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August 15, 2022

Via Hand Delivery and Electronic Mail (emma.rodvien@puc.ri.gov)

Emma Rodvien
Coordinator
Energy Facility Siting Board
RI Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Mayflower Wind Energy LLC– Application to Construct Major Energy Facility
Docket No. SB-2022-02

Dear Ms. Rodvien:

Enclosed herewith please find an original and nine (9) copies of Mayflower Wind Energy LLC's Reply to Supplemental Memoranda of the Towns of Middletown and Little Compton in Support of Motions to Intervene for filing in the above-entitled matter.

Please feel free to contact me if you have any questions.

Respectfully,

Christian F. Capizzo

CFC:nah
Enclosure

cc: Service List

STATE OF RHODE ISLAND
ENERGY FACILITY SITING BOARD

IN RE: MAYFLOWER WIND ENERGY LLC'S APPLICATION TO CONSTRUCT MAJOR ENERGY FACILITIES	))))))	Docket No. SB-2022-02

REPLY OF MAYFLOWER WIND ENERGY LLC TO SUPPLEMENTAL MEMORANDA OF THE TOWNS OF MIDDLETOWN AND LITTLE COMPTON IN SUPPORT OF MOTIONS TO INTERVENE

On August 1, 2022, the Energy Facility Siting Board (the "Board") issued its Procedural Directive regarding the motions to intervene filed by the Towns of Middletown and Little Compton. The Board appropriately requested supplemental briefing from the movants setting forth what specific interests were being claimed that would not be protected by the existing parties. Order at 1 (towns should provide "more specificity and detail, addressing how each of the interests of the Towns identified in their respective motions to intervene may be directly and materially affected").

I. Background and Introduction

The Town of Middletown and the Town of Little Compton (the "Towns") submitted Supplemental Memoranda ("Supp. Memo.") on August 9, 2022. Although the Supplemental Memoranda differ in minor respects, they make the same deficient arguments for intervention. For ease of review, Mayflower Wind Energy LLC ("Mayflower Wind") responds to both Supplemental Memoranda herein.

In the Supplemental Memoranda, the Towns have still failed to identify any specific interest that is not already adequately represented in this proceeding. The Towns' generalized concern for views of and activities in waters of the Sakonnet River ("Sakonnet") will be well protected by the numerous regulatory bodies with jurisdiction over the Mayflower Wind

transmission connector project in Rhode Island ("Project"), as well as by this Board. These kinds of generalized concerns can and should be presented by the Towns by way of public comments. *See* R.I. Gen. Laws §42-98-9.1. The Towns' participation as intervenors will only needlessly complicate, delay and increase burdens in this proceeding.

II. Argument

The Towns claim that "no state agency can fully opine on or license Town-specific issues without Town involvement." Middletown Supp. Memo. at 4; Little Compton Supp. Memo at 4. This is not the standard for intervention. The standard applied in this context requires the town seeking to intervene either to be a host community, which the Towns are not, or to demonstrate (i) an interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Board's action in the proceeding, or (ii) any other interest of such nature that petitioners' participation may be in the public interest. 445-RICR-00-00-1.10(B). Mayflower Wind's opposition to the Towns' Motions to Intervene explained why these standards have not been met and why interventions should not be granted, particularly here where the multiple state agencies involved have expertise and experience that the Towns do not. Mayflower Wind's position is further supported by recent precedent. *Verizon New England, Inc. v. Savage*, 267 A.3d 647, 654 (R.I. 2022).

In Verizon, the Rhode Island Supreme Court just recently **denied** motions to intervene by two cities – Cranston and Pawtucket – in a case brought against a state agency, the Division of Taxation. Despite the unique impacts of the case on Cranston and Pawtucket (from a potential multimillion dollar refund of telecommunications equipment property taxes deposited in a restricted account and distributed to cities and towns pro rata based on population), the Supreme Court found that Cranston and Pawtucket's interests were adequately represented by the Division and the City of Providence. *Verizon*, 267 A.3d at 658. Specifically, the Court noted that the

"proffer of a generalized grievance" which is common to all municipalities without an adequate explanation as to how those concerns are different in kind or adverse to another party is insufficient to demonstrate that the interests were not adequately represented by the other parties. *Id.* at 657.[1] As in *Verizon*, the Towns' claimed interest in the proposed underwater cable will be adequately represented by state agencies here including but not limited to, the Rhode Island Department of Environmental Management (the "DEM") and the Rhode Island Coastal Resources Management Council (the "CRMC") – and by Portsmouth, another shoreline community along the Sakonnet.

The Towns' citations to the Energy Facility Siting Act, R.I. Gen. Laws §42-98-2 (the "EFSA") do not support their request for intervention. There is no indication in the EFSA that the legislature intended to give *every* community that may be tangentially interested in an energy facility siting proceeding the right to intervene—such a finding would be extremely administratively burdensome for the Board and unnecessary. Conversely, there are provisions in the EFSA specifically supporting *the host community's involvement, but not non-host communities*. *See* RIGL § 42-98-9.1. The provision that the Towns cite in their Supplemental Memo[2] specifically references that the EFSA is concerned with the *state's* environment. It does not focus on any aspect "uniquely within the Town's purview" as the Towns may suggest. The DEM, CRMC, and other state agencies have the subject matter experts fully capable of reviewing the impact of the Project on the state's environment, including the impact on the health and safety of its citizens, the cost to the community, public health and safety. The reasons the Towns cite to justify intervention are unavailing and do not meet the legal standard.

[1] The Towns themselves cite to the *Verizon* precedent but take the Court's general findings on intervention out of the context and ignore the fact that the Court upheld the *denial* of intervention for the two towns due to the fact that the interests of the towns were only general grievances that were adequately represented by state parties. *See* Middletown Supp. Memo at 9; Little Compton Supp. Memo at 9.

[2] Middletown Supp. Memo. at 3; Little Compton Supp. Memo. at 4.

First, each Town cites it's "economy, recreational values, and unique interests of its residents" as grounds for intervention. Middletown Supp. Memo. at 6; Little Compton Supp. Memo. At 5.[3] The Towns fail to explain, however, why these alleged interests will be "directly affected" by an underwater cable located in the middle of the Sakonnet, as required by Rule 1.10(B). As noted in Mayflower Wind's initial Objection, those are state waters, and there is no question that DEM (and the numerous other reviewing agencies identified in the Application) will adequately protect any interest that the Towns may have in the condition of those waters. See Verizon, 267 A.3d at 654 ("However, a compelling showing may be necessary when the intervenor's interest is identical to that of one of the present parties, or if there is party charged by law with representing the proposed intervenor's interest")

The Towns also cite possible impacts to the Town's infrastructure and transmission infrastructure. Middletown Supp. Memo. at 6; Little Compton Supp. Memo at 7. Once again, however, there is no specific explanation or details of what transmission infrastructure will allegedly be affected by the proposed underwater cable in state waters, and no showing that the Towns or their infrastructure will be directly affected by the proposed cable in any way. Thus, even applying the precedent cited by the Towns, that an intervention can be made by providing "a tangible basis for intervention, and an adequate explanation as to why their interests were not adequately represented," the Towns have not provided such tangible basis nor have they provided any legitimate reason that their interests are not adequately represented by either the many very competent Rhode Island state agencies or the host community. Middletown Supp. Memo at 7;

[3] Little Compton unlike Middletown cites a table showing "Landings by Ports in Rhode Island" which was included as Table 7-9 in Mayflower Wind's application. This table does not further the Towns quest for intervention and it is incorrect to state that it was included as a "major fishing port that *could be impacted*." The Mayflower Wind Application actually states, "the intensity and locations of recreational fishing within Rhode Island state waters are *not expected to be affected*." Application at 7-17.

Little Compton Supp. Memo at 7 (both *citing Verizon New England Inc. v. Savage*, 267 A.3d at 655).

The Towns further claim that Mayflower Wind has "requested consideration" of an alternative route that would make landfall and/or cross through in Middletown and Little Compton. Middletown Supp. Memo. at 8; Little Compton Supp. Memo. at 8. This statement is *not* correct. In fact, the opposite is correct. Mayflower's Application confirms that Mayflower has determined that an alternative route making landfall in Middletown is "impractical" and *dismissed that onshore route from further consideration*. Application p. 5-9. There is absolutely no "request" or proposal from Mayflower Wind for the Board to consider a route that crosses Middletown. The Towns' vague request to "participate" in discussions about alternatives is also not relevant to their intervention. Middletown Supp. Memo at 8; Little Compton Supp. Memo at 8. Mayflower Wind has involved stakeholders and has and will continue to conduct extensive outreach with coastal communities for the Project.[4] The Towns' status as formal intervenors in this proceeding is entirely unnecessary for the Towns to participate in discussions and file public comments in this proceeding or otherwise interact with Mayflower Wind regarding the Project.

Finally, the Towns cite several cases that address standing. Middletown Supp. Memo. at 5, 9-10; Little Compton Supp. Memo. at 9-10. Standing relates to the power of a court to hear a claim. *See In re Narragansett Elec. Co*., 276 A.3d 363, 373 (R.I. 2022) (objection to "overhead power lines that would 'mar[ ] water views' for many 'residents and visitors'" insufficient to establish standing to appeal Board decision). The issue before the Board is not standing, but

[4] Mayflower Wind has conducted outreach in Rhode Island Coastal Communities such as Portsmouth Tiverton, Little Compton, Middletown and Newport including but not limited to: conducting presentations and providing information on the Project, hosting a Virtual Open House (1/27/22), a 3D Virtual Tour of the Project (5/4/22), a Virtual Exhibition Room (https://www.3dwtech.co.uk/dashboard/mayflower/mayflower-wind/exhibition-en/). In addition, Mayflower Wind will be hosting a Virtual Portsmouth Community Forum on August 16, 2022 that will be available for all to attend.

intervention – specifically, whether the Towns have satisfied the requirements for intervention expressly set forth in Rule 1.10. Because the Towns have not shown that they have an interest "which may be directly affected, and which is not adequately represented by existing parties and as to which the petitioners may be bound," Rule 1.10(B)(2), or any "other interest of such nature that petitioner's participation may be in the public interest," Rule 1.10(B)(3), the motions to intervene should be denied.

III. Conclusion

In sum, the Towns have no interest that may be directly affected by the Project and which is not adequately represented by existing parties and as to which petitioners may be bound by the Board's action in the proceeding. Nor do the Towns have any other interest that is different from the interest of the general public in this proceeding. Granting the Towns' requests for intervention, in light of the Towns' failure to provide specificity or detail as to how they are directly affected by the Project and the Towns' failure to show why they are not adequately represented by existing parties will unnecessarily complicate, delay and burden this proceeding.

Respectfully submitted,

Dated: August 15, 2022

MAYFLOWER WIND ENERGY LLC

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I sent a copy of the foregoing to the service list below by electronic mail.

Docket No. SB-2022-02 – Mayflower Wind Energy LLC's Application for a License to Construct Major Energy Facilities (Portsmouth, RI) (as of 08/04/2022)

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February 9, 2022

Supreme Court

No. 2020-40-M.P.
(A.A. 18-187)

Verizon New England Inc. :

v. :

Neena S. Savage, in her capacity as Tax Administrator for the State of Rhode Island. :

Supreme Court

No. 2020-40-M.P.
(A.A. 18-187)

Verizon New England Inc.	:	
v.	:	
Neena S. Savage, in her capacity as Tax Administrator for the State of Rhode Island.	:	

Present: Suttell, C.J., Goldberg, Robinson, Lynch Prata, and Long, JJ.

O P I N I O N

Justice Goldberg, for the Court. This case came before the Supreme Court on November 4, 2021, pursuant to a writ of certiorari issued upon petition by the City of Pawtucket (Pawtucket) and the City of Cranston (Cranston) (collectively movants).[1] The movants seek review of a decision by the Sixth Division District Court denying their motions to intervene in an action commenced by the plaintiff, Verizon New England Inc. (Verizon), by way of appeal from a decision of the defendant, the Tax Administrator for the State of Rhode Island.[2] According to the

[1] In the Sixth Division District Court, the cities of Pawtucket and Cranston were the moving parties seeking to intervene in an administrative appeal by application to the court. Therefore, herein they are referred to collectively as "movants."

[2] The state tax administrator did not appear in this action before this Court.

movants, the trial judge erred in determining that those cities' interests in this controversy would be adequately represented by the City of Providence (Providence), an intervenor in this case. For the reasons set forth in this opinion, we affirm the order of the District Court denying the motions to intervene.

Facts and Travel

This controversy arose from Verizon's challenge to a 2018 final decision of the tax administrator that upheld an assessment of Verizon's tangible personal property (TPP) tax and denied Verizon's request for a lower assessment and a partial refund for TPP taxes paid from 2010 through 2014. On December 21, 2018, Verizon filed an administrative appeal in the District Court in accordance with G.L. 1956 § 8-8-24, seeking to set aside the tax administrator's final decision, alleging that the tax administrator failed to apply the proper depreciation approach, which, according to Verizon, resulted in excessive assessments and overpayments totaling approximately $21,358,152.

Initially, on February 27, 2019, the District Court heard and denied motions filed by the tax administrator to dismiss this case for failure to join indispensable parties and, alternatively, to join indispensable parties—the state's thirty-nine cities and towns and the Department of Revenue Division of Municipal Finance.

In October 2019, Providence moved to intervene as of right, followed by Pawtucket and Cranston. In its memorandum in support of its motion, Providence

claimed an interest in the TPP tax and contended that, under G.L. 1956 § 44-13-13, most of the TPP tax is "apportioned to the cities and towns[,]" and, thus, Providence's interests could be substantially impacted by the outcome of the action.[3] Significantly, in their motions to intervene, movants merely adopted Providence's memorandum of law and the arguments therein and presented no additional contentions separate from those offered by Providence.

On January 14, 2020, the District Court held a hearing on the motions to intervene. The trial judge granted Providence's motion and denied movants' motions. The trial judge carefully reviewed the four requisites necessary for intervention[4]—namely that (1) the applicant files a timely application, which was

[3] Pursuant to G.L. 1956 § 44-13-13, of the total TPP tax that is paid to the state, an amount "not to exceed three quarters of one percent (.75%)" is payable to the department of revenue for administrative expenses and "identified as general revenue" and the remainder is "apportioned to the cities and towns * * * on the basis of the ratio of the city or town population to the population of the state as a whole * * * and may be recorded as a receivable[.]" Section 44-13-13(6)(i)-(ii).

[4] In reviewing these four factors, the trial judge cited *Marteg Corporation v. Zoning Board of Review of City of Warwick*, 425 A.2d 1240 (R.I. 1981), and *Tonetti Enterprises, LLC v. Mendon Road Leasing Corp.*, 943 A.2d 1063 (R.I. 2008). *See Marteg Corporation*, 425 A.2d at 1242 (discussing pre-amendment language of Super. R. Civ. P. 24(a)(2)); *see also Tonetti Enterprises, LLC*, 943 A.2d at 1072-73 (same). As discussed in further detail *infra*, there exists limited caselaw interpreting Rule 24(a) of the District Court Civil Rules. Therefore, both this Court and the District Court will look to caselaw interpreting Rule 24(a) of the Superior Court Rules of Civil Procedure, which prior to 1995 contained language identical to the current District Court rule. *See Tonetti Enterprises, LLC*, 943 A.2d at 1071-72 (looking to caselaw interpreting certain rules of the Superior Court Rules of Civil Procedure for guidance on District Court rules).

not at issue in this case; (2) the applicant claims an interest relating to the property or transaction; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is not adequately represented by the current parties to the action.

The trial judge determined that all three cities satisfied the second and third requirements, but further found that Providence adequately represented the interests of both Pawtucket and Cranston. Specifically, with respect to the second requirement, the trial judge found that, because the three cities are direct beneficiaries of the TPP tax, and thus have an economic interest that is intertwined with the tax revenue at issue and any future distributions, they have an interest relating to the property or transaction in dispute—namely, Verizon's request for a lower tax assessment. With respect to the third requisite, the trial judge found that the cities had no other avenue to protect their interests in the event of an adverse ruling. Finally, while acknowledging that the fourth requirement generally involved a minimal threshold, the trial judge found that the cities' interests were not adequately represented by the state agency and that intervention was appropriate. Apparently concerned with an influx of motions to intervene from multiple municipalities in the state, and because movants had simply relied upon Providence's memorandum and arguments in support of their own motions to intervene, the trial judge found that the interests of Pawtucket and Cranston would

be adequately represented by Providence, which was allowed to intervene as of right. An order entered in the District Court on January 16, 2020, memorializing the trial judge's decision.

The movants filed a petition for writ of certiorari pursuant to § 8-8-32, which this Court granted on June 25, 2020.[5] The movants had argued in support of their petition that the trial judge erred in concluding that Providence adequately represented their interests when Providence was not yet a party—a finding to which movants were not afforded an opportunity to respond—and that the proper inquiry was whether the parties to the action at the time of the hearing on their motions, which did not then include Providence, adequately represented movants' interests. Accordingly, in granting certiorari we remanded the record to the District Court with direction to "allow [p]etitioners the opportunity to set forth, with particularity, what their individual interests in the matter are and why those interests cannot be adequately represented by the City of Providence" and to issue a decision on the motions to intervene setting forth the court's findings and reasoning therefore.

[5] Pursuant to G.L. 1956 § 8-8-32,

> "Any party in interest, if aggrieved by a final judgment rendered in proceedings [in the District Court], may within twenty (20) days from the date of entry of the judgment petition the supreme court of the state of Rhode Island for a writ of certiorari to review any questions of law involved."

On remand, the trial judge again determined that movants' interests were adequately represented by Providence, and he denied their motions to intervene. The trial judge concluded that the ultimate issue in the case was the "statutory interpretation of accumulated depreciation" and that, except for the varying distribution to each municipality under the law, movants' interests and arguments were identical to those of Providence—being that the proper calculations were performed by the tax administrator and the taxes were correctly paid and distributed. As a result, an order on remand entered on September 10, 2020, denying movants' request to intervene, and the case was returned to this Court.[6]

Standard of Review

"Our review of a case on certiorari is limited to an examination of the record to determine if an error of law has been committed." *State v. Poulin*, 66 A.3d 419, 423 (R.I. 2013) (quoting *State v. Greenberg*, 951 A.2d 481, 489 (R.I. 2008)). "In addition to examining the record for judicial error, 'we inspect the record to discern if there is any legally competent evidence to support the findings of the hearing justice below.'" *Id.* (quoting *Brown v. State*, 841 A.2d 1116, 1121 (R.I. 2004)). "We

[6] The Court notes that movants' appendix submitted in this Court includes certified transcribed copies of the audio recordings of the District Court hearings on the motions to intervene, which occurred on January 14, 2020, and September 3, 2020. At oral argument before this Court on November 4, 2021, Verizon stipulated to having no objection to the transcriptions. Our independent review of the audio recordings transmitted from the District Court to this Court on certiorari reveals no discrepancies in movants' transcribed record.

shall not disturb the findings of the trial justice unless it is established that he or she misconceived or overlooked relevant and material evidence or was otherwise clearly wrong." *WMS Gaming, Inc. v. Sullivan*, 6 A.3d 1104, 1111 (R.I. 2010) (quoting *New England Telephone and Telegraph Co. v. Clark*, 624 A.2d 298, 300 (R.I. 1993)).

Additionally, "[t]his Court reviews a trial justice's [decision on] a motion to intervene for abuse of discretion, reversing only if the justice failed to apply the standards set forth in Rule 24(a)(2), or otherwise committed clear error." *Town of Coventry v. Baird Properties, LLC*, 13 A.3d 614, 619 (R.I. 2011).

