D.T.E. 01-57

Petition of the Tennessee Gas Pipeline Company for exemption from the Town of Agawam zoning ordinance for the purpose of constructing and operating a gas chromatograph building.

APPEARANCES: Harold W. Potter, Jr., Esq.
Holland & Knight LLP
10 St. James Avenue
Boston, Massachusetts 02116
FOR: TENNESSEE GAS PIPELINE COMPANY
Petitioner

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I. INTRODUCTION

A. Description of the Proposed Project

Pursuant to G.L. c. 40A, § 3, the Tennessee Gas Pipeline Company ("Tennessee" or "Company") filed a petition with the Department of Telecommunications and Energy ("Department") on July 13, 2001, seeking exemption from the Town of Agawam zoning ordinance ("zoning ordinance") in connection with the Company's proposal to install an approximately 8' x 10' prefabricated equipment building, containing a gas chromatograph, on the site of its existing compressor station in the Town of Agawam ("Agawam" or "Town") (Exh. TEN-1). In its petition, Tennessee asserted that it requires exemption from two specific provisions of the zoning ordinance: Section 180-37 (permitted uses in an agricultural district) and Section 180-13 (site plan review) (id. at 2-3). In addition, the Company requested that the Department grant it a "blanket exemption" from all other provisions of the zoning ordinance that may apply to the proposed chromatograph building (id. at 3-4). Tennessee stated that the primary purpose of the proposed chromatograph building is to allow the Company to more accurately measure the thermal heating value of the natural gas passing through its gas transmission system (id. at 2).

Tennessee stated that it is a natural gas pipeline company as defined in G.L. c. 164, and is a public utility transporting natural gas in bulk to numerous Massachusetts and New England local distribution companies (Exhs. TEN-1, at 1; DTE-1). Tennessee stated that it owns approximately 48 acres of property on Suffield Street in Agawam (Exh. HO-EL-2). The Company stated that it has for many years maintained and operated a district office, a compressor station, and associated natural gas pipeline facilities on the site ("compressor station site") (id. at

1). Specific structures currently existing on the site include three compressor buildings, a control building, an office building, and several warehouses, garages and storage buildings (Exh. HO-EL-2). The Company stated that the proposed chromatograph building would be approximately 8' x 10', and that it would be approximately eight feet high (Exh. HO-EV-1). The Company indicated that the building would be located in the northwestern portion of the compressor station site, to the west of the existing control building (Exhs. TEN-1, exh. A; HO-EL-1, atts. 1, 2). The Company provided evidence showing that the proposed chromatograph building would be significantly smaller than the control building, and the other existing buildings on the site (id.).[1] Tennessee stated that the proposed building would house a gas chromatograph and associated tubing, valves, conduit and wiring, as well as equipment used to calibrate the chromatograph (Exh. HO-EL-3).[2] The Company stated that the building also would contain an uninterruptible power source and a gas leak detection system (id.).

The Company's witness, David Carroll, testified that the proposed chromatograph building would be a skid-mounted prefabricated unit, with all equipment and wiring pre-installed (Tr. 1, at 17). Mr. Carroll stated that, as a result, on-site construction work would be minimal, and would include placement of the unit on a concrete foundation, followed by the interconnection of electric, telephone and natural gas sampling lines (id. at 17-21).

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[1] The record shows that the footprint of the control building, for example, is approximately 30' x 40', and the footprint of the largest compressor building is approximately 60' x 40' (Exh. HO-EL-3).

[2] The calibration equipment would consist of three cylinders, one containing a standard sample of natural gas and two containing pure helium (Exh. HO-EL-3).

B. Procedural History

On July 13, 2001, Tennessee filed a zoning exemption petition with the Department. The Company's petition was docketed by the Department as D.T.E. 01-57. A public hearing was held in Agawam on September 19, 2001. The Department received no petitions to intervene or to participate as an interested person in the proceeding.

On August 14, 2001, Department staff issued a set of information requests to the Company. On October 23, 2001, the Company submitted the prefiled direct testimony of its witness, David Carroll, Principal Measurement Specialist for Tennessee.

The Department conducted an evidentiary hearing on November 14, 2001. Tennessee presented Mr. Carroll, whose testimony addressed the purpose of the proposed chromatograph building and its anticipated environmental impacts.[3] The Hearing Officer entered 29 exhibits into the record. At the close of hearings, the Company filed a brief. On March 12, 2002, the Company filed a statement regarding the applicability of the Massachusetts Environmental Policy Act ("MEPA") to the proposed project, and the record was closed.

II. STANDARD OF REVIEW

G.L. c. 40A, § 3 provides, in relevant part, that

> Land or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or bylaw if, upon petition of

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[3] With two exceptions, the Company's written responses to the Department's information requests were authored by James H. Odom, a Tennessee employee. Mr. Odom was not made available for cross examination during the hearing. However, Mr. Carroll adopted Mr. Odom's responses under oath; therefore these responses were admitted into evidence. The remaining two information request responses (Exhs. HO-EL-8 and HO-EV-2) were not admitted into evidence, because they were provided by a Company consultant who was not made available for cross examination, and Mr. Carroll testified that he could not adopt the responses as his own testimony.

> the corporation, the [Department] shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public . . . .

Thus, a petitioner seeking exemption from a local zoning bylaw under G.L. c. 40A, § 3 must meet three criteria. First, the petitioner must qualify as a public service corporation. Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975) ("Save the Bay"). Second, the petitioner then must establish that it requires a zoning exemption(s). Boston Gas Company, D.T.E. 00-24, at 3 (2001) ("Boston Gas"). Finally, the petitioner must demonstrate that its present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare. Tennessee Gas Pipeline Company, D.T.E. 99-50, at 3-4 (2000) ("Tennessee Gas (2000)").

A. Public Service Corporation

In determining whether a petitioner qualifies as a "public service corporation" for the purposes of G.L. c. 40A, § 3, the Supreme Judicial Court has stated:

> among the pertinent considerations are whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.

Save the Bay, 366 Mass. 667, 680. See also, Boston Gas, D.T.E. 00-24, at 3-4; Berkshire Power Development, Inc., D.P.U. 96-104, at 26-36 (1997) ("Berkshire Power").

B. Exemptions Required

The statute authorizes the Department to exempt land and structures "in particular

respects from the operation of a zoning ordinance or bylaw." G.L. c. 40A, § 3. In determining whether exemption from a particular provision of a zoning bylaw is "required" for purposes of G.L. c. 40A, § 3, the Department looks to whether the exemption is necessary to allow construction or operation of the petitioner's project as proposed. See, Tennessee Gas (2000), D.T.E. 99-50, at 6-8; Western Massachusetts Electric Company, D.P.U./D.T.E. 99-35, at 4, 6-8 (1999)("WMECO"); Tennessee Gas Company, D.P.U. 92-261, at 20-21 (1993). It is the petitioner's burden, not the Department's, to identify the individual zoning provisions applicable to the project and then to establish on the record that exemption from each of those provisions is required:

> The Company is both in a better position to identify its needs, and has the responsibility to fully plead its own case. . . . The Department fully expects that, henceforth, all public service corporations seeking exemptions under c. 40A, § 3 will identify fully and in a timely manner all exemptions that are necessary for the corporation to proceed with its proposed activities, so that the Department is provided ample opportunity to investigate the need for the requested exemptions.

New York Cellular Geographic Service Area, Inc., D.P.U. 94-44, at 18 (1995).

C. Public Convenience or Welfare

In determining whether a present or proposed use is reasonably necessary for the public convenience or welfare, the Department must balance the interests of the general public against the local interest. Save the Bay, 366 Mass. 667, 680; Town of Truro v. Department of Public Utilities, 365 Mass. 407 (1974). Specifically, the Department is empowered and required to undertake "a broad and balanced consideration of all aspects of the general public interest and welfare and not merely [make an] examination of the local and individual interests which might be affected." New York Central Railroad v. Department of Public Utilities, 347 Mass. 586, 592

(1964) ("New York Central Railroad"). When reviewing a petition for a zoning exemption under G.L. c. 40A, § 3, the Department is empowered and required to consider the public effects of the requested exemption in the state as a whole and upon the territory served by the petitioner. Save the Bay, 366 Mass. 667, 685; New York Central Railroad, 347 Mass. 586, 592.

With respect to the project site chosen by a petitioner, G.L. c. 40A, § 3 does not require a demonstration that the petitioner's preferred site is the best possible alternative, nor does the statute require the Department to consider and reject every possible alternative site presented. Rather, the availability of alternative sites, the efforts necessary to secure them, and the relative advantages and disadvantages of those sites are matters of fact bearing solely upon the main issue of whether the preferred site is reasonably necessary for the convenience or welfare of the public. Martarano v. Department of Public Utilities, 401 Mass. 257, 265 (1987); New York Central Railroad, 347 Mass. 586, 591.

Therefore, when making a determination as to whether a petitioner's present or proposed use is reasonably necessary for the public convenience or welfare, the Department examines: (1) the present or proposed use and any alternatives or alternative sites identified; (2) the need for, or public benefits of, the present or proposed use; and (3) the environmental impacts or any other impacts of the present or proposed use. The Department then balances the interests of the general public against the local interest, and determines whether the present or proposed use of the land or structures is reasonably necessary for the convenience or welfare of the public. Boston Gas, D.T.E. 00-24, at 4-6; WMECO, D.P.U./D.T.E. 99-35, at 5-6; Tennessee Gas (2000), D.T.E. 99-50, at 5-6; Tennessee Gas Company, D.T.E. 98-33, at 4-5 (1998).

III. ANALYSIS AND FINDINGS

A. Public Service Corporation Status

Tennessee is a "gas company" as defined by G.L. c. 164, § 1 (Exh. TEN-1, at 1). See also Tennessee Gas (2000), D.T.E. 99-50, at 6. Accordingly, Tennessee qualifies as a public service corporation for the purposes of G.L. c. 40A, § 3.

B. Need for the Requested Zoning Exemptions

In its petition, Tennessee requested exemption from two specific provisions of the Agawam zoning ordinance ("individual exemptions") (Exh. TEN-1, at 2-4). In addition, the Company stated that it requires a "blanket" exemption from all other provisions of the Agawam zoning ordinance "which are, or may be" applicable to the proposed building (id. at 3-4).

1. Individual Exemptions

a. Section 180-37: Agricultural Districts

In its petition, the Company stated that the proposed chromatograph building, like the compressor station site as a whole, would be located within an agricultural district, as designated on the Town of Agawam building zone map (Exh. TEN-1, at 2-3, exh. B at § 180-37).[4] Agawam's zoning ordinance is permissive, in that it specifies the kinds of uses allowed in a district, all other uses being excluded by implication. Section 180-37 of the zoning ordinance lists five types of permitted uses in an agricultural district: farms, buildings for the sale of farm

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[4] Exhibit B to TEN-1 is a copy of the Agawam Zoning Ordinance, provided by the Company. Although the copy is not certified or attested to, the Department accepts it into evidence in this instance because the genuineness of the copy has not been questioned. See, G.L. c. 233, § 74. In future proceedings pursuant to G.L. c. 40A, § 3, the Department will require an attested to or certified copy of the zoning bylaw or ordinance at issue.

products, certain logging activities, certain residential uses, and airports (id.). The Company stated that the proposed chromatograph building would not be a permitted use in an agricultural district (id.).

Based upon a review of the express language of Section 180-37 of the zoning ordinance, it cannot reasonably be argued that the Company's proposed chromatograph building is a permitted use in an agricultural district. The Department therefore concludes that without zoning relief, such as the issuance of an exemption pursuant to G.L. c. 40A, § 3, Tennessee would be prohibited from constructing and operating its chromatograph building as proposed. Accordingly, the Department finds that exemption of the proposed chromatograph building from Section 180-37 of the Agawam zoning ordinance is required within the meaning of G.L. c. 40A, § 3.

b. Section 180-13: Site Plan Review

Section 180-13 of the zoning ordinance identifies uses or projects requiring the preparation of a site plan, and sets forth procedures for the review of site plans by the Agawam Planning Board (Exh. TEN-1, exh. B at § 180-13). Tennessee stated that its proposed chromatograph building "will conflict" with this provision of the zoning ordinance (Exh. HO-Z-2). The Company did not identify the nature of the conflict and did not further explain its need for exemption from Section 180-13.

Based on the evidence in the record the Department concludes that Tennessee has not demonstrated that exemption from Section 180-13 of the Agawam zoning ordinance is necessary to allow construction or operation of the Company's chromatograph building as proposed. Consequently, the Department finds that exemption of the proposed building from

Section 180-13 is not required within the meaning of G.L. c. 40A, § 3.

2. Blanket Exemption

In addition to its requests for exemption from Sections 180-37 and 180-13 of the zoning ordinance, the Company has requested "a blanket exemption from any and all provisions" of the ordinance (Exh. TEN-1, at 3-4).[5] Tennessee identified a number of reasons for its request, the majority of which reflected the Company's view that a G.L. c. 40A, § 3 proceeding before the Department is a more advantageous forum for seeking zoning relief than a proceeding before a local zoning board. The Company stated that: (1) as a public service corporation, Tennessee has the statutory right to make use of G.L. c. 40A, § 3; (2) zoning appeals "are different locally than at the state level"; (3) decisions by zoning boards of appeals are automatically stayed pending appeal, while Department decisions are not automatically stayed; (4) zoning bylaws in different municipalities may contain different standards than those applied by the Department; (5) the Company seeks uniform treatment of its zoning petitions, which is more likely if all petitions are addressed to a single body; (6) the Department is charged with balancing regional or statewide concerns, whereas a local zoning board is charged only with balancing local concerns and local public interest; and (7) the Company seeks "to avoid the problems encountered in D.T.E. 98-33" (Exh. HO-Z-2).[6]

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[5] As the Company notes, the Massachusetts Supreme Judicial Court confirmed the Department's authority to issue comprehensive zoning exemptions in Planning Board of Braintree v. Department of Public Utilities, 420 Mass. 22 (1995), which upheld the Department's final order in Braintree Electric Light Department, D.P.U. 90-263 (1991).

[6] In D.T.E. 98-33 (December 10, 1998) Tennessee sought and received a zoning exemption in connection with an unrelated project in Agawam. The referenced "problems" apparently refer to the allegations set forth in a motion for clarification ("motion") filed

(continued...)

Petitions for blanket zoning exemptions are infrequently granted. As a threshold legal matter, the wholesale exemption of a project from local zoning requirements, without more, is inconsistent with the Department's interpretation of its mandate under G.L. c. 40A, § 3: to determine, based on the record, the individual exemptions needed to allow construction and operation of a petitioner's project.

The Department recognizes, however, that comprehensive zoning relief may be appropriate in certain circumstances. Thus, the Department will consider the issuance of a blanket exemption, for example, where numerous individual exemptions are required, and where the issuance of a blanket exemption could avoid substantial public harm by serving to prevent delay in the construction and operation of the proposed use. See, Berkshire Power, D.P.U. 96-104 (1997) (blanket exemption granted where Department determined that petitioner's involvement in zoning litigation before other state bodies would preclude timely construction and operation of petitioner's electric generating facility, which the Energy Facilities Siting Board had determined was needed by a particular year); Braintree Electric Light Department, D.P.U. 90-263 (1991) (blanket exemption granted where petitioner was the sole electric utility serving the Town of Braintree, both the Department and the Energy Facilities Siting Council had determined that construction of a new substation was required to meet petitioner's service obligations, and

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[6] (...continued)
by Tennessee regarding the Department's final order in that proceeding. In the motion, Tennessee indicated its belief that the Department had exempted the Company from one particular section of the Agawam zoning ordinance, even though the section was not referenced in the Department's order. The record indicates that this issue was subsequently rendered moot by the issuance of a building permit for the Company's project, and that, consequently, the Company's motion later was withdrawn. See, letter from Harold W. Potter, Esq. to Peter Palica, Esq., Hearing Officer, D.T.E. 98-33 / D.T.E. 98-40 (December 10, 1998).

petitioner was involved in ongoing zoning litigation in state court).

Tennessee has identified a number of the advantages that may accrue to a public service corporation which chooses to seek zoning relief from the Department, pursuant to G.L. c. 40A, § 3, rather than through appeal to local zoning entities or to the state court system. However, the Company's elucidation of the logic underlying its choice of forum does not explain, or lend the necessary evidentiary support to, its request for a blanket zoning exemption here. The Company has requested, for example, only two individual exemptions; accordingly, the number of individual exemptions required clearly is not so great as to warrant consideration of a comprehensive exemption. The Company has not asserted the pendency of other zoning-related litigation pertaining to the gas chromatograph building, or cited any other circumstances external to this proceeding which might warrant consideration of a blanket exemption so that this proceeding does not become an exercise in futility. Finally, the Company has neither asserted nor shown that construction of the chromatograph building is time sensitive or of critical importance to Tennessee's ability to continue serving its customers in a satisfactory manner pending the building's construction and operation.

There is insufficient evidence in the record of this proceeding to support a conclusion that exemption from the Agawam zoning ordinance in its entirety is necessary to allow construction and operation of Tennessee's proposed chromatograph building in a timely fashion. Accordingly, the Department finds that such an exemption is not required within the meaning of G.L. c. 40A, § 3.

Moreover, the Legislature's enactment of the Zoning Act, St. 1975, c. 808, § 3, was a conferral of broad decision-making on local authorities under Home Rule, Mass. Const. Amend.

Art. 89. The broad grant is subject to certain exceptions, the public service corporation petition under G.L. c. 40A, § 3 being but one. Chapter 40A, § 3 speaks of "exempt[ing] in particular respects"; the Department therefore holds that broad or blanket exemptions must necessarily be exceptional and warranted only by public convenience and necessity. No sufficient showing has been made here to warrant so broad an intrusion on the express grant of Home Rule authority.

C. Public Convenience or Welfare

1. Need or Public Benefit of Use

Tennessee stated that the proposed gas chromatograph would be used to measure the composition and thermal heating value, in British Thermal Units ("BTU"), of the natural gas passing through the Company's pipelines at the Agawam compressor station (Exh. TEN-2, at 2). Mr. Carroll stated that until recently, Tennessee's gas supply originated solely from west of Massachusetts, and traveled in only one direction, to the east (Exh. TEN-2, at 3). However, beginning in December of 1998, the Company began receiving gas supplies from the east as well (id.).[7] Mr. Carroll stated that these new supplies and changes in gas flow direction require the installation of a chromatograph at the Agawam site, so that Tennessee can accurately determine the composition and BTU value of the commingled gas (id.). The Company stated that having the capacity to determine the exact BTU content of the gas leaving its pipeline is important because Tennessee's tariff provides that the Company may not transport gas at a BTU content higher than 1100 BTU or lower than 967 BTU (Tr. 1, at 26), and because, like most interstate gas pipeline transporters, Tennessee bills its customers using a mathematical equation which includes as

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[7] Mr. Carroll stated that the Company at that time began taking gas from the Distrigas facility in Everett and, in March of 1999, from a connection with the Portland Natural Gas Transmission System (id.).

factors both the quantity of gas delivered and its BTU content or caloric value (Exh. HO-N-1). The underlying assumption of the billing method (and consequent customer protection) is that a cubic foot of gas will vary in heat content only within prescribed limits.

Tennessee stated that it began billing by BTU content, or "therm billing", in the early 1980's, and that therm billing, as opposed to volumetric billing, is now considered standard industry practice (Tr. 1, at 27). The Company stated that therm billing has become widely used because of the significant variation in BTU content that can arise when natural gas is received from a number of different sources (id. at 27-28). The Company stated that natural gas entering the Tennessee system from western Massachusetts, which would be made up of gas from the Gulf of Mexico and from Canada, typically has a BTU content of approximately 1020; that gas coming from Distrigas, to the east, generally has a BTU content between1080 and 1085; that the BTU content of gas from Nova Scotia falls between1080 and1095; and that the BTU content of the gas entering from the Iroquois and TransCanada systems generally runs between 1006 and 1010 BTU (id. at 28-29).

Tennessee stated that, in Massachusetts, the Company's customers include local distribution companies, pipeline transmission companies, and electric generating facilities (id. at 15, 33). The Company stated that increasing the accuracy with which the BTU content of its gas can be measured will benefit its customers, because it will result in more accurate billing (Exh. HO-N-1). Mr. Carroll stated that installation of the chromatograph on the compressor station site could reduce billing errors by up to 6½ percent for its customers in the Agawam and northern Connecticut area (Tr. 1, at 33).

2. Alternatives Explored

The Company stated that a chromatograph is the most accurate instrumentation currently available to measure the BTU content of natural gas (Exh. TEN-2, at 3). The Company did not indicate that an alternative exists to the use of a chromatograph to measure BTU content.

The Company stated that it did not consider alternative sites for the chromatograph building (Exhs. HO-N-1; HO-N-2). The Company noted that all pipelines owned by Tennessee coming into eastern New England pass through the Agawam compressor station and that the compressor station site therefore provides a strategic location at which to sample and analyze a large quantity of gas, while avoiding the installation of numerous chromatographs at downstream points (id.). Mr. Carroll stated that if the proposed chromatograph building were not built on the existing compressor station site, Tennessee could be required to install up to four off-site chromatographs (Tr. 1, at 33).[8]

3. Impacts of the Proposed Use

a. Emissions

The Company stated that neither construction nor operation of the proposed chromatograph building would result in the emission of air pollutants, that the proposed building would not store or discharge water, and that the building would not store or discharge any hazardous materials (Exhs. HO-EA-1; HO-EW-1; HO-ES-1).

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[8] Mr. Carroll stated that one chromatograph might be needed at the Berkshire Power generating facility in Agawam, one at the Agawam delivery point to Bay State Gas, one to the east of the compressor station site, and one to the west of the compressor station site (id. at 33-34).

b. Wetlands and Land Resources

The Company submitted an aerial photograph, delineated to show approximate wetlands boundaries, zoning, land use and property ownership within a one-half mile radius of the compressor station site (Exh. HO-EL-1, att. 1). The aerial photograph shows that the proposed location of the chromatograph building within the compressor station site is not in, or within the buffer zone to, any delineated wetlands resource areas (id.). The Company also stated that construction of the building would not require the clearing of any vegetation (Exh. HO-EV-5).

c. Visual

The Company provided information indicating that the chromatograph building would be located in the interior of the compressor station site (Exh. TEN-1, exh. A). The Company also indicated that the three nearest residences are approximately 100 feet from the boundary of the compressor station site and 400 feet from the proposed location of the chromatograph building within the site (id.). According to the aerial photograph provided by the Company, vegetation exists between the proposed chromatograph site and the nearest residences (id.).

Tennessee stated that the Company presently does not use any natural vegetation or landscaping to visually buffer existing facilities on the compressor station site, and that no vegetation or landscaping would be added to the site if the chromatograph building were to be constructed as proposed (Exh. HO-EV-6). The Company stated that the proposed building would be relatively small and its color (tan with white trim) would allow it to blend into the background of the existing buildings on the site (Exhs. HO-EV-4; HO-EV-7). The Company stated that because the chromatograph building would be so much smaller than most of the existing buildings, its existence "will hardly be noticed" after its installation (id.).

Tennessee stated that the compressor station site has numerous existing buildings, facilities and roadways that require external lighting, and the only incremental lighting that would be associated with the chromatograph building is a red strobe light on the south side of the building, which would be lit only when a gas leak is detected inside the building (Exh. HO-EV-3).

d. Noise

The Company stated that construction of the proposed building would take approximately two weeks, and that noise from "general construction equipment" would **occur** during that time (Exh. HO-EN-1). The Company stated that once the building is complete, the only noise that would emanate from it would be noise from the heater/air conditioner (id.). Tennessee further stated that this noise would be undetectable, given the masking noise of existing gas pipeline compressor units (id.).

The Company stated that noise data collected over a three day period indicates that the current use of the compressor station site does not violate the Massachusetts Department of Environmental Protection noise regulations (Exh. HO-EN-2). Tennessee asserted that operation of the proposed building would not affect its compliance with these regulations (id.).[9]

e. Traffic

The Company stated the compressor station site is a hub of operations for several compressor stations in the area, and that operations personnel frequently work around the site (Exh. HO-ET-1). The Company stated that incremental traffic created as a result of the proposed

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[9] Tennessee stated that there are no local noise regulations or ordinances in the Town of Agawam with defined numerical limits (id.).

building would be undetectable (id.).

f. Land Use

Tennessee stated that the proposed chromatograph building would not affect land use on abutting or neighboring properties, because the building would be located entirely within the Company's compressor station site, and would not require easements, rights of way, or other land use changes on those properties (Exhs. HO-EL-1, HO-EL-5, HO-EL-6).

4. Analysis

Tennessee has presented evidence, primarily through the testimony of its expert witness, Mr. Carroll, that construction of the proposed gas chromatograph building on the site of the Company's existing compressor station in Agawam would be in the public interest, because it would allow Tennessee to more accurately measure the BTU content of the commingled natural gas in its pipeline system and, in turn, would allow the Company to determine compliance with requirements of its tariff and to more accurately bill its customers.

The record shows that Tennessee considered the Agawam compressor station site to be a strategic location for the chromatograph building, because this location would make use of an already developed site owned by the Company and would eliminate the need for up to four downstream chromatographs.

