BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

GREENROOTS, INC. and CONSERVATION LAW FOUNDATION, INC., non-profit corporations, Complainants, v. MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES and MASSACHUSETTS ENERGY FACILITIES SITING BOARD, Respondents.	**COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964**

I. INTRODUCTION

Decisions about where proposed energy facilities will be sited have enormous negative health and environmental consequences for environmental justice communities with large Limited English Proficient ("LEP") populations like East Boston and Chelsea, Massachusetts. Yet the Massachusetts Energy Facilities Siting Board (the "Board"), the state entity responsible for the review and permitting of proposed energy facilities in the Commonwealth of Massachusetts, has rebuffed—as "disruptive"—the attempts of non-English speaking residents to fully participate in these decisions, in direct contravention of federal law.

For decades, communities of color, low-income communities, and immigrant communities in Massachusetts and around the country have been forced to shoulder a disproportionate share of the environmental burdens of urban life. For East Boston and Chelsea—majority-minority communities with substantial numbers of non-English speakers—those burdens are compounded. Decisions to site environmental hazards in these communities have created neighborhoods marked by heavy industrial uses and vehicular and air travel, forcing residents to live amidst pollution and contamination. And as the current COVID-19 crisis has made clear, this environmental injustice has profound consequences that extend far beyond the direct effects of pollution and containment.[1] The virus has hit Black, Latino, and immigrant-rich neighborhoods like East Boston and Chelsea especially hard, due to the cumulative environmental and public health burdens those residents

[1] *See e.g.*, Andrew Ryan and Kay Lazar, *Coronavirus may be hitting harder in Black and Latino communities*, BOSTON GLOBE (April 7, 2020), available at: https://www.bostonglobe.com/2020/04/07/nation/coronavirus-may-be-hitting-hard-black-latino-communities/; *see also* Nik DeCosta-Klipa, *Marty Walsh says Boston's early racial data on COVID-19 is "disturbing,"* BOSTON.COM (April 10, 2020), available at: https://www.boston.com/news/local-news/2020/04/10/boston-racial-data-coronavirus (reporting Boston neighborhoods with highest rate of COVID-19 cases were Hyde Park, East Boston, and Mattapan, all of which have majority-minority populations).

bear.[2] Despite these burdens, the very state agencies responsible for safeguarding public and environmental health have declined to preserve land for public benefit, in lieu of siting industrial hazards in the middle of these immigrant communities.

As recipients of federal financial assistance, the Respondent entities—the Board, the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA"), and the Massachusetts Department of Public Utilities ("DPU")—are bound by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, to ensure that no residents are unlawfully excluded from their public decision-making processes. This mandate includes ensuring the meaningful involvement of LEP residents.

The mandates of Title VI and its implementing regulations are similarly reflected in the enabling legislation and regulations of the Board, which specifically require a public process that builds a record based on meaningful public notice and opportunities for community participation. *E.g.*, M.G.L. c. 164, § 69J; 980 CMR 1.04(5). Not only is public engagement required, it is also the only source for certain relevant facts necessary for the Board to ensure that the record is complete. Other state laws and policies, including the Language Access Policy and Implementation Guidelines[3] and Environmental Justice Executive Order[4] and Policy[5] for the

[2] *See, e.g.*, Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. TIMES (Apr. 7, 2020) (reporting on nationwide study showing statistical link and "large overlap" between COVID-19 deaths and other diseases associated with long-term exposure to fine particulate matter, with results suggesting that "long-term exposure to air pollution increases vulnerability to experiencing the most severe COVID-19 outcomes").

[3] Originally issued as ANF Bulletin #16, pursuant to Executive Orders 526 and 527 on October 10, 2012, and updated on March 20, 2015.

[4] Massachusetts Executive Order 552 ("E.O. 552").

[5] 2017 Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs (2017 EEA EJ Policy). The Board is subject to the 2017 EEA EJ Policy. *City of Brockton v. Energy Facilities Siting Bd.*, 469 Mass. 196, 200 n.11 (2014).

Commonwealth,[6] all likewise require that the Board include a community's most vulnerable residents—those who are people of color, low-income, or have limited English proficiency (LEP)—in its decision-making process to ensure their equal participation in the review and approval of energy facilities.

Despite the requirements of Title VI and these parallel statutory and regulatory mandates, the Board has resisted calls to provide meaningful language access, thereby denying LEP East Boston and Chelsea residents the right to participate on equal terms with English speakers. By providing inferior and inadequate interpretation and translation services, the Board effectively cuts off meaningful access to community participation during hearings, robs constituents of the ability to understand local energy infrastructure and environmental burdens, and fails in its duties under existing law and policy to (a) not discriminate based on national origin or English-language proficiency and (b) provide effective access for those who are LEP. Moreover, the exclusion of non-English speakers results in siting decisions by the Board based on an incomplete record—a disservice to East Boston and Chelsea residents overall.

The Board's failure to execute its critical responsibilities is exemplified by the review, comment, and approval process for an electrical substation and transmission lines proposed by NSTAR Elec. Co. d/b/a Eversource Energy ("Eversource") as the East Eagle Reliability Project (the "Project"). As detailed below, the Board has continually and intentionally failed to ensure the meaningful participation of LEP East Boston and Chelsea residents in its proceedings regarding this Project and has severely undermined the ability of these residents to fully understand the

[6] While compliance with state law and policy is not the subject of this complaint, there is considerable overlap in the goals and mandates of Title VI and Massachusetts law and policy regarding environmental justice and language access. Just as this complaint alleges noncompliance with Title VI, the agencies named in this complaint have also been persistently out of compliance with E.O. 552 and the 2017 EEA EJ Policy since their issuance. As detailed below, the Board has consistently and without irony held Eversource to standards the Board itself has ignored, despite the obligations imposed by Title VI and the implementing regulations.

impacts that this proposed Project will have on their community and their lives. The Board's resistance has spanned several years, compromising the decision-making process for the Project at several junctures during two separate proceedings conducted by the Board, EFSB 14-04/D.P.U. 14-153/14-154 ("the Initial Proceeding") and EFSB 14-04A/D.P.U. 14-153A/14-154A ("the Project Change Proceeding").

The Board's continual and systematic failures constitute national origin discrimination under Title VI and the EPA's regulations implementing the statute. 40 C.F.R. Part 7, *Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency* ("EPA Regulations"). They also violate Executive Order 13166 and the *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, Docket No. FRL-7776-6 (June 25, 2007) ("EPA LEP Guidance").

Complainants request that EPA's External Civil Rights Compliance Office ("ECRCO") promptly and thoroughly investigate the allegations set forth in this complaint and take all actions necessary to ensure that Respondent entities comply fully with the law, including: halting review of the Project pending an investigation of Respondents' language access practices; suspending federal funding until a remediation plan for LEP engagement is in place; and implementing monitoring and enforcement mechanisms sufficient to ensure Respondents' future compliance with their legal obligations to LEP residents.[7]

[7] As set forth more fully herein, any effective relief must also account for the extraordinary impact of COVID-19 on LEP communities in Chelsea and East Boston, which have sustained serious economic and public health harms.

II. THE PARTIES

a. The Complainants

i. GreenRoots

GreenRoots, Inc. is a not-for-profit, community-based organization dedicated to improving and enhancing the urban environment and public health of Chelsea, Massachusetts, and surrounding communities, including East Boston. For over twenty years, GreenRoots has engaged in ecological restoration activities, provided educational activities, convened educational events, held meetings, and organized local groups and individuals on a broad range of issues impacting the health and environment of Chelsea and Greater Boston residents, many of whom are low-income, LEP residents of color. Since 2014, GreenRoots has mobilized its membership to participate in proceedings related to consideration of the Project. GreenRoots, in its original incarnation as the Greenspace and Recreation Committee of the Chelsea Collaborative, and several of GreenRoots' staff and members were granted limited participant status in the Initial Proceeding on September 1, 2015. GreenRoots petitioned for and was granted intervenor status in the Project Change Proceeding on April 5, 2019.

ii. Conservation Law Foundation

CLF is a nonprofit, member-supported organization dedicated to protecting New England's environment. CLF protects New England's environment for the benefit of all people and uses the law, science, and the market to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy. CLF's mission includes working to end the unfair environmental burdens imposed on low-income and communities of color and safeguarding the health and quality of life of all New England communities. CLF became involved in this Project in November 2017, at the close of the Initial Proceeding, due to GreenRoots' concerns about language access. CLF has members residing in Chelsea and East Boston, and GreenRoots itself is

an organizational member of CLF. CLF petitioned for and was granted limited intervenor status in the Project Change Proceeding on April 5, 2019.[8]

b. Respondents

i. Massachusetts Executive Office of Energy and Environmental Affairs (EEA)

EEA is the primary agency of the Commonwealth of Massachusetts for environmental planning, charged with, *inter alia*, "analyz[ing] and mak[ing] recommendations, in cooperation with other state and regional agencies, concerning the development of energy policies and programs in the commonwealth." M.G.L. c. 21A, § 2(17).

ii. Massachusetts Department of Public Utilities (DPU)

DPU is one of seven departments contained within EEA. M.G.L. c. 21A, § 7. As outlined in Chapter 25 of the Massachusetts General Laws, DPU is responsible for the oversight of investor-owned electric power, natural gas, and water utilities in the Commonwealth, monitoring service quality, regulating safety in the transportation and gas pipeline areas, and the "siting" of energy facilities. M.G.L. c. 25, § 12N. Its mission is to "ensure that utility consumers are provided with the most reliable service at the lowest possible cost, to protect the public safely from transportation and gas pipeline related accidents; to oversee the energy facilities siting process, and to ensure that residential ratepayers' rights are protected."[9]

[8] "Limited participant" is a type of intervener status under the Board's regulations that confers limited participation rights on grantees, including the right to submit post-hearing briefs, but not to participate in discovery, offer or examine witnesses during the evidentiary hearing, or seek judicial review of the Board's final decision. *See* 980 CMR 1.05(2).

[9] Department of Public Utilities, *Who we serve*, Commonwealth of Massachusetts (n.d.), available at: https://www.mass.gov/orgs/department-of-public-utilities.

iii. Energy Facilities Siting Board (the Board)

As established under M.G.L. c. 164, §69H, the Board is part of, but independent from, DPU, though the agencies are functionally interrelated.[10] The Board itself is composed of leadership from within EEA and other state agencies, including

> the secretary of energy and environmental affairs, who . . . serve[s] as [chair], the secretary of housing and economic development, the commissioner of the department of environmental protection, the commissioner of the division of energy resources, commissioners of the commonwealth utilities commission, or their designees, as well as three public members, appointed by the governor and experienced in environmental, energy, and labor issues.

Id. §69H.

The Board is charged with providing a "reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." *Id.* The Board reviews the "need for, cost of, and environmental impacts of transmission lines, natural gas pipelines, facilities for the manufacture and storage of gas, and oil facilities." *Id.* Under §§ 69H-Q, the Board is empowered to, *inter alia*, "adopt and publish rules and regulations," including "for the conduct of the board's public hearings," and to "approve for review and approval or rejection any application, petition, or matter related to the need for, construction of, or siting of facilities" while applying "department and board standards in a consistent manner." *Id*. § 69H(1)-(4).

III. JURISDICTION

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal

[10] The Board sits within, but is "not under the supervision or control of" DPU, though DPU "administratively supports the work of the [Board] and its staff." Energy Facilities Siting Board Website (last visited May 27, 2020), available at: https://www.mass.gov/orgs/energy-facilities-siting-board/. The Board's own staff also "conduct DPU siting-related cases that do not fit within the [Board's] jurisdiction." *Id*.

financial assistance." 42 U.S.C. § 2000d. Acceptance of federal funds, including EPA assistance, creates an obligation on the recipient to comply with Title VI and the federal agency's implementing regulations. 40 C.F.R. § 7.80. As explained below, EEA receives federal assistance from EPA, making it subject to the requirements of Title VI and EPA's implementing regulations. In addition, this complaint is timely and satisfies all other jurisdictional requirements.

a. Federal Financial Assistance

EEA is a recipient of federal financial assistance as defined in EPA's Title VI regulations. EPA's Title VI regulations define a "[r]ecipient" as "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient." 40 C.F.R. § 7.25.

EEA has received a total of $ 17.56 million in federal funds from EPA from Fiscal Year 2008 to 2020, constituting approximately 36% of all federal funding received by the agency. EEA received $1,347,340 in federal funds from EPA in Fiscal Year 2019 and 2020 alone. EEA presently receives nine grants from EPA that are scheduled to terminate on or after June 30, 2020. Moreover, EEA's enabling statute requires the agency to "represent and act on behalf of the commonwealth in connection with federal grant programs." M.G.L. c. 21A, § 2(25).

EEA's sub-agencies, including the Massachusetts Department of Environmental Protection, the Department of Agricultural Resources, the Massachusetts Department of Fish and Game, and the Massachusetts Clean Water Trust (formerly the Water Pollution Abatement Trust) received a total of $639.16 million from the EPA from Fiscal Years 2008 to 2020, with $82.74 million of that funding received from the EPA in Fiscal Years 2019 and 2020 alone. *See* M.G.L.

c. 21A, § 7 (listing departments contained in EEA); *id*. § 8 (listing offices contained within office of the Secretary of EEA).

Because EEA receives financial assistance from EPA, it is subject to Title VI and EPA's Title VI implementing regulations. 40 C.F.R. § 7.25.

b. Program or Activity

A "program or activity" includes "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government." 40 C.F.R. § 7.25. "[I]f any part of a listed entity receives federal funds, the entire entity is covered by Title VI." *Ass'n of Mexican-Am. Educators v. California*, 195 F.3d 465, 475 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (citing *Grimes v. Superior Home Health Care*, 929 F. Supp. 1088, 1092 (M.D. Tenn. 1996)).

EEA is an agency of the Commonwealth of Massachusetts. The Massachusetts General Court has conferred general jurisdiction onto EEA to execute a broad range of environmental regulation for the benefit of all of the residents of Massachusetts. M.G.L. c. 21A, § 2. As described above, the EEA contains, as relevant here, a "department of public utilities," *id.* § 7, which in turn contains the Board. M.G.L. c. 164, § 69H; *see also id.* (noting that the Secretary of EEA is chairman of the Board). The agency is also vested with plenary powers that it may exercise as necessary and convenient to perform acts within its jurisdiction, such as notice requirements for matters within its jurisdiction. Accordingly, EEA's operations meet the definition of a "program

or activity" under Title VI, and it must comply with Title VI in implementing all its regulatory activities.

c. Timeliness

The complaint alleges that Respondents are in continuing violation of Title VI. At present, and as detailed below, the Board discriminates against LEP persons by failing to provide adequate professional interpretation at public meetings and failing to properly translate vital documents into languages other than English. This complaint is therefore timely because the Board's discriminatory rules and practices are in effect each and every day, its discriminatory acts under those rules are ongoing. Further, as set forth below, this complaint is filed within 180 days of some of the most recent and egregious examples of this continuing violation, including the February 28, 2020 issuance of the Board's Tentative Decision on the Project Change Petition in English, without an accompanying Spanish language translation and with a deadline for public comment of March 6, 2020, at 5:00 p.m. and the delayed issuance of the Spanish language translation of the Board's Tentative Decision on March 5, 2020, which unlawfully truncated LEP residents' opportunity for comment.[11]

d. Other Jurisdictional and Prudential Considerations

This complaint satisfies all other jurisdictional criteria under Title VI and EPA's implementing regulations. Specifically, this complaint is in writing, describes the alleged discriminatory acts, identifies the challenged practice, and is filed with EPA by GreenRoots and CLF on behalf of LEP residents who have experienced adverse impacts as a result of the Board's violations of Title VI. 40 C.F.R. §7.120(a), (b).

[11] Even if these recent events and the continuing nature of the violations in question did not fall within 180 days of the Complaint—which they undoubtedly do—ECRCO may waive these time limits. 40 C.F.R. § 7.120(b)(2). ECRCO also has ongoing authority to periodically review recipients' programs and activities to ensure Title VI compliance. *Id.* § 7.115.

IV. FACTUAL BACKGROUND

a. East Boston and Chelsea are Environmental Justice Communities with Substantial Numbers of Non-English Speakers

East Boston is a neighborhood of Boston, separated from the rest of the city by Boston Harbor to the west. It is bordered on the east by both the City of Revere and the Town of Winthrop, and located across the Chelsea Creek from the City of Chelsea to the north. More than 45,000 residents, most of them working-class immigrants of color, call East Boston their home. Indeed, more than half of East Boston residents identify as Hispanic or Latinx, and almost half were born outside the United States to non-citizen parents.[12] By comparison, 44.5% of Boston's overall population (and in many neighborhoods, well over 70%) identifies as white and non-Hispanic, while only 33.2% of East Bostonians do.[13] Nearly half of East Boston's residents are also LEP, meaning that they do not speak English as their primary language and have a limited ability to speak, read, write or understand English.[14]

The race and language demographics of East Boston almost inevitably intersect with issues of poverty and environmental justice. East Boston is not only less white, with residents more likely to lack English proficiency than other Boston neighborhoods, but also significantly less wealthy by most economic measures. East Boston's median household income is almost $10,000 below that of Boston generally; nearly a third of households live on less than $35,000 per year, and 19.3%

[12] *See, e.g.*, Boston Planning & Development Agency, Boston in Context: Neighborhoods at 8, 10 (Feb. 2020), available at: http://www.bostonplans.org/getattachment/1882b00d-48fe-41bc-ac1a-6979e25dbaf1 (hereinafter, "Boston in Context: Neighborhoods") (reporting that 56.4% of East Boston residents are Hispanic or Latino and that 49.5% are foreign born).

[13] *Id.* at 8.

[14] *See*, *e.g.*, City of Boston, Language and Communications Access: Demographic Data Report—Limited English Proficiency at 1, 3 (2018), available at: https://www.boston.gov/sites/default/files/document-file-11-2018/demographic_data_report_-_neighborhood_depth_lep_with_accom_notice_2.pdf (reporting, based on 2011-2015 data, that 46% of East Boston residents, or more than 19,000 people, are LEP).

of residents live below the federal poverty line.[15] In a city where nearly half the population has earned at least a bachelor's degree, only 26.2% of East Bostonians have done so.[16] City and state planners for decades have forced East Boston's residents to shoulder a disproportionate share of the burdens that come with modern urban life, siting numerous heavy industrial uses there in close proximity to residential neighborhoods. The most obvious example is Logan International Airport, whose footprint dominates most of East Boston's available space. The airport is the one of the busiest in the country, with thousands of flights coming and going every day, subjecting East Boston's residents to air pollution and severe, almost constant noise. Other heavy industrial and diesel-truck reliant uses and pollutant sources abound, forcing East Boston residents to pay far more than their fair share, in the form of diminished health and quality of life for its residents, for any benefits that come from these uses.

Like East Boston, Chelsea is a majority-minority community that has long been a gateway city for immigrants, refugees, and asylum-seekers from Russia and Ireland to Somalia and El Salvador. A manufacturing city, Chelsea lost a "significant portion" of its industrial base in the post-World War II period, when construction of the Tobin Bridge "spliced the city and decimated neighborhood homes and streets," leading to "[d]ecades of decline."[17] Today, although Chelsea plays a critical role in the Commonwealth's economy, that role has come at significant environmental and public health costs for the City. In addition to storing all of the jet fuel used at Logan International Airport and 70-80% of New England's home heating oil along the Chelsea Creek, Chelsea is home to the "primary road salt distribution facility" for the Commonwealth, as

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[15] Boston Planning & Development Agency, "Boston in Context: Neighborhoods," *supra* note 12, at 23, 25.

[16] *Id.* at 14.

[17] RKG Associates, Inc. et al., *Comprehensive housing analysis and strategic plan,* City of Chelsea, at 5 (Nov. 15, 2017), available at: https://www.chelseama.gov/sites/chelseama/files/uploads/chelsea_housing_strategy_volume_1_final_final_final.pdf.

well as the regional New England Produce Center.[18] In conjunction with the high-traffic Tobin Bridge and nearby Logan Airport, these uses have exposed Chelsea's residents to "alarmingly high amounts of air pollution for decades."[19] As the EPA itself has noted:

> The industrial character of Chelsea Creek and the contamination of its water, fish, and sediment disproportionally expose the residents of Chelsea and neighboring communities to environmental and public health hazards. Chelsea Creek is not only the most contaminated tributary flowing into Boston Harbor, but also the second most polluted water body in Massachusetts. . . . Residents of Chelsea not only experience higher than average exposure to environmental degradation, but lower than average access to environmental amenities as well.[20]

Chelsea residents are overwhelmingly working-class, immigrant families of color. Approximately 66.9% of residents identify as Hispanic or Latinx alone and over 45% of residents identify as foreign-born.[21] With over 70% of residents over the age of five speaking a language other than English at home,[22] Chelsea also has the highest share of adults speaking limited English of any city in Massachusetts, with 33% of those who speak a language other than English at home reporting that they speak English "not at all," "not well" or "well."[23] These residents are crowded

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[18] *Id*.

[19] Nik DeCosta-Klipa, *Why the city of Chelsea has been so hard hit by coronavirus*, BOSTON.COM (Apr. 10, 2020), available at: https://www.boston.com/news/local-news/2020/04/10/chelsea-massachusetts-coronavirus ("City of Chelsea Hard Hit") (reporting that a Harvard T.H. Chan School of Public Health study found that "long-term exposure to air pollution leads to a large increase in COVID-19 death rate.").

[20] United States Environmental Protection Agency, *Community Partner Profiles, Region 1: Chelsea, Massachusetts* (hereinafter, "Chelsea Profile"), EPA 832N12001, Green Infrastructure Program (2011), available at: https://www.epa.gov/sites/production/files/2015-10/documents/region-1.pdf.

[21] United States Census Bureau (2019, July 1). *Quick facts—Chelsea city, Massachusetts—population estimates,* [Table], available at: https://www.census.gov/quickfacts/chelseacitymassachusetts (hereinafter, "Quick Facts: Chelsea").

[22] *Id*.

[23] Boston Planning & Development Agency, Research Division, *Demographic profile of adult limited English speakers in Massachusetts*, at 3 (Feb. 2019), available at: http://www.bostonplans.org/getattachment/dfe1117a-af16-4257-b0f5-1d95dbd575fe. There is no question that the Board is aware of this longstanding demographic fact. *See, e.g.*, Conservation Law Foundation's Comments on Tentative Decision, Nos. EFSB 14-04A/D.P.U. 14-153A/14-154A at 6 n. 3 (Apr. 6, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11908084.

into a land area of just 1.8 square miles, rendering Chelsea one of the densest populated cities in the Commonwealth and country.[24] Despite Chelsea's contributions to the state's economic lifeblood, the City has been left out of Greater Boston's economic advancements. Over 18% of Chelsea residents live in poverty and the City's median household income is over $20,000 less than that of the Commonwealth as a whole.[25] Nearly 80% of Chelsea's workers have been deemed "essential" under the Governor's present order closing non-essential workplaces, serving in occupations like food service and preparation, healthcare, and personal services.[26] The City's public-school system well illustrates the diversity and challenges of its population: in the 2019-20 academic year, 93% of students are children of color, 42.5% are English Language Learners, and 63.9% are economically disadvantaged.[27]

It comes as no surprise, then, that the Commonwealth of Massachusetts has long designated Chelsea and East Boston as "environmental justice" (or EJ) communities,[28] whose residents are entitled to enhanced solicitude from the state government because of their race, national origin,

[24] City of Chelsea, *About our city* (n.d.), available at: https://www.chelseama.gov/about-our-city.

[25] United States Census Bureau, "Quick Facts: Chelsea," *supra* note 21.

[26] DeCosta-Klipa, "City of Chelsea Hard Hit," *supra* note 19.

[27] Department of Elementary and Secondary Education, *Chelsea* (00570000), School and District Profiles, available at: http://profiles.doe.mass.edu/profiles/student.aspx?orgcode=00570000&orgtypecode=5&leftNavId=305. To qualify as "economically disadvantaged," a student or the student's family must be participating in one or more of the following programs included in the Commonwealth's direct certification system: Supplemental Nutrition Assistance program, Transitional Aid for Families with Dependent Children, Medicaid, and children under the care of the Department of Children and Families. Massachusetts law defines an "English learner" as a child who "does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English." M.G.L. c. 71A, § 2(d).

[28] Pursuant to the 2017 EEA EJ Policy, an environmental justice or "EJ" population includes communi-ties where 25% of the population is identified as an "English Isolated" household: one that does not have an adult that speaks only English or English very well.

income level, and LEP status and the burdens to "meaningful involvement" in public decision-making processes that usually attend that status.[29]

b. Eversource Seeks Approval from the Board to Construct a Substation in East Boston That Would Substantially Impact All Surrounding Communities.

Before detailing how Respondents have systematically excluded LEP residents from the Board's process, Complainants first outline that process here to provide context for later discussion of the Board's exclusionary actions. On December 23, 2014, Eversource, a large company that provides electricity throughout much of New England, sought to construct two new 115 kilovolt (kv) underground transmission lines running through Boston, Everett and Chelsea, which would connect with a new aboveground electrical substation in East Boston.

The impact of this Project on the surrounding environmental justice communities cannot be overstated. The proposed substation would be across the street from a children's playground, on land initially slated for a soccer field, an urgent community need in a neighborhood lacking green and recreative space.[30] Additionally, the high-voltage electric substation would sit on the banks of the "highly industrialized and severely degraded" Chelsea Creek, in close proximity to a densely packed residential neighborhood filled with families of color, as well enormous tanks of jet fuel and home heating oil.[31] Finally, the region surrounding the Creek, which has already

[29] *See generally* 2017 EEA EJ Policy; Commonwealth of Massachusetts, 2010 Environmental Justice Populations—Boston Metro, available at: https://www.mass.gov/doc/ej-2010-pdf-map-boston-metro/download (identifying East Boston and Chelsea as EJ communities based on applicable income, minority population, and English isolation criteria).

[30] U.S. EPA, *Chelsea Profile*, *supra* note 20 (noting that Chelsea and East Boston have the "lowest amounts of open space per person" compared to other Boston neighborhoods and nearby communities). Notably, the Project's new site was originally supposed to become a public soccer field. Instead, the City promised Eversource, as part of the July 2018 land swap, that it would not oppose its project-change petition, directly or indirectly, a commitment that was not publicly disclosed until a full year later, during an evidentiary hearing on Eversource's project-change petition. By these actions, the City of Boston has broken two decades of promises to residents to develop the City Yards into more green space for a community that sorely needs it.

[31] *Id*.

flooded in the past two years, is predicted to suffer increased, chronic flooding in the next few decades as a direct result of climate change.[32] According to Daniel Faber, Director of the Northeastern University Environmental Justice Research Collaborative, as sea levels rise between 6 and 15 feet, there is a "high . . . risk for catastrophic failures" at industrial sites along the banks of the Creek.[33]

To construct the project, Massachusetts law requires Eversource to obtain approval from the Board. *See* M.G.L. c. 164, § 69J. Eversource filed three related petitions seeking that approval in December 2014, commencing the Initial Proceeding. The applicable statute requires that a hearing "shall be held in each locality in which a facility," including the proposed substation, "would be located." M.G.L. c. 164, § 69J; *see also* M.G.L. c. 164, § 69G (defining "facility"). The Board held a single public comment hearing in Chelsea on July 29, 2015, and none in East Boston.

Unsurprisingly, Eversource's petitions generated significant opposition. In particular, Channel Fish Co. (Channel Fish), a local fish processing company, and the trustee of a local realty trust intervened in the Board proceeding to oppose the project's approval. GreenRoots (then identified by its parent organization at the time, the Chelsea Collaborative) and three individual members became Limited Participants and spent the next three years educating the community about the project and raising local concerns.

Ultimately, the Board approved Eversource's proposed project on December 1, 2017, with certain conditions, one of which directed Eversource and Channel Fish to work with the City of

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[32] *See generally* City of Chelsea, *Designing coastal community infrastructure for climate change* (Jan. 2017), available at: https://www.chelseama.gov/sites/chelseama/files/uploads/20170215_chelsea_va.pdf (noting that "increased flooding and groundwater levels" have the potential to threaten energy infrastructure, which in turn "pose public health and environmental hazards to the adjacent neighborhoods and Chelsea Creek."). In fact, another substation owned by Eversource, Chelsea Substation #488 at Willoughby Street, currently lies in the immensely vulnerable Upper Chelsea Creek. *Id*. at 6-5.

[33] Shannon Dooling, *'Hit first and worst': Region's communities of color brace for climate change impacts*, WBUR (Jul. 26, 2017), available at: https://www.wbur.org/news/2017/07/26/environmental-justice-boston-chelsea.

Boston to see whether a new site could be found for the proposed substation, farther away from Channel Fish's facility.[34] Those efforts resulted in a July 2018 land swap between Eversource and the City of Boston, in which Eversource exchanged the lot that was originally slated for the substation with a different lot, located on the same larger City-owned parcel known as the City Yards, about 190 feet west of the original site. Eversource then filed a "Project Change" petition with the Board on November 15, 2018, seeking approval to build the substation at this new site instead of the old one.

On February 19, 2019, GreenRoots sought leave to intervene to oppose the project change, after the Board held a public comment hearing on Eversource's project-change petition at East Boston High School. CLF petitioned that same day for Limited Participant status in the Project Change Proceeding. On April 5, 2019, the Board, acting through Presiding Officer M. Kathryn Sedor, granted both GreenRoots' intervention petition and CLF's petition for limited participant status and scheduled adjudicatory proceedings on Eversource's project change petition. Evidentiary hearings took place over three days in July 2019. On February 28, 2020, Presiding Officer Sedor and Board Staff released a tentative decision, which recommended overruling GreenRoots' and CLF's challenges to the project-change petition and approving Eversource's requested project change.[35]

[34] Petition of NSTAR Electric Company d/b/a Eversource Energy, *Final Decision*, EFSB 14-04/D.P.U. 14-153/14-154, at 167 (December 1, 2017) (hereinafter, "Final Decision."), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9171585.

[35] *See generally* Petition of NSTAR Elec. Co. d/b/a Eversource Energy, *Tentative Decision*, EFSB 14-04A/D.P.U. 14-153A/14-154A (Feb. 28, 2020) (hereinafter, "Tentative Decision"), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11869244.

c. Throughout Its Proceedings, the Board Resisted Calls to Provide Meaningful Language Access, Ultimately Denying LEP Residents the Right to Participate on Equal Terms with English Speakers.

In both the Initial Proceeding on Eversource's 2014 petitions and the most recent Project Change Proceeding, the Board has consistently failed, and often outright resisted, calls by GreenRoots, CLF, and others to ensure meaningful public participation rights for all affected residents, including those who are LEP, consistent with Massachusetts's policies on environmental justice and language access and Title VI.

On October 19, 2017, the Board informed the service list of a public hearing on November 30 at which it would consider the Tentative Decision in the Initial Proceeding.[36] Two weeks before the hearing, GreenRoots sent a letter to the Board on behalf of ninety signatories, including four limited participants. Outlining health and safety concerns of community members regarding the site, GreenRoots made clear that it planned "to provide verbal testimony at the Public Hearing scheduled for 30 November 2017 and [planned] on having a number of Spanish-speaking residents present. Accordingly, [the group] expects that the EFSB will provide materials in Spanish, as well as translation services at the hearing."[37]

The Board ultimately provided severely limited interpretation at this hearing, entirely failing to interpret any of the proceedings for the benefit of LEP individuals. Instead, the interpreter's sole function was to translate Spanish comments into English, rather than also translating English proceedings into Spanish. This was by design. Indeed, on November 21, 2017,

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[36] Email from Kathryn Sedor to Service List (Oct. 19, 2017), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9172642. The Board's first Public Notice on the Project, with respect to a July 29, 2015 public meeting, had announced that a "Spanish/English and Portuguese/English translator [would] be present." EFSB, Notice of Adjudication/Notice of Public Comment Hearing (undated), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9223505. Although an interpreter was apparently present, this practice was discontinued, despite the Board's clear awareness that there was a community need for interpretation.

[37] Letter to Kathryn Sedor from GreenRoots at 1 (Nov. 16, 2017), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9171919.

Presiding Officer Sedor sent an email to "Parties, Interested Persons, GreenRoots, and Mr. Jesse Purvis," stating, in relevant part:

> You will note that Greenroots in its comment letter asks, among other things, that Spanish-speaking translator be available at the Siting Board meeting on November 30th. The Siting Board has decided to grant this request. Accordingly, we would ask, as is the case with public hearings, that Eversource arrange to have a Spanish translator at the Board meeting. The purpose of the translator will be: (1) to translate for the Board any oral comments by a Spanish speaker who is granted leave by the Board Chairman to present comments; and (2) to translate any questions and answers that may occur between Board members and a Spanish speaker.[38]

Approximately twenty Spanish speaking residents attended the November 30 hearing, most with limited or zero English proficiency. An interpreter was onsite, but only to interpret the one Spanish-speaking resident allowed to testify to the Board. In other words, the Board's sole effort to comply with federal and state mandates on language access was purely for the *Board's* benefit, rather than for the benefit of residents. The Board did nothing to ensure that the numerous Spanish speaking residents in attendance—who reside in the surrounding communities and will be directly impacted by the Project—understood the proceeding as a whole. The Board made no effort to consecutively interpret the proceedings from English to Spanish, and failed to provide any equipment for simultaneous interpretation.

When GreenRoots' Executive Director Roseann Bongiovanni inquired about having the interpreter also provide interpretation for attendees during the hearing, Presiding Officer Sedor rebuffed her, claiming that doing so would be "too disruptive" and that this was the first time the Board had ever accommodated a request for interpretation. Thus, twenty LEP Spanish-speaking residents were left with no way of understanding what was said during the two- and half-hour

[38] Email from Kathryn Sedor to Parties, Interested Persons, GreenRoots, and Jesse Purvis, at 1 (Nov. 21, 2017), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9171889.

hearing, and no ability to understand and thus respond to or echo the testimony of others as an English-speaking resident might have done. When these residents were finally permitted to speak—following hours of English-only, complex, and technical testimony by parties, intervenors, and limited participants—they had no context or confidence to share their perspective, rendering the record essentially incomplete.

On January 11, 2018, CLF, GreenRoots, and Lawyers for Civil Rights (then Lawyers Committee for Civil Rights and Economic Justice) sent a letter to Matthew A. Beaton, the then-EEA Secretary and Board Chair, objecting to the inadequate interpretation services under existing law and policy and calling for the Final Decision to be reversed and reconsidered.[39] The Board never replied to this letter.

On November 30, 2018, CLF, GreenRoots, and Lawyers for Civil Rights responded to Eversource's Petition for Project Change by sending a second letter to then-Secretary Matthew Beaton, alerting him once again to the language access issues of the Initial Proceeding and calling for the Board to begin the public process anew.[40] On December 20, 2018, Secretary Beaton replied with a letter to the three signatory organizations detailing what he claimed to be the Board's recent enhancements to language access and stating a commitment to "meaningful language access and ample opportunity for public input and comment by abutters, other residents, and organizations in the community" on the Project Change.[41]

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[39] Letter from Bradley Campbell, Iván Espinoza-Madrigal, & Roseann Bongiovanni to Matthew A. Beaton, at 5-6 (Jan. 11, 2018), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10129066.

[40] Letter from Bradley Campbell, Iván Espinoza-Madrigal, & Roseann Bongiovanni to Matthew A. Beaton, at 1-2 (Nov. 30, 2018), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10129065.

[41] Letter from Matthew A. Beaton to John Walkey, Bradley Campbell, Iván Espinoza-Madrigal, and Roseann Bongiovanni, at 2 (Dec. 20, 2018), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10194055.

Despite Secretary Beaton's assurances, the Board's track record on accommodating Chelsea and East Boston's language-access needs saw little or no improvement during the Project Change Proceeding. On July 9, 2019, the Board commenced evidentiary hearings. GreenRoots learned during the first day of evidentiary hearings that the hearings were open to any member of the public to attend. GreenRoots confirmed that several Spanish-speaking East Boston residents wished to attend and notified the Board, inquiring whether interpretation services could be arranged for the next hearing date.[42]

On July 10, 2019, the Board informed the parties that the hearings would be suspended while the department worked to address GreenRoots' request for Spanish language interpretation.[43] The final hearings were scheduled for July 25 and 26, 2019. Presiding Officer Sedor informed the parties that, while interpretation had been arranged for the next hearing date, "[r]eal-time interpretation will be provided in Spanish in a separate hearing room."[44] After GreenRoots objected to this facially discriminatory proposal,[45] the Board relented and allowed interpretation to occur in the same hearing room where the proceedings occurred.[46]

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[42] *See* July 9, 2019 Hr'g Tr. I:197; July 25, 2019 Hr'g Tr. II:203-05; *see also* Email from Kathryn Sedor to Service List, at 1 (Jul. 10, 2019) ("GreenRoots requested Spanish interpretation at hearings on July 11 and July 16. EFSB response pending.").

[43] Email from Kathryn Sedor to Parties and Limited Participants (Jul. 10, 2019) (noting that issue of interpretation is "question of first impression for the Siting Board"), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10940766.

[44] Email from Kathryn Sedor to Service List (Jul. 23, 2019), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10980183.

[45] Email from Joshua M. Daniels to Service List (Jul. 24, 2019), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10982883.

[46] *See* July 25, 2019 Hr'g Tr. II:203-05.

Even then, however, the interpretation was of poor quality and flagrantly inconsistent with standard practice.[47] First, over the course of the six-hour hearing on July 25, the interpreting equipment malfunctioned frequently, such that listeners could scarcely hear the interpreter. The proceedings had to be stopped several times to test and swap out equipment. Second, the interpreter for July 25 arrived alone and was expected to interpret the entire day by herself, though it is standard practice that at least two interpreters work collaboratively, allowing for breaks every 15-20 minutes. The following day, the Board supplied two interpreters. This, along with better working equipment, improved the situation marginally, but interpretation remained inconsistent and inadequate.

None of the interpreters provided appeared to have the experience necessary to interpret this type of adjudicatory proceeding. The hearing required interpreters skilled in simultaneous interpretation—in other words, interpreting from English to Spanish in real time, without interruption of the proceeding. Furthermore, interpretation of this proceeding required familiarity with many technical terms of art specific to energy siting. The interpreter hired for July 25, 2019 made clear to community members that she was both unfamiliar with energy proceedings and the requisite vocabulary, as well as unpracticed in simultaneous interpretation. Although the Board could have built pauses into the proceeding to allow for consecutive interpretation, it declined to

[47] *See, e.g.*, American Bar Association, *Standards for Language Access in Courts* (Feb. 2010), available at: https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.pdf; American Translators Association, *Code of Ethics and Professional Practice* (n.d.), available at: https://www.atanet.org/governance/code_of_ethics.php; The Committee for the Administration of Interpreters for the Trial Court (Massachusetts), Administrative Office of the Trial Court, The Code of Professional Conduct for Court Interpreters of the Trial Court (2009), available at: https://www.mass.gov/doc/code-of-professional-conduct-for-court-interpreters-of-the-trial-court/download; CTS Language Link, *Professional Code of Conduct for Interpreters and Translators,* available at: https://interpretersunited.wfse.org/Docs/CTS_Code_Of_Conduct.pdf; National Association of Judiciary Interpreters & Translators, *Code of Ethics and Professional Responsibilities* (n.d.), available at: https://najit.org/wp-content/uploads/2016/09/NAJITCodeofEthicsFINAL.pdf.

do so. At the end of the July 25 hearing, the interpreter apologized to community members, remarking that her interpretation was subpar and that she felt badly about her inadequate services. The interpreters provided on the second day also lacked the necessary experience and comprehension of the terminology associated with the Project and regulatory procedure, sounded overwhelmed with their task, and peppered their speech with interjections that distracted from the interpretation.

Overall, the interpretation was plagued by persistent time lags and the Board refused to incorporate the frequent breaks necessary to accommodate consecutive interpretation.[48] Instead, the Board instructed interpreters to rely on the rough transcript being created by a stenographer. That approach created many problems, including the fact that unedited transcripts are often rife with errors—including omitted speaker identifiers, incorrect words or omitted topical words, and unmarked inaudible speech—as well as the substantial time lag that inevitably separates what is said from its transcription. This frankly incomprehensible direction from the Board, coupled with the inexperience of the interpreters, resulted in inadequate and incomplete translation, including:

- Periods of silence from interpreters during which words, questions, and whole statements in English were skipped entirely, with no Spanish language interpretation;
- Entire exchanges between the GreenRoots attorney, Board members, and witnesses left out of the interpretation;
- Persistent time lags between the English and Spanish interpretation, in which the interpreters were sometimes up to two to three minutes behind the spoken English;
- Interpreters focusing on the written transcript, such that they could not pay attention to or communicate who was speaking; and

[48] See Letter from Joshua M. Daniels, Rodney Dowell, & Amy Laura Cahn to Kathleen Theoharides, at 6-10 (Aug. 8, 2019) (hereinafter, "August 8 Letter"), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11787561.

- Interpreters interjecting their own words and phrases like “tu sabes” (English translation: “you know”), “go ahead-no te preocupes” (English translation: “go ahead; don’t worry”), “siguen; lo siento mucho, no sé” (English translation: "They're continuing. I'm really sorry, I don't know"), “ay Dios” (English translation: “Oh God”), and “so” in a distracting manner.

Furthermore, many aspects of the interpretation were simply incorrect. This included persistent inaccuracies; words made up in Spanish, presumably when the speaker was unaware of the proper term; and whole sections misinterpreted with no correlation between the English and Spanish content.

Finally, toward the end of the July 26 hearing, when a Spanish speaking resident took off her headset out of frustration about the quality of the interpretation, one of the interpreters dismissed her outright. The interpreter responded by saying “no importa que escuche y los que no les guste se pueden ir a otro lado.” This translates to “It doesn't matter that you hear and those who don't like it can go somewhere else.” The message was unmistakable: LEP community members were neither welcome nor included at proceedings with implications for their community’s health, safety, and well-being.

LEP residents in attendance communicated these problems to GreenRoots’ counsel, who in turn tried to raise them with the Board at the first available break during the second day of hearings on July 25, 2019. Presiding Officer Sedor responded curtly that she was “not going to address [the issue]” then or “discuss this further,” stating that “[t]he Siting Board has gone very much out of its way to do the very best that it can to provide Spanish interpretation,” “scrambl[ing], . . . investigat[ing], . . . [and] spen[ding] the money to get the best interpreters [it] can.”[49]

After the evidentiary hearings concluded in July, counsel for GreenRoots and CLF wrote to the Secretary of EEA and Chair of the Board Kathleen Theoharides, documenting the failings

[49] July 25, 2019 Hr’g Tr. II:244-45.

in the interpretation provided during the hearings and urging her to take corrective action.[50] Secretary Theoharides did not respond for two and a half months. In her October 22 letter, the Secretary claimed that "the Siting Board has made a number of enhancements to better serve communities with limited English proficiency in its proceedings."[51] However, the only examples she cited were the very same subpar interpretation services about which GreenRoots and CLF had complained.[52]

The Board's failure to ensure language access for Chelsea and East Boston residents with LEP did not end there. On February 28, 2020, Board Staff released a Tentative Decision, recommending approval of Eversource's project-change filing and setting a public comment hearing and Board vote for March 11, 2020 at East Boston High School.[53] The same notice also set a deadline of 5:00 p.m. on March 6, 2020 for the parties and the public to submit written comments on the Tentative Decision, which was available only in English.[54] The Board advised that it would be distributing a Spanish-language version of the Tentative Decision "as soon as possible."[55] However, this document was only released at 6:16 p.m. on March 5, 2020—leaving Spanish-speaking commenters with LEP *less than 23 hours* to digest and comment on the 100 page plus Tentative Decision.[56]

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[50] *See* Joshua M. Daniels, Rodney Dowell, & Amy Laura Cahn, "August 8 Letter", *supra* note 49, at 6-11.

[51] Letter from Kathleen Theoharides to Joshua M. Daniels, Rodney Dowell, & Amy Laura Cahn, at 2 (Oct. 22, 2019), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11547960.

[52] *Id.*

[53] Email from Kathryn Sedor to Service List (Feb. 28, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11869332.

[54] *Id.*

[55] *Id.*

[56] Email from Andrew Greene to Service List (Mar. 5, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11902547.

The Board could not explain why the English-language Tentative Decision was not released with the Spanish-language version, such that English and Spanish speakers would be given equal opportunity to comment. Following overwhelming criticism from the community, the Board conceded—barely three hours before the public comment deadline was to expire—that the Board would extend the written comment period for members of the public until 5:00 p.m. on March 11, the day before the public hearing and Board vote.[57] While allowing LEP Spanish-speaking commenters a little more time, however, that step failed to correct the disparity: Spanish-speaking commenters were allowed only four days to comment, while their English-speaking neighbors got eleven. Furthermore, though the Board announced the date of the March 11 hearing to the public on February 28, 2020, the Board had still not secured interpretation services by March 6, 2020, and delegated responsibility for this task to Eversource, even though Title VI language access obligations belong to the Board.[58]

As the threat posed by the novel COVID-19 pandemic became increasingly clear in early March, it also became apparent that LEP communities of color in East Boston and Chelsea would be the hardest hit, experiencing disproportionate rates of virus spread while suffering severe economic harm from the resultant lockdowns. Yet the Board initially refused to postpone the public comment hearing and Board vote, which were scheduled for March 11, 2020. Despite the obvious public health concerns inherent in hundreds of people gathering in a crowded high-school auditorium for five hours during a global pandemic, when scores of cases had already been confirmed in the Commonwealth and in East Boston and Chelsea in particular, the Board declined

[57] Email from Kathryn Sedor to Service List (Mar. 6, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11905861.

[58] Email from Andrew Greene to Catherine Keuthen and David Rosenzweig (Mar. 6, 2020) (subject line: Request for Interpretation Services for EFSB 14-4A Siting Board Meeting on March 11, 2020 at East Boston High School), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11904092.

to postpone the hearing.[59] As an accommodation, Board Staff planned to livestream the meeting over YouTube. While the notice stated that "language access services" would be provided to "those who attend the Board meeting," it made no mention whether the livestreamed version would also be translated, or how those livestreaming the hearing could make public comments on par with those willing to attend in person.[60] Raising both public health and language access concerns, GreenRoots requested that the Board postpone the hearing, noting that Governor Charlie Baker had declared a state of emergency in the Commonwealth the previous day.[61] Notwithstanding the Governor's declaration, Board Staff initially denied that request.[62] However, after a groundswell of opposition, including from public officials,[63] the Board reversed course hours later.[64]

It is now unknown when the public hearing and Board vote will happen, what form it will take, or how language-access needs will be accommodated.

[59] *See* Email from Kathryn Sedor to Service List (Mar. 10, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11922327.

[60] *Id.* These issues were somewhat addressed in Andrew Greene's March 11 Email to Joshua M. Daniels.

[61] *See* Email from Joshua M. Daniels to Service List (Mar. 11, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11924180.

[62] Email from Andrew Greene to Joshua M. Daniels (Mar. 11, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11924181.

[63] *See, e.g.,* Email from Boston City Councilor Lydia Edwards to Andrew Greene (Mar. 11, 2020) (stating that by going ahead with the hearing, the Board was planning to take an "unnecessary risk," demonstrating a "continued disregard of the safety of [her] community."), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11925621.

[64] *See* Email from Kathryn Sedor to Service List (Mar. 11, 2020), available at: https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/11925620 .

V. LEGAL ANALYSIS

a. Title VI and its Accompanying Regulations Require Recipients of Federal Funding to Ensure Meaningful Access to Programs and Activities by LEP Individuals.

i. National Origin Discrimination

Although the Supreme Court has been clear that section 601 prohibits "only intentional discrimination," *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001), section 602 of Title VI allows federal agencies to proscribe conduct that has a disparate impact on protected groups and individuals. *Id*. at 281.

Courts have consistently held that discrimination against LEP individuals is prohibited under Title VI as a form of discrimination based on national origin. *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974); *see also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116-17 (9th Cir. 2009) (noting *Lau* held that "discrimination against LEP individuals was discrimination based on national origin in violation of Title VI"); *United States v. Maricopa Cnty., Ariz.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) ("[L]ongstanding case law, federal regulations, and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI."); *accord* Enforcement of Title VI-National Origin Discrimination Against Persons with Limited English Proficiency, 65 Fed. Reg. 50,123, 50,124 (Aug. 11, 2000) (noting that the Department of Justice has "consistently adhered to the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations" (citing 28 C.F.R. § 42.405(d)(1))).

In addition, a number of recent decisions from federal district courts have reaffirmed that, in the context of both equal protection and Title VI claims, the denial of language access may "support an inference for intentional discrimination on the basis of national origin." *Reyes v.*

Clarke, No. 2:18CV611, 2019 WL 4044316, at *24 (E.D. Va. Aug. 27, 2019) (denying motion to dismiss Title VI and equal protection claims of LEP inmate who alleged that failure to provide services in non-English languages "bears more heavily" on non-white individuals, that prison staff knew of "significant Spanish-speaking population" but failed to ensure adequate interpretation services were available or to promulgate a language access policy, and that culture at prison was "not merely indifferent to Spanish-speaking inmates" but was "actively hostile toward inmates of Central American origin"); *accord H.P. v. Bd. of Educ. of City of Chi.*, 385 F. Supp. 3d 623 (N.D. Ill. 2019) (denying motion to dismiss Title VI claims of students and parents who plausibly alleged intentional discrimination by providing specific examples demonstrating that public school district knew of need for competent interpretation and translation services but "nonetheless intentionally and systematically fail[ed] to provide these services," thereby denying plaintiffs the ability to "meaningfully participate" in the relevant educational process).

ii. Executive Order 13166

To help effectuate the dictates of Title VI as expressed in *Lau* and other federal court decisions, then-President Bill Clinton issued Executive Order 13166, "Improving Access to Persons with Limited English Proficiency." Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (2000). In August 2000, President Clinton ordered agencies providing federal financial assistance to draft Title VI guidance "specifically tailored to its recipients that is consistent with LEP guidance issued by the Department of Justice." *Id.*

iii. Environmental Protection Agency Regulations and Guidance

The obligations of programs or activities receiving federal financial assistance from EPA are codified at 40 C.F.R. Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency. The regulation's application is broad, applying to "*all* applicants for, and recipients of, EPA assistance in the operation of programs or

activities receiving such assistance beginning February 13, 1984." 40 C.F.R. § 7.15 (emphasis added). Moreover, the regulatory language makes clear that practices that disparately impact protected communities, whether intentional or not, are unlawful: funding recipients may not use criteria or methods of administering a program or activity "which have the *effect* of subjecting individuals to discrimination" because of their race, color, or national origin, or "have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program or activity" with respect to individuals of a particular race, color, or national origin. *Id*. § 7.35(b) (emphasis added).

The regulation provides examples of specifically prohibited discriminatory actions, including, as relevant here:

- Providing any service or benefit to an individual which is "different, or is provided differently from" that provided to others under the program;
- Subjecting an individual to "segregation in any manner or separate treatment in any way" related to receiving services or benefits under the program, and;
- Denying a person or any group of persons the "opportunity to participate as members of any planning or advisory body which is an integral part of the program or activity."

40 U.S.C. §7.35(a)(2), (4), (5). In addition, funding recipients "shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination" under any program or activity, or "with the purpose or effect of defeating or substantially impairing" the accomplishment of Title VI's and the accompanying regulation's objectives. *Id*. § 7.35(c).

The EPA has further expounded upon these prohibitions and obligations in the *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, Docket No. FRL-7776-6, 69 Fed. Reg. 35,602 (June 25, 2004) (hereinafter, "EPA LEP

Guidance"). In general, recipients must "take reasonable steps to ensure meaningful access to their programs and activities" by LEP individuals, beginning with an individualized assessment that balances four factors: the "number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee"; the "frequency with which LEP individuals come in contact with the program"; the "nature and importance of the program, activity or service provided by the program to people's lives"; and the resources available to the grantee/recipient and costs." *Id*. at 35,606. Populations "likely to include LEP persons" who "should be considered when planning language services" include, as relevant here, individuals who "live in communities in close proximity to a plant or facility that is permitted or regulated by an EPA recipient." *Id*.

The EPA LEP Guidance also notes that both "[q]uality and accuracy" of the language service is "critical in order to avoid serious consequences to the LEP person and to the recipient." *Id*. at 35,607. To that end, recipients must ensure that interpreters are not simply bilingual. Instead, they must have knowledge in "both languages of any specialized terms or concepts peculiar to the entity's program or activity." *Id*. at 35,608. Additionally, necessary interpretation "should be provided in a timely manner" at a "time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services" to LEP individuals. *Id*.

Recipients must also translate "vital" documents, ensuring that LEP individuals are not deprived of meaningful access because they are unaware that a "particular program, right or service exists." *Id*. at 35,610. A lack of resources also does not insulate a recipient from the obligation to translate vital documents "into at least several of the most frequently-encountered languages and to set benchmarks for continued translations into the remaining languages over time." *Id*. Finally, the safe harbor provisions for written translation outlined by the EPA LEP Guidance "do not affect

the requirement" to provide competent oral interpretation where reasonable and necessary—to that end, the Guidance provides the specific example of requiring community coordinators to ensure that "environmental impact statements have been explained to persons in communities in close proximity" to environmental hazards like manufacturing facilities. *Id*.

ECRCO is responsible for conducting investigations upon receipt of a Title VI complaint to ensure that federal funding recipients are complying with their civil rights obligations. If the investigation yields a preliminary finding of non-compliance, ECRCO will notify the recipient in writing of its preliminary findings and recommendations for achieving voluntary compliance. 40 C.F.R. § 7.115(c)(1). After receiving the notice, the recipient may agree to these recommendations or submit a written response demonstrating that the findings are inaccurate, or that compliance may be secured through other steps; however, if the recipient takes neither step, ECRCO "shall . . . send a formal written determination of noncompliance to the recipient," with copies to the Award Official and the Assistant Attorney General for Civil Rights. *Id*. § 7.115(d). If compliance cannot be informally assured, EPA may "terminate or refuse to award or to continue assistance," as well as "use any other means authorized by law" to secure compliance, including a "referral of the matter to the Department of Justice." *Id*. § 7.130(a).

b. The Board has Systematically Failed to Provide Meaningful Access for Residents of East Boston and Chelsea.

As detailed above, the Board has failed to comply with Title VI through its outright denial of interpretation services, offering of segregated and separate treatment to people with LEP, and erratic and inadequate provision of interpretation and translation services to the majority Spanish-speaking communities of Chelsea and East Boston.

Every element of the four-factor test outlined in the EPA LEP Guidance militates in favor of greater language access than the Board provided throughout its review process. With respect to

the first and second prongs—the number or proportion of LEP individuals likely to be encountered and the frequency with which LEP individuals come in contact with the program—there is no question that the Board was well aware of the concentration of LEP residents in East Boston and Chelsea, given the historical demographics of those communities and the continued requests for interpretation and translation from community organizations like GreenRoots. So too has the Board acknowledged that delivery of interpretation services for LEP residents is necessary under and mandated by existing Massachusetts law and policy.

Even as the Board explicitly recognized that Eversource was falling short in