



Richard A. Kanoff  
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January 7, 2020

Andrew Green, Director  
Ms. Joan Evans, Presiding Officer, General Counsel  
Energy Facilities Siting Board  
One South Station, 5<sup>th</sup> Floor  
Boston, MA 02110

Re: *NSTAR Electric d/b/a Eversource Energy*  
EFSB 17-02/DPU 17-82/17-83

Dear Mr. Green and Ms. Evans:

Please find enclosed an original and five (5) copies of the Petition for Appeal of Protect Sudbury, Inc., in the above proceeding.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard A. Kanoff". The signature is fluid and cursive, with a large, stylized initial "R".

Richard A. Kanoff

Enclosures

cc: Mark Marini, Secretary, Department of Public Utilities  
Service List

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT

No. \_\_\_\_\_

_____	)
	)
PROTECT SUDBURY, INC.,	)
	)
Intervenor-Appellant,	)
	)
v.	)
	)
ENERGY FACILITIES SITING BOARD,	)
	)
Petitioner-Appellee.	)
_____	)

**PETITION FOR APPEAL  
PURSUANT TO M.G.L., ch. 25, § 5**

1. On December 17, 2019, the Energy Facility Siting Board (the “Siting Board”) issued a Final Decision (“Final Decision”) in the proceeding docketed EFSB, 17-02, D.P.U. 17-82 and D.P.U. 17-83 (“EFSB Proceeding”) in response to a petition of NSTAR Electric Company/d/b/a Eversource Energy (“Eversource”), filed on April 20, 2017, for approval of construction of a new, approximately 9-mile, 115 kV underground transmission line located primarily in Sudbury, Massachusetts (“New Line”).

2. In the Final Decision, the Siting Board approved, with conditions, the Company’s proposal. The Siting Board sanctioned Eversource’s choice to build the New Line in an environmentally undeveloped area in Sudbury, including a 7.6 mile underground segment within an inactive Massachusetts Bay Transportation Authority (“MBTA”) right of way (“ROW”) in Sudbury, Stow, Marlborough and Hudson and a 1.4 mile underground in-street segment in Hudson (identified, in the Final Decision, as the “MBTA Underground Route”). Final Decision at 2.

3. The Siting Board did not approve alternative routes submitted for consideration including an under-the-streets route in Sudbury (identified as the “All-Street Route”) or an alternative to the MBTA Underground Route located on an existing transmission line ROW owned by New England Power Company d/b/a National Grid (“National Grid”), (identified in the Final Decision, as the “Transmission Alternative 2” or the “NEP Alternative”). Final Decision at 2, 30, 97.

4. Protect Sudbury, Inc., an intervenor in the EFSB Proceeding and a party aggrieved by the Final Decision, hereby appeals the Final Decision and respectfully requests that the Supreme Judicial Court set aside the Final Decision, because it is based upon errors of law, is unsupported by substantial evidence of record, and is arbitrary, capricious and an abuse of the Siting Board’s discretion in violation of M.G.L., ch. 30A, § 14(7).

#### **Jurisdiction and Venue**

5. The Supreme Judicial Court for Suffolk County has jurisdiction over the subject matter of this action and authority to order the relief requested, pursuant to M.G.L. ch. 25, § 5, and M.G.L., ch. 164, § 69P.

#### **Parties**

6. Appellant Protect Sudbury, Inc., (“Protect Sudbury”) is a non-profit corporation duly organized under the laws of the Commonwealth with its principal office in Sudbury, Massachusetts. Protect Sudbury was granted intervenor status in the proceeding before the Siting Board as a full party.

7. Appellee Siting Board is an agency of the Commonwealth of Massachusetts, established pursuant to M.G.L., ch. 164, § 69H, having its offices at One South Station, Boston, Massachusetts.

## Facts

8. Protect Sudbury and other intervenors presented substantial evidence that the MBTA Underground Route was not needed and, if approved and constructed, would damage environmentally sensitive and protected areas including bordering vegetative wetlands, bordering land subject to flooding, riverfront areas and 100-foot buffer zones. The MBTA Underground Route would permanently affect rare species, cold-water fisheries, vernal pools, scenic roads, and public water supplies, and would damage protected conservation land/open space and result in the loss of extensive mature forest land and vegetation and increase the risk associated with increased flooding and pollution. Moreover, the MBTA Underground Route would permanently destroy and damage scores of trees and other vegetation, in close proximity to abutting homes and businesses, indefinitely alter the terrain, and impact property values. In addition, the MBTA ROW route is known to be contaminated with a yet-to-be-determined quantity of hazardous materials which increases environmental risks (and expense) associated with removal and disposal of highly unsafe materials.

9. The EFSB erred in its determination that comparative impacts of the MBTA Underground Route are equivalent to the impacts of the All-Street Route or NEP Alternative. The record evidence demonstrated that the MBTA Underground Route would have dramatic short- and long-term environmental impacts, and that these impacts are much more significant than the environmental impacts of the All-Street Route or the Transmission Alternative 2. Accordingly, the approval of the MBTA Underground Route rather than other alternatives is unsupported by substantial evidence and contrary to the laws of the Commonwealth.

10. In addition, Protect Sudbury and other parties submitted substantial evidence of material deficiencies in the Company's cost analysis and compliance with the ISO-New England ("ISO-NE") review process. In violation of well-settled precedents, the Company did not submit the MBTA Underground Route for review by ISO-NE, and the Final Decision erroneously approved this failure. In addition, the Company's cost analysis relies upon inherently inaccurate conceptual cost estimates. In the Final Decision, the Siting Board ignores, among other things, overlapping estimates, deficiencies in cost methodology, inherent uncertainties around early stage estimates, and the costs associated with removal, management and disposal of hazardous

materials. Accordingly, the record does not support any conclusion that the MBTA Underground Route is least cost as compared to the All-Street Route or the NEP Alternative.

11. The record indicates that the MBTA Route lacks support in the community and is opposed by both the Sudbury and Hudson town Select Boards. The Siting Board's failure to value the lack of support for the MBTA Underground Route as compared to the NEP Alternative or All Street Route and its failure to reasonably consider community input is error.

12. The approval of the MBTA Underground Route, rather than Non-Transmission Alternatives, the All-Street Route, or the NEP Alternative, is not supported by substantial evidence in the record. Any of these alternatives, which are fully supported by detailed intervenor evidence in the record, would address the purported need, at the least cost, with demonstrably less harm to the environment and to the public health and the community as a whole than the MBTA Underground Route.

13. The Siting Board's numerous references to the Massachusetts Department of Conservation and Recreation's ("DCR") rail trail in the Final Decision and its implicit reliance upon the purported benefits of development and construction of the rail trail is not supported by the evidence, and is arbitrary and capricious.

14. The Siting Board's implementation of an unreasonable and prejudicial schedule and procedure and its failure to reopen the record to allow consideration of relevant additional information regarding need and alternatives violates due process.

### **Legal Claims**

15. The Siting Board's approval of the MBTA Underground Route is based upon errors of law, and is unsupported by substantive evidence, is unwarranted by facts found on the record as submitted, is arbitrary and capricious, is an abuse of discretion, and is otherwise not in accordance with law for the following reasons:

- i. The Siting Board erred in its determination that MBTA Underground Route was least cost, notwithstanding record

evidence that that the cost estimates submitted by Eversource were not reviewed by ISO-NE, were unreliable and not least cost as compared to alternatives.

- ii. The Siting Board erred in its conclusion that the MBTA Underground Route, located on an underdeveloped MBTA ROW in a sensitive environmental area, has fewer environmental impacts than the All-Street Route or Transmission Alternative 2, notwithstanding compelling and detailed record evidence of the environmental harm from the MBTA Underground Route.
- iii. The Siting Board erred by rejecting the unequivocal consensus of stakeholders against the MBTA Underground Route, including Appellant Protect Sudbury and the Towns of Sudbury and Hudson, in its decision to approve the MBTA Underground Route.
- iv. The Siting Board erred in disregarding its own longstanding precedents that promoted the construction of transmission lines under streets.
- v. The Siting Board erred in determining that the MBTA Underground Route is a superior alternative in terms of reliability, cost, and environmental impact and need, that overall plans for construction are consistent with health, environmental protection and resource use, and that the MBTA Underground Route is consistent with the Commonwealth's Smart Growth/Smart Energy policy.
- vi. The Siting Board erred in giving unwarranted weight to the purported link between the multi-use rail trail proposed to be managed by DCR and the MBTA Underground Route.

- vii. The Siting Board violated due process in its application of the adjudicatory process and failure to reopen the record.

Accordingly, the Final Decision should be set aside, because the Siting Board did not comply with, among other things, M.G.L., ch. 164, §§ 69H and 69J, and therefor did not comply with standards set forth by the Legislature. The Siting Board erred in concluding: that the MBTA Underground Route is superior to alternative routes in terms of environmental impacts and cost; that environmental impacts of the MBTA Underground Route have been minimized; and that the MBTA Underground Route will serve the public convenience and is consistent with the public interest. In addition, the Siting Board erred in concluding that the MBTA Underground Route location for the New Line is consistent with current health, environmental protection, and resource use and development policies of the Commonwealth. Pursuant to M.G.L., ch. 25, § 5, this Court should order the Final Decision vacated and this matter remanded to the Siting Board for further proceedings to correct these errors.

#### **Prayer for Relief**


Wherefore, Protect Sudbury respectfully requests that this Court to:

1. Set aside the Final Decision of the Energy Facilities Siting Board;
2. Set aside and reverse the Siting Board's findings and rulings as arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, lacking adequate subsidiary findings, inconsistent with precedent, rendered on an incomplete record prior to the close of evidence or otherwise not in accordance with law;

3. Such other relief as the Court deems necessary and proper.

Respectfully submitted,

PROTECT SUDBURY, INC.,  
By its attorneys,

A handwritten signature in black ink, appearing to read "Richard A. Kanoff", written over a horizontal line.

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125 High Street  
Boston, MA 02110  
617-345-3000

Dated: January 7, 2020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT

No. \_\_\_\_\_

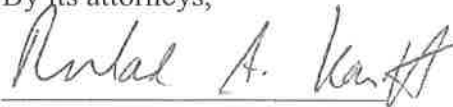
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PROTECT SUDBURY, INC.,	)
	)
Intervenor-Appellant,	)
	)
v.	)
	)
ENERGY FACILITIES SITING BOARD,	)
	)
Petitioner-Appellee.	)
_____	)

CERTIFICATE OF APPEAL

I, Richard A. Kanoff, counsel for Appellant Protect Sudbury, Inc., hereby certify that, in my opinion, there are probable grounds for appeal from the Final Decision of the Energy Facilities Siting Board dated December 18, 2019, in the proceedings docketed as EFSB 17-02, D.P.U. 17-82, and D.P.U. 17-83, to make it a fit subject for judicial inquiry and that this appeal is not taken for the purpose of delay.

Respectfully submitted,

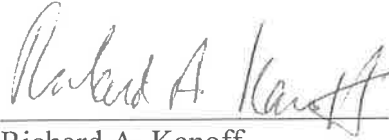
PROTECT SUDBURY, INC.,  
By its attorneys,



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Burns & Levinson LLP  
125 High Street  
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CERTIFICATE OF SERVICE

I, Richard A. Kanoff, hereby certify that a copy of the foregoing document was served this 7<sup>th</sup> day of January 2020 upon the Energy Facilities Siting Board and the Service List for the above-captioned proceeding, electronically, in accordance with the requirements of 980 C.M.R. § 1.03 (Siting Board's Rules of Practice and Procedure) and the Procedural Ground Rules issued in this case.



Richard A. Kanoff

Dated: January 7, 2020