The record shows that construction of the proposed chromatograph building on the Company's proposed site would have only minor environmental impacts, primarily because it would be located within an already developed compressor station site. The record shows that the proposed building would likely be visually unintrusive, because it is very small, would be located on an internal portion of the existing compressor station site, and would blend into the

background of existing larger buildings on the site. The proposed building would have no air emissions, and would discharge no water or hazardous materials. The record shows that incremental traffic impacts would be undetectable, and that, except during construction, incremental noise impacts also would be undetectable. The record shows that no wetlands or other vegetation would be disturbed in connection with constructing or operating the proposed building. The record also shows that the proposed building would not affect land use on abutting or neighboring properties, because it would be located entirely on land owned by the Company and would not require off-site easements, rights of way or other land use changes on those properties.

Based on the foregoing, the Department finds that construction of the proposed chromatograph building on the proposed site would serve the public interest, and that such interest outweighs the minimal environmental impacts, consisting primarily of temporary construction noise impacts, on the local community. The Department therefore finds that the proposed gas chromatograph building is reasonably necessary for the public convenience or welfare.

D. Section 61 Findings

MEPA provides that "any determination made by an agency of the Commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact." G.L. c. 30, § 61 ("Section 61 findings"). Pursuant to MEPA's implementing regulations, however, Section 61 findings are required only where an agency intends to act on a proposed project for which the Secretary of Environmental Affairs ("Secretary") has required the filing of an Environmental Impact Report

("EIR"). 301 CMR § 11.12(5). In this case, Tennessee has confirmed that the Company was not required to file, and did not file, an EIR with the Secretary for the proposed chromatograph building (Exh. TEN-4). Accordingly, the Department is not required to make Section 61 findings with respect to the project.

E. Conclusion

As set forth in Section III.A, above, Tennessee has established that it is a public service corporation. As set forth in Section III..B, above, Tennessee also has established that it requires an exemption from Section 180-37 of the Agawam zoning ordinance. As set forth in Section III.C, above, Tennessee has established that the proposed project is reasonably necessary for the public convenience or welfare. As set forth in Section III.D, above, Tennessee has established that its proposed project does not require the filing of an EIR with the Secretary of Environmental Affairs. Accordingly, the Department grants Tennessee an exemption from Section 180-37 of the Agawam zoning ordinance.

In granting this exemption, the Department notes that, while it is lawful for a public service corporation to seek a zoning exemption without first consulting with the affected municipality, it is neither sound public policy nor a good use of Department and Company resources. As noted in Section III.B.2., below, the Department is cognizant of the inherent tension between the Home Rule authority of municipalities to enact local zoning codes, and the statutory authority of the Department, pursuant to G.L. c. 40A, § 3, to grant public service corporations exemptions from these codes. The Department favors the resolution of local issues on a local level whenever possible to reduce local concern regarding any intrusion on Home Rule authority. The Department urges future petitioners to seek a zoning exemption from the

Department only after consulting with municipal officials, and then only if the municipality is unable to grant the necessary zoning approval, or if it encounters difficulties in obtaining municipal zoning approvals within a reasonable period of time.

IV. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That Tennessee's petition for an exemption from Section 180-37 of the Agawam zoning ordinance be allowed, pursuant to G.L. c. 40A, § 3; and it is

FURTHER ORDERED: That Tennessee's petition for an exemption from Section 180-13 of the Agawam zoning ordinance be denied, pursuant to G.L. c. 40A, § 3; and it is

FURTHER ORDERED: That Tennessee's petition for a blanket exemption from the Agawam zoning ordinance be denied, pursuant to G.L. c. 40A, § 3; and it is

FURTHER ORDERED: That Tennessee notify the Department of any significant changes in the planned timing, design or environmental impacts of the proposed project; and it is

FURTHER ORDERED: That the Secretary of the Department shall transmit a certified copy of this Order to the Clerk of the Town of Agawam, and that Tennessee shall serve a copy of this Order on the Agawam City Council, Agawam Planning Board, and Agawam Zoning Board of Appeals within five business days of its issuance and shall certify to the Secretary of the Department within ten business days of its issuance that such service has been accomplished.

By order of the Department,

_____
James Connelly, Chairman

_____
Deirdre K. Manning, Commissioner

_____
W. Robert Keating, Commissioner

_____
Eugene Sullivan, Commissioner

_____
Paul B. Vasington, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).