Discussion

Rule 24(a)(2) of the District Court Civil Rules provides for intervention as of right when "[u]pon timely application * * * the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action[.]"[7] The relevant language of that rule and Rule 24 of the Superior Court Rules of Civil Procedure were identical prior to a 1995 amendment to the Superior Court rule for intervention as of right, which was enacted in order to align with its federal counterpart.[8] *See* Reporter's Notes to Dist. Ct. Civ.

[7] The Reporter's Notes to Rule 24 of the District Court Civil Rules provides that "[c]ircumstances in which intervention would be appropriate in the District Court are rare."

[8] Prior to the 1995 amendment, Rule 24(a) of the Superior Court Rules of Civil Procedure read: "Upon timely application anyone shall be permitted to intervene in an action * * * when the representation of the applicant's interest by existing parties

R. 24; Super. R. Civ. P. 24(a). Notably, in *Marteg Corporation v. Zoning Board of Review of City of Warwick*, 425 A.2d 1240 (R.I. 1981), which was decided prior to the amendment, this Court analyzed one's right to intervene in a Superior Court action according to the four elements that now comprise Superior Court Rule 24(a).[9] *See Marteg Corporation*, 425 A.2d at 1242. Because we have held that the language of District Court Rule 24(a)(2)—albeit in the context of the pre-amendment Superior Court rule—is applicable by way of the test set forth in *Marteg*, it was appropriate for the trial judge in the present case to follow that test in evaluating whether an

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is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *." *Marteg Corporation*, 425 A.2d at 1242 n.1 (applying pre-amendment language of Super. R. Civ. P. 24(a)). The Committee Notes to the Superior Court rule state that the 1995 amendment to subdivision (a) followed the 1966 amendment to its federal counterpart.

[9] Despite the revision to the Superior Court rule in 1995, the test applied to a Superior Court motion to intervene has not changed. The Superior Court rule provides that:

> "Upon timely application anyone shall be permitted to intervene in an action:
>
> "* * *
>
> > "When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Super. R. Civ. P. 24(a)(2).

applicant should be allowed to intervene as of right in a District Court proceeding. *See id.*

To establish a right to intervene, movants were required:

> "(1) to file timely application for intervention, (2) to show an interest in the subject matter of that action in that the disposition of the action without intervention would as a practical matter impair or impede their ability to protect that interest, and (3) to establish that their interest was not adequately represented by the existing parties." *Marteg Corporation*, 425 A.2d at 1242.

On review, movants do not challenge the trial judge's findings with respect to the first two components[10] of this rule; rather, they contend that the trial judge erred in finding that Providence would adequately represent their interests because, they contend, he focused too narrowly on the parties' positions—specifically, that each city is aligned with and supports the tax administrator's statutory interpretation of accumulated depreciation under § 44-13-13 and the conclusion that Verizon's TPP tax was correctly assessed. The movants argue that the trial judge failed to consider the cities' distinct interests in how a "refund * * * would be accomplished by the District Court in the event that Verizon's interpretation of the tax statute prevails."

[10] The first two uncontested components of the rule for intervention as of right are comprised of three elements, namely (1) a timely filed application; (2) an interest in the subject matter of the action; and (3) a showing that the disposition of the action without intervention would as a practical matter impair or impede the ability to protect that interest. *See e.g.*, *Retirement Board of Employees' Retirement System of City of Providence v. Corrente*, 174 A.3d 1221, 1229 (R.I. 2017).

Additionally, movants assert that, because the burden of showing inadequate representation is minimal, they need only demonstrate "some tangible basis" that their interests "may" be at risk.

Verizon, on the other hand, contends that precedent requires movants to "show [an] adverse legal position with Providence * * * to make a compelling showing of inadequate representation." (Citing *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013); *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984); and *Retirement Board of Employees' Retirement System of City of Providence v. Corrente*, 174 A.3d 1221 (R.I. 2017).) Because movants cannot make a compelling showing, Verizon argues, the trial judge "acted within [his] discretion in denying the [m]otions." Verizon also asserts that movants have not demonstrated a direct interest relating to the property or transaction that is subject to the action. We first address movants' burden.

This Court has recognized that "Rhode Island precedent [concerning whether representation is adequate] is sparse"; as such, we "may properly look to the federal courts for guidance." *Corrente*, 174 A.3d at 1230 (quoting *Tonetti Enterprises, LLC v. Mendon Road Leasing Corp.*, 943 A.2d 1063, 1073 (R.I. 2008)). Typically, the proponent of intervention need only establish "'some tangible basis to support a claim of purported inadequacy' of representation by the current [parties,]" *Baird Properties, LLC*, 13 A.3d at 620 (quoting *Credit Union Central Falls v. Groff*, 871 A.2d 364, 368 (R.I. 2005)), and such burden is "considered minimal[.]" *Id.* (citing

Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972)). When the burden is considered minimal, "the requirement of the rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate." *Id.* (brackets omitted) (quoting *Trbovich*, 404 U.S. at 538 n.10).

However, a compelling showing may be necessary when the intervenor's "interest is identical to that of one of the present parties, or if there is a party charged by law with representing the [proposed intervenor's] interest[.]" 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1909, 394-95 (3d ed. 2007). Significantly, a presumption of adequate representation arises when either "the goals of the applicants are the same as those of the plaintiff or defendant," or "the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute." *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999); *see Corrente*, 174 A.3d at 1230. "To overcome that presumption, [one seeking to intervene] ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *United Nuclear Corporation v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) (quoting *Moosehead Sanitary District v. S.G. Phillips Corporation*, 610 F.2d 49, 54 (1st Cir. 1979)); *see Town of Coventry v. Hickory Ridge Campground, Inc.*, 111 R.I. 716, 722-23, 306 A.2d 824, 828 (1973) (determining that when the Superior Court established that the town solicitor

inadequately represented the interests of the town's citizens by failing to appear in court and prematurely entering into a consent decree, intervention was warranted).

However, factors such as adversity of interest, collusion, or nonfeasance are not exclusive. *See, e.g.*, *Daggett*, 172 F.3d at 111. An intervenor may support a claim of inadequacy of representation by demonstrating that there is "an actual conflict of interests[,]" *id.* at 112, or that "its interests are sufficiently different in kind or degree from those of the named party." *B. Fernández & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006); *see Corrente*, 174 A.3d at 1230 (concluding that the intervenors rebutted the presumption by demonstrating that "a vast gulf" existed between the positions of the intervenors—the city and its mayor—and the government agency, the retirement board); *see also Groff*, 871 A.2d at 368 (holding that the intervenor established an interest different in kind from the current parties because she not only claimed an interest in the funds, she claimed an interest that was superior to that of the other parties).

This Court has determined that, where a party is presumed to represent the intervenor's interest or position, the one seeking intervention must simply provide "an adequate explanation as to why what is assumed—here, adequate representation—is not so." *Corrente*, 174 A.3d at 1230 (quoting *Maine v. Director, United States Fish and Wildlife Service*, 262 F.3d 13, 19 (1st Cir. 2001)). Nevertheless, "the tests of inadequacy may vary with the strength of the interests."

Maine, 262 F.3d at 20 (citing *Daggett*, 172 F.3d at 111); *see* Wright, cited *supra*, § 1909 (explaining that, where the interests are not identical but are similar, "[a] discriminating appraisal of the circumstances of the particular case is required" and the court should consider the degree of difference between interests).

In the case at bar, the merits of the underlying controversy concern a question of law. Because movants and Providence have presented identical goals—that the state's interpretation of accumulated depreciation and assessment of Verizon's TPP tax should be upheld—there is a presumption of adequate representation in this case. *See United Nuclear Corporation*, 696 F.2d at 144 (determining that a presumption of adequate representation existed where the movants' interests were no different in kind from and the litigation goal, of upholding the constitutionality of the statute, was aligned with a party to the action); *see also Corrente*, 174 A.3d at 1230 (although a presumption of adequate representation applied where a government entity was a party, presumption was overcome by adverse positions between the current parties and the intervenors). The movants do not hold positions that are adverse to that of Providence.

The record discloses that the trial judge initially considered movants' burden of establishing inadequacy of representation to be minimal, but on remand, he required movants to make a compelling showing of inadequate representation. However, the proper standard lies in the middle. In this case, to overcome the

presumption, it was incumbent upon movants to provide a tangible basis for intervention, *Baird Properties, LLC*, 13 A.3d at 620, and an adequate explanation as to why their interests were not "adequately represent[ed]" by Providence. *Corrente*, 174 A.3d at 1230 ("This is a fact-intensive determination that 'must be determined in keeping with a commonsense view of the overall litigation.'") (quoting *Maine*, 262 F.3d at 19). They failed to do so.

On remand in the District Court, movants expressed serious concern about the specter of a settlement or judgment that would require a refund to Verizon; movants implied that a refund would result in a clawback of previous payments. Specifically, they speculated that, because the three cities each have their "own unique set of fiscal and budgetary challenges, concerns, and priorities[,]" in the event the state and Verizon negotiate a settlement, "Providence will push for a settlement or order that is structured in a way that best fits Providence's fiscal and budgetary priorities" rather than those of movants. The movants also argued that any refund to Verizon would cause havoc to those cities' distinct "fiscal and budgetary challenges, concerns, and priorities[,]" namely because how such a refund would be accomplished is unknown. It matters not whether these contentions are analyzed by the District Court utilizing the higher burden of a compelling showing of inadequate representation as employed—incorrectly, we note—or using the less burdensome standard of a tangible basis for intervention and an adequate explanation as to why

that interest would not be adequately represented by Providence. The conclusion is the same; because movants failed to demonstrate that a cognizable distinction in their interests exists on the merits from those of Providence, there is no tangible basis for intervention. We reject the contention that the possibility of a settlement (which exists in every case) amounts to a tangible basis for intervention. We now turn to the issue of the adequacy of representation.

Because the level of adequacy of representation "may vary with the strength of the interests[,]" *Maine*, 262 F.3d at 20, a clear understanding of movants' interests is important. On the merits, Verizon claims that the tax administrator deviated from the statutorily required method of calculating accumulated depreciation by failing to consider all factors that impact the value of Verizon's TPP. This misapplication, according to Verizon, led to an overstated assessment of its taxable TPP and excessive tax payments to the state for the calendar years from 2009 through 2014. Verizon claims that, as a result, it is entitled to a partial refund.

Although the ultimate interpretation of accumulated depreciation may determine *if* Verizon is entitled to a refund or credit, *how* that refund or credit is managed or administered is not before the trial judge. *See* G.L. 1956 § 44-1-4.[11]

[11] General Laws 1956 § 44-1-4 provides that "[t]he tax administrator is authorized and empowered to make rules and regulations, as the administrator may deem necessary for the proper administration and enforcement of the tax laws of this state."

Specifically, it is the tax administrator and the director of administration who are vested with the authority to manage refunds and credits.[12] *See* § 44-1-11; *see also* § 44-13-16.[13] Additionally, there is no claim for monetary relief from Providence or from movants. The movants' primary contention supporting intervention concerns how a refund or credit will be administered under § 44-1-11 if Verizon prevails or the parties reach a settlement. The movants submit that this gives rise to

[12] The movants take issue with the relief Verizon requests. Although a party may request specific relief, it is a different question as to whether the court may order such relief without encroaching upon a "responsibility explicitly committed to the Legislature[,]" *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995), and properly delegated to an administrative agency. The trial judge apparently recognized this maxim in drawing parameters relative to the issue at hand in this matter. Courts are charged with applying the law, not making it. *See Conley v. Crown Realty, LLC*, 223 A.3d 768, 772 (R.I. 2020) ("[T]his Court merely applies the law—it does not make it.").

[13] Section 44-1-11 provides:

> "Whenever an erroneous payment or any payment in excess of the correct amount of any tax, excise, fee, penalty, interest, or other charge is made to the tax administrator, the general treasurer shall, after certification by the tax administrator with the approval of the director of administration, refund the erroneous payment or overpayment, or the tax administrator may credit the erroneous payment or overpayment against any tax then or thereafter due, as the circumstances may warrant."

With respect to the TPP tax at issue, "[i]f the tax administrator determines that the corporation has paid a tax in excess of the amount lawfully due, he or she shall allow a refund or permit a credit." Section 44-13-16(a).

"a *direct* interest in the TPP [t]ax and multi-million dollar refund claimed by Verizon." (Emphasis added.) This contention is simply unfounded.

As discussed *infra*, movants argue that their interests are "separate and distinct from the interests of Providence" in that every municipality "has its own unique set of fiscal and budgetary challenges, concerns, and priorities"; according to movants, these interests "come into play in spending TPP [t]ax revenue[], [which] would be affected differently by" a decrease in that revenue. The movants compare their interests in the TPP tax to the intervenors' interests in their real property in *Hickory Ridge Campground*, where there was "special injury of economic loss through property devaluation" to the intervenor-landowners whose properties abutted a proposed campground. *Hickory Ridge Campground, Inc.*, 111 R.I. at 723, 306 A.2d at 828. However, the factual circumstances in that case are vastly different from those in the case at bar. In *Hickory Ridge Campground*, based on well-founded law that abutting property owners who are affected by zoning board decisions have interests that are unique from each other and that are not adequately represented by zoning boards, the Court determined that intervention was warranted where the property owners were not adequately represented by the town solicitor, who failed to appear for a court proceeding and to account for the pending motion to intervene before entering a consent decree. *See id.* at 723-24, 306 A.2d at 828; *see also Caran v. Freda*, 108 R.I. 748, 753, 279 A.2d 405, 408 (1971).

We are of the opinion that movants' interests in ancillary effects, specifically on the expenditure of tax revenue, is indirect and contingent upon both the interpretation of the statute and its effects, if any. *See Hines Road, LLC v. Hall*, 113 A.3d 924, 930 (R.I. 2015) (determining that intervenor's interest was contingent upon an agreement between the parties); *see also Tonetti Enterprises, LLC*, 943 A.2d at 1073 ("An intervenor's interest must bear a 'sufficiently close relationship to the dispute between the original litigants' and the 'interest must be direct, not contingent.'") (quoting *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 42 (1st Cir. 1992)). The proffer of a generalized grievance—common to all municipalities—that movants' fiscal and budgetary concerns are uniquely different from those of Providence, without an adequate explanation as to how those concerns are different in kind or adverse to Providence, is conclusory and insufficient to overcome the underlying presumption. *See Corrente*, 174 A.3d at 1230 (determining that the presumption was overcome by a showing of adverse positions); *see also Groff*, 871 A.2d at 368 (determining that intervenor's interest was different in kind in that she claimed priority over other claimants to the limited funds in a client account); *West Warwick School Committee v. Souliere*, 626 A.2d 1280, 1284 (R.I. 1993) (determining that the motion to intervene was properly denied where "the taxpayers failed to show any actual or concrete wrong beyond a general grievance common to all taxpayers"). This is not

a case where various parties are claiming a competing interest in a limited fund.[14] *See Groff*, 871 A.2d at 368. Rather, Providence's interest in the continuation of TPP tax revenue, in the greatest amount possible, is clearly aligned with that of movants. Although movants' interests in the amount of TPP taxes as compared to Providence may vary, that distinction is governed by statute and has no bearing on this lawsuit. Thus, their interests are sufficiently similar, not competing, and, we conclude, will be adequately represented by Providence's identical litigation goals.

The movants also argue that a settlement between the state and Verizon could result in an order for a refund from movants and cause havoc to their budgets and resident services. This argument is without merit. We are hard-pressed to envision any settlement or order mandating affirmative relief outside the provisions of § 44-1-11. Such a decision would rest with the Legislature. *See* §§ 44-1-4, 44-1-11, 44-13-16. The unrealistic specter of a settlement is insufficiently cognizable to rebut the presumption that Providence adequately represents movants' interests in this controversy. *See T-Mobile Northeast LLC v. Town of Barnstable*, 969 F.3d 33, 40

[14] In *Credit Union Central Falls v. Groff*, 871 A.2d 364 (R.I. 2005), we held that the intervenor, a former client of an attorney who purloined funds, was not adequately represented by the Supreme Court's Chief Disciplinary Counsel, who intervened to protect all of the attorney's former clients, because the intervenor alleged a right to the funds superior to that of other former clients. *Groff*, 871 A.2d at 368. Thus, although the interests of the former clients in the funds in the court registry were identical, the intervenor's interest was different in kind in that she claimed priority over the other claimants. *See id.*

(1st Cir. 2020) (determining that concerns of settlement without "specificity or record support" do not demonstrate inadequate representation). The movants presented no authority to demonstrate that a settlement between the state and Verizon could bind a nonparty. Thus, the trial judge did not err by overlooking movants' concerns about a settlement and, more appropriately, focusing on their respective positions.

Furthermore, movants now submit that they "may wish to pursue challenges" to Verizon's depreciation calculation method that the other parties do not raise. Despite their failure to raise this new trial strategy on remand, these concerns are similarly speculative and fail to overcome the presumption of adequate representation. *See Daggett*, 172 F.3d at 112 ("[T]he use of different arguments as a matter of litigation judgment is not inadequate representation *per se*."). To the extent that movants wish to present challenges to Verizon's interpretation of accumulated depreciation, they may do so in an amicus brief. *See id.* (noting that, because statutory intent is not typically proved through trial evidence, and proposed intervenors did not demonstrate otherwise, its arguments were appropriate for an amicus brief and not intervention).

Within the parameters of the issue in this case, the trial judge found that the movants' interests and positions were no different from those of Providence. The movants failed to demonstrate a cognizable difference in their interests as compared

to Providence's interest or to provide an adequate explanation as to how Providence's representation of their interests is lacking. Because Pawtucket and Cranston failed to overcome the presumption of adequate representation, we are of the opinion that the trial judge did not err or abuse his discretion in concluding that the movants failed to demonstrate that their interests were not adequately represented by Providence.

Conclusion

For the reasons set forth in this opinion, we affirm the order of the District Court. The record in this case may be remanded to the District Court with our decision endorsed thereon.

STATE OF RHODE ISLAND

SUPREME COURT – CLERK'S OFFICE
Licht Judicial Complex
250 Benefit Street
Providence, RI 02903

OPINION COVER SHEET

Title of Case	Verizon New England Inc. v. Neena S. Savage, in her capacity as Tax Administrator for the State of Rhode Island.
Case Number	No. 2020-40-M.P. (A.A. 18-187)
Date Opinion Filed	February 9, 2022
Justices	Suttell, C.J., Goldberg, Robinson, Lynch Prata, and Long, JJ.
Written By	Associate Justice Maureen McKenna Goldberg
Source of Appeal	Sixth Division District Court
Judicial Officer from Lower Court	Associate Judge Christopher K. Smith
Attorney(s) on Appeal	For Plaintiff: Thomas P. Quinn, Esq. Matthew R. Joyce, Esq. William A. Hazel, Esq., *Pro Hac Vice*
	For Defendant: Robert K. Taylor, Esq. Frank J. Milos, Jr., Esq.

276 A.3d 363
Supreme Court of Rhode Island.

IN RE NARRAGANSETT ELECTRIC COMPANY d/b/a National Grid E-183 115 kV Transmission Line Relocation Project.

No. 2018-40-M.P
|
June 17, 2022

Synopsis

Background: City, organization dedicated to protecting park, hotel, and corporation that held seafood festival in park filed petition for certiorari seeking review of order of the Energy Facility Siting Board (EFSB) determining that "underground alignment" and "bridge alignment north" were not feasible options for relocating power lines as required to facilitate relocation of interstate highway and approving "bridge alignment south."

Holdings: The Supreme Court, Suttell, C.J., held that:

[1] organization did not have concrete injury required to establish its organizational standing on behalf of its members to pursue action;

[2] corporation did not claim concrete injury required to establish its standing to pursue action;

[3] hotel alleged particularized and concrete injuries so as to have standing to pursue action;

[4] argument that provision in settlement agreement waiving any right of review regarding outcome of relocation of power lines was void as against public policy related to order of EFSB entered nearly 15 years earlier, such that argument was not timely; and

[5] EFSB's failure to make findings of fact and conclusions of law in compliance with Administrative Procedures Act (APA) did not require remand to EFSB for such findings.

Affirmed.

West Headnotes (22)

[1] Electricity Generating facilities in general

When reviewing decision of the Energy Facility Siting Board (EFSB), Supreme Court will not engage in factfinding or weigh conflicting evidence presented to the EFSB. R.I. Gen. Laws Ann. §§ 39-5-3, 42-98-12(b).

[2] Electricity Generating facilities in general

When reviewing decision of the Energy Facility Siting Board (EFSB), Supreme Court will not substitute its own judgment for that of the EFSB. R.I. Gen. Laws Ann. §§ 39-5-3, 42-98-12(b).

[3] Electricity Generating facilities in general

When reviewing decision of the Energy Facility Siting Board (EFSB), Supreme Court's inquiry is limited to the determination of whether the EFSB's ruling is lawful and reasonable and whether its findings are fairly and substantially supported by legal evidence. R.I. Gen. Laws Ann. §§ 39-5-3, 42-98-12(b).

[4] **Electricity**🔑Generating facilities in general

Although Supreme Court reviews the factual findings of the Energy Facility Siting Board (EFSB) deferentially, pure questions of law, including statutory interpretations, are reviewed de novo by the Supreme Court. R.I. Gen. Laws Ann. §§ 39-5-3, 42-98-12(b).

[5] **Electricity**🔑Removal or change of location of poles and other apparatus

City did not waive its right to seek review of order of Energy Facility Siting Board (EFSB), determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option, by generally agreeing in settlement agreement adopted by EFSB not to appeal or contest decision of EFSB, where agreement carved out exception for decisions determining feasibility of alignments, and order resulted from hearings conducted to determine feasibility of alignments.

[6] **Electricity**🔑Generating facilities in general

A person is "aggrieved" by a judgment or order, as required to have standing to seek review of order of the Energy Facility Siting Board (EFSB), when such judgment or order results in injury in fact, economic or otherwise. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[7] **Electricity**🔑Generating facilities in general

To form the basis for standing to seek review of order of the Energy Facility Siting Board (EFSB), the alleged injury required for a person to be aggrieved by an order must be a legally cognizable and protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[8] **Electricity**🔑Generating facilities in general

Harms to aesthetic and recreational interests are cognizable interests that would support finding an alleged injury as required for a person to be aggrieved by an order of the Energy Facility Siting Board (EFSB) and have standing to seek review of the order. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[9] **Electricity**🔑Generating facilities in general

Mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "aggrieved" for purposes of standing to seek review of order of the Energy Facility Siting Board (EFSB). R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[10] **Electricity**🔑Removal or change of location of poles and other apparatus

Organization dedicated to protecting park did not have concrete injury required to establish its organizational standing on behalf of its members to pursue action seeking judicial review of order of Energy Facility Siting Board (EFSB), determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option, although organization appeared to hold longstanding interest in resolution of relocation; obstruction of water views on entrance to city and "conspicuous eyesore" of overhead power lines were injuries to general public, not to specific members, and organization's contention that order "squandered opportunity" to enhance economic and recreational value of area was concern implicating policy question. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[11] **Electricity**🔑Removal or change of location of poles and other apparatus

Corporation that held seafood festival in park did not claim concrete injury required to establish its standing to pursue action seeking judicial review of order of Energy Facility Siting Board (EFSB), determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option; corporation asserted that implementing third option would result in specific and calculable economic loss to many individuals and businesses participating in events in the park, but corporation did not describe its own potential losses or state it would suffer economic, aesthetic, or recreational harms. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[12] **Electricity**🔑Removal or change of location of poles and other apparatus

Hotel alleged particularized and concrete injuries so as to have standing to pursue action seeking judicial review of order of Energy Facility Siting Board (EFSB), determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option; hotel alleged that implementing third option would result in high-voltage power lines surrounding the hotel, would obstruct views both within the hotel and of the hotel from other locations, and would negatively impact income generated by hotel, as well as commercial value of hotel's property. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[13] **Electricity**🔑Generating facilities in general

Although a cognizable injury, as required for a person to be aggrieved by an order of the Energy Facility Siting Board (EFSB) and have standing to seek review of the order, may not be purely conjectural or hypothetical, parties can establish standing with a showing of reasonable likelihood of future injury. R.I. Gen. Laws Ann. §§ 39-5-1, 42-98-12(b).

[14] **Electricity**🔑Removal or change of location of poles and other apparatus

Petitioners' argument that provision in settlement agreement waiving any right of review regarding outcome of

relocation of power lines was void as against public policy related to order of Energy Facility Siting Board (EFSB) entered nearly 15 years earlier adopting and incorporating the agreement, such that argument was not timely, in proceeding in which petitioners sought judicial review of order of EFSB, determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option. R.I. Gen. Laws Ann. § 42-98-12(b).

[15] **Electricity**Removal or change of location of poles and other apparatus

Petitioners' argument that Energy Facility Siting Board (EFSB) violated statutory procedures by allowing parties to determine feasibility of alternative methods of relocating power lines related to order of EFSB entered nearly 15 years earlier adopting and incorporating settlement agreement regarding outcome of relocation, such that argument was not timely, in proceeding in which petitioners sought judicial review of order of EFSB, determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option; petitioners took issue with EFSB's adoption and incorporation of settlement agreement. R.I. Gen. Laws Ann. § 42-98-12(b).

[16] **Electricity**Removal or change of location of poles and other apparatus

Petitioners' argument that order of Energy Facility Siting Board (EFSB), determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option, contained no findings of fact as to feasibility and could not be upheld related to the order, not to prior order of EFSB entered nearly 15 years earlier adopting and incorporating settlement agreement regarding outcome of relocation, such that argument was timely, in proceeding in which petitioners sought judicial review of order; petitioners alleged that EFSB was statutorily required to make specific findings and provide factual basis for its conclusion and that EFSB could not rely on findings made in prior order. R.I. Gen. Laws Ann. §§ 42-98-11(b)(3), 42-98-12(b).

[17] **Electricity**Removal or change of location of poles and other apparatus

Petitioners waived issue of whether Energy Facility Siting Board (EFSB) improperly authorized electric company to use ratepayer funds for purposes other than "under-grounding," in proceeding seeking judicial review of order of EFSB, determining two options for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option; petitioners spent little time on the issue in their briefs.

[18] **Public Utilities**Review and determination in general

Supreme Court's deference to the factual findings of the Public Utilities Commission (PUC) is all but absolute. R.I. Gen. Laws Ann. § 39-5-3.

[19] **Public Utilities**Review and

determination in general

Supreme Court reviews judgments and orders of the Public Utilities Commission (PUC) solely to determine whether the PUC's findings are lawful and reasonable, fairly and substantially supported by legal evidence, and sufficiently specific to enable Supreme Court to ascertain if the evidence upon which the PUC based its findings reasonably supports the result. R.I. Gen. Laws Ann. § 39-5-3.

[20] **Electricity** Removal or change of location of poles and other apparatus

Failure of Energy Facility Siting Board (EFSB) to make findings of fact and conclusions of law in compliance with Administrative Procedures Act (APA) did not require remand to EFSB for such findings, in proceeding seeking judicial review of order of EFSB, determining "underground alignment" option and "bridge alignment north" option for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option; all parties agreed on the record that "underground alignment" was not feasible, and no party pursued "bridge alignment north" option, such that remand for findings would produce same results and only extend proceedings. R.I. Gen. Laws Ann. §§ 42-35-12, 42-98-7(3)(e).

[21] **Public Utilities** Review and determination in general

If it becomes impossible for Supreme Court properly to fulfill its assigned function because of the failure of the Public Utilities Commission (PUC) to set forth sufficiently the findings and the evidentiary facts upon which it rests its decisions, Supreme Court will not speculate thereon nor search the record for supporting evidence or reasons. R.I. Gen. Laws Ann. § 42-35-12.

[22] **Electricity** Removal or change of location of poles and other apparatus

Energy Facility Siting Board (EFSB) failed to make findings of fact and conclusions of law in compliance with Administrative Procedures Act (APA) in order determining "underground alignment" option and "bridge alignment north" option for relocating power lines to facilitate relocation of interstate highway were not feasible and approving third option; although order noted parties' agreement that "underground alignment" was not feasible, its discussion as to feasibility of other options was notably absent, and order provided no reasoning as to why EFSB approved electric company's joint report with city asking EFSB to approve third option. R.I. Gen. Laws Ann. §§ 42-35-12, 42-98-7(3)(e), 42-98-11(b).

***367** Energy Facility Siting Board

Attorneys and Law Firms

Patrick C. Lynch, Esq., Jeffrey B. Pine, Esq., for Petitioners.

W. Mark Russo, Esq., Steven J. Boyajian, Esq., Marc DeSisto, Esq., for Respondents.

Present: Suttell, C.J., Goldberg, Robinson, Lynch Prata, and Long, JJ.

OPINION

Chief Justice Suttell, for the Court.

This Court issued a writ of certiorari to review an order of the Energy Facility Siting Board (the board or EFSB) concerning the relocation of power lines across the Providence and Seekonk Rivers. The petitioners, the City of Providence; Friends of India Point Park (FIPP); Procaccianti Companies, Inc. d/b/a The Hilton Garden Inn (Hilton); and McMac, Inc. d/b/a The R.I. Seafood Festival (Seafood Festival), seek review of the board's January 17, 2018 order determining that the so-called "underground alignment" and the "bridge alignment north" were not feasible, and approving the "bridge alignment south." The respondents, EFSB; the City of East Providence; and Narragansett Electric Company d/b/a National Grid (National Grid), allege that three of the petitioners do not have standing and that review of the board's decisions is not timely. For the reasons stated herein, we affirm the order of the EFSB.

I

Facts and Travel

In April 2003, National Grid filed a notice-of-intent application with the board requesting approval for the relocation of an approximately 6,200-foot portion of the power line designated as E-183 between Franklin Square in Providence and Bold Point in East Providence. In its application, National Grid explained that the project was required by the Rhode Island Department of Transportation to facilitate the relocation of I-195. National Grid asserted that the new alignment would not substantially differ from the alignment in use at the time, and it therefore proposed that the application was appropriate for abbreviated review under Rule 1.6(f) of the board's Rules of Practice and Procedure. *See* 445 RICR 00-00-1.6(f). Shortly after National Grid filed its notice-of-intent application, the City of Providence, the City of East Providence, and the Rhode Island Attorney General separately intervened in the matter pursuant to Rule 1.10(a)(1) of the board's Rules of Practice and Procedure. *See* 445 RICR 00-00-1.10(a)(1), (d)(2).

Rule 1.6(f) sets out the requirements for filing a notice of intent to, among other things, relocate an existing power line. 445 RICR 00-00-1.6(f). Once that notice of intent is filed, the board is required to hold a public hearing in one or more of the cities or towns affected by the application. *Id.* at 1.6(g). The board must then "determine whether the project may result in a significant impact on the environment or the public health, safety and welfare[.]" *Id.* at 1.6(h). If the board so determines, the project is treated as an alteration and a full review is necessary; otherwise, the project receives abbreviated review. *Id.* From early June through early August 2003, the board held several public hearings ***368** to determine whether the proposed relocation would result in a significant impact, "thereby, requiring a full EFSB review."

In September 2003, National Grid and three intervenors, the Attorney General, Providence, and East Providence, entered into a stipulation and consent order regarding further proceedings (the stipulation). The parties agreed that the case could continue as an abbreviated, rather than a full, proceeding, but with certain modifications, such as requesting advisory opinions from several agencies and allowing National Grid and the intervenors to submit testimony. In October 2003, the board largely approved the stipulation, and issued an order incorporating most of the stipulation's terms, with several minor modifications (the 2003 order). Importantly, the 2003 order incorporated the parties' agreement that "the standard which the [b]oard shall apply in making its decision on Narragansett's application is that provided in R.I.G.L. § 42-98-11(b)." In relevant part, G.L. 1956 § 42-98-11(b) states that:

> "The board shall issue a decision granting a license only upon finding that the applicant has shown that:
>
> "(1) Construction of the proposed facility is necessary to meet the needs of the state and/or region for energy of the type to be produced by the proposed facility.
>
> "(2) The proposed facility is cost-justified, and can be expected to produce energy at the lowest

> reasonable cost to the consumer consistent with the objective of ensuring that the construction and operation of the proposed facility will be accomplished in compliance with all of the requirements of the laws, rules, regulations, and ordinances * * * or that consideration of the public health, safety, welfare, security and need for the proposed facility justifies a waiver of some part of the requirements when compliance cannot be assured.
>
> "(3) The proposed facility will not cause unacceptable harm to the environment and will enhance the socio-economic fabric of the state."

The 2003 order also required advisory opinions from the Department of Health, Department of Environmental Management, Statewide Planning Program, Public Utilities Commission (PUC), the Providence Planning Board, and the East Providence Planning Board.

In May 2004, National Grid, East Providence, Providence, and the Attorney General entered into a settlement agreement regarding the outcome of the relocation project (the settlement agreement). The agreement split the relocation project into two phases. Phase I, which involved overhead relocation of a portion of the E-183 power line through Providence, would be completed in 2005 to allow for the I-195 relocation project. Phase II consisted of the relocation of the remaining power line, beginning in Franklin Square in Providence and ending in East Providence.

The settlement agreement contemplated five alternative alignments for the Phase II power line relocation and ranked them by preference. The underground alignment, which would relocate the power line underground between Franklin Square and a new transition station in East Providence, was the preferred alignment; thus, it was to be constructed as long as it was not "too costly" or "not feasible (in light of such factors as engineering considerations, property rights or licensing issues)[.]"[1] If ***369** the underground alignment could not be constructed because it was too costly or was not feasible, the next preferred alignment was the bridge alignment north. If the bridge alignment north could not be constructed because it was deemed too costly or not feasible, the bridge alignment south was next preferred. If the bridge alignment south was too costly or not feasible, the final preferred alignment was the "Tockwotton alignment." If none of the preferred alignments could be constructed, National Grid was to complete the relocation according to its original plan, as explained in its notice-of-intent application, referred to in the settlement agreement as the "original alignment."

The settlement agreement also outlined how the determination would be made to move from one preferred alignment to the next preferred alignment. In the event that National Grid found that an alignment was not feasible, it was to file either a stipulation, in which all parties consented to moving on to the next preferred alignment, or a report "presenting in detail the justifications for pursuing the alternative alignment[.]" If the latter option was used, the other parties could then file objections to the report, to which National Grid could respond. Subsequently, the board would conduct a hearing and "approve, modify or reject the [r]eport."

In the settlement agreement, Providence, East Providence, and the Attorney General principally agreed "not to appeal or otherwise contest a decision of the EFSB * * * which approves the project contemplated by this agreement." These parties also agreed not to contest before the EFSB, or any other governmental authority, a relocation made pursuant to the terms of the settlement agreement. However, an exception was carved out that allowed the parties to contest a decision by the board "rendered in proceedings pursuant to" determining the feasibility of an alignment, as discussed *supra*.

After conducting a hearing regarding the settlement agreement, the board issued a report and order on October 29, 2004, which approved and incorporated the settlement agreement (the 2004 order). In the 2004 order, the board considered whether the various alignments as stated in the settlement agreement met the standard for approval specified in § 42-98-11(b). The board referenced that the PUC found, in its advisory opinion, that there was a need to relocate the power line between Franklin Square and East Providence, but the board did not itself make a specific finding that the project was necessary. The board went on to find that the relocation was cost-justified "whether it is constructed overhead * * * or underground[.]" The board also found that using any of the alignments as provided in the settlement agreement would "enhance the socio-economic fabric of the state and minimize the impact on the environment." In adopting the settlement agreement, the board also

stated in the 2004 order that all "parties have agreed that the E-183 Line will be relocated underground unless it is determined that this is not feasible."

In October 2016, National Grid and East Providence filed a joint report and motion asking the board to approve the use of the bridge alignment south for the relocation project.[2] In this filing, National Grid and ***370** East Providence asserted that the underground alignment was not feasible "[b]ecause of the significant cost of the underground alignment and the risks which have been identified[.]" These parties also contended that the next preferred alignment, the bridge alignment north, was also not feasible because it would require either acquiring an active business or rerouting the river crossing.

The Attorney General did not oppose the joint report and motion and agreed that the bridge alignment south was the "most feasible[.]" However, Providence objected to the joint report and motion, asserting that it had "consistently taken the position * * * that the underground alignment can be achieved at a cost which is not unreasonable, given the aesthetic and ancillary benefits which would flow from the removal of the overhead transmission towers and wires."

The board conducted a hearing on National Grid and East Providence's joint report and motion in February 2017. National Grid then moved for an extension of time, which Providence supported and the board granted. Before the next hearing, Providence submitted a supplemental memorandum which advocated for "burial of such portions of the E-183 line as can reasonably be accomplished"; that is, for partial undergrounding. Providence stated its willingness to adopt the bridge alignment south if the portion of the power line through India Point Park was buried. At the next hearing on the joint report and motion, held on September 26, 2017, Providence conceded that the underground alignment as envisioned in the settlement agreement was not feasible; however, Providence continued to suggest a partially underground alignment. Ultimately, the board continued the hearing and asked the parties to brief whether Providence's partial-undergrounding proposal was within the settlement agreement. The board also asked Providence to brief the issue of the feasibility of its proposal. The matter was continued until October 18, 2017.

At the October 18, 2017 hearing, the board considered both a motion filed by Providence to extend time to determine the feasibility of its proposal and the joint report and motion of National Grid and East Providence to adopt the bridge alignment south. Ultimately, the board denied Providence's motion to extend time. The board also adopted National Grid and East Providence's report, accepting that the underground alignment and bridge alignment north were not feasible, and approved the bridge alignment south.

On January 17, 2018, the board issued a written order (the 2018 order) stating that the underground alignment and the bridge alignment north were not feasible and approving National Grid and East Providence's motion to use the bridge alignment south.

On January 29, 2018, Providence, FIPP, Hilton, and Seafood Festival jointly filed a petition for certiorari in accordance with § 42-98-12(b), which petition sought review of the 2018 order.[3] This Court issued the writ of certiorari on February 14, 2018.

II

Standard of Review

Our review of decisions made by the EFSB is governed by § 42-98-12(b), which ***371** provides, in part, that EFSB decisions may be reviewed "in the manner and according to the standards and procedures provided in chapter 5 of title 39."

[1] [2] [3]Accordingly, the EFSB's findings "on questions of fact shall be held to be prima facie true and as found by the [EFSB]" and this Court "shall not exercise its independent judgment nor weigh conflicting evidence." General Laws 1956 § 39-5-3. Thus, we will not "engage in factfinding or weigh conflicting evidence presented to the [EFSB]." *New England Telephone & Telegraph Company v. Public Utilities Commission*, 446 A.2d 1376, 1380 (R.I. 1982). We also will not "substitute our own judgment for that of the [EFSB.]" *United States v. Public Utilities*

Commission of State of Rhode Island, 635 A.2d 1135, 1140 (R.I. 1993). Instead, our "inquiry is limited to the determination of whether the [EFSB]'s ruling is lawful and reasonable and whether its findings are fairly and substantially supported by legal evidence." *New England Telephone & Telegraph Company*, 446 A.2d at 1380. This Court may reverse EFSB orders or judgments "made in the exercise of administrative discretion" if the EFSB "exceeded its authority or acted illegally, arbitrarily, or unreasonably." Section 39-5-3.

[4]Although we review the EFSB's factual findings deferentially, "pure questions of law, including statutory interpretations, * * * are reviewed *de novo* by this Court." *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 504 (R.I. 2011).

III

Discussion

Before this Court, petitioners first argue that the provision in the settlement agreement waiving any right to appeal or otherwise contest approval of the project is void as against public policy and, additionally, not binding upon "non-party [p]etitioners." The petitioners next contend that the board violated statutory procedures and "abdicated its statutory duty" by allowing the parties to determine the feasibility of alternative methods of relocating the lines. The petitioners also claim that the board's 2018 order contains no findings of fact as to the feasibility of either the underground alignment or the bridge alignment north. Finally, petitioners assert that the board "improperly authorized National Grid's use of ratepayer funds for purposes other than under-grounding in violation of state law and its own order."

[5]The respondents East Providence and EFSB submit that petitioners FIPP, Hilton, and Seafood Festival lack standing to seek judicial review of the board's 2018 order and are not properly before the Court. The respondents additionally argue that review by way of certiorari is not timely; they submit that petitioners' quarrel is with the 2004 order, not the 2018 order. The petitioners contest both arguments.[4]

A

Standing

Both East Providence and the board contend that all petitioners except Providence ***372** lack standing to bring the instant action. East Providence asserts that these petitioners do not have standing to object to a report filed under the settlement agreement because they were not parties to that agreement. The board additionally avers that these petitioners do not cite particularized injuries that can form the basis for standing. However, FIPP, Hilton, and Seafood Festival assert that they have standing and are properly before this Court.

[6] [7] [8] [9]As noted above, chapter 5 of title 39 of the general laws applies to our judicial review of decisions made by the board. *See* § 42-98-12(b). Accordingly, filing a petition for certiorari is the "exclusive remedy" for entities "aggrieved by any order or judgment of the [EFSB]." Section 39-5-1. "It is well settled in this jurisdiction that 'a person is so aggrieved by a judgment or order when such judgment or order results in injury in fact, economic or otherwise.' " *In re Review of Proposed Town of New Shoreham Project*, 19 A.3d 1226, 1227 (R.I. 2011) (mem.) (quoting *Newport Electric Corp. v. Public Utilities Commission*, 454 A.2d 1224, 1225 (R.I. 1983)). To form the basis for standing, the "alleged injury must be a 'legally cognizable and protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.' " *Watson v. Fox*, 44 A.3d 130, 135-36 (R.I. 2012) (alterations omitted) (quoting *McKenna v. Williams*, 874 A.2d 217, 226 (R.I. 2005)). Harms to aesthetic and recreational interests are cognizable interests. *See Summers v. Earth Island Institute*, 555 U.S. 488, 494, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). However, "[m]ere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization * * * aggrieved." *Watson*, 44 A.3d at 136 (alterations omitted) (quoting *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 452 A.2d 931, 933 (R.I. 1982)).

[10]Here, FIPP has not shown a sufficient particularized and concrete injury to establish its organizational standing on behalf of its members. FIPP points only to injuries that will affect the general public—the obstruction of water views on an entrance to Providence "used by some 60 million cars a year," the "conspicuous eyesore" of overhead power lines that would "mar[ ] water views" for many "residents and visitors"—rather than to injuries specific to its members. *Cf. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181-83, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (holding that affidavits from members of an organization, each alleging an inability to use outdoor areas for recreational activities, such as fishing and hiking, "adequately documented injury in fact"). FIPP appears to hold a longstanding interest in the resolution of this problem, but that interest is not sufficient to constitute an injury. *See Watson*, 44 A.3d at 136. And FIPP's contention that the board's decision "squandered" "a once-in[-]a[-]lifetime opportunity" to enhance the "economic and recreational value" of the area is not a concrete injury; rather, it is a concern that "implicate[s] questions of policy more appropriately addressed in the political arena." *In re Review of Proposed Town of New Shoreham Project*, 19 A.3d at 1229. Therefore, FIPP does not have standing.

[11]Similarly, Seafood Festival does not have standing because it also does not claim a particularized, concrete injury that will result from the board's decision to approve the bridge alignment south. In its affidavit supporting the petition for certiorari, Seafood Festival asserted that, if the bridge alignment south were implemented, ***373** there would be a "specific and calculable economic loss to the many individuals and businesses who participate in events in the Park"; it did not describe its own potential losses or state that it would suffer particularized economic, aesthetic, or recreational harms.

[12] [13]We conclude, however, that Hilton has alleged particularized and concrete injuries so as to have standing in the instant matter. Hilton asserts that, if the bridge alignment south is implemented, "high-voltage power lines would virtually surround the Hotel" and would "obstruct views" both within the hotel and of the hotel from other locations, constituting a concrete and particularized aesthetic injury. Additionally, Hilton asserts that the existence of these lines around the hotel would "negatively impact" income generated by the hotel, as well as the commercial value of the hotel's property, thus also establishing a reasonably likely economic injury.[5]

B

Timeliness

The respondents next contend that review is barred because it is untimely, asserting that petitioners are, in fact, challenging the 2004 order, not the 2018 order. The respondents submit that, because petitioners did not seek review of the approval and incorporation of the settlement agreement within ten days of the entry of the 2004 order, their challenge is out of time. In response, petitioners argue that review is timely because, they assert, "[t]he relevant appeal period commenced as of January 17, 2018 – the date of the EFSB order actually approving the overhead relocation of the lines[.]" The petitioners further assert that the 2004 order did not approve the overhead alignment and that any findings the board made in 2004 were rendered nugatory through the passage of time.

Pursuant to § 42-98-12(b), "[a]ny person aggrieved by a decision of the board may within ten (10) days from the date of ratification of the decision, obtain judicial review of the decision[.]" Furthermore, the 2018 order directs the parties to this statute, and indicates that they "may, within ten (10) days of the issuance of this order petition the Supreme Court for a writ of certiorari to review the legality and reasonableness of [the] order."

The respondents filed their petition for writ of certiorari on January 29, 2018. The petition, as it relates to the January 17, 2018 order, was therefore timely.[6] Accordingly, our review requires an examination of each of the arguments raised by petitioners and the extent to which those arguments relate either to the 2004 order or the 2018 order.

In the 2004 order, the board rendered findings in accordance with the standard for granting a license found in § 42-98-11(b). The board referenced the PUC advisory opinion, which found that there was a need to relocate the transmission lines. The board

then found that the facility was cost-justified, whether it was constructed overhead or underground. The board also discussed the socioeconomic aspects of relocating the lines and noted that several entities favored an underground alignment. ***374** The board indicated that the parties agreed that the lines would be buried unless National Grid determined that it was not feasible, in which case "after an opportunity for objections from the other parties, the [b]oard will implement Section II-J of the [s]ettlement [a]greement." In the 2018 order, the board indicated that the underground alignment and the bridge alignment north were not feasible and approved the use of the bridge alignment south.

[14]The petitioners first argue that the provision in the settlement agreement waiving any right of review is void as against public policy and, additionally, not binding upon "non-party [p]etitioners." This argument clearly relates to the 2004 order wherein the board *adopted and incorporated* the settlement agreement, and, thus, is not timely because the challenge was brought nearly fifteen years after the order had been issued. *See* § 42-98-12(b); *see also Interstate Navigation Co. v. Burke*, 465 A.2d 750, 754-55 (R.I. 1983) (concluding that the petitioner's failure to petition for a writ of certiorari within the statutory period required by § 39-5-1 rendered the order in that case "nonreviewable").

[15]The petitioners next contend that the board violated statutory procedures and "abdicated its statutory duty" by allowing the parties to determine the feasibility of alternative methods of relocating the lines. In support of this contention, petitioners argue that the board improperly delegated its statutory authority, in violation of the nondelegation doctrine. The petitioners specifically take issue with the board's adoption and incorporation of the settlement agreement; they submit that the board "effectively delegat[ed its statutory duty] to a private utility company and other interested third parties" by allowing them to "evaluat[e] the feasibility of alternative [alignments] to the requested relocation of the power lines." This argument squarely falls within the ambit of the 2004 order. Accordingly, this argument also is not timely. *See* § 42-98-12(b).

[16] [17]Third, petitioners claim that the board's 2018 order contains no findings of fact as to the feasibility of either the underground alignment or the bridge alignment north. The petitioners submit that the board was required by both § 42-98-11(b)(3) and its own rules to make "specific findings" and provide a factual basis for its conclusions in the 2018 order. They also note that the board cannot rely on findings it made in the 2004 order, which, they submit, "have been rendered obsolete and inaccurate[.]" Accordingly, petitioners submit that, absent such findings of fact, the 2018 order cannot be upheld. This argument clearly is timely as it relates to the 2018 order; we therefore proceed to address it.[7]

C

Factual Findings

The petitioners submit that the 2018 order cannot be upheld because the board failed to make findings of fact in accordance ***375** with § 42-98-11(b) and EFSB Rule 1.13(c)(1).[8] Specifically, they allege that the board did not provide a "factual basis for its conclusion that burying all or some of the lines was not feasible[.]"

In response, East Providence and the board argue that the board's decision was "lawful and reasonable" and was supported by the fact that all parties before the board agreed that the underground alignment was not feasible. National Grid asserts that the board's determination that the underground alignment was not feasible "has ample evidentiary support in the record" and must be upheld. National Grid additionally submits that all parties agreed that the underground alignment was not feasible and that "[t]here was simply no dispute, factual or legal, for the EFSB to resolve since all issues, save for the feasibility of approved alternative alignments, had been resolved thirteen years prior." National Grid asserts that "[t]he purpose of requiring detailed findings in administrative decisions is to ensure that a 'judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved.' " (Quoting *Thorpe v. Zoning Board of Review of Town of North Kingstown*, 492 A.2d 1236, 1237 (R.I. 1985).). Accordingly, it contends that a remand of the 2018 decision "serves no useful purpose other than to forestall the final determination of an issue not in

dispute."

