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SJC-12997

TOWN OF SUDBURY vs. ENERGY FACILITIES SITING BOARD & another<sup>1</sup>  
(and a consolidated case<sup>2</sup>).

Suffolk. March 1, 2021. - June 25, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Energy Facilities Siting Board. Public Utilities, Energy company, Electric company, Electrical transmission line. Electric Company. Environment. Administrative Law, Record, Decision, Judicial review, Substantial evidence.

Civil actions commenced in the Supreme Judicial Court for the county of Suffolk on January 17, 2020.

After consolidation, the case was reported by Cypher, J.

Jeffrey M. Bernstein for town of Sudbury.  
Richard A. Kanoff for Protect Sudbury, Inc.  
Pierce O. Cray, Assistant Attorney General, for Energy Facilities Siting Board.  
David S. Rosenzweig for NSTAR Electric Company.  
The following submitted briefs for amici curiae:  
Kin K. Gee, pro se.

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<sup>1</sup> NSTAR Electric Company, doing business as Eversource Energy, intervener.

<sup>2</sup> Protect Sudbury, Inc. vs. Energy Facilities Siting Board & another.

Andrew M. Fischer for Massachusetts Bicycle Coalition & others.

Mark R. Rielly & Rachel C. Thomas for New England Power Company.

KAFKER, J. The town of Sudbury (town) and Protect Sudbury, Inc. (Protect Sudbury), challenge a decision of the Energy Facilities Siting Board (board) that approved a proposal by NSTAR Electric Company, doing business as Eversource Energy (Eversource), under G. L. c. 164, § 69J, to construct a new electrical transmission line between substations in Sudbury and Hudson (project). Eversource sought to construct the new transmission line after assessments revealed that this area needed additional energy supply to withstand certain contingencies, posing a risk to 72,000 customers. The board's mandate under G. L. c. 164, § 69H, when considering such projects, is to "provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." The town and Protect Sudbury (collectively, petitioners) raise a number of challenges to the manner in which the board applied these three statutory considerations in this case.

We conclude that there was no error in the board's assessment and approval of the project. We first explain that the board's obligation is to balance the reliability, cost, and environmental impact of each proposal before it. No one factor

is determinative, and the board has wide discretion to balance the factors from case to case to achieve its statutory mandate. Many of the petitioners' arguments are little more than disagreement with how the board interpreted its statutory mandate or balanced these considerations. Our role is not to substitute our judgment or the petitioners' judgment for that of the board, however, and we see no legal basis for disturbing the board's careful and reasoned decision in this case. Accordingly, for the reasons described infra, we affirm the board's approval of the project.<sup>3</sup>

1. Background. a. Energy Facilities Siting Board. The board is an independent board within the Department of Public Utilities charged by the Legislature with administering the provisions contained in G. L. c. 164, §§ 69H-69Q. See G. L. c. 164, § 69H. "The approval of the board is required prior to the commencement of construction of any 'facility' . . . in the Commonwealth, and no State agency may issue a construction permit for any such facility unless the petition to construct the facility has already received approval from the board." Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities

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<sup>3</sup> We acknowledge the amicus briefs submitted by Kin K. Gee; the Massachusetts Bicycle Coalition, Massachusetts Central Rail Trail Coalition, East Quabbin Land Trust, East Coast Greenway Alliance, and Rails to Trails Conservancy; and New England Power Company, doing business as National Grid.

Siting Bd., 448 Mass. 45, 46-47 (2006) (Alliance I), quoting G. L. c. 164, §§ 69J, 69J 1/4. Its "governing mandate . . . is to 'provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.'" Alliance I, supra at 47, quoting G. L. c. 164, § 69H. To accomplish this, the board reviews "the need for, cost of, and environmental impacts of transmission lines," and "[s]uch reviews shall be conducted consistent with . . . [§] 69J." G. L. c. 164, § 69H. Also, "[i]n order to site a new electric transmission line, [the utility provider] is required to demonstrate to the [board] . . . that the project 'will or does serve the public convenience and is consistent with the public interest' and is 'reasonably necessary for the convenience or welfare of the public.'" Sudbury v. Massachusetts Bay Transp. Auth., 485 Mass. 774, 786 (2020), citing G. L. c. 164, § 72, and G. L. c. 40A, § 3.

More specifically, in this case, the board evaluated Eversource's application based on the following five requirements:

"(1) that additional energy resources are needed . . . ;

"(2) that, on balance, the proposed project is superior to alternative approaches in terms of reliability, cost, and environmental impact, and in its ability to address the identified need . . . ;

"(3) that the applicant has considered a reasonable range of practical facility siting alternatives and that the

proposed facilities are sited in locations that minimize costs and environmental impacts while ensuring a reliable energy supply . . . ;

"(4) that environmental impacts of the project are minimized and the project achieves an appropriate balance among conflicting environmental concerns as well as among environmental impacts, cost, and reliability . . . ; and

"(5) that plans for construction of the proposed facilities are consistent with the current health, environmental protection, and resource use and development policies of the Commonwealth."

b. Eversource's site-selection process. Eversource sought to site a new 115 kilovolt underground transmission line between one of its substations in Sudbury and the Hudson light and power department's substation in Hudson.<sup>4</sup> Eversource conducted a thorough site-finding process before determining its preferred plan for the project, detailed infra.

