

Christian F. Capizzo
(401) 861-8247
ccapizzo@psh.com

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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 four (4) copies of Mayflower Wind Energy LLC's Post-Hearing Memorandum on Motions to Intervene of the Towns of Middletown and Little Compton 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

MAYFLOWER WIND ENERGY LLC
POST-HEARING MEMORANDUM ON MOTIONS TO INTERVENE OF THE TOWNS
OF MIDDLETOWN AND LITTLE COMPTON

On August 18, 2022, the Energy Facility Siting Board (EFSB or Board) convened a Preliminary Hearing regarding Mayflower Wind Energy LLC's (Mayflower Wind) Application to Construct Major Energy Facilities in Portsmouth, Rhode Island. At the Preliminary Hearing, the Board heard oral argument regarding whether the Board should allow the interventions of the Towns of Middletown and Little Compton (the Towns), which Mayflower Wind opposed. In lieu of ruling on the issue of intervention at the Preliminary Hearing, the Board granted Mayflower Wind and the Towns the opportunity to come to agreement on the scope of a limited intervention and file a memorandum addressing the reasonable parameters that would limit the scope of the intervention, assuming the Board will grant a limited intervention to the Towns, in light of arguments made during the August 18, 2022 Preliminary Hearing. On September 1, 2022, Mayflower Wind and the Towns conferred and attempted in good faith to come to an agreement on the scope of a limited intervention. Based on said conversation, the parties were unable to come to an agreement on the scope of limited intervention. Therefore, pursuant to the August 19, 2022 procedural directive, Mayflower Wind is filing the present memorandum.

I. Mayflower Wind Maintains Its Position That The Towns Should Not Be Granted Intervenor Status In Any Form

As Mayflower Wind previously detailed in its Objections to the Motions to Intervene and its Reply to the Town's Supplemental Memoranda, the Board should not allow the Towns to intervene in this proceeding because the Towns have not met the standard for intervention.

Intervention requires that the parties demonstrate (i) an interest which may be *directly affected* and which is not adequately represented by existing parties and 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). As was clear during oral argument at the Preliminary Hearing, the Towns have failed to demonstrate an interest that is directly affected in this proceeding. The Towns claimed interests in activities such as sunbathing, beach yoga, and bird hunting are simply not *direct* interests.¹

Even the Town’s interest in the waters of the Sakonnet River are not direct. Counsel for the Towns was only able to speculate about potential indirect impacts that may occur to shellfishing and commercial and recreational fishing in waters adjacent to their shoreline. Specifically, the Chairman inquired as follows with the Towns’ Counsel:

THE CHAIRMAN: So if someone – if someone derives revenue from shell fishing that's going on and they're nowhere near the coast, do they have an interest to intervene as well?

MS. DESAUTEL: Yes, they do.

THE CHAIRMAN: So every single town in the State of Rhode Island that has a seafood business that's selling shellfish has expressed an interest that allows them to intervene in this docket. Is that the position you're taking?

MS. DESAUTEL: No. The position I'm taking is recreational fishing is not accounted for.

THE CHAIRMAN: You said commercial fishing.

MS. DESAUTEL: I apologize. Recreational fishing is the activity that I spoke about in my argument earlier. The CRMC does not allow for

¹ Towns’ Counsel’s assertion that “Harms to aesthetic and recreational interests are cognizable interests” is unavailing in this case. First, the *Narragansett* case was about standing, which has a different legal standard than intervention. Second, the Court in the next sentence of that case states “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.” *Narragansett Elec. Co.*, 276 A.3d 363, 267 (2022).

recreational fishery impacts to be included as part of its mitigation analysis currently.²

THE CHAIRMAN: How does the town get direct interest in recreational fishing?

MS. DESAUTEL: It gets a collection for landing fees, permits, any permits that let's say a recreational charter fishery boat, marina use, tax revenue from people that own boats, property tax.

THE CHAIRMAN: Which are all indirect.

MS. DESAUTEL: I fail to see how there's -- what would be a direct revenue?

THE CHAIRMAN: Well, indirect, if someone is going out there recreational fishing and they can't and they leave, that's direct if a person wanted to bring the fishing gear out there. The indirect impact is now they won't go and pay the fee to the town. One is direct, the other one is indirect, isn't it?

MS. DESAUTEL: No. I disagree with that respectfully.

See Transcript p. 52, lines 23-24, p. 53, lines 1-24 and p. 54, lines 1-18

In addition, fish habitat in the middle of the Sakonnet River is a state, not local concern and will be the subject of both state and federal project reviews.