[18] [19]We begin by noting that the Court applies the same standards to orders and decisions of the EFSB as it does to those of the PUC, as set forth in chapter 5 of title 39 of the general laws. *See* § 42-98-12(b); *see also* § 39-5-3. Indeed, "this Court's deference to the PUC's factual findings is all but absolute." *In re A & R Marine Corp.*, 199 A.3d 533, 537 (R.I. 2019) (brackets omitted) (quoting *In re Proposed Town of New Shoreham Project*, 25 A.3d at 504). The Court "reviews judgments and orders of the PUC solely to determine whether the PUC's findings are lawful and reasonable, fairly and substantially supported by legal evidence, and sufficiently specific to enable us to ascertain if the evidence upon which the PUC based its findings reasonably supports the result." *Id.* (brackets omitted) (quoting *Narragansett Electric Co. v. Public Utilities Commission*, 773 A.2d 237, 240 (R.I. 2001)).

Furthermore, the EFSB's "proceedings shall in all respects comply with the requirements of the Administrative Procedures Act, [G.L. 1956] chapter 35 of [title 42]." Section 42-98-7(3)(e). Section 42-35-12 provides that "[a]ny final order shall include ***376** findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

[20]Although we agree with petitioners that the 2018 order failed to make findings of fact and conclusions of law in compliance with the Administrative Procedures Act, we conclude that remanding the case for such findings with regard to the underground alignment and the bridge alignment north is unnecessary.

Our review of the record indicates that all parties to the settlement agreement agreed that the underground alignment was not feasible. In their joint report and motion, National Grid and East Providence asserted that the underground alignment was not feasible "[b]ecause of the significant cost of the underground alignment and the risks which have been identified[.]" The Attorney General supported the joint report and motion.[9] Although Providence initially objected to the joint report and motion, it ultimately conceded at the September 26, 2017 hearing that the underground alignment as envisioned in the settlement agreement was not feasible. *See D & H Therapy Associates v. Murray*, 821 A.2d 691, 694 (R.I. 2003) ("Having eaten his cake, [the] defendant may not renounce its calories."); *see also Gaumond v. Trinity Repertory Company*, 909 A.2d 512, 519-20 (R.I. 2006) (applying the concept that "a defendant [in a criminal case] may not complain of testimony on appeal when such testimony was brought out by [the] defendant himself" to issues raised in the civil context (quoting *State v. Harris*, 871 A.2d 341, 345-46 (R.I. 2005))).

At that hearing, EFSB Board Member Janet Coit sought to clarify the parties' positions:

> "[Board Member] Coit: * * * So first, could I just hear from all the parties clearly? East Providence and National Grid already moved jointly to determine that underground was not feasible. I take it from what you filed, City of Providence, and from comments on the record from the Attorney General's office at a previous meeting that all four parties to this agreement agree that the underground is not feasible. Could you all confirm that?
>
> "[Providence Assistant City Solicitor]: Yes.
>
> "[East Providence Assistant City Solicitor]: Yes.
>
> "* * *
>
> "[Assistant Attorney General]: I just want to make sure I understand the question.
>
> "[Board Member] Coit: The question is about the underground alignment as conceived of in the original settlement agreement * * *.
>
> "[Assistant Attorney General]: Yes, with the river crossings. Yes, that is correct. That is not feasible.
>
> "[Attorney for National Grid]: And I would answer the same way. * * *"

With regard to bridge alignment north, National Grid and East Providence submitted that it was not feasible because it would require either acquiring an active business or rerouting the river crossing. At oral argument before this Court, no ***377** party indicated its support for bridge alignment north. Indeed, in a submission to the board, Providence stated its willingness to adopt the *bridge alignment south* if the portion of the power line through India Point Park was buried; it made no arguments in

support of pursuing bridge alignment north. It therefore appears that no party is seeking to pursue implementing the bridge alignment north alternative.

Under the terms of the settlement agreement, which was incorporated in the 2004 order, if National Grid determined that the construction of a preferred alignment was not feasible, it was to present either a stipulation signed by all parties consenting to an alternative alignment or a report detailing the justifications for pursing the alternative alignment. If any party filed an objection to the report, the EFSB would then be required to "conduct a hearing to resolve such issues and/or disputes and approve, modify or reject the [r]eport."

[21] [22]Here, National Grid did file a joint report with East Providence, and Providence objected. The EFSB then conducted a hearing and ultimately approved the joint report in its 2018 order; that order, however, is devoid of any findings of fact or conclusions of law. Although the 2018 order makes note of the parties' agreement that the underground alignment was not feasible, its discussion as to the feasibility of both the bridge alignment north—the next preferred alignment under the settlement agreement—and the bridge alignment south was notably absent. The 2018 order provided no reasoning as to why the board "unanimously approved" the joint report and motion. The order merely restated the determinations of National Grid and East Providence. As we have previously stated, "if it becomes impossible for us properly to fulfill our assigned function because of the PUC's failure to set forth sufficiently the findings and the evidentiary facts upon which it rests its decisions, we will not speculate thereon nor search the record for supporting evidence or reasons." *Portsmouth Water and Fire District v. Rhode Island Public Utilities Commission*, 150 A.3d 596, 602 (R.I. 2016) (alterations omitted) (quoting *Narragansett Electric Company v. Rhode Island Public Utilities Commission*, 35 A.3d 925, 931 (R.I. 2012)).

Although remanding the case for such factual findings would ordinarily be appropriate, we conclude that in the circumstances of the case "[s]uch a remedy would be fruitless." *Bruce Pollak v. 217 Indian Avenue, LLC*, 222 A.3d 478, 484 (R.I. 2019); *see Guilford v. Mason*, 22 R.I. 422, 430, 48 A. 386, 388 (1901) (recognizing "[t]he maxim that the law does not compel one to do vain or useless things"); *cf. El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 498 (1st Cir. 1992) ("[E]quity will not require a useless thing[.]"). The parties agreed on the record that the underground alignment was not feasible, and no party has pursued the bridge alignment north. Remanding the case for findings of fact would clearly produce the same results and would only extend the proceedings regarding a project that was first proposed nearly twenty years ago. In accordance with the 2004 order and the incorporated settlement agreement, the next preferred alignment is the bridge alignment south. Accordingly, we uphold the 2018 order of the board.

IV

Conclusion

For the reasons stated herein, we affirm the 2018 order of the Energy Facility Siting Board. The record may be returned to the Energy Facility Siting Board.

All Citations

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Footnotes

1 Construction of the underground alignment also depended on obtaining any necessary permits or regulatory approval and on other conditions outlined in the settlement agreement, such as the transfer of easements to National Grid by the municipal parties. These conditions are not at issue in this case.

2 In the twelve years between the board's 2004 order approving the parties' settlement agreement and National Grid and East Providence's 2016 joint report and motion, a good many hearings and meetings took place,

testimony from different parties was heard, estimates were obtained, and reports were filed. However, none of these actions are directly relevant to the matter before us.

3 The Attorney General, despite being a party before the board, is not a party to this action. However, this Court allowed the Attorney General to participate in this action by filing an amicus curiae brief. We recognize that several individuals have served as Attorney General since National Grid filed its original application in 2003. Not surprisingly, the position taken by that office has not been consistent during the pendency of this case.

4 Before this Court, East Providence asserts that Providence agreed not to appeal or otherwise contest a decision of the board as part of the settlement agreement adopted by the board in its 2004 order. However, although the parties to the settlement agreement generally agreed not to appeal or seek review, an exception was carved out for a decision rendered in accordance with Section II(J) of the agreement, which explained the procedure to be followed if any of the alignments were determined to be infeasible by National Grid. The 2018 order resulted from hearings conducted in accordance with Section II(J) of the agreement, and, thus, Providence did not waive its right to seek review of that order.

5 Although a cognizable injury may not be "purely conjectural or hypothetical," parties can establish standing with a showing of "reasonable likelihood" of future injury. *Narragansett Indian Tribe v. State*, 81 A.3d 1106, 1111 (R.I. 2014).

6 General Laws 1956 § 42-98-12(b) requires that a petition be filed within ten days of the EFSB's order. Here, the tenth day fell on Saturday, January 27, 2018, and the petition was filed on Monday, January 29, 2018. *See* Art. I, Rule 20(a) of the Supreme Court Rules.

7 The petitioners additionally assert that the board "improperly authorized National Grid's use of ratepayer funds for purposes other than under-grounding in violation of state law and its own order." The petitioners acknowledge in their brief that they spent "[l]ittle time" on this argument. "This Court has consistently held that 'simply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.' " *Barnes v. Rhode Island Public Transit Authority*, 242 A.3d 32, 36-37 (R.I. 2020) (brackets omitted) (quoting *Fisher v. Applebaum*, 947 A.2d 248, 252 (R.I. 2008)). Accordingly, we deem this issue waived.

8 EFSB Rule 1.13(c)(1) provides that, in its final decision:

> "The Board shall make specific findings regarding and shall grant a Board License only upon a finding that the applicant has shown that:
>
> "i) Construction of the proposed facility is necessary to meet the needs of the state and/or region for energy of the type to be produced by the produced [*sic*] facility,
>
> "ii) The proposed facility is cost-justified,
>
> "iii) The proposed facility can be expected to produce energy at the lowest reasonable cost to the consumer consistent with the objective of ensuring that the construction and operation of the proposed facility will be accomplished in compliance with all of the requirements of the laws, rules, regulations, and ordinances, under which, absent the Act, a license would be required, or that consideration of the public health, safety, welfare,

security and need for the proposed facility justifies a waiver or some part of such requirements when compliance therewith cannot be assured,

"iv) The proposed facility will not cause unacceptable harm to the environment, and

"v) The proposed facility will enhance the socioeconomic fabric of the state." 445 RICR 00-00-1.13(c)(1).

9 In its response to the joint report and motion, the Attorney General concluded that "the Department believes the Bridge Alignment - South Alternative represents the most feasible, cost-effective solution that accomplishes the goals of the Settlement Agreement. Based on the foregoing, the Department does not oppose the Joint Report and Motion that National Grid and East Providence have filed with the EFSB."

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