i. Identification of need. Eversource proposed the transmission line to address reliability concerns that were identified by ISO New England Inc. (ISO-NE). ISO-NE is "a private, nonprofit entity that runs the region's power grid and its restructured wholesale energy market." Strategic Energy, LLC v. Western Mass. Elec. Co., 529 F. Supp. 2d 226, 229 (D. Mass. 2008). It is entrusted under Federal law with operating a safe and reliable transmission system in New England,

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<sup>4</sup> Before the board, Eversource also filed a petition pursuant to G. L. c. 40A, § 3, seeking individual and comprehensive exemptions from zoning enactments in Sudbury, Hudson, and Stow, the grant of which has not been challenged.

administering "a regional network that coordinates the movement of wholesale electricity in all or parts of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont."

Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 12, 16 (1st Cir. 2013). Its "system . . . transmits energy through high-voltage lines to local distribution lines that serve consumers." Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils., 461 Mass. 166, 180 n.26 (2011) (Alliance III). ISO-NE also "oversees the markets for wholesale electricity in the New England region." PNE Energy Supply LLC v. Eversource Energy, 974 F.3d 77, 80 (1st Cir. 2020). As most relevant here, the board explained that ISO-NE "carries out a regional system planning process, wherein it conducts periodic needs assessments on a system-wide or specific-area basis, and develops an annual regional transmission plan using a ten-year planning horizon" as part of its role as the independent system operator of New England.

As such, when conducting needs assessments, ISO-NE analyzes how a particular grid or subarea will perform in the event of several contingencies. A "contingency" in this context is an event causing the loss of transmission system elements. A single contingency is referred to as an "N-1" contingency, and an "N-1-1" contingency occurs when there is a subsequent loss of a transmission element following an N-1 event. As the board

explained, an "N-1-1 contingency" is "a particularly adverse event where two separate and unrelated parts of a transmission system fail." ISO-NE uses these criteria to ensure that a transmission system can reliably deliver power even during stressed conditions and the loss of one or more transmission elements.

In 2015, ISO-NE issued the "Greater Boston Area Updated Transmission Needs Assessment" (2015 needs assessment). The 2015 needs assessment used "summer peak 90/10 load" forecasts<sup>5</sup> of customer demand and other assumptions from ISO-NE's then most current 2013 capacity, energy, loads, and transmission (CELT) report to assess the reliability of the existing transmission lines.

Eversource relied on the 2015 needs assessment and 2013 CELT forecasts from ISO-NE for its determination of need. The 2015 needs assessment found that the existing transmission system in the Marlborough subarea<sup>6</sup> is inadequate to reliably serve current and future customer load. Specifically, the 2015 assessment identified numerous postcontingency "thermal

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<sup>5</sup> The peak 90/10 load represents an energy load level that has a ten percent chance of being exceeded because of weather conditions in any one year.

<sup>6</sup> The Marlborough subarea includes the cities of Marlborough and Framingham and the towns of Hudson, Stow, Berlin, Northborough, Westborough, Southborough, Grafton, and Shrewsbury.

overloads" and "low-voltage violations" in the Marlborough subarea following certain N-1 and N-1-1 contingencies.

Eversource stated that although the N-1 violations identified in the area would be addressed by other planned transmission system investments, N-1-1 postcontingency thermal overloads and low voltage violations would remain unresolved, leaving a risk that more than 72,000 customers in the subarea could lose power.

Eversource also presented the board with its internal updated analysis undertaken in 2016 and 2016 ISO-NE CELT forecast data that Eversource considered as part of the updated analysis. Eversource claimed that its updated analysis confirmed the need for the project as identified in the 2015 needs assessment, demonstrating a risk of "post-contingency thermal overloads" and "low voltage violations" in the Marlborough subarea. Based on all of this information, Eversource concluded that there was a need for additional energy supply in the Marlborough subarea.

ii. Facility and route selection. To select a proposed location for the project, Eversource identified a study area, reviewed potential routes between the Sudbury and Hudson substations, and narrowed the list of potential routes. As part of this process, Eversource met with Federal, State, and municipal officials; petitioner Protect Sudbury; residents;



business owners; and other stakeholders to discuss route options and to obtain input.

Eversource considered multiple alternatives in addition to a new transmission line to address the need. It analyzed various nontransmission alternatives that could potentially address the identified need.<sup>7</sup> Eversource also assessed an alternative transmission project consisting of multiple transmission line reinforcements and upgrades to several substations (transmission alternative two), most of which would need to be constructed and operated by another transmission company, New England Power Company, doing business as National Grid (NEP).<sup>8</sup> Eversource expressed concerns about the cost and reliability of these alternatives and, as described in more detail infra, concluded that a new transmission line would be superior to both alternatives.

Eversource next examined a range of routes for the line. Eversource analyzed twenty-one potential route options,

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<sup>7</sup> Those alternatives included generation, energy efficiency, demand response, and battery storage. The town also proposed its own nontransmission alternative: a combination of solar-panel photovoltaic technology, storage resources, and demand response. Based on its detailed analysis, Eversource determined that the least-expensive, feasible nontransmission alternative would be a new generation facility, consisting of peak generating units and reciprocating engines.

<sup>8</sup> Transmission alternative two is also referred to as the "NEP Alternative."

including both overhead and underground routes along a Massachusetts Bay Transportation Authority right of way (MBTA ROW), a mix of public roadways, and routes suggested by the petitioners.<sup>9</sup> This analysis identified three routes for further evaluation and presentation to the board. Eversource identified as its preferred route for the new line an approximately nine-mile route, of which 7.6 miles would run underground along the MBTA ROW in Sudbury, Stow, Marlborough, and Hudson.<sup>10,11</sup> As part of this preferred route, Eversource partnered with the

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<sup>9</sup> After considering abutting land uses, natural resources, traffic patterns, and constructability issues, Eversource eliminated nine routes because of their clear inferiority and identified twelve routes for further study based on reliability, environmental, and cost considerations. Eversource then identified design variations or hybrid designs for five of the remaining twelve routes, yielding a total of twenty options along twelve unique route corridors. It then analyzed each of these routes, which entailed (1) establishing evaluation criteria to assess the impacts of each route; (2) calculating a ratio score for each criterion for each route; (3) assigning individual weights to each criterion to reflect its potential for impacts; and (4) determining a total raw ratio score and total weighted ratio score for each route. Eversource scored the twenty options based on seventeen environmental and constructability criteria that fell into three categories: (1) developed environment criteria (seven criteria); (2) natural environment criteria (six criteria); and (3) constructability criteria (four criteria). Eversource designed the criteria and the weights given to reflect the unique components of the project, study area, and public feedback.

<sup>10</sup> The board referred to this route as the "MBTA Underground Route." We refer to it as the "preferred route."

<sup>11</sup> The remainder of the line would run underneath streets in Hudson.

Department of Conservation and Recreation in the codevelopment of a segment of the Massachusetts Central Rail Trail, a proposed multiuse rail trail. Eversource presented a variation of this same route that would instead run overhead along the MBTA ROW (overhead route). Additionally, as required by § 69J, Eversource also proposed as an alternative an approximately ten-mile route for the project that would run entirely under existing roadways in Sudbury and Hudson (all-street route).

Based on its consideration of environmental impacts, cost, and reliability, Eversource selected the underground route along the MBTA ROW as its preferred route for the project.<sup>12</sup>

c. Procedural background. On April 20, 2017, Eversource filed three petitions with the board and the Department of Public Utilities, pursuant to G. L. c. 164, § 69J, for approval of the project. The board consolidated the three petitions into a single adjudicatory proceeding, accepted written public comments, and held two public comment hearings. It then conducted a thirty-two month adjudicatory proceeding, including

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<sup>12</sup> Eversource originally presented the overhead route as its preferred route, but after meetings with towns and stakeholders, and further consideration of the greater environmental impacts of an overhead route, Eversource decided to present the underground route as the preferred route for the project. Ultimately, the overhead route had a lower cost than the preferred route but greater potential for adverse environmental impacts.

sixteen days of evidentiary hearings, amassing a substantial evidentiary record consisting of over 1,840 exhibits and 2,800 transcript pages, extensive discovery responses, and written and oral testimony from twenty-eight witnesses.<sup>13</sup>

On June 13, 2019, the town filed a motion to reopen the record and hearing to admit in evidence (1) current load and energy efficiency forecast data from ISO-NE; (2) current Department of Energy Resources solar photovoltaic data; and (3) new information relating to nontransmission alternatives. It argued that the new evidence was necessary for review of the project and submitted an affidavit in support of its motion. Eversource opposed the motion and submitted two supporting affidavits, arguing that the new data would not change any of the board's findings or conclusions, and that the data therefore did not satisfy the standard in 980 Code Mass. Regs. § 1.09(1) (2010) for reopening the record and hearing. The town filed a reply to Eversource's opposition and submitted a second affidavit responding to Eversource's opposition.

On December 2, 2019, the board issued a tentative decision denying the motion to reopen the record and approving Eversource's petition to construct the project using the

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<sup>13</sup> There were five active interveners before the board -- the towns of Sudbury, Hudson and Stow; Hudson Light and Power Department; and Protect Sudbury -- and approximately sixty individual participants.

preferred route. On December 18, 2019, the board issued its 246-page final decision.

The petitioners filed separate appeals from the final decision with a single justice of this court pursuant to G. L. c. 25, § 5. See Alliance I, 448 Mass. at 46. Eversource subsequently was permitted to appear as an intervener in the appeals. The parties filed a joint motion to consolidate the appeals, proceed on a single record, and impound confidential documents. After granting the motion, the single justice reserved and reported the case to the full court.

2. Discussion. a. Motion to reopen the record. Before reaching the merits, we first address the procedural issue raised by the town regarding its motion to reopen the record before the board to add more recent ISO-NE forecast data. Under the applicable regulations, a movant must "clearly show good cause for re-opening the hearing" to reopen the record. 980 Code Mass. Regs. § 1.09(1). The parties agree that, under board precedent, "good cause" only exists where the evidence, if admitted, would be likely to have a significant impact on the board's decision in the proceeding. The board denied the town's motion because it was not likely that the new data would have a significant impact on the board's decision. The town argues that the board erroneously relied on extrarecord information -- the affidavits and analysis submitted by Eversource in

opposition to the town's motion -- in denying the motion to reopen. Essentially, the town argues that without an evidentiary hearing it was error for the board to rely on Eversource's analysis of, and conclusions drawn from, new data that Eversource submitted in opposition to the motion.