Further, as Mayflower Wind has stated in its arguments before the Board, the Town has also failed to allege a unique public interest consideration to warrant granting intervention. In fact, Board Member Brady questioned whether intervention by the Towns is even necessary when she stated:

BOARD MEMBER BRADY: Mr. Chairman, I would say that my general feeling is that a lot of the concerns that are out there are -- pardon the use of the word general twice in a short period, but there are some very general

² Despite inaccurate remarks by the Towns' Counsel, CRMC regulatory requirements do allow for both review and analysis of commercial and recreational fishing impacts including but not limited to holding meetings with Applicant, the Council and the Fisherman's Advisory Board (including both commercial and recreational fishermen) to discuss potential fishery related impacts, CRMC's evaluation of potential adverse impacts of offshore development and other uses on commercial and recreational fisheries and CRMC's prohibition of any uses or activities that would result in significant long-term negative impacts to Rhode Island's commercial or recreational fisheries.

concerns that I think we are able to address through our questioning and that when I asked the question regarding the Statewide Planning advisory opinion, in the past that has been targeted towards economic issues at the city and town level, and in particular it addresses the conformance with the comprehensive plans of the cities or towns and state guide plan unit elements which are intended to cover the interests, particularly the cities and towns, and if there were a change in the route of the project, I would think that would take us back to recalibrating, the application would need to be changed, that we would have some time at that point to consider whether there was a future opportunity for intervention. So my feeling in general is that I don't know that it's necessary, but if there are some points that you feel should really be considered, that there would be a limited opportunity. I'm not opposed to that, but I'm not sure that I see the need.

See Transcript p. 83, lines 21-24 and p.84 lines 1-24

The mere assertion that participation is in the public interest is not sufficient. *See In re Invenergy Thermal Development* EFSB Docket SB2015-06 (January 29, 2016). The interests cited by the Towns are no different than the interest of the general public in the proceeding, and the Rhode Island legislature did not intend for every party who may have a remote, speculative interest in a proceeding to be a formal intervenor. On the contrary, interested parties are welcome to participate in the proceeding through the public comment process both before the Board as well as the public comment process before the Rhode Island Coastal Resources Management Council and its review of the Project. The Board is capable of assessing public comment and, if appropriate, issuing data requests to the Parties in response to public comment. Mayflower Wind welcomes the opportunity to respond to such data requests and is confident in the Board's ability to manage the input from the public.

Thus, Mayflower Wind maintains its original position that the Towns should not be permitted to intervene in this proceeding. The concerns cited by the Town do not rise to the level required to meet the standard for intervention and any issues raised by the Towns can be easily handled by the Siting Board and the Parties through public comment. Admitting the Towns as intervenors will only needlessly complicate, delay and increase burdens in this proceeding.

II. In the Event That the Board Grants Limited Intervention to The Towns, Such Intervention Should Be Limited in Scope to The Towns' Economic Interests, If Any, Directly Related to Mayflower Wind Activities on the Surface of the Sakonnet River During the Construction Period

Notwithstanding the above arguments, to the extent the Board determines a limited intervention is appropriate, the Board should appropriately limit the Town's intervention in the following way. The scope of the Town of Middletown's intervention shall be limited to its economic interests, if any, directly related to: (1) Mayflower Wind's project construction activities conducted on the surface of the Sakonnet River directly adjacent to the shoreline of the Town of Middletown and only during the active construction period, which Mayflower Wind anticipates to be during the non-summer months. The scope of the Town of Little Compton's intervention shall be limited to its economic interests, if any, directly related to: (1) Mayflower Wind project construction activities conducted on the surface of the Sakonnet River directly adjacent to the shoreline of the Town of Little Compton and only during the active construction period, which Mayflower Wind anticipates to be during the non-summer months.

These limitations on scope are consistent with Chairman Gerwatowski's observations on scope expressed during the Preliminary Hearing. Without waiving its objection to intervention by the Towns, limiting the scope in this manner may be appropriate for the limited purpose of narrowing the potential direct interests of the Town in the proceeding, consistent with the standard for intervention. Mayflower Wind maintains that it is tenuous at best to claim that the Towns have a direct interest in the surface of the water during construction period, particularly given that construction will be completed during the off-season in state jurisdictional waters. However, should the Board decide to grant an intervention, limiting such intervention to Mayflower Wind construction activity on the surface of the Sakonnet River area directly adjacent to the shoreline of each Town during construction is the closest interest the Towns could allege. Specifically, the Chairman's questioning of the Town's assertion of impact on views and water access:

THE CHAIRMAN: All right. Visual impacts and water access. In Paragraph 9 in the Little Compton motion and Paragraph 8 of Middletown's, "The towns assert that the subsea cable is likely to affect the town's views and water access," but there is no view impact once that transmission cable is in the surface of the ocean so we're really talking again just the construction period.

See Transcript p. 64, lines 14-22

The Chairman, furthered his inquiry on this topic:

THE CHAIRMAN: Issues that relate to construction that's taking place, but not the actual cable itself and how it's going to be put into the bottom of the sea. You're just worried about the economic impacts when there's activity on the surface of the water.

