

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Petition of Cape Wind Associates, LLC)	EFSB 07-8
for a Certificate of Environmental Impact)	
and Public Interest)	July 28, 2008

RULING ON MOTIONS RE EFSB JURISDICTION RELATIVE TO DRI DECISIONS AND
ON MOTIONS RE SCOPE OF PROCEEDING

I. Background

In a Final Decision issued pursuant to G.L. c. 164, § 69J, the Energy Facilities Siting Board (“Siting Board”) on May 11, 2005, approved the petition by Cape Wind Associates, LLC (“Cape Wind” or “Company”) and Commonwealth Electric Company d/b/a NSTAR Electric to construct two new 115 kV electric transmission lines, partly undersea and partly underground (“Transmission Project”), intended to interconnect a proposed offshore wind generating facility in Nantucket Sound (“wind farm”) with the regional electric grid on Cape Cod (together, “combined project”).¹ On October 18, 2007, the Cape Cod Commission (“Commission”) denied Cape Wind’s application for Development of Regional Impact (“DRI”) approval for the Transmission Project. Without DRI approval, Cape Wind states, the Company cannot construct the Transmission Project, and local permitting authorities on Cape Cod cannot issue other approvals required for Transmission Project construction.

On December 28, 2007, Cape Wind filed with the Siting Board an Application for a Certificate of Environmental Impact and Public Interest (“Certificate”). In its Application, Cape Wind has asked the Siting Board to exercise its authority pursuant to G.L. c. 164, §§ 69K-69O½ (“Certificate statute” or “certificate provisions”) to issue a Certificate containing a DRI approval for the Project. Cape Wind also has asked that the Certificate include eight additional state and local approvals necessary to construct the Transmission Project (“eight additional approvals”) (Exh. CW-2, at 1, 7-8; Att. C).

In accordance with the Procedural Schedule established on February 26, 2008, the parties in March and April, 2008, filed a number of preliminary motions and supporting memoranda, as well as responses, replies, and sur-replies relative to the motions. Although this ruling does not address all motions filed by the parties, it does address: (1) motions pertaining to the Siting

¹ See Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, 15 DOMSB 1 (May 11, 2005) (“Final Decision”).

Board's jurisdiction to issue a DRI decision in a Certificate proceeding; (2) motions addressing whether the scope this proceeding should be limited to the Transmission Project only, or should also include the proposed wind farm; (3) a motion by the Commission to limit the record in the proceeding; and (4) a motion by the Commission to remand the project for further review by the Commission.²

II. EFSB Jurisdiction to Override the Commission's DRI Denial

A. Positions of the Parties

Two of the intervenors, the Commission and the Alliance to Protect Nantucket Sound ("Alliance"), have filed partial motions to dismiss the Company's Certificate Application, **asserting that the Siting Board lacks jurisdiction to issue a Certificate containing a DRI approval.** As grounds, each asserts that Section 17 (b) of the Cape Cod Commission Act ("CCC Act") grants exclusive authority to review DRI decisions to the Barnstable Superior Court and the Massachusetts Land Court. (Alliance Memorandum in Support of Motion to Dismiss at 21-22 (March 14, 2008) ("Alliance Memorandum"); Commission Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction at 3-8 (March 14, 2008) ("Commission Memorandum"). The Commission moves to dismiss on three additional grounds: (1) that the Siting Board lacks authority to override a DRI decision because the CCC Act does not expressly subordinate the Commission's authority to issue DRIs to the authority of the Siting Board to override state and local permitting decisions under the Certificate statute (Commission Memorandum at 5-8); (2) that the DRI denial was a procedural denial, not a final Commission decision; and (3) that Cape Wind has failed to meet certain requirements in Section 69L (4) of the Certificate statute (Commission Motion to Dismiss for Failure to Comply with Statutory Preconditions at 1-3 (March 14, 2008)).

Cape Wind and Clean Power Now oppose the motions to dismiss. Both disagree with the Commission's position that Cape Wind needed to appeal the DRI denial to Barnstable Superior Court or Land Court, and cannot seek an override of the Commission's decision from the Siting

² Additionally, certain of the parties' motions question the Siting Board's jurisdiction to issue the eight additional approvals requested by the Company. That issue is not addressed here. Because of the complexity and importance of the question, Staff will take evidence during hearings concerning the eight additional approvals and may hear additional argument from the parties before issuance of a ruling. *See, e.g., Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board*, 448 Mass. 45, 51-52 (2006) (upholding, inter alia, the Siting Board's development of new standard of review via adjudication: "[b]y proceeding in this manner, the board was able to consider the legal question in a specific factual context. The board's decision to wait until after the evidentiary record was complete maximized the likelihood that the standard it developed would be workable and grounded in the evidence").

