

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF PUBLIC UTILITIES**

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Petition of NSTAR Electric Company d/b/a	)	
Eversource Energy Pursuant to G.L. c. 40A, § 3	)	
for Individual and Comprehensive Exemptions	)	D.P.U. 19-143
from the Zoning Ordinance of the Town of	)	
Barnstable	)	

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**PETITION OF NSTAR ELECTRIC COMPANY d/b/a EVERSOURCE ENERGY  
PURSUANT TO G.L. c. 40A, § 3 FOR INDIVIDUAL AND COMPREHENSIVE  
EXEMPTIONS FROM THE ZONING ORDINANCE OF THE TOWN OF  
BARNSTABLE**

**I. INTRODUCTION**

Now comes NSTAR Electric Company d/b/a Eversource Energy (“Eversource” or the “Company”) and hereby requests that, pursuant to the provisions of G.L. c. 40A, § 3, the Department of Public Utilities (the “Department”) grant individual and comprehensive zoning exemptions from the operation of the *Zoning Ordinance of the Town of Barnstable* (the “Zoning Ordinance”)<sup>1</sup> in connection with the Company’s proposed modifications to the existing West Barnstable Substation (the “Substation”) located on Oak Street in Barnstable, Massachusetts<sup>2</sup> (the “Zoning Petition”). The Substation was initially constructed in 2012 as part of the Company’s Lower

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<sup>1</sup> A certified copy of the Zoning Ordinance and the Zoning Map of the Town of Barnstable (the “Zoning Map”) dated September 30, 2019 are provided as Attachment A.

<sup>2</sup> The Company owns approximately 15 acres of land on Oak Street that consists of two abutting lots. The first, numbered 661 Oak Street, is a 9.85-acre lot upon which the West Barnstable Substation is located. There is also a 115-kV/25-kV substation located at 661 Oak Street (“Oak Street Substation”), the construction of which was exempted from the operation of the Barnstable Zoning Ordinance in Commonwealth Electric Company, D.T.E. 03-7 (2003) (“2003 Exemption”). The second lot is numbered 625 Oak Street and is 5.32 acres in size. The proposed expansion of the West Barnstable Substation as described in this Petition will take place on both lots, which are collectively referred to herein as the “Substation Site.”

Southeastern Massachusetts (“SEMA”) Reliability Project, which was approved by the Energy Facilities Siting Board (the “Siting Board”) in EFSB 10-2/D.P.U. 10-131/10-132, which approval included the grant of individual and comprehensive zoning exemptions (“2012 Exemption”).

The modifications at the Substation are required to accommodate the connection of a new 115-kV transmission line (the “New Line”), which is needed to alleviate thermal overload conditions, provide voltage support, and prevent the potential for voltage collapse that could affect over 500 megawatts (“MW”) of load on Cape Cod and the islands of Martha’s Vineyard and Nantucket. The modifications at the Substation and the New Line are referred to herein as the “Mid Cape Reliability Project” or the “Project.”

Simultaneously herewith, the Company is submitting: (a) a petition with the Siting Board requesting the approval of the construction of the Project pursuant to G.L. c. 164, § 69J (the “Siting Board Petition”); (b) a petition with the Department requesting a determination that the New Line is necessary and will serve the public convenience and be consistent with the public interest in accordance with G.L. c. 164, § 72 (the “Section 72 Petition”); and (c) motions filed with the Department and the Siting Board in all three dockets requesting that the Department refer the Section 72 Petition and the Zoning Petition to the Siting Board and that the Siting Board consolidate all three petitions for review and decision. See G.L. c. 25, § 4; G.L. c. 164 § 69H(2). The Company incorporates by reference the Siting Board Petition and the Section 72 Petition together with all their attachments into this Zoning Petition. The Siting Board Petition and Attachment A of the Siting Board Petition, a document entitled *Analysis to Support Petitions Before the Energy Facilities Siting Board – Mid Cape Reliability Project* (the

“Analysis”), dated November 8, 2019, provide the factual basis for the Company’s conclusion that the Project is necessary in order to maintain a reliable supply of electricity in the Commonwealth, at least cost and with the least environmental impact.

Inasmuch as the standards applicable to approval pursuant to G.L. c. 164, §§ 69J and 72 are essentially the same as the standards that apply to requests for zoning relief pursuant to G.L. c. 40A, § 3, the Siting Board Petition provides a comprehensive factual foundation for the zoning relief sought in this proceeding. See, e.g., New England Power Co. d/b/a Nat’l Grid & Western Mass. Elec. Co., EFSB 10-1/D.P.U. 10-107/10-108, at 82, 97 (2012) (“NEP/WMECO 2012”); New England Power Co., D.P.U. 89-163, at 6 (1993); New England Power Co., D.P.U. 91-117/118, at 4 (1991); Mass. Elec. Co., D.P.U. 89-135/136/137, at 8 (1990).