MS. DESAUTEL: That's correct.

THE CHAIRMAN: I'm trying to narrow it down because I think that every one of these interests, unless I'm missing one, relates to that core issue, activity that's occurring on the surface of the water.

MS. DESAUTEL: That's correct.

See Transcript p. 65, lines 2-15

The Chairman, concluded his inquiry with Counsel for the Towns as follows:

THE CHAIRMAN: Barring that, those similar construction impacts that relate to the activity on the surface, that's the extent of the interest that you've asserted.

MS. DESAUTEL: That's correct.

THE CHAIRMAN: I think I said that before, but I just want to make sure that was clear.

See Transcript p. 82, lines 4-11

Finally, Mayflower Wind would like to clarify that any potential intervention granted to the Towns should not serve as any admission or confirmation that the Towns have any standing to challenge a decision of the Board. The issue of standing would be one for a court to address and any limited intervention is no evidence of standing, which would require a showing of a direct cognizable interest and actual or imminent harm to that interest, not mere speculative harm. *See Narragansett Elec. Co.*, 276 A.3d 363, 267 (2022).

III. Conclusion

As set forth herein, Mayflower Wind and the Towns made a good faith effort to reach an agreement on the scope of the Towns' intervention but were unable to do so. Mayflower Wind maintains its original position that intervention of the Towns is inappropriate and inconsistent with the EFSB regulations, EFSB precedent and Rhode Island case law. However, should this Board determine that a limited intervention is appropriate, such intervention should be limited in scope to the most direct interests possible, which is the surface of the Sakonnet River adjacent to the shoreline of each Town during the active construction period, which Mayflower Wind anticipates to be during the non-summer months.

Dated: September 8, 2022

Respectfully submitted,

MAYFLOWER WIND ENERGY LLC

By its Attorneys,



Christian F. Capizzo
Robert K. Taylor
PARTRIDGE SNOW & HAHN LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
Phone: (401) 861-8200
Email: ccapizzo@psh.com
Email: rtaylor@psh.com

Eric K. Runge
DAY PITNEY, LLP
One Federal Street, 29th Floor,
Boston, MA 02110
Phone: 617-345-4635
Email: ekrunge@daypitney.com

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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)

Service List – Updated August 4, 2022

Name/Address	Email	Phone/FAX
File an original and 4 copies with EFSB: Emma Rodvien, Coordinator Energy Facility Siting Board 89 Jefferson Boulevard Warwick, RI 02888	Emma.Rodvien@puc.ri.gov Patricia.Lucarelli@puc.ri.gov Ronald.Gerwadowski@puc.ri.gov Terry.Gray@dem.ri.gov Meredith.Brady@doa.ri.gov Suzanne.Amerault@dem.ri.gov Maria.Mignanelli@doa.ri.gov	401-780-2173
Parties (Electronic Service Only, Unless by Request)		
Mayflower Wind Energy LLC Christian Capizzo, Esq. Partridge Snow & Hahn 40 Westminster St, Suite 1100 Providence, RI 02903	ccapizzo@psh.com rtaylor@psh.com ekrunge@daypitney.com mczepiel@daypitney.com daniel.hubbard@mayflowerwind.com jennifer.flood@mayflowerwind.com kathleen.freeman@mayflowerwind.com	
Town of Portsmouth Kevin P. Gavin, Esq. Law Office of Kevin P. Gavin 31 Harrington Avenue Portsmouth, RI 02871	kevingavinlaw@gmail.com tierneylaw@yahoo.com clerkoffice@portsmouthri.com rrainer@portsmouthri.gov	401-662-2520 401-316-4566
Narragansett Electric Company George W. Watson, III, Esq. Robinson & Cole One Financial Plaza, 14th Floor Providence, RI 02903	GWatson@rc.com RJReybitz@pplweb.com COBrien@pplweb.com JScanlon@pplweb.com	
Public Utilities Commission (PUC)	Cynthia.Wilsonfrias@puc.ri.gov Todd.Bianco@puc.ri.gov Luly.Massaro@puc.ri.gov	401-941-4500
Division of Public Utilities and Carriers (DPUC)	Christy.Hetherington@dpuc.ri.gov John.Bell@dpuc.ri.gov Thomas.Kogut@dpuc.ri.gov Margaret.L.Hogan@dpuc.ri.gov	401-941-4500

Office of Energy Resources (OER)	Christopher.Kearns@energy.ri.gov	
Town of Little Compton Marisa A. Desautel, Esq. Desautel Law 38 Bellevue Avenue, Unit H Newport, RI 02840	marisa@desautelesq.com	401-477-0023
Town of Middletown Marisa A. Desautel, Esq. Desautel Law 38 Bellevue Avenue, Unit H Newport, RI 02840	marisa@desautelesq.com	401-477-0023