Board. They assert that no conflict exists between the Cape Cod Commission Act (“CCC Act”) and the Certificate statute; the CCC Act states that appeals of DRI decisions are jurisdictional to the Superior Court and Land Court, but, they assert, this proceeding does not constitute an appeal of the Commission’s DRI decision (Cape Wind Opposition to Motions to Dismiss at 63-64 (March 26, 2008) (“Cape Wind Opposition”); Memorandum of Clean Power Now in Opposition to Intervenor Opponents’ Motions to Dismiss at 28-29 (March 26, 2008) (“Clean Power Opposition”). In further support, Clean Power Now points to language in the Certificate statute granting the Siting Board authority to issue a certificate “[n]otwithstanding the provisions of any other law to the contrary” (Clean Power Opposition at 27).

With respect to the finality of the Commission’s decision, Clean Power Now asserts that it is clear from the evidence in the record that the Commission denied Cape Wind’s DRI application (Clean Power Opposition at 25). Clean Power Now also points out that the Commission argues simultaneously, and irreconcilably, that the DRI decision is not final enough to trigger Siting Board review, yet is sufficiently final for judicial review (*id.* at n.11).

Cape Wind and Clean Power Now note that the Commission and Alliance rely on the doctrine of implied repeal in asserting that the 1989 CCC Act exempts Commission decisions from operation of the 1973 Certificate statute, since neither statute contains such an exemption. Citing several SJC decisions, both note that implied repeal “is highly disfavored” by the Massachusetts courts (Cape Wind Opposition at 59-63; Clean Power Opposition at 27-28).

Cape Wind further asserts that the Commission is estopped, on two grounds, from challenging in this proceeding the Siting Board’s jurisdiction to issue a DRI decision. First, Cape Wind points to an SJC decision in which the court “conclusively held” that a Certificate proceeding “is not a vehicle for relitigation of issues that have already been fully and fairly determined”(Cape Wind Reply re Motion to Establish Scope of Proceeding at 12 (April 4, 2008).³ Second, Cape Wind asserts that the Commission has essentially waived its right to raise the issue of Siting Board jurisdiction, because the Commission raised the same issue in a recent Certificate proceeding; the Siting Board ruled against the Commission’s position; and the Commission did not appeal the Board’s final decision (*id.* at 12).⁴

³ The Company references City Council of Agawam v. Energy Facilities Siting Board, 437 Mass. 821 (2002), the first proceeding conducted by the Siting Board under the Certificate statute.

⁴ The Company is referring to Colonial Gas Company d/b/a KeySpan Energy Delivery New England, EFSB 06-1 (May 22, 2007), the most recent Certificate proceeding.

B. Analysis and Findings Re EFSB Jurisdiction

1. EFSB Jurisdiction to Override a DRI Decision

The Siting Board's primary mandate is to implement the provisions of the Siting statute "so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." G.L. c. 164, § 69H. The Certificate provisions in the Siting statute are a tool created by the Legislature to assist the Board in carrying out this mandate. Where a permitting decision by a state or local agency would delay or prevent the construction of a proposed energy facility, the Certificate provisions allow the Siting Board to override that decision and to issue a Certificate containing the necessary approval. See G.L. c. 164, §§ 69K, 69L. The Certificate provisions thus were enacted specifically to allow the Siting Board, under appropriate circumstances, to determine that the Commonwealth's interests in a sufficient and reliable energy supply outweigh the interests of a state or local permitting agency in exercising its otherwise legitimate permitting authority. The Certificate process was intended to ensure "that local boards do not use their power over licenses and permits to thwart the needs of the broader community for a reliable, affordable, and environmentally sound energy supply." City Council of Agawam v. Energy Facilities Siting Board, 437 Mass. 821, 828 (2002).

The Board's override authority extends to "all individual permits, approvals, or authorizations . . . necessary for the construction and operation" of a proposed energy facility. G.L. c. 164, § 69K (emphasis added). There is no express exemption in either the Certificate statute or the CCC Act for DRI decisions; the Commission and Alliance do not assert that an express exemption exists. Rather, they argue that an implied exemption can be found in the CCC Act.

