

IN BOARD OF SUDBURY SELECTMEN
EXECUTIVE SESSION
WEDNESDAY, JUNE 7, 2017

Present: Chairman Robert C. Haarde, Vice-Chairman Leonard A. Simon, Selectman Susan N. Iuliano, and Town Manager Melissa Rodrigues, Special Counsel George Pucci and Special Counsel Jeff Epstein.

The statutory requirements as to notice having been complied with, the meeting was called to order at 3:36pm in the Flynn Building Silva Room.

Chairman Haarde moved to enter into Executive Session to discuss strategy with respect to potential litigation if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares regarding Eversource, pursuant to General Laws chapter 30A, §21(a)(3).

Selectman Simon seconded the motion.

It was voted unanimously on roll call:

Robert C. Haarde – aye, Leonard A. Simon – aye, Susan N. Iuliano – aye

Eversource Litigation

Special Counsel Pucci began by explaining that he and Special Counsel Epstein are working in a way so as not to duplicate efforts is seeking experts to assist with the Eversource case. Special Counsel Epstein is working on identifying an expert environmental firm to evaluate the cost estimation claim given by Eversource of how much more costly it would be to construct the power lines underground rather than above ground. He has identified an expert who is willing to oppose Eversource and they have a contact who could assist with an independent cost estimate analysis.

He next discussed the Massachusetts Environmental Policy Act (MEPA) Scoping Session and site visit scheduled for Monday, June 12, stating that it is advisable to have Counsel present at the site visit. He also stated that it is beneficial to the Town that the deadline to submit comments to MEPA regarding the project has been extended to June 20, 2017.

Selectman Iuliano clarified that the site visit begins at 3pm and the scoping session at LSRHS begins at 6pm.

Special Counsel Pucci again recommend that counsel attend the site visit. He clarified that Selectmen members should attend the forum, but that it is no necessary for counsel to do so.

Regarding the comments to be submitted to MEPA, Counsel Pucci advised that all comments, including concerns from Town departments, consultants and committees be included since rights are waived to use arguments later in the proceedings if they are not included in the memo.

Town Manager Rodrigues stated that the Conservation Commission wishes to submit testimony to the Siting Board (EFSB). As it may be beneficial later on to call them as witness, it seems that we would not want to “show our cards” by allowing them to submit written testimony.

Special Counsel Pucci stated that a formal filing with EFSB is being submitted on behalf of the entire Town and the same is true of the MEPA filing.

Town Manager Rodrigues asked for advice from counsel regarding board members speaking at the upcoming MEPA scoping meeting.

Special Counsel Epstein advised that the Board's goal is to have MEPA members consider problems with the project's planning process in broad terms.

Special Counsel Pucci gave the example that issues that Eversource would encounter with their full environmental report requirements would be beneficial to bring up. He advised to have as broad a scope as possible on the issues.

Chairman Haarde asked whether consultants should be invited to speak at the MEPA meeting. Special Counsel Pucci responded that consultants Horsley Witten are not yet ready to do so and that the Environmental Notification Form (ENF) from submitted to MEPA from Eversource should be reviewed for this.

Special Counsel Epstein suggested that a password-protected location be set up to share documents pertaining to the Eversource filing.

Selectman Simon asked how many MEPA members will attend the meeting as well as what their credentials are. Special Counsel Pucci and Epstein responded that just a few members will attend and that their credentials can be reviewed from the MEPA website.

Special Counsel Pucci provided updates on several matters. He stated that the Paul Chernick proposal on the validity of the ISO needs analysis justifying the Eversource project is available.

In regards to the National Grid (NGrid) project, which was defeated in favor of the Eversource project, Counsel Pucci received confirmation through NGrid's general counsel that they will not file petition to intervene with the Eversource project. He stated this was disappointing, but NGrid is not interested in pursuing this at this time, perhaps stemming from their desire to maintain a favorable relationship with Eversource for future projects. He stated that this does not mean that NGrid is not interested in the needs analysis evaluation.

He stated that resident group Protect Sudbury is applying a great deal of pressure regarding the way they wish to have the case proceed. Counsel Pucci asked Richard Kanoff, the attorney retained by Protect Sudbury, what the group believes the best outcome of the Eversource opposition efforts would be. He received a two-part response: 1. The power lines going underground would be the best feasible option for Sudbury and 2. The ISO process determining project need was flawed and the NGrid option shouldn't have been defeated. Counsel Pucci further stated that it is necessary for the group to state exactly which experts they are willing to provide for the case, so the Town is aware of whether the group can realistically be of help.

