

MASSACHUSETTS SUPREME JUDICIAL COURT

Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board

448 Mass. 45 (2006) · Decided December 18, 2006

SUMMARY

The Massachusetts Supreme Judicial Court affirmed the Energy Facilities Siting Board’s conditional approval of transmission lines connecting the proposed Cape Wind facility to the regional electric grid. The court held that the board acted within its discretion by adopting a revised approach to determining need for transmission lines and by issuing a conditional permit requiring Cape Wind to obtain necessary permits before construction. The court also rejected claims that the conditional approval improperly delegated the board’s statutory responsibility or lacked adequate procedural notice.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Greaney, J.
JURISDICTION	Massachusetts
DECIDED	December 18, 2006
DISPOSITION	affirmed
PROCEDURAL POSTURE	Alliance to Protect Nantucket Sound, Inc., an intervener in proceedings before the Energy Facilities Siting Board, appealed the Board's conditional approval of a petition to construct and operate electric transmission lines. A single justice of the Supreme Judicial Court reserved and reported the case to the full court without decision.
STANDARD OF REVIEW	Under G. L. c. 164, § 69P, the court reviewed whether the Board's decision complied with the State and Federal Constitutions, applicable statutory procedures, and Board rules; was supported by substantial evidence; and was arbitrary, capricious, or an abuse of discretion. The court gave great deference to the Board's expertise and experience, and the challenger bore a heavy burden of proving invalidity.
PRECEDENTIAL VALUE	Published Massachusetts Supreme Judicial Court opinion; precedential.
PARTIES	Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board

TOPICS

administrative law judicial review of agency action statutory interpretation environmental law
appellate procedure

PRACTICE AREAS

administrative law energy regulation environmental law utility regulation appellate procedure

QUESTIONS PRESENTED

1. Whether the Energy Facilities Siting Board acted within its discretion by announcing and applying a new approach to determining the need for transmission lines after the evidentiary hearing and through adjudication rather than rulemaking.
2. Whether the Board lawfully issued a conditional approval requiring the applicants to obtain permits for the proposed wind farm before constructing the related transmission lines.
3. Whether the Board improperly delegated its statutory duty to make an independent finding of need by conditioning approval on future permitting events.
4. Whether the Board abused its discretion by declining to reopen the administrative record to include a draft environmental impact report.
5. Whether the Board erred in declining to require specific financial information under G. L. c. 164, § 69J.

HOLDINGS

1. The Board acted within its discretion in developing and applying a new approach through adjudication and in addressing the legal standard after the evidentiary record was complete, because the parties had reasonable notice of the issues and an opportunity to present evidence and argument.
2. The Board lawfully issued a conditional permit requiring Cape Wind to submit all permits necessary to begin construction of the wind farm before construction of the transmission lines could begin.
3. The conditional approval did not improperly delegate the Board's duty. The Board independently found that existing transmission capacity was inadequate, and the future submission of required wind-farm permits would conclusively establish the remaining condition that the generator was likely to become available.
4. The Board did not abuse its discretion by refusing to reopen the record to include the draft environmental impact report.
5. The court declined to disturb the Board's interpretation of the statutory financial-information requirement, even assuming the statutory language could reasonably be read in the manner urged by Alliance.

KEY QUOTATIONS

“The scope of our review is limited to “whether the decision of the board is in conformity with the [Constitution of the [C]ommonwealth and the Constitution of the United States, was made in accordance with

the procedures established under [G. L. c. 164, §§ 69H-69O,] and with the rules and regulations of the board with respect to such provisions, was supported by substantial evidence of record in the board's proceedings; and was arbitrary, capricious or an abuse of the board's discretion under the provisions of [§ 69H] to [§ 69O]." (51)

"It is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking." (52)

"Rather than improperly delegating its responsibilities, the board has, in effect, imposed a heightened standard of proof on the applicants." (54)

FACTUAL BACKGROUND

Cape Wind and NSTAR jointly proposed two 115-kilovolt transmission circuits, approximately eighteen miles long, running underground through Massachusetts and undersea through Nantucket Sound to connect a proposed offshore wind farm to the regional power grid. The proposed wind farm would be located in Federal waters outside the Board's jurisdiction and would consist of 130 wind turbines and an electrical service platform. The Board found that existing transmission capacity was insufficient to transmit the wind farm's output, but because the wind farm remained subject to multiple Federal and State permits, it conditioned approval of the transmission-line project on Cape Wind's submission of permits authorizing construction of the wind farm.

PROCEDURAL HISTORY

The Board conditionally approved a joint petition by Cape Wind Associates, LLC, and Commonwealth Electric Company to construct approximately eighteen miles of underground and undersea transmission lines connecting a proposed offshore wind farm to the regional electric grid. The Board required Cape Wind to obtain and submit all permits necessary to begin construction of the wind farm before construction of the transmission lines could commence. Alliance challenged the timing and contingent nature of the Board's decision and sought vacatur and remand. The Supreme Judicial Court affirmed the Board's decision.

DISPOSITION

affirmed

CASES CITED

- Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 412 (2001)
- Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 312-313 (1981)
- Securities & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 201-203 (1947)
- Massachusetts Elec. Co. v. Department of Pub. Utils., 383 Mass. 675, 679 (1981)
- LaPointe v. License Bd. of Worcester, 389 Mass. 454, 458 (1983)
- Boston Gas Co. v. Department of Pub. Utils., 405 Mass. 115, 120-121 (1989)
- Strasnick v. Board of Registration in Pharmacy, 408 Mass. 654, 660-661 (1990)
- Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utils., 395 Mass. 836, 844-846 (1985)

- New England Tel. & Tel. Co. v. Department of Pub. Utils., 372 Mass. 678, 686 (1977)
- Mello v. License Comm'n of Revere, 435 Mass. 532, 534 (2001)
- Andover v. Energy Facilities Siting Bd., 435 Mass. 377, 380-381 (2001)
- Point of Pines Beach Ass'n v. Energy Facilities Siting Bd., 419 Mass. 281, 285-286 (1995)
- New Bedford v. Energy Facilities Siting Council, 413 Mass. 482, 489-490 (1992)
- Tofias v. Energy Facilities Siting Bd., 435 Mass. 340, 349 (2001)
- Boston Gas Co. v. Department of Pub. Utils., 367 Mass. 92, 104 (1975)
- Robinson v. Department of Pub. Utils., 416 Mass. 668, 673 (1993)
- Boston Edison Co. v. Bedford, 444 Mass. 775, 783 (2005)

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