The Commission and Alliance point first to Section 17(b) of the Act. They assert that this provision allows review of DRI decisions exclusively by the Barnstable Superior Court and the Land Court and, therefore, that it prohibits Siting Board review of DRI decisions. Section 17 (b) provides that "any person aggrieved by a commission decision on a development of regional impact may *appeal* the commission's decision to the Barnstable county superior court or the land court" (emphasis added). Thus, Section 17 (b) identifies the two forums in which judicial review of DRI decisions may be sought. An applicant in a Siting Board Certificate proceeding, however, is not seeking judicial review of a permitting agency's decision. The applicant is exercising an independent statutory right to seek a Certificate for its proposed energy facility from the Siting Board. The arguments to dismiss based on Section 17(b) are unpersuasive.

The Commission next argues that because the Legislature did not expressly provide in the CCC Act that DRI decisions may be overridden by the Siting Board, the Siting Board lacks the legal authority to do so. The Commission notes that the Act expressly classifies the Commission as a "local board" for purposes of G.L. c. 40B, the Commonwealth's affordable housing

development statute. As a result, the Commission's usual permit-issuing authority under the CCC Act is limited in some respects. See CCC Act, Section 11 (k); G.L. c. 40B, §§ 20-23. The Commission argues that the Legislature could have included a similar provision in the CCC Act, i.e., a provision expressly providing that the Commission's authority to issue DRI decisions is qualified by the Board's superseding authority to issue Certificates overriding such decisions. Since the Act does not include such a provision, the Commission argues, it follows that the Legislature did not intend for the Commission's authority to be superseded by the Siting Board's.

The Siting statute, including its Certificate provisions, was enacted in 1973. The Cape Cod Commission Act was enacted by the Legislature approximately 15 years later, in 1989. It is presumed that the Legislature was aware of the Certificate provisions when it enacted the CCC Act. Suliveres v. Commonwealth, 449 Mass. 112, 116 (2007) ("We assume that, when it enacts legislation, the Legislature is not only aware of existing statutes, but also is aware of the prior state of the law as explicated by the decisions of this court"); Commonwealth v. Callahan, 440 Mass. 436, 440 - 441 (2003) ("When the Legislature enacts legislation '[w]e assume . . . that [it is] aware of existing statutes'"). The Legislature could have -- but did not -- include in the CCC Act a provision exempting Commission DRI decisions from operation of the Certificate statute. It therefore would be wholly improper for the Siting Board to create such an exemption. Commonwealth v. Burgess, 450 Mass. 366, 371 (2008) ("Where the statute is clear, we interpret it as written."); Commonwealth v. Sargent, 449 Mass. 576, 607 (2007) ("We will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design"); Suliveres v. Commonwealth, 449 Mass. at 117 ("The Legislature is free to amend statutes; [h]owever, where the Legislature has chosen not to do so, 'it is not for this court . . . to rewrite the clear intention expressed by the statute'"); Commonwealth v. Katsirubis, 45 Mass. App. Ct. 132, 135 (1998) ("when construing two or more statutes together, '[w]e are loath to find that a prior statute has been superseded in whole or in part in the absence of express words to that effect or of clear implication.'").

I can find no sound basis for reading the complete silence of the Legislature regarding the interrelationship between the Commission's authority under the CCC Act and the Siting Board's authority under the Certificate statute as evidence of legislative intent to exempt DRI decisions from operation of the Certificate statute.⁵

2. Finality of the Commission's DRI Denial

The Commission asserts that its DRI denial was not final, as it was a procedural denial

⁵ In contrast, the Legislature expressly addressed in the CCC Act the interrelationship between the Commission's permitting authority under the Act and the comprehensive permitting process established by G.L. c. 40B. This would seem to further undercut, rather than support, the argument that the Legislature signaled by remaining silent that the Commission uniquely should be exempt from the override process.

and was issued without prejudice. However, in the DRI decision itself, the Commission states twice that it “denies” the Company’s DRI application. The Commission also states that further review of the project by the Commission would require submittal by Cape Wind of another DRI application (Exh. CW-2, Att. M at 2, 62). The cover letter forwarding the DRI decision to Cape Wind references the DRI appeal process, stating that the Commission will record its decision with the Barnstable County Registry of Deeds “[a]fter the appeal period has lapsed and no appeal has been filed or that if such appeal has been filed, that it be dismissed or denied” (*id.* at (I)). Based on the record, the Commission’s DRI decision is reasonably considered a final decision. Accordingly, the motions to dismiss seeking dismissal of the Company’s Certificate Application on the basis that the DRI denial was not a final decision are denied.⁶

3. Conformance of the Company’s Application with G.L. c. 164, § 69L (4)

G.L. c. 164, § 69L (4) requires a Certificate applicant to include in its Application “a representation as to the applicant’s inability to proceed with construction or operation of the facility by reason of the denial” of a necessary approval. The Commission asserts that its DRI denial does not prevent Cape Wind from constructing the project. However, the record shows that the Commission disapproved Cape Wind’s DRI application and, as set forth above, that the Commission’s decision was final. Section 13(e) of the CCC Act expressly provides that “[i]f the Commission disapproves the development of regional impact no further work may be done on the development.” Citing section 13(e), the Company states in both its Initial Petition and its Application that it cannot proceed with the Transmission Project because of the Commission’s decision (Exhs. CW-1, at 29; CW-2, at 29). The record supports a finding that Cape Wind cannot proceed with its proposed project while the Commission’s DRI denial is in effect.

G.L. c. 164, § 69L (4) also requires an applicant to represent that it made a good faith effort to obtain the permit for which the applicant seeks the Certificate. The Commission’s stated reason for its DRI denial was Cape Wind’s failure to provide sufficient information regarding the project (Commission Memorandum at 1-2). The Commission and Alliance suggest that Cape Wind’s failure to provide this information may have constituted a lack of good faith effort by the Company to obtain DRI approval (Commission memorandum at 3, 7; Alliance Memorandum at 22). The record shows that the combined project has been the subject of extensive environmental review by a number of different federal and state agencies, and that a great deal of the information generated regarding the project has been available to the Commission. This includes, for example, the Final Decision and record in EFSB 02-5 (the Siting Board’s transmission line approval proceeding) and the Environmental Notification Form, Draft

⁶ It has previously been determined, in another Certificate proceeding involving the Cape Cod Commission, that the Commission’s DRI decisions are final agency decisions. See Colonial Gas Company d/b/a KeySpan Energy Delivery New England, EFSB 06-1, *Ruling on Cape Cod Commission Motion to Dismiss* (May 10, 2007).

Environmental Impact Report, Final Environmental Impact Report, and the Certificate issued by the Secretary of Environmental and Energy Affairs for the project, issued pursuant to the Massachusetts Environmental Policy Act. At this stage of the proceeding, I cannot make a finding that Cape Wind failed to make a good faith effort to obtain DRI approval from the Commission. The motions to dismiss based on the Company's asserted noncompliance with G.L. c. 164, § 69L (4) are denied.

III. Scope of the Proceeding

A. Positions of the Parties

1. The Commission, the Alliance, and the Town of Barnstable

The Commission asserts that the Siting Board's statutory mandate to minimize environmental impacts requires the Board to consider all project-generated impacts that occur within the Commonwealth, even if the impacts are attributable to the wind turbines or other components of the combined project located in federal waters (Commission Memorandum in Support of Motion to Define Scope of Proceeding at 5 (March 14, 2008) ("Commission Scope Memorandum"); Commission Response to Jurisdictional Motions at 1-2 (March 26, 2008).

The Alliance asserts that the Siting Board's review in a Certificate proceeding necessarily must be as broad as the jurisdiction and scope of review of the agencies whose permitting decisions would be displaced by the Board in a Certificate proceeding. Thus, since the Commission's review of the project encompassed in-state impacts of the wind farm, so must the Siting Board's (Alliance Opposition to Motions to Limit Scope of Proceeding at 10-16 (March 26, 2008) ("Alliance Opposition"). The Alliance additionally asserts that the Siting Board must consider the impacts of the combined project because the Certificate statute requires much broader findings than are required for the review of a proposed energy facility under G.L. c. 164, § 69J (*id.* at 10-11). Finally, the Alliance additionally asserts that an important distinction exists between an agency's jurisdiction and the permissible scope of agency's review once jurisdiction attaches (Alliance Opposition at 3, 8-10). The Alliance points to case law in other contexts which, it asserts, are analogous to the present situation and support review in this proceeding not only of the Transmission Project, but of all in-state impacts attributable to the combined project (*id.* at 4-8).

The Town of Barnstable ("Town") states that it adopts and supports the views of the Alliance and the Commission relative to the appropriate scope of the Siting Board's review (Town Memorandum in Response to Motions at 1 (March 26, 2008).

2. Cape Wind, CLF, Clean Power Now, and DEP

Both Cape Wind and the Conservation Law Foundation assert that, consistent with the

Siting Board's exercise of jurisdiction in the transmission line approval proceeding, as affirmed by the Massachusetts Supreme Judicial Court ("SJC"), the scope of this proceeding should be limited to those portions of the Transmission Project located within Massachusetts or within the three-mile jurisdictional limit of Massachusetts waters (Cape Wind Memorandum Regarding Scope of Proceeding at 1 (March 14, 2008) ("Cape Wind Memorandum"); CLF Memorandum in Support of Motion to Limit Scope at 1 (March 14, 2008) ("CLF Memorandum"). Cape Wind and CLF note that the U.S. Supreme Court, as well as the U.S. First Circuit Court of Appeals and the federal District Court of Massachusetts, have specifically determined that jurisdiction over the middle of Nantucket Sound, including the area where the wind farm would be located, lies with the federal government, and not with the Commonwealth (CLF Memorandum at 5, citing United States v. Maine, 475 U.S. 89, 93-94 (1986); Cape Wind Memorandum at 4-10). CLF notes further that, in addition to the Siting Board itself, other Massachusetts agencies, such as the Department of Environmental Protection ("DEP") and MEPA, have acknowledged that their review of the Cape Wind project is limited to those elements of the project that lie within Massachusetts or Massachusetts waters (CLF Reply to Opposition to Motion to Limit Scope at 3-7 (April 4, 2008). CLF asserts that no legal authority has been offered to support the Alliance's asserted distinction between jurisdiction and scope of the proceeding (id. at 1-2).

Clean Power Now concurs with Cape Wind and CLF that extensive federal and state case law exists which definitively precludes state jurisdiction over the wind farm or any other components of the combined project located in federal waters (Clean Power Now Memorandum Regarding Scope of Proceeding at 1 (March 14, 2008)). Clean Power Now asserts in addition that, because this issue has previously been addressed and decided by the Siting Board and by federal and state courts, the doctrine of collateral estoppel precludes re-litigation of the issue here (id. at 3-8).⁷

DEP states that it concurs with CLF's reasoning, and notes that limiting review of the project to the facilities located within Massachusetts state waters is consistent with DEP's exercise of its jurisdiction over proposed projects with components in both state and federal waters (DEP Response to Motions on Jurisdictional Issues at 2-3 (March 26, 2008)).

⁷ The Commission asserts that the doctrine of collateral estoppel, or issue preclusion, is inapplicable, because neither the Siting Board nor the courts have addressed the impacts of the proposed wind farm within Massachusetts (Commission Response to Jurisdictional Motions at 2-8 (March 26, 2008). The Commission also emphasizes that it does not suggest that the Board or the Commission itself should regulate the wind farm; rather, the Commission advocates that impacts of the wind farm that occur within Massachusetts or Massachusetts waters should be reviewed (id. at 8).

B. Analysis and Findings Re Scope of Proceeding

None of the parties to this proceeding dispute that the wind farm proposed by Cape Wind would be located in federal waters, beyond the three-mile limit of Massachusetts territorial waters. Each also acknowledges that, as a result, the courts have determined definitively that the Commonwealth has no jurisdiction over the wind farm project. Nevertheless, the Commission and the Alliance assert that the scope of this proceeding should encompass the wind farm or, at a minimum, impacts of the wind farm within Massachusetts.

Three principal arguments are advanced in support of the position taken by the Commission and the Alliance. First, the Commission and the Alliance draw a distinction between exercising jurisdiction over a non-jurisdictional project and evaluating its impacts. The Commission asserts that the latter is permissible because it would not constitute regulation of the non-jurisdictional project. Second, the Commission asserts that the Siting Board is required to take into account impacts of the wind farm on Massachusetts, in order to fulfil the Board's statutory obligation to minimize environmental impacts in the Commonwealth. Finally, the Commission asserts that the Siting Board must review the in-state impacts of the wind farm because the Commission considered these impacts in its review of the Company's DRI application, and the scope of Siting Board review in a Certificate proceeding must be at least as broad as the review undertaken by the agency or agencies whose permits are the subject of the proceeding.

In approving the Company's proposed transmission lines in 2005, the Siting Board expressly excluded the wind farm from the permissible scope of the proceeding, stating that the Board "lack[ed] jurisdiction to review the wind farm because as currently proposed, it would lie solely in federal waters." Final Decision at 13, n.2. The SJC has affirmed the Board's position. Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45, 48 (2006) ("The area in which the wind farm itself is proposed to be built is located in Federal waters and, thus, falls beyond the scope of the Board's jurisdiction"). The Board's position in the transmission line approval proceeding is consistent with decisions of the federal courts, including the United States Supreme Court, and with the decisions of other Massachusetts administrative agencies relative to the jurisdiction of Massachusetts over activities in federal waters.⁸ In the face of this precedent, the arguments advanced by the intervenors to expand the scope of the

⁸ See, e.g., United State v. Maine, 420 U.S. 515 (1975) ("Maine I"); United States v. Maine, 475 U.S. 89 (1986) (Maine II"); Alliance to Protect Nantucket Sound, Inc., v. U.S. Dept. of Army, 398 F.2d. 106 (1st Cir. 2005); Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC, 373 F.2d. 183 (1st Cir. 2004); Exh. CW-2(B), *Certificate of the Secretary of Environmental and Energy Affairs on the Final Environmental Impact Report for the Cape Wind Project* at 3 (March 29, 2007)); DEP Response to Motions on Jurisdictional Issues at 2-3 (March 26, 2008).

proceeding to include consideration of the wind farm, or impacts of the wind farm, are unpersuasive.⁹ The scope of the proceeding will be limited to the Transmission Project, and the motions by the parties to expand the scope are denied.¹⁰

IV. Motion to Remand and Motion to Limit the Record

In addition to its motions to dismiss, the Commission filed: (1) a motion to remand (March 14, 2008); and (2) a motion to limit the record in this proceeding to the record presented to the Commission in the Commission's DRI proceeding (March 14, 2008).

With respect to the motion to remand, I have found that the Commission's DRI denial was a final decision, and no other reason that would support a remand appears in the record. The motion to remand therefore is denied. With respect to the motion to limit the record, Siting Board review in a Certificate proceeding is confined to the record of a state or local permitting proceeding only where the agency's findings of a fact are adjudicatory in nature. 980 CMR 6.03 (1). It has previously been determined, in another Certificate proceeding involving the Cape Cod Commission, that the Commission's DRI review process is not an adjudicatory proceeding, hence its findings are not adjudicatory. Colonial Gas Company d/b/a KeySpan Energy Delivery New England, EFSB 06-1, *Ruling on Intervenors' Motion to Limit Scope of Proceeding* (May 10, 2007). I affirm and adopt the findings, and reasoning, in that ruling. Accordingly, the Commission's motion to limit the record is denied.

V. Conclusion

The motions by the Alliance to Protect Nantucket Sound and the Cape Cod Commission

⁹ Each of the arguments seeking to expand the proceeding to include review of the wind farm or its impacts fails for the same reason. Simply put, and consistent with the cited decisions, the permissible scope of an agency proceeding is coextensive with the agency's subject matter jurisdiction. Whether the Commission's assertion of jurisdiction over in-state impacts of the wind farm exceeded the Commission's authority is a question which the courts, not the Siting Board, ultimately must answer. However, the Commission's assertion of jurisdiction over the wind farm does not require the Siting Board to assert jurisdiction, particularly since the Board has concluded herein that it lacks such jurisdiction.

¹⁰ Having found that the Siting Board lacks jurisdiction to review the wind farm, I do not address the argument that the parties are estopped from raising that issue in this proceeding. Similarly, having found that the Siting Board has jurisdiction to issue a Certificate containing a DRI decision, I do not address the argument that the parties are estopped from raising that issue here.

to dismiss Cape Wind's Certificate Application for lack of jurisdiction, to the extent that the motions pertain to the Commission's DRI denial, are denied; the motions by Cape Wind, the Conservation Law Foundation, and Clean Power Now to limit the scope of the proceeding to the Transmission Project only are granted; the Cape Cod Commission's motion to remand and motion to limit the record are denied.

M. Kathryn Sedor, Esq.
Presiding Officer