We afford the board a great degree of deference when it rules on whether to reopen an administrative record. See Brockton Power Co. v. Energy Facilities Siting Bd., 469 Mass. 215, 219 (2014); Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 420 (2001) ("An agency may reopen a hearing, but we accord agencies broad discretion in deciding whether to do so . . ." [citation omitted]). The town characterizes the opposition materials as "extra-record" and argues that the board cannot rely on such extrarecord arguments when ruling on the motion to reopen. The very purpose of a motion to reopen the administrative record, however, is for the board to consider putting material that is not in the record (i.e., extrarecord material) into the record. The board must look at the extrarecord material to determine whether there is "good cause" to admit it. The board did just that here: it considered the materials and the affidavits submitted by both parties and ultimately determined that the new data would not have an impact on its decision because the new data did not change the fact

that there was already a need for additional energy supply.<sup>14</sup> We see no error in the board's decision to deny the motion to reopen.

b. Standard under G. L. c. 164, § 69H. The petitioners raise a number of challenges to various determinations made by the board, each of which we address infra. We begin, however, by addressing the framework of G. L. c. 164, § 69H. Section 69H provides that the board "shall implement the provisions contained in [§§] 69H to 69Q, inclusive, so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost" (emphases added). The statute identifies three objectives -- reliability, environmental impact, and cost -- and provides that the board must balance each of these three objectives by maximizing reliability and minimizing environmental impact and cost. See New Bedford v. Energy Facilities Siting Council, 413 Mass. 482, 485 (1992), S.C., 419 Mass. 1003 (1995) ("The statute mandates that the council balance environmental harm that would be caused by a new power plant against the other statutory objectives -- providing a necessary energy supply at the lowest possible

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<sup>14</sup> If we adopted the town's position, the board would have to rule on motions to reopen the administrative record without ever looking at the evidence that the movant wants added to the record or any arguments related to that evidence.

cost").<sup>15</sup> To be selected, a proposal need not be the best in each of the three categories. Nor is any single factor prioritized over the others. The factors are considered in combination with each other. An alternative can be evaluated higher in terms of reliability and lower in terms of cost or environmental impact or vice versa, and still be selected. It is the over-all balancing and evaluation of all three factors that determines whether the proposal satisfies the statutory criteria.

The petitioners' arguments reflect a misunderstanding or distortion of this framework. For example, Protect Sudbury at one point argues that the board erroneously approved the project because it did not have the least environmental impact or the lowest possible cost among available alternatives. But this is not what the statute requires. As explained supra, the board does not have to choose the alternative that has the least environmental impact; it instead must balance the three objectives based on the circumstances presented in each case.

The record before the board in this case demonstrates how the board will often have to balance the statutory objectives. One part of the board's analysis of the petition was weighing

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<sup>15</sup> At the time of our decision in New Bedford, § 69H used "necessary energy supply" instead of "reliable energy supply." See New Bedford, 413 Mass. at 485. The relevant statutory language is otherwise the same.



the project against the proposed nontransmission alternatives and transmission alternative two. The board determined that the project provided greater reliability at a lower cost but with more environmental impacts than transmission alternative two. And, while the nontransmission alternatives provided the least environmental impacts, the board determined that they were not as reliable as the project and would cost more. Later, when choosing the best route for the new transmission line, none of the proposals before the board provided the most reliability at the lowest cost with the least environmental impacts. The board determined that the overhead route provided the lowest cost with the greatest environmental impact; the all-street route provided the highest cost with the lowest environmental impact; and the preferred route fell somewhere in the middle on cost and was comparable to the all-street route on environmental impact. At no point did any one of these options provide the board with the greatest reliability at the lowest cost and with the fewest impacts to the environment. To carry out its mandate, therefore, the board had to compare the relevant costs and benefits of each proposal and determine whether the project as proposed "provide[d] a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." G. L. c. 164, § 69H.

We also recognize that there is a substantive as well as a comparative aspect to this three-factor analysis. For example, for any option to be selected, it must have "a minimum impact on the environment." To carry out this statutory mandate, the board expressly required "that environmental impacts of the project [be] minimized and the project achieve[] an appropriate balance among conflicting environmental concerns as well as among environmental impacts, cost, and reliability." Therefore, the board's assessment of the environmental impact of a proposal is not simply a relative exercise. That a proposal has the least environmental impact of the alternatives presented does not automatically mean that it satisfies the statutory requirement of having a "minimum impact on the environment." Rather, the board must scrutinize each option and ensure, consistent with § 69H, that the preferred option has the required "minimum impact on the environment." This is the appropriate statutory framework under which we must review the board's actions in this case. We next turn to the numerous specific challenges raised by the petitioners.

c. Board's decision. i. Standard of review. "In evaluating a claim that the board's determination is arbitrary, capricious, or unsupported by substantial evidence, we 'give[] great deference to the board's expertise and experience.'" Brockton Power Co., 469 Mass. at 223, quoting Alliance I, 448