Selectman Iuliano inquired about the strength of challenging reliability need as an argument.

Special Counsels spoke about Smart Grid and other technologies that may make the construction of new power lines obsolete in the future.

Chairman Haarde asked whether Attorney Kanoff has had experience intervening before the EFSB prior to this. Special Counsel Epstein confirmed that he had.

Special Counsel Pucci stated that he would work on a draft of the filing due on June 15 and send it to Special Counsel Epstein and then to the Board of Selectmen for review.

In addition, Special Counsel Pucci stated that he produced a memo on Public Trust Doctrine for the Board. The memo explains what the doctrine means and how it applies to the Eversource case. He believes that the Town has a viable good claim faith to make based on the doctrine, but that such a case seems like a “long shot.” It could be useful, however, as a part of the strategy that would also include a lack of ability to obtain the site for the project on the part of Eversource. It should be filed in Superior Court.

Special Counsel Epstein affirmed that EFSB will not approve a project on a hypothetical site – the location must be secured in order to meet with their approval.

Town Manager Rodrigues was surprised to learn that the MBTA will not be getting all the money for use of the land from Eversource up front. It would be divided over 20 years at \$425,000 per year, which is not a significant contribution to their annual budget.

Special Counsel Pucci further explained the application of the Public Trust Doctrine in the Eversource case. He stated that people assume certain future uses for abandoned rails, and installation of high voltage power lines, which would do irreparable damage to the surrounding ecosystem, are not among those uses. He opined that a legitimate argument can be made on this basis.

Town Manager Rodrigues stated that Eversource may not have actually filed their option.

Special Counsel Pucci opined that declaratory relief against the MBTA would be likely to introduce uncertainty and slow down approval for the project, thus buying the Town time to defeat it on other grounds. Delays could also convince Eversource to pursue the project elsewhere or abandon it altogether. He offered as an example the success of a 93A claim he had worked on against Harvard University pertaining to land they owned in Weston.

Selectmen Simon agreed that ambiguity would be valued in this instance as well.

Special Counsel Epstein offered more information about Siting Board. He said that the can file petition to intervene next week, but Counsel needs to know soon if the Town wishes to fight at all costs. Consultant Paul Churnik gave a starting budget of \$40,000 for the work he is being asked to do. Synapse does energy efficiency consulting and they declined to give the Town a proposal for the project because they feel that success is so unlikely. Karl Rabago is the contact at Pace Energy and Climate Center School of Law, which deals with Smart Grid work, and his work will likely cost another \$20,000. He could help to fight the ISO end argument that there is no infrastructure need for this project. Counsel was informed that this project could be done for \$54,500, not including cost assessment, and it was requested that a new quote be provided which would include engineering. It was discussed that Eversource does a poor job of cost estimating and even built in a very large 50% margin of error into their filings.

Special Counsel Pucci agreed that if the Town wishes to pursue the need argument, it will be necessary to retain an EFSB expert, and that Mr. Horsley of Horsley Witten is impressive on the stand.

Special Counsel Epstein asked whether the Town wishes to fight the project before the Siting Board and also in court. He opined that Eversource will “hang in” regarding this project for a long time. Eversource has already invested a great deal of money in the project and they are not a small company with limited resources. Furthermore, they've already made the huge concession to go underground.

Selectman Simon asked about the Town of Hudson’s current position on the project.

Town Manager Rodrigues stated that Tom Moses informed her "our position is the same" regarding the project. It appears that their Board of Selectmen may have voted against the Community Agreement that Eversource offered, which is surprising as Eversource had agreed to everything the Town of Hudson had asked for.

Selectman Simon stated deliberate confusion presented by Eversource is making it challenging to determine a concise list of concessions. He believes that gaining a clearer understanding of the under street option would be helpful.

Special Counsel Epstein stated that the Siting Board has a tremendous bias towards power lines, but that the future trend appears to be micro grids, smart grids and other new technologies.

Chairman Haarde stated that demonstrating a lack of need for the project may be useful as a component of overall argument, but not the entire case.

Special Counsel Epstein explained that each individual point does not need to be a "won" in order for a case to succeed in court. He opined that it is unlikely that the Eversource project is in fact an urgent need.

Chairman Haarde asked what level of detail is needed for the petition to intervene. Special Counsel Epstein stated that a high level of detail is not required. Intervening will start the Discovery process, and the Town will need to decide which experts will be hired by mid-July.

Town Manager Rodrigues suggested that the Board should put experts on retainer so that Eversource isn't able to hire them first. Special Counsel Epstein explained that putting consultants on retainer will not cost anything beyond the hours that the consultants work.

Special Counsel Pucci explained that there is no administrative remedy for appealing an ISO decision. It is not a governmental body and thus does not have force of law appeals process in place.

Selectman Simon opined that the Town must find an apparent defect in order to overturn their decision.

Special Counsel Epstein opined that it is doubtful that Counsel can find an argument that will dismantle the ISO's entire need determination report. He stated that by mid-July all consultants need to be fully immerse in the work of building the case against the project. There will be a pre-file period from mid-July to early in the fall. A great deal of money will need to be spent on the 3-4 consultants needed for the task. Eversource may file a rebuttal, and 15-20 days of trial hearings may be needed.

Special Counsel Pucci explained that in this instance here, the Town would be faced with high costs in a short time period. By contrast, a case stretched over several years would allow for more budgeting.

Special Counsel Epstein stated that beginning litigation on the project can be delayed for a little longer, but not much longer. If the Board advises Counsel that the Town wants a full-scale attack, Counsel feels comfortable that there are good faith arguments to be made, but they may not succeed.

Special Counsel Pucci clarified that the best hope for success in this case is if external circumstances change.

Selectman Simon requested an opinion on how likely the Town is to win on the argument being discussed. Special Counsel Epstein opined that it's very unlikely, and he would estimate that there is a less than 20% chance of defeating this project based on the need argument.

Chairman Haarde stated with regards to the Town of Hudson's rejection of the Community Agreement that they must have felt they could get more from Eversource. He said that he was surprised that Hudson is taking a "tough" stance, especially since Eversource gave Hudson a better deal than Sudbury from the beginning.

With regards to the impact of citizen intervention, Special Counsel Epstein stated that he has seen lots of people turn out in opposition of a project and not sway the Siting Board.

Special Counsel Pucci enumerated the comments on the Protect Sudbury website. The arguments include: there is no immediate need for the project, the project presents a clear and present danger (which he felt would be a tough case to argue), the project will negatively impact resident health, historic districts, drinking water, property value, conservation land and protected species as well as the fact that Eversource has a history of disregard for town bylaws.

Selectmen Simon stated that he is under the impression that Protect Sudbury will not make significant financial contributions toward legal or expert fees.

Special Counsel Epstein repeated that Counsel needs some sense of how the Board wishes to proceed.

Town Manager Rodrigues stated that she believes the best approach would be to go "big and broad" with the Eversource litigation.

Selectman Iuliano agreed, elaborating that part of the large fees in the coming months will also serve to "buy time" in delaying the project and making it possible for external circumstances to arise.

Town Manager Rodrigues explained that if the hired experts feel there is no case to be made against the project, the Town can change its stance. If it achieves nothing else, retaining experts will get the attention of Eversource and may help to gain additional concession in the Host Community Agreement. She stated that if the Board agrees with this approach, they should authorize Special Counsel to hire specialists.

She confirmed that the Board should expect to see Special Counsel's filings next Tuesday.

Special Counsel Epstein asked whether a second proposal from Pace was desired. All Board members concurred that a second proposal is indeed needed.

Selectman Simon made the motion to "VOTE to authorize Counsel to retain experts in regards to the Eversource case with a budget up to \$100,000." Selectman Iuliano seconded the motion.

It was voted unanimously on roll call:

Haarde – aye, Simon – aye, Iuliano – aye

Special Counsel Pucci said that Superior Court judges would be likely to give reasoned decisions on the matter.

Chairman Haarde stated that the judge would have knowledge that there's a second track for the case to proceed along.

Special Counsel Pucci opined that seeking declaratory judgement would be the best track in this case. The goal would then become simply to defeat the motion to dismiss. He elaborated that calling the legality of the project into question by "just checking" on it is a fine and possibly effective track to take.

Selectman Iuliano discussed the current actions needed by the Board. She stated that the MEPA filing is the next step and Town Manager Rodrigues stated that she is working with staff to elaborate on the bullet points they've compiled in opposition to the project. It was agreed that Counsel would provide a cover letter to the comments.

Special Counsel Pucci stated that the MEPA filing is submitted electronically, thus extra time for delivery does not need to be factored in. He stated that filing will be in early July.

Special Counsel Epstein stated that he will inform Marta that the Board wishes to put her company on retainer and get a scope from the engineer.

Adjournment

Chairman Haarde moved to adjourn. Selectman Iuliano seconded the motion.

It was voted unanimously on roll call:

Haarde – aye, Simon – aye, Iuliano – aye

There being no further business, the meeting adjourned at 4:52 pm.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk