, unreasonable, arbitrary, whimsical, or capricious.
PRECEDENTIAL VALUE	Published Massachusetts Supreme Judicial Court opinion; precedential.

PARTIES

Box Pond Association, Concerned Citizens of Bellingham, Joan Eckert
v. Energy Facilities Siting Board

TOPICS

judicial review of agency action

agency adjudication

administrative procedure act

evidence

appellate procedure

PRACTICE AREAS

administrative law

environmental law

appellate procedure

evidence

QUESTIONS PRESENTED

1. Whether the hearing officer abused her discretion by denying an intervener's request for a six-week extension to retain a replacement noise expert.
2. Whether the hearing officer improperly revoked or quashed a subpoena directed to the withdrawn noise expert without providing a formal opposition period.
3. Whether the board erred by giving limited consideration to the withdrawn expert's unsworn, uncross-examined prefiled testimony.
4. Whether the board properly excluded a second noise expert's testimony from the compliance proceeding as beyond the scope of the turbine-change proceedings.
5. Whether the board abused its discretion by refusing to reopen the proceedings to receive evidence concerning SCONOx air-pollution-control technology.

HOLDINGS

1. The hearing officer acted within her discretion in denying the requested six-week extension because the interveners lacked record support for the delay and the statutory time requirement for deciding the generating-facility petition weighed against extending the proceedings.
2. The hearing officer properly revoked or quashed the subpoena because the applicable subpoena procedures did not require a formal seven-day opposition period, the interveners suffered no prejudice, and no exceptional circumstances required compelling an expert retained by another party to give his previously formed opinion.
3. The board did not err in giving limited consideration to the withdrawn expert's prefiled testimony and was not required to address every aspect of that evidence in its final decision.
4. The board acted within its authority by excluding testimony concerning ambient noise measurements that did not relate to the turbine change and instead sought to relitigate issues decided in the original proceeding.
5. The board did not abuse its discretion by refusing to reopen the record for draft Department of Environmental Protection materials concerning ambient-noise measurement methodology because the materials were insufficiently authenticated and of questionable reliability.

6. The hearing officer did not abuse her discretion by excluding a manufacturer's press release concerning SCONOx technology and refusing to reopen the proceedings because the press release did not materially support the interveners' assertions and was an unsupported marketing document rather than a scientific study.

KEY QUOTATIONS

"We affirm the decision of the board." (410)

"The decision whether to grant a motion to continue lies within the sound discretion of the hearing officer or the board." (413)

"An agency's interpretation of its own regulation and statutory mandate will be disturbed only if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious." (416)

"The board acted within its authority." (419)

"There was no denial of substantial justice in the hearing officer's decision to exclude the evidence." (423)

FACTUAL BACKGROUND

IDC proposed a natural-gas-fired, combined-cycle electric generating facility in Bellingham, initially described as having a 700-megawatt output, with an adjacent Mendon parcel serving as an undeveloped buffer. During the proceedings, IDC changed from Siemens Westinghouse turbines to General Electric turbines and reduced the proposed output to 525 megawatts because it could not obtain emissions guarantees for the original turbines. Intervenors relied on a noise expert whose testimony was withdrawn shortly before he was scheduled to testify, sought additional noise evidence, and later sought to introduce evidence concerning alternative air-pollution-control technology called SCONOx.

PROCEDURAL HISTORY

IDC filed a petition with the Energy Facilities Siting Board to construct and operate a natural-gas-fired electric generating facility in Bellingham. After evidentiary hearings, the board approved the petition subject to conditions and later approved a compliance filing reflecting a turbine change and reduced output. The intervenors appealed under G. L. c. 25, § 5, and the single justice reserved and reported the consolidated appeals to the Supreme Judicial Court.

DISPOSITION

affirmed

CASES CITED

- Stow Mun. Elec. Dep't v. Department of Pub. Utils., 426 Mass. 341, 344 (1997)
- Wolf v. Department of Pub. Utils., 407 Mass. 363, 367 (1990)
- Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867-868 (1997)
- Costello v. Department of Pub. Utils., 391 Mass. 527, 533 (1984)

- Foote v. Process Equip. Co., 353 Mass. 755 (1967)
- Commonwealth v. Super, 431 Mass. 492, 496-497 (2000)
- Elbar Realty, Inc. v. Shapiro, 342 Mass. 276, 278 (1961), appeal dismissed, 368 U.S. 802 (1961)
- Demoulas v. Demoulas, 432 Mass. 43, 59 (2000)
- Polaroid Corp. v. Rollins Envtl. Servs. (N.J.), Inc., 416 Mass. 684, 696 (1993)
- Commonwealth v. Miles, 420 Mass. 67, 85 (1995)
- TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 17 (2000)
- Brookline v. Commissioner of the Dep't of Envtl. Quality Eng'g, 398 Mass. 404, 414 (1986)
- Boston Police Superior Officers Fed'n v. Boston, 414 Mass. 458, 462 (1993)
- Martorano v. Department of Pub. Utils., 401 Mass. 257, 262-263 (1987)
- Hawthorne's, Inc. v. Warrenton Realty, Inc., 414 Mass. 200, 210 n.6 (1993)
- Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 379 (1960)
- Barrus v. Phaneuf, 166 Mass. 123, 124 (1896)
- School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 423 Mass. 7, 15 (1996)
- Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530 (1988)
- Planning Bd. of Braintree v. Department of Pub. Utils., 420 Mass. 22, 30-31 (1995)
- Catlin v. Board of Registration of Architects, 414 Mass. 1, 6 (1992)
- Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 135 (1998)
- Stowe v. Bologna, 415 Mass. 20, 22 (1993)
- Zachs v. Department of Pub. Utils., 406 Mass. 217, 227 (1989)
- Canavan's Case, 432 Mass. 304, 313 (2000)
- Boston Edison Co. v. Department of Pub. Utils., 419 Mass. 738, 749 (1995)
- Nevins v. Tinker, 384 Mass. 702, 705-706 (1981)
- Fairfield v. Lowry, 207 Mass. 352, 358 (1911)
- Deland v. Old Republic Life Ins. Co., 758 F.2d 1331, 1336 (9th Cir. 1985)
- Vinal v. Contributory Retirement Appeal Bd., 13 Mass. App. Ct. 85 (1982)