Mass. at 51. "The board's interpretation of its 'statutory mandate will be disturbed only if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.'" Brockton Power Co., supra at 219, quoting Box Pond Ass'n, 435 Mass. at 416. As for the application of facts, "[o]ur 'review does not turn on whether, faced with the same set of facts, we would have drawn the same conclusion as [the siting board], but only "whether a contrary conclusion is not merely a possible but a necessary inference."'" Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 690 (2010) (Alliance II), quoting Goldberg v. Board of Health of Granby, 444 Mass. 627, 638 (2005). Given this deference, the "burden of proving that the decision is invalid . . . is a heavy one." Alliance I, supra.

ii. Need. We begin with the challenge to the board's determination that there was a need for additional energy resources. The town argues that the ISO-NE forecasts are too conservative because they base the existence of a need on the occurrence of rare contingencies. The board defended the use of these rare contingencies, explaining in its final decision that "[a] key role of reliability planning is to address contingencies that may be statistically unlikely, but such significant threats to reliable energy supply that they necessitate a certain remedy."

We discern no error in the board's use of the conservative N-1-1 criterion in assessing the existence of a need. Conservative forecast predictions are warranted, particularly given the importance placed on a reliable electric system. State law makes it clear that the residents of the Commonwealth simply cannot be exposed to foreseeable and avoidable power outages. See St. 1997, c. 164, § 1 (h) (Electric Utility Restructuring Act) ("reliable electric service is of utmost importance to the safety, health, and welfare of the commonwealth's citizens and economy"). See also St. 1997, c. 164, § 1 (a) ("electricity service is essential to the health and well-being of all residents of the commonwealth, to public safety, and to orderly and sustainable economic development"). If government and industry fail to properly plan and act to timely address our energy needs, enormous suffering can result.

The town also maintains that the forecasts should not have been relied on because they consistently overestimate future load growth. The board considered and rejected this argument. Again, we discern no error in the board's decision to use ISO-NE load forecasts in assessing whether there was a need for additional energy resources. We first note that these forecasts are commonly relied on by the board and other New England States. See NextEra Energy Resources, LLC v. Department of Pub. Utils., 485 Mass. 595, 615-616 (2020) (emphasizing reasonable

reliance on tracking system used by industry in New England region). Moreover, the board's determination of need here was based both on current need as well as projected future loads, particularly as forecast in the 2015 needs assessment. That assessment determined that existing transmission lines were insufficient to provide the subarea with the necessary energy supply in the event of certain contingencies based on pre-2013 usage. As explained supra, contingency planning is necessary and appropriate. Consequently, the board's conclusion of a then-existing need is not dependent on whether the future load forecasts provided by Eversource were somewhat overestimated. Accordingly, the board's determination was supported by substantial evidence.<sup>16</sup>

iii. Cost. Both petitioners challenge the board's assessments of cost as it relates to the project and several of the alternatives. For the nontransmission alternatives, the board compared the cost to the ratepayers for each. For transmission alternative two, the board used conceptual cost estimates to compare the cost of the proposal.<sup>17</sup> For much of the

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<sup>16</sup> During the evidentiary hearing, ISO-NE itself made this clear, as it told the board in response to an information request that the need for the project was not dependent on forecast growth in demand.

<sup>17</sup> A planning grade estimate has a range of plus or minus twenty-five percent. The less precise conceptual cost estimate

proceeding, Eversource relied on a conceptual cost estimate for the project as well. It eventually provided a planning grade estimate for the project, but only for the project.

Protect Sudbury argues that Eversource failed to "meet it[s] burden to submit cost estimates that provided any reasonable basis for a determination of lowest possible cost." It maintains that conceptual cost estimates are inherently inaccurate and that the board cannot engage in any meaningful comparison with alternatives using these estimates. It argues that the board therefore should require applicants to submit planning grade estimates for all options under consideration.

We discern no legal error in the board's decision to rely primarily on conceptual cost estimates when comparing the project with proposed alternatives. As the board explained,

"the [board's] balancing of environmental impact, cost, and reliability of supply takes place at a relatively early stage in the engineering design of a particular project. As a result, project cost estimates are typically developed only to an intermediate level of precision. Furthermore, applicants typically do not develop engineering design of alternatives to the same level of detail, so cost estimates for alternatives are necessarily less precise."

As a result, the board explained, it would be impractical and inefficient to require planning grade estimates for all of the options presented in a petition. Moreover, the board and the

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has a range from minus twenty-five percent to plus fifty percent.

petitioners were able to question Eversource's cost witnesses extensively. Eversource also provided detailed responses and documentation to the board in response to record requests. Any concerns with the accuracy or limitations of these cost estimates could have been addressed through the evidentiary hearing procedures. There was ample evidence upon which the board could reasonably assess the comparative cost of the proposals being considered. Therefore, we conclude that the board's reliance on conceptual cost estimates was reasonable.

Protect Sudbury's insistence that the board require planning grade estimates for each alternative is also arguably inconsistent with the time frames set out in G. L. c. 164, § 69J. This section encourages the board to issue a decision on a petition in a timely manner by providing that proceedings before the board should be completed in twelve months from the filing date. G. L. c. 164, § 69J (board "shall within twelve months from the date of filing approve [or reject] a petition to construct a facility"). Cf. Box Pond Ass'n, 435 Mass. at 415 & n.7 (construing similar one-year time frame for consideration of petition to construct generating facility, contained in G. L. c. 164, § 69J 1/4, as "directory and not mandatory"). Protect Sudbury acknowledges that obtaining a planning grade estimate for just the all-street route would take ten to twelve months. If Eversource had to provide such estimates for every proposal

it considered, or all the proposals of interest to objectors, that could result in substantial delay to a proceeding that already lasted over thirty-two months. Such a delay could frustrate the board's ability to complete the approval process in a timely manner, and thus leave the Commonwealth's energy needs unaddressed and its residents unprotected.<sup>18</sup>

iv. Alternative approaches. After determining that there was a need for additional energy resources, the board considered whether there were alternative approaches that could satisfy the need. The board focused on several proposed nontransmission alternatives and transmission alternative two. It ultimately concluded that the nontransmission alternatives and transmission

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<sup>18</sup> Protect Sudbury appears to argue that because the ranges in the conceptual cost estimates overlap, the board could have treated any of the alternatives presented as having the lowest possible cost. The board properly rejected this argument. It explained that the direction of deviation from the baseline estimate would likely be the same across projects; if the cost of the preferred route exceeded its baseline estimate, the cost of the other routes would also be expected to exceed their baseline. This is because the cost items that comprise each estimate, such as the cost of labor or materials, are the same or similar for each route. This is one reason the board uses the baseline estimates rather than the ranges to compare project costs, a practice also used by ISO-NE. See NextEra Energy Resources, LLC, 485 Mass. at 615-616 (recognizing significance of industry standard).



alternative two provided lower reliability at higher costs than the project.<sup>19</sup>

Again, we discern no reason to disturb the board's findings or conclusions with regard to the alternatives. The board concluded that the project was superior to the nontransmission alternatives for several reasons, each of which is supported by the evidence that was before it. It concluded that the nontransmission alternatives were not as reliable as the project, as there was uncertainty whether a combination of nontransmission alternatives could feasibly meet the need:<sup>20</sup>

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<sup>19</sup> The board did find that at least some of the nontransmission alternatives were "preferable" to the project on environmental impacts.

<sup>20</sup> The town argues that the board failed to appreciate the significance of Eversource's repeated reduction in the amount of additional electricity that a nontransmission alternative would need to be capable of adding (injection amount). Eversource initially estimated that 264 megawatts of energy capacity were required for nontransmission alternatives to meet the need. Over the course of the proceeding before the board, Eversource lowered the required capacity to 115 megawatts. Eversource used this revised estimate when assessing the proposed nontransmission alternatives. The town argues that this reduction -- totaling fifty-five percent by the end of the hearing -- undermines the reliability of Eversource's analysis regarding nontransmission alternatives. The board noted the reduction but ultimately gave it little weight in its analysis. The town overstates the importance of the injection amount in the board's analysis. It is clear from the board's consideration and rejection of nontransmission alternatives that the necessary injection amount was not a major consideration for the board. Rather, the board focused on concerns regarding the reliability and feasibility of these solutions being used to meet an immediate need.

"Without compelling evidence that a substantial cut in peak power demand in the Marlborough [s]ubarea is feasible, and likely to occur, relying on such an expectation is not an appropriate response to the identified, and immediate, need." The board also concluded that these alternatives were inferior on cost, as they would result in a higher annual cost to ratepayers than the project. Again, each of these findings is supported by substantial evidence in the record before the board. Neither petitioner provides us with any reason why we should overrule the board's reasoned balancing with regard to the reliability and cost of the nontransmission alternatives. See Brockton Power Co., 469 Mass. at 223, citing Alliance I, 448 Mass. at 51.

Similarly, although the project carried a "greater potential for adverse environmental impacts" than transmission alternative two, the board nonetheless concluded that "the overall benefits of the project outweigh the environmental advantages" of transmission alternative two. These benefits included the increased reliability provided by the [p]roject at a lower cost. On reliability, the board valued the flexibility that the project would bring as a new, distinct energy supply source in the region, thereby providing greater geographical diversity.

Protect Sudbury argues that the board's determination on reliability was error, as the board credited the project with "enhanced reliability," a term that has no statutory basis. All that the board did, however, was determine that a new transmission facility brought greater reliability, including geographical diversity, to the subarea when compared with simply increasing the capability of existing facilities. For this reason, it concluded that the project provided greater reliability than transmission alternative two. Such a decision falls squarely within the discretion and expertise of the board. See Alliance I, 448 Mass. at 51.

On cost, the record before the board showed that transmission alternative two would be approximately \$20 million more expensive than the project. In addition to its challenge to the use of a conceptual cost estimate for transmission alternative two, discussed supra, Protect Sudbury argues that the cost estimate was not a reliable basis on which the board could make a decision. It argues that Eversource simply provided the cost estimate provided by NEP without explaining how NEP developed the estimate or demonstrating its reliability. The board considered Protect Sudbury's arguments and rejected them, concluding that NEP's direct participation was not required and that it was reasonable to rely on evidence given to Eversource. It also explained that both the board and the

petitioners were able to seek information from NEP through Eversource over the course of the proceeding. We agree with the board's position that it was reasonable to rely on the cost estimate provided by NEP for the purposes of comparing the cost of transmission alternative two to the cost of the project.<sup>21</sup>

Given these findings, we conclude that the board's balancing of the trade-offs and its approval of the project over transmission alternative two were supported by substantial evidence. See Brockton Power Co., 469 Mass. at 223, quoting Alliance I, 448 Mass. at 51.

v. Route. Once it determined that a new transmission facility was the best approach for meeting the identified need, the board then considered whether the route proposed by Eversource was superior to alternative routes. See G. L. c. 164, § 69J (petition must identify "other site locations"). The board focused its analysis on Eversource's preferred route -- the underground route -- and the two primary alternative routes -- the overhead route and the all-street route.<sup>22</sup> For cost, the board determined that the overhead route

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<sup>21</sup> We note that in an amicus brief submitted to this court, NEP defended the reliability of its cost estimate as "thorough, accurate and complete."

<sup>22</sup> The board focused on these three routes because even though other routes were included in the petition, it concluded that there was no evidence in the record that any other route would be clearly superior to these three routes. The board also

had the lowest cost and that the all-street Route had the highest cost, with the preferred route falling in the middle. For environmental impact, the board concluded that the preferred route and the all-street route were comparable and that both were superior to the overhead route. For reliability, the board concluded that all three routes were comparable.

Given these findings, the board determined that the preferred route was superior to the overhead route because it had fewer adverse environmental impacts. This reduction in environmental impact meant that the preferred route's higher cost -- approximately \$28.3 million more than the overhead route -- was justified. The board also concluded that the preferred route and the all-street route were comparable on both reliability and environmental impact; therefore, the higher cost of the all-street route -- approximately \$18.5 million more than the preferred route and \$46.8 million more than the overhead route -- was not justified. Accordingly, the board found that the preferred route was superior on balance to both the overhead and all-street routes.

Protect Sudbury argues that the board was wrong because the all-street route was comparable to the preferred route on cost.

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concluded that Eversource did not exclude any of the petitioners' preferred routes from being comprehensively reviewed as part of the route selection process.

We readily reject this argument as the evidence before the board demonstrated that the preferred route was approximately \$18.5 million less expensive than the all-street route. The petitioners advance a number of arguments as to why the board's cost calculations were incomplete and suggest that the cost between these two routes was not as significant as the board determined. None of these arguments has any merit, however, as the board's determination that the preferred route was superior to the all-street route on cost was supported by substantial evidence.<sup>23</sup>

We also reject the petitioners' arguments challenging the board's determination that the preferred route and the all-street route were comparable on environmental impact. The petitioners raise two points about the manner in which the board weighed and assessed the environmental impacts that merit discussion. The petitioners contend that the board should have given more weight to the permanent impacts caused by construction on the preferred route as opposed to the temporary impacts on the all-street route. The petitioners also argue

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<sup>23</sup> We also reject the town's argument that the board essentially always must approve of a project that costs more but has fewer adverse environmental impacts. The fact that the board determined that the project was superior to the overhead route does not mean that the board must always select a route with higher costs but lower environmental impacts.

that the board failed to weigh impacts on the natural environment more heavily than impacts on the built environment.

We agree with the board that nothing in the statutory framework dictates how the board must balance these different environmental considerations in every case. The statute does not categorize or prioritize impacts as argued by the petitioners. To analyze the environmental impacts, Eversource used seventeen different criteria, including criteria that measured the impact to both the natural environment and the built environment.<sup>24</sup> It also assigned weights to each criterion, taking into consideration the potential temporary and permanent impacts that could result from each. Thus, Eversource's thorough, multifaceted analysis of the environmental impacts on the different routes reasonably accounted for the various types of impacts that could result. Indeed, the board correctly highlighted that Eversource's analysis of the environmental impacts "provides a balanced consideration of both impacts to the natural and built environments, and places greater emphasis on the more impactful criteria, whether these are related to short-term or long-term effects." As we have also previously explained, some impacts, although temporary, can still be

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<sup>24</sup> Tellingly, neither the town nor Protect Sudbury argues that any of these criteria should not have been used. Similarly, neither argues that Eversource should have considered other criteria.

significant.<sup>25</sup> See, e.g., Brockton v. Energy Facilities Siting Bd., 469 Mass. 196, 214, S.C., 469 Mass. 215 (2014) ("traffic from construction and regular deliveries presents potentially significant environmental impacts").

To be sure, even the board acknowledges that "if all else is equal, then a permanent impact should be accorded more weight than a temporary one." But under § 69H, the board has flexibility and can address these issues on a case-by-case basis, focusing on the specific facts presented. In sum, the distinctions between environmental impacts that the town seeks to draw are not set out in the statute, nor is the over-all environmental analysis of the board in any way arbitrary or capricious or unsupported by substantial evidence. Rather, the board undertook a comprehensive comparative analysis of environmental impacts and carefully explained its reasoning.

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<sup>25</sup> For example, the board determined that the impact from construction along the all-street route, although temporary, would be substantial. It explained: "At a typical residence or business location along this route, there would be roughly two to three weeks of trench-related construction activities, including pavement sawing, trench excavation, duct bank installation, and temporary pavement patching." Moreover, this disruption would affect a greater number of residents, as the all-street route had 234 more residential units abutting the route than the preferred route.



Thus, deference is due. See Brockton Power Co., 469 Mass. at 223, quoting Alliance I, 448 Mass. at 51.<sup>26</sup>

Ultimately, there was no error in the board's decision to approve the preferred route over the all-street route. The board explained its rationale in its detailed analysis and conclusions, all of which are supported by substantial evidence. It is simply not our role to displace them with the town's preferred balancing of the statutory criteria. See, e.g., Sy v. Massachusetts Comm'n Against Discrimination, 79 Mass. App. Ct. 760, 765 (2011) ("substantial evidence standard does not permit the reviewing court to substitute its judgment for that of the agency even if there is evidence to support the court's point of view"). Therefore, we reject the challenges to the board's approval of the preferred route over the all-street route.

vi. Public policy of the Commonwealth. The town also challenges the board's conclusion that the project is consistent with the current health, environmental protection, and resource

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<sup>26</sup> The board also determined that the preferred route satisfied the additional requirement that it had a minimum impact on the environment. The board found "that with the implementation of the specified conditions and mitigation presented above, and compliance with all applicable local, [S]tate, and [F]ederal requirements, the environmental impacts of the [p]roject along the MBTA Underground Route would be minimized." It further found "that the [p]roject along the MBTA Underground Route would achieve an appropriate balance among conflicting environmental concerns as well as among environmental impacts, reliability, and cost."

use and development policies of the Commonwealth. See G. L. c. 164, § 69J, fourth par. The board properly relied on the declaration of the Legislature that reliable electricity service "is essential to the health and well-being of all residents of the [C]ommonwealth," in the Electric Utility Restructuring Act. St. 1997, c. 164, § 1 (a). The board then correctly emphasized that the project received a final environmental impact report certificate from the Secretary of Energy and Environmental Affairs "affirming the [p]roject's consistency with [the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H,] requirements that all [p]roject-related impacts to the environment have been properly and adequately identified, minimized, and mitigated," and that Eversource "is required to obtain all environmental approvals and permits required by [F]ederal, [S]tate, and local agencies and must be constructed and operated according to those permits and approvals." The board further determined that the project is consistent with environmental protection policies of the Commonwealth, including the Global Warming Solutions Act of 2008, St. 2008, c. 298, because it would generate minimal greenhouse gas emissions, have no adverse climate change impacts, and facilitate the integration of renewable energy resources by improving the reliability of the regional transmission system. Finally, it concluded that, subject to specific mitigation and conditions

required by the board, the project was consistent with the resource use and development policies of the Commonwealth because it was designed to minimize impacts to natural and cultural resources and would promote a more robust transmission system that is better positioned to support the objectives of the Energy Diversity Act.<sup>27</sup>

On appeal, the town argues that a nontransmission alternative solution would be "far more consistent" with the more recent policies of the Commonwealth. It also argues that the Electric Utility Restructuring Act is outdated, and that there have been a "plethora of climate and environmental policies recently adopted by the Commonwealth" that emphasize the importance of environmental and other public health concerns over the reliability of the transmission of electricity.

Once again, the town provides no proper legal basis to reverse the board's assessment of the project. The town ignores the statutorily required balancing of reliability and cost along with environmental impacts and dismisses the board's thorough application of that balancing test. The town also ignores the board's careful consideration of the need to minimize

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<sup>27</sup> The board explained that the Energy Diversity Act, St. 2016, c. 188, requires utilities like Eversource to procure additional renewable energy resources.

environmental impacts, including those emphasized by recent environmental statutes.

We also emphasize that it is the responsibility of the Legislature, not this court, to determine that an act has become outdated. See, e.g., Liberty Sq. Dev. Trust v. Worcester, 441 Mass. 605, 619 (2004) (urging Legislature to address "outdated" statute); Bongaards v. Millen, 440 Mass. 10, 34 (2003) (emphasizing that it is role of Legislature to address past statutes even where "there appears to be no dispute that [a] statute is outdated and inadequate"). We have no power to decide that a statute's usefulness has faded out over time. Although we must harmonize older statutes with newer ones, and more general with more specific ones, we discern no difficulty doing so in the instant case. See Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 620 (2019), quoting School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, SEIU, 438 Mass. 739, 751 (2003) ("In the absence of explicit legislative commands to the contrary, we construe statutes to harmonize and not to undercut each other"). We emphasize that the Electric Utility Restructuring Act is a relatively recent act that is specifically directed at the energy issues we consider here. Importantly, none of the cited acts has curtailed, in any way, the significance of a reliable electricity supply to the health of the Commonwealth. And, as

the board explained, the project helps advance many of the recent environmental and resource use policies of the Commonwealth by enabling future development of renewable resources.

Finally, we recognize, as did the board, that this approval is a single step, albeit a significant one, in a multistep process to secure approval for the construction of the project. Before Eversource may proceed with construction, it must have secured all necessary approvals from numerous other State and local authorities, including those responsible for protecting the environment and other resources. See Alliance II, 457 Mass. at 668 (§ 69J approval necessary before issuance of any construction permits). We therefore reject the town's argument that the board erred in concluding that the project is consistent with the policies of the Commonwealth, as they are required to be considered by the board.

3. Conclusion. For the foregoing reasons, we affirm the order of the board.

So ordered.