## **II. DESCRIPTION OF THE WORK AT WEST BARNSTABLE SUBSTATION**

1. To accommodate the connection of the New Line, the Company must extend the existing fence line along the western boundary of the Substation by approximately 65 feet to provide space for the new equipment. A portion of the expansion work will take place on existing disturbed and graveled areas. The expansion will include approximately 1.4 acres of new land disturbance, including tree clearing, grading, modifications to an existing stormwater swale, reconfiguring the existing gravel access road and relocating the existing 25-kV distribution line poles. The new equipment includes new 115-kV circuit breakers and new overhead terminal equipment. No new transformers will be installed as part of the Project. While new equipment will be added inside the existing control house, it will not increase in size or height and there will be no modifications to its exterior.

2. The following specific equipment will be installed at the existing West Barnstable Substation:

- Two 115-kV breakers;
- Four 115-kV breaker disconnects;
- Three voltage transformers for relaying;
- Three lightning arrestors;
- One bridge tower;
- One line terminal disconnect;
- One bay of 115-kV bus and bus supports; and
- Associated relaying equipment in the existing control house.

3. Related site work associated with the Project at the West Barnstable Substation will include:

- Clearing and grading the yard;
- Installing footings, foundations and underground electric raceway;
- Installing a ground grid in the yard area;
- Relocation of existing access road and existing 25-kV distribution poles;
- Installing lighting in the yard area;
- Spreading crushed stone in the yard area;
- Installing fencing; and
- Installing miscellaneous associated protective relaying, metering, control wiring, and related equipment.

See Attachment B for a copy of the USGS locus map and aerial photograph and Attachment C for a plan showing the layout of the proposed Substation modifications.

4. The current cost estimate for the Project is approximately \$59.1 million (2019 dollars), estimated at a planning grade cost level ( $\pm 25\%$ ), which includes \$45 million for construction of the New Line and \$14.1 million for the Substation upgrades.

### **III. COMMUNITY AND MUNICIPAL OUTREACH**

5. The Company has conducted an extensive outreach effort in connection with the Project. A summary of the Project outreach meetings conducted to date is provided in Table 1-1 in Section 1 of the Analysis. With respect to zoning-related outreach, Company representatives met with Barnstable officials on three separate occasions: (1) May 14, 2019; (2) July 1, 2019; and (3) October 30, 2019.

At the May 14<sup>th</sup> meeting with Barnstable officials, representatives of Eversource met with the Assistant Town Manager, Assistant Town Counsel and Town Engineer regarding the Project. The need for the Project and the work proposed at the West Barnstable Substation were discussed as well as the need and rationale for the Company's proposal to seek individual and comprehensive zoning exemptions from the Department. The Company presented a list of the provisions of the Zoning Ordinance from which it needed exemptions to construct the Project. The Town officials did not indicate any concern with the Company's intention to seek zoning exemptions from the Department or with the list of individual exemptions. The primary issue of interest to the Barnstable officials was ensuring that groundwater resources would be protected.<sup>3</sup>

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<sup>3</sup> Please see Section 5 of the Analysis for a discussion of how the Project, including work at the Substation, will not affect groundwater resources. As described therein, Eversource will require its contractors to utilize equipment that is properly maintained to reduce the risk of a spill and to have spill containment and prevention devices (e.g., drip pans, absorbent pads, etc.) accessible to crews at each work location. The Company will also require its contractors to adhere to its Best Management Practices ("BMPs"), including those relative to the storage and handling of oils, lubricants and other chemicals during construction.

6. At the July 1<sup>st</sup> meeting with Barnstable officials, the Company discussed with the Department of Public Works Director, Town Engineer and Director of Planning and Development both Project-related work at the Substation and the individual exemptions it intended to seek from the Department, as well as the Company's plan to request a comprehensive zoning exemption from the Department.

7. On October 30, 2019, Barnstable and Company representatives met a third time to discuss the final list of zoning exemptions that the Company is requesting in this Zoning Petition. The Barnstable officials, including the Building Inspector, expressed no major issues with the Company's pursuit of zoning exemptions from the Department. The primary issue of concern expressed by Barnstable officials at the meeting remains ensuring the protection of groundwater resources. On this point, the Company and Barnstable continue to work cooperatively to identify feasible and practical steps that may be taken to address Barnstable's concerns. The Company remains committed to a collaborative working relationship with Barnstable.

8. Following the submittal of this Petition, and throughout the permitting and construction of the Project, the Company will continue to communicate with Barnstable officials and other interested parties with regard to any concerns or issues that may arise.

#### **IV. STANDARD OF REVIEW**

9. 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 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.

10. 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. Dep't of Pub. Utils., 366 Mass. 667 (1975) (“Save the Bay”); NSTAR Electric Company d/b/a Eversource Energy, EFSB 14-02/D.P.U. 14-73/14-74, at 90 (“Eversource Walpole-Holbrook”); NSTAR Electric Company d/b/a Eversource Energy, EFSB 15-03/D.P.U. 15-64/15-65, at 77 (“Eversource Mystic-Woburn”); NSTAR Electric Company d/b/a Eversource Energy, D.P.U. 15-85, at 3 (2016) (“Eversource Woburn”). Second, the petitioner must establish that it requires the requested zoning exemptions. Eversource Walpole-Holbrook at 90; Eversource Mystic-Woburn at 77; Eversource Woburn at 3; Boston Gas Company, D.T.E. 00-24, at 3 (2001) (“Boston Gas 2001”). Third, the petitioner must demonstrate that its present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare. Eversource Walpole-Holbrook at 90; Eversource Mystic-Woburn at 77; Eversource Woburn at 3; Tennessee Gas Pipeline Company, D.T.E. 01-57, at 3-4 (2002).

## **V. EVERSOURCE IS A PUBLIC SERVICE CORPORATION**

11. In determining whether a petitioner qualifies as a “public service corporation,” the Supreme Judicial Court (the “SJC”) has stated:

[A]mong 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. at 680. See also NSTAR Electric, D.P.U. 08-1, at 3 (2009); Commonwealth Electric 2003, at 4; Boston Gas 2001, at 3-4; Berkshire Power Development, Inc., D.P.U. 96-104, at 26-36 (1997) (“Berkshire Power”).

12. Eversource has its principal place of business at 800 Boylston Street, 17th Floor, in the City of Boston, Massachusetts 02199. Eversource is an electric company as defined in G.L. c. 164, § 1 and, therefore, is a public service corporation authorized by the Commonwealth to transmit and distribute electricity. Eversource Walpole-Holbrook at 91; Eversource Mystic-Woburn at 78; Eversource Woburn at 6; NSTAR Electric Company d/b/a Eversource Energy, D.P.U. 15-02, at 6-7 (2015) (“Eversource Hopkinton”); NSTAR Electric Company, D.P.U. 14-55/14-56, at 12; NSTAR Electric Company, D.P.U. 13-177/13-178, at 10-11 (2015). As an electric company and a public service corporation in the Commonwealth, Eversource is entitled to seek a zoning exemption pursuant to G.L. c. 40A, § 3. Save the Bay, 360 Mass. at 680; Eversource Hopkinton at 6-7; NSTAR Stoughton at 150.

## **VI. THE PROJECT IS REASONABLY NECESSARY FOR THE PUBLIC CONVENIENCE OR WELFARE**

13. In determining whether a present or proposed use is reasonably necessary for the public convenience or welfare, the Department balances the interests of the general public against the local interest. Save the Bay, at 680; Town of Truro v. Dep’t of Pub. Utils., 365 Mass. 407 (1974); Eversource Walpole-Holbrook at 92; Eversource Mystic-Woburn at 79; Eversource Woburn at 4. Specifically, the Department undertakes “a broad and balanced consideration of all aspects of the general public interest and welfare and not merely [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”); Eversource Walpole-Holbrook at 92; Eversource Mystic-Woburn at 79; Eversource Woburn at 4-5. When reviewing a petition for a zoning exemption, the Department considers the public effects of the requested exemption in the state as a whole and upon the territory served by the petitioner. Save the Bay, at 685; New York Central Railroad, at 592; Eversource Walpole-Holbrook at 92; Eversource Mystic-Woburn at 79; Western Massachusetts Electric Company and New England Power Company d/b/a National Grid, D.P.U. 13-187/13-188, at 7 (2015) (“WMECO/NEP Northfield/Erving”).

14. With respect to the project site chosen by a petitioner, a petitioner is not required to demonstrate that its preferred site is the best possible alternative, nor must the Department consider and reject every possible alternative site presented. Commonwealth Electric 2003, at 5. Rather, the availability of alternative sites or routes, 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. Martorano v. Dep’t of Pub. Utils., 401 Mass. 257, 265 (1987); New York Central Railroad, at 591; NSTAR Carver 2008, at 5.

15. 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. Eversource Walpole-Holbrook at 92-93; Eversource Mystic-Woburn at 79;

Eversource Woburn at 5. 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 2001, at 4-6; MECo 2002, at 5-6; Tennessee Gas 2002, at 5-6; Tennessee Gas Company, D.T.E. 98-33, at 4-5 (1998); Eversource Walpole-Holbrook at 93; Eversource Mystic-Woburn at 79.

**A. Public Benefit and Need for the Project**

16. The primary purpose of the modifications to the Substations and the related work is to accommodate the New Line. Comprehensive information supporting the immediate need for the Project is set forth in Section 2 of the Analysis.

**B. Alternatives Considered**

17. In addition to the proposed Project, the Company identified various alternatives to address the capacity and reliability issues driving the need for the Project. In evaluating alternatives, the Company considered factors relating to the reliability, complexity, cost, and the time required to implement them in order to address the identified needs in an efficient, reliable, long lasting, least-cost and least-environmental-impact manner. The alternative approaches and routing options that were considered are described in Sections 3 and 4 of the Analysis. As shown therein, the Project is the superior alternative for meeting the identified need.

**C. Potential Environmental Impacts**

18. The Company has conducted detailed analyses of the environmental impacts of the Project, identified the relevant impacts and proposed measures to minimize impacts associated with the construction and operation of the Project.

Comprehensive information regarding the minimization of impacts for the Project is set forth in Section 5 of the Analysis.

## **VII. THE PROJECT REQUIRES INDIVIDUAL ZONING EXEMPTIONS**

### **A. Standard of Review**

19. In determining whether an exemption from a particular provision of a zoning bylaw is “required,” the Department looks to whether the exemption is necessary in order to allow construction or operation of the petitioner’s project as proposed. Eversource Walpole-Holbrook at 93; Eversource Mystic-Woburn at 80; Eversource Woburn at 6. It is a petitioner’s burden 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 required exemptions.

Eversource Walpole-Holbrook at 94; Eversource Mystic-Woburn at 80-81 n.71; Eversource Woburn at 6, quoting New York Cellular Geographic Service Area, Inc., D.P.U. 94-44, at 18 (1995).

20. The Department and the Siting Board favor the resolution of local issues on a local level when possible to reduce concern regarding the possibility of intrusion (by the granting of zoning exemptions) on a municipality’s home rule power to adopt zoning bylaws. Russell Biomass LLC, EFSB 07-4/D.P.U. 07-35/07-36, at 60-63 (2009) (“Russell 2009”); Eversource Mystic-Woburn at 82; Eversource Woburn at 38;

Eversource Hopkinton at 46. The Department and the Siting Board look to whether a petitioner has consulted with local officials regarding its project before seeking zoning exemptions. Western Massachusetts Electric Company, D.P.U. 13-187/188, at 53-54 (2015); NSTAR Electric Company, D.P.U. 13-126/127, at 29 (2014); NSTAR Electric Company, D.P.U. 13-64, at 24-25 (2014); New England Power Company, D.P.U. 12-02, at 33-34 (2012). The Company has complied with each of these requirements by meeting with Barnstable officials on three occasions to discuss the Project and the zoning exemptions being requested.

**B. Individual Zoning Exemptions Required**

21. As described in more detail below, the Project needs relief from the Zoning Ordinance in several respects. The Project is needed in the immediate time frame in order to provide reliable transmission service and to increase the capacity of the electric system in the area. Thus, Eversource is seeking zoning relief from the Department in order to allow for the timely and efficient construction of the Project. To date, the Town has not expressed any objection to Eversource's approach.

22. According to the Zoning Map, the Substation Site is located in the Residence F ("RF") Zoning District and in the Aquifer Protection ("AP") and Resource Protection ("RP") Overlay Districts. Based on Eversource's review of the Zoning Ordinance, the modifications to the Substation necessary to interconnect the New Line would require municipal zoning relief as set forth below.

23. Uses. The Company would need zoning relief in the form of use variances for each of the following provisions of the Zoning Ordinance:

a. Section 240-7A of the Zoning Ordinance provides that "[n]o building shall

be erected or altered and no building or premises shall be used for any purpose except in conformity with all of the regulations herein specified for the district in which it is located.” Without a variance, the Project cannot comply with this provision.

b. Per Section 240-14A-D of the Zoning Ordinance, utility uses are not permitted in the RF zoning district; thus, a use variance would be required for the proposed Substation modifications.

c. Regarding the AP Overlay District, Section 240-35E provides that the permitted uses in the overlay district are only those uses allowed in the underlying zoning district; thus, because utility uses are prohibited in the RF Zoning District, they are prohibited in the AP Overlay District and a use variance would be required for the proposed Substation modifications.<sup>4</sup>

c. The Substation Site is also within the RP Overlay District, which is established by Section 240-36 of the Zoning Ordinance. The Zoning Ordinance does not provide a list of permitted or prohibited uses in the RP Overlay District. To the extent that the construction or operation of the Project is regulated or prohibited in the RP

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<sup>4</sup> The purpose of the AP Overlay District is to “protect the public health, safety, and welfare by encouraging nonhazardous, compatible land uses within groundwater recharge areas.” Even though the Substation and Project modifications are not permitted in the underlying RF Zoning District, the operation of the Substation and the construction and operation of the Project will not cause any detrimental impact on groundwater recharge. As discussed in the Analysis at Section 5.7.6, the Substation’s existing stormwater management system will be modified, as necessary, to conform to MassDEP’s Stormwater Standards as prescribed under the Wetlands Protection Act Regulations (310 CMR 10.00). These standards require, in part, implementation of certain water quality BMPs to collect and treat stormwater runoff prior to discharge (e.g., deep sump catch basins, infiltration trenches and swales) and adherence to a post-construction stormwater operation and maintenance plan. Moreover, there are no standards or requirements in Section 240-35E regarding activities in the AP Overlay District. Therefore, exempting the Project from the use prohibition in Section 240-35E will not result in any negative impacts to the purposes of the zoning provision.

Overlay District, the Company seeks an exemption from obtaining zoning relief.<sup>5</sup>

d. Finally, Section 240-10 prohibits any use that is injurious, noxious or offensive by reason of the emission of odor, fumes, dust, smoke, vibration, noise, lighting or other cause. There will be some incremental lighting added to the Substation as part of the Project. There are no standards in Section 240-10 to determine whether potential impacts from the proposed lighting could be “injurious, noxious or offensive” and, therefore, the requirement is subjective. The provision also lists “other cause” and, thus, leaves open for interpretation whether a function of the construction or operation of the Project could be “injurious, noxious or offensive.” Because the provision is subjective and thus subject to interpretation, a variance would be required to ensure that the Project complies with the Section 240-10.

Regarding the variances discussed in subsections a-d above, Section 240-125B(1)(e) of the Zoning Ordinance authorizes the grant of use variances. To grant a use variance, the Barnstable Zoning Board of Appeals would need to find the following in accordance with G.L. c. 40A, § 10: (a) circumstances exist relating to soil conditions,

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<sup>5</sup> Per Section 240-36(2), the purposes of the RP Overlay District include: (1) reducing nitrogen contamination by reducing impacts from, among others, runoff from impervious surfaces; (2) reducing nitrogen loading to groundwater and surface water; (3) increasing groundwater protection in areas with septic systems and groundwater wells; and (4) reducing development potential. As noted in the prior footnote and as discussed in the Analysis in Section 5.7.6, the Substation’s existing stormwater management system will be modified, as necessary, to conform to MassDEP’s Stormwater Standards. The proposed BMPs will focus on Low Impact Development (“LID”) techniques to mitigate potential changes in runoff, promote infiltration, and provide water quality treatment. Water quality treatment will likely be achieved primarily using infiltration BMPs such as infiltration basins and trenches, vegetated swales and crushed stone in lieu of pavement. These types of BMPs efficiently remove stormwater pollutants including total suspended solids, phosphorous, metals and total petroleum hydrocarbons, and are relatively low maintenance. Moreover, there are no standards or requirements in Section 240-36 regarding activities in the RP Overlay District. Therefore, exempting the Project from the use prohibition in Section 240-36 will not result in any negative impacts to the purposes of the zoning provision. As required in Section 240-36D, the minimum square footage of the Substation Site is more than 87,120 square feet.

shape or topography of the particular parcel or structure that do not affect generally the zoning district in which the parcel or structure is located; (b) a literal enforcement of the provisions of the bylaw would involve substantial hardship to the applicant and there is a nexus between the special circumstance and the hardship; and (c) the relief requested may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the bylaw. It is difficult, if not impossible, particularly for use variances, to demonstrate the existence of unique conditions relating to soil conditions, shape or topography of a parcel of land or structure. Moreover, variances are a legally disfavored form of relief and, even if granted, are susceptible to appeal.<sup>6</sup> To avoid the delay, cost and uncertainty associated with seeking local zoning relief and any potential appeals arising therefrom, the Company seeks exemptions from Sections 240-7A, 240-10, 240-14, 240-35E and 240-36 of the Zoning Ordinance.

24. Frontage. Per the table in Section 240-14E, a minimum of 150 feet of frontage is required in the RF Zoning District. The Substation Site has only 67.33 feet of frontage on Oak Street and, therefore, a variance is required. The Company seeks an exemption from the minimum frontage requirement in Section 240-14E to avoid the delay, cost and uncertainty associated with seeking the variance and any potential appeals

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<sup>6</sup> The Company characterizes variances as “legally disfavored” because the Massachusetts Supreme Judicial Court has ruled that they are to be issued sparingly and only if all of the statutory prerequisites have been met. Norcross v. Board of Appeal of the Building Department of the City of Boston, 255 Mass. 177, 185 (1926) (“[i]t is only in rare instances and under exceptional circumstances that relaxation of the general restrictions established by the statute ought to be permitted. The power granted is only for the relief of specific instances, peculiar in their nature”). This holding has been consistently reiterated in decisions by Massachusetts courts regarding the issuance of variances. Guiragossian v. Board of Appeals of Watertown, 21 Mass. App. Ct. 111 (1985).

arising therefrom. The Siting Board granted an exemption from the need to obtain a variance from the frontage requirement for the existing Substation in the 2012 Exemption.

25. Height. Section 240-14E provides a maximum building height of 30 feet, or 2½ stories, whichever is lesser, in the RF District. All structures associated with the proposed modifications are below 30 feet with the exception of a tower that will be approximately 54 feet in height. While the Building Inspector expressed his belief at the October 30<sup>th</sup> meeting that substations are not considered buildings, he did not opine whether structures must meet the 30-foot height limitation. To remove all doubt about the Project's compliance with the maximum height requirement, the Company seeks an exemption from the height requirement in Section 240-14E of the Zoning Ordinance for the tower.

26. Number of Buildings on a Lot. Section 240-7F(1) allows only one principal permitted building on each lot in a residential district. Both the Substation and the Oak Street Substation have existing control houses that are located on the same lot (661 Oak Street). The Building Inspector expressed his belief at the October 30<sup>th</sup> meeting that substations are not considered buildings. However, to ensure that the Project conforms with Section 240-7F(1), the Company would need a variance and, to avoid the delay, cost and uncertainty associated with seeking a variance and any potential appeals arising therefrom, the Company seeks an exemption from Section 240-7F(1) of the Zoning Ordinance. The Siting Board granted an exemption from the limitation on the number of permitted buildings on a lot in the 2012 Exemption.

27. Site Plan Review. The modifications to the Substation Site would require



site plan approval pursuant to Article IX of the Zoning Ordinance because it would involve “construction ... grading, clearing or other land development activity” and “[new construction of any building or structure, including any grading or land development activity except detached single-family and two-family dwellings. . .” Section 240-101A provides that neither a building permit nor occupancy permit shall be issued for any activity or use requiring site plan review until site plan approval has been obtained from the Barnstable Building Commissioner. Regarding the purpose of site plan review, Section 240-98 provides:

Developments designed to be used for business and professional offices, commercial establishments, industrial facilities, medical-service facilities, public recreational facilities and multiple-family dwellings, together with their associated outdoor areas for vehicular movement and parking, invite and accommodate varying degrees of open and continuous use by the general public. Owing to their physical characteristic and the nature of their operations, such developments may affect neighboring properties and adjacent sidewalks and streets. It is in the interest of the community to promote functional and aesthetic design, construction and maintenance of such developments and to minimize any harmful effects on surrounding areas.

As noted by the Department in the 2003 Exemption, “relatively large-scale development projects, with likely impacts beyond a developer’s own site, are the primary focus of the site plan review process laid out in this Section.” Commonwealth Electric Company, D.T.E. 03-7, at 14 (2003). The proposed modifications to the West Barnstable Substation are to the rear of the Substation Site and, once operational, will not have any impacts of the type envisioned by Section 240-98 on neighboring properties and adjacent sidewalks and streets. Moreover, the Company must have the discretion to design the Project and site layout in a manner that is consistent with established utility, state and federal standards to ensure its reliable operation; such technical engineering and electrical issues

are typically beyond the general scope of municipal review. For these reasons, the Company is seeking an exemption from the site plan review requirements in Article IX of the Zoning Ordinance. The Department and the Siting Board granted exemptions from the need to obtain site plan approval in both the 2003 Exemption and the 2012 Exemption.

28. Parking. Article VI of the Zoning Ordinance establishes Town wide off-street parking requirements for “new, expanded or intensified uses within the Town. . .” and no non-residential use may be intensified without providing adequate off-street parking as provided in the Zoning Ordinance. The Zoning Ordinance provisions regulate several aspects of parking, including: (1) the minimum number of parking spaces by use; (2) parking space location, design and screening requirements; and (3) landscaping requirements. Because utility uses are not permitted in the RF Zoning District, the number of parking spaces required would appear to fall into the catch-all category of “[a]ll other uses” in the Schedule of Off-Street Parking Requirements found in Section 240-56 where the number of spaces is “[a]s determined by the Building Commissioner.” The Building Inspector confirmed at the October 30<sup>th</sup> meeting that it is within his discretion to determine the number of parking spaces for the Project. Parking at the Substation is rare because the Substation is unmanned and will remain so after the Substation modifications are complete. Although the Zoning Board of Appeals can reduce the number of spaces required by special permit, the grant of a special permit is discretionary, some of the criteria are subjective, and the Board of Zoning Appeal may impose conditions to the grant of any special permit. Because of the legal uncertainty in obtaining a special permit, the possibility of the imposition of problematic conditions and

the potential for adverse interpretations, delay, burden and undue expense associated with the permitting process and appeals therefrom, the Company seeks an exemption from the parking requirements in Article VI. Such an exemption was granted to the Company in both the 2003 Exemption and the 2012 Exemption.

29. Signs. Article VII of the Zoning Ordinance regulates signs and prescribes the types, number and size of signs in various zoning districts. The Company affixes three types of signs on its substation fences and will do so on the new fence that will be installed to accommodate the Substation modifications:

- No Trespassing Signs (approximate size: 12" x 9")
- Contact Information Signs (approximate size: 14" x 10")
- Danger Signs (approximate size: 14" x 10")

The danger signs appear to be permitted pursuant to Section 240-75, which allows warning signs necessary for public safety. The no-trespassing and informational signs do not appear to be permitted in the RF Zoning District and, therefore, variances would be required for these signs.

30. Performance Bond. Section 240-124A of the Zoning Ordinance requires a performance bond of not less than \$4 per foot of frontage against possible costs due to erosion or damage within passable street rights-of-way, and a second bond or cash security may be required by the Building Commissioner for other construction. The amount of these bonds is to be determined by the Building Commissioner in his sole discretion. Further this section requires certification of compliance with yard requirements by a registered land surveyor. Inasmuch as the amounts of these bonds are unfixed and there is no process for how these determinations are to be made, the potential for project delay is great, and the Company seeks an exemption from the bond provisions

and from the requirements in this Section 120-124A. The Department and the Siting Board granted exemptions from the performance bond requirements in both the 2003 Exemption and the 2012 Exemption.

31. Occupancy Permit. Section 240-124B of the Zoning Ordinance requires that no premises and no building or structure erected, altered or in any way changed as to construction or use, under a permit or otherwise, shall be occupied or used without an occupancy permit signed by the Building Commissioner, and that “[s]uch permit shall not be issued until the premises, building or structure and its uses and accessory uses comply in all respects with this chapter.” Inasmuch as it will be impossible for the Company to comply with this provision once it has been granted any exemption from the Barnstable Zoning Ordinance by the Department, the Company seeks an exemption from this requirement of Section 120-124B for the issuance of an occupancy permit. The Department and the Siting Board granted exemptions from the occupancy permit requirements in both the 2003 Exemption and the 2012 Exemption.

32. To avoid vagueness and subjectivity in the Zoning Ordinance as applied to the Project and the need to seek use and dimensional variances and other zoning relief, Eversource seeks the following exemptions in order to construct, operate and maintain the Project in Barnstable:

<b>Zoning Ordinance Provision</b>	<b>Local Relief Required</b>	<b>Why Exemption is Required</b>
Section 240-7A Prohibits building unless all Zoning Ordinance provisions are met	Use Variance	The Company cannot meet this requirement as the Project cannot meet several provisions in the Zoning Ordinance. A use variance would be needed to ensure compliance. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Section 240-10 Prohibits uses that are injurious, noxious or offensive	Use Variance	The Project requires additional lighting. There are no standards in Section 240-10 governing what is “other cause” or “injurious, noxious or offensive.” A use variance would be needed to ensure compliance. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Section 240-14A-D Utility uses not permitted in Residence F Zoning District	Use Variance	A use variance would be needed to authorize a prohibited use. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Section 240-35E Utility uses not permitted in Aquifer Protection Overlay Zoning District	Use Variance	A use variance would be needed to authorize a prohibited use. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Section 240-36 Resource Protection Overlay District	Use Variance	The Zoning Ordinance does not provide a list of permitted/prohibited uses. To ensure compliance, a use variance would be needed. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Section 240-14E Minimum frontage	Variance	The Substation Site has only 67.33 feet of frontage on Oak Street and does not meet the minimum frontage requirement of 150 feet; therefore, a variance is required.

<b>Zoning Ordinance Provision</b>	<b>Local Relief Required</b>	<b>Why Exemption is Required</b>
Section 240-14E Maximum building height	Variance	It is unclear whether the maximum building height requirement would apply to the 54-foot tower. To ensure compliance, a variance would be needed. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Section 240-7F(1) Only one principal permitted building is allowed on each lot	Variance	Both the West Barnstable and the Oak Street Substations are located on the same lot and each has a control house. To ensure compliance, a use variance would be needed. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal.
Article IX Site Plan Review	Site Plan Approval	The Company must have the discretion to design the Project and site layout in a manner that is consistent with established utility, state and federal standards to ensure its reliable operation; such technical engineering and electrical issues are typically beyond the general scope of municipal review.
Article VI Off-Street Parking	Special Permit	There are no parking requirements listed in the Zoning Ordinance because utility uses are not allowed. The number of parking spots that would be required is at the discretion of the Building Commissioner. The number of parking spots can be adjusted by special permit, but the grant of special permits is discretionary and could be unfavorably conditioned. The station is currently unmanned and will continue to be so after the Project is constructed.
Article VII Signs	Variance	The informational and no-trespassing signs that would be placed on the fence are not allowed in the RF Zoning District so variances would be required. The criteria for use variances are difficult to meet and, even if granted, the variance is susceptible to appeal

Zoning Ordinance Provision	Local Relief Required	Why Exemption is Required
Section 240-124A Performance Bond	Variance	Inasmuch as the amounts of these bonds are unfixed and there is no process for how these determinations are to be made, the potential for project delay is great.
Section 240-124B Occupancy Permit	Variance	An occupancy permit can be granted only if all provisions of the Zoning Ordinance are met. An exemption from this provision is needed so that an occupancy permit can be obtained.

### VIII. THE PROJECT REQUIRES COMPREHENSIVE ZONING EXEMPTIONS

33. The Company also respectfully requests a comprehensive exemption from the operation of the Zoning Ordinance with respect to the Project. The grant of a comprehensive zoning exemption is based on the specifics of each case. NSTAR Electric Company d/b/a Eversource Energy and New England Power Company d/b/a National Grid, EFSB 15-04/D.P.U. 15-140/15-141, at 150 (2018) (Eversource/NEP Woburn-Wakefield); Eversource Walpole Holbrook 98; Eversource Woburn at 41. The Department will consider a request for comprehensive zoning relief when issuance of a comprehensive exemption is imminently needed to avoid substantial public harm. Eversource/NEP Woburn-Wakefield at 150; Eversource Walpole Holbrook at 98; Eversource Woburn at 41.

34. The Department has cited additional factors as relevant in making a determination to grant a comprehensive exemption including, but not limited to, whether: (1) the project is needed for reliability; (2) the project is time sensitive; (3) there are multiple municipalities involved that could have conflicting zoning provisions that might hinder the uniform development of a large project spanning these communities; (4) the

project proponent has actively engaged the communities and responsible officials to discuss the applicability of local zoning provisions and address local concerns; and (5) the communities affected by the project do not oppose the issuance of a comprehensive zoning exemption. Eversource Woburn-Wakefield at 150; Eversource Walpole-Holbrook at 98.

35. The grant of a comprehensive zoning exemption is necessary even where individual zoning exemptions are granted, as the two types of zoning exemptions serve distinct needs. An individual zoning exemption relates to specific provisions in the Zoning Ordinance *currently* in effect that have the potential to conflict or be inconsistent with, prevent, delay or obstruct the construction or operation of the Project. On the other hand, a comprehensive zoning exemption goes beyond the provisions in the current Zoning Ordinance (from which an individual zoning exemption may be granted), to exempt the Project from any *future* zoning enactment that comes into effect that has the potential to jeopardize the Project (in the same manner described above for individual zoning exemptions).<sup>7</sup> In this manner, the two types of zoning exemptions work in tandem to ensure that meritorious energy facilities like the Project are constructed as approved by the Department without undue delay. The very purpose of a comprehensive

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<sup>7</sup> A comprehensive zoning exemption is also necessary with regard to provisions currently in effect because zoning bylaws and ordinances are rarely written with unique energy infrastructure facilities in mind. The lack of clearly defined and specific regulation of electric infrastructure in the Zoning Ordinance, and the vague and subjective terms and provisions of the Zoning Ordinance result in an imprecise, at best, application of the zoning provisions to the Project. The Company interprets the provisions of zoning ordinances and bylaws conservatively, in the hope that it is requesting individual zoning exemptions for all of the provisions that could conceivably be said to apply to a project. The grant of a comprehensive exemption removes any reasonable doubt as to the ability of the Project to move forward without violating any current terms of the Zoning Ordinance.



zoning exemption is thus to provide a mechanism for relief from local zoning that would not be available if only individual zoning exemptions were able to be secured.

36. As described herein, the Project satisfies the Department's standards for the grant of a comprehensive zoning exemption. As described in detail in Section 2 of the Analysis, the Project (including the modifications at the Substations) are necessary for system reliability and the timing of the need the Project is imminent. The Project involves modifications at the West Barnstable Substation in order to make the New Line operational. As discussed in Section III above, the Company has actively engaged the responsible officials in Barnstable to discuss the applicability of local zoning provisions, the need for both the individual and comprehensive zoning exemptions and the Company's plan to seek exemptions from the Department. Moreover, the Company is committed to maintaining a constructive working relationship with Barnstable to ensure that groundwater resources are and remain protected at the Substation. Finally, Barnstable, to date, has not expressed opposition to Eversource seeking the requested zoning exemptions from the Department.

37. In sum, a comprehensive zoning exemption from the operation of the Barnstable Zoning Ordinance would ensure the timely construction of this important Project. This benefit redounds directly to customers.

## **IX. PERMITS REQUIRED**

38. To the extent that the Department grants the Company's petition, the Company anticipates that the additional permits listed in Section 6 of the Analysis would be required to construct and operate the Project.

**WHEREFORE**, Eversource respectfully requests that, pursuant to G.L. c. 40A, § 3, and after due notice and a public hearing, the Department determine that the construction of the proposed modifications to the West Barnstable Substation is reasonably necessary for the convenience and welfare of the public, and that the Substation Site in Barnstable, the uses to be made of it, and the structures to be built and maintained thereon by Eversource shall be individually and comprehensively exempted from the operation of the Barnstable Zoning Ordinance, to the extent applicable thereto.<sup>8</sup>

Respectfully Submitted,

**NSTAR ELECTRIC COMPANY d/b/a  
EVERSOURCE ENERGY**

By their attorneys,



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Dated: November 8, 2019

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<sup>8</sup> Pursuant to the Department's Checklist for Zoning Exemption Petitions (attached as Attachment D), the Company has provided a copy of the Company's Environmental Notification Form submitted pursuant to the Massachusetts Environmental Policy Act ("MEPA") as Appendix 6-1 to the Company's Siting Board Petition. The Company has also provided a draft hearing notice, including a CD-ROM in Microsoft Word, with the Siting Board Petition.

## **ATTACHMENTS**

- Attachment A: Barnstable Zoning Ordinance and Zoning Map
- Attachment B: USGS Locus Map and Aerial Photograph – West Barnstable Substation
- Attachment C: Plan of West Barnstable Substation Modifications
- Attachment D: Checklist for Zoning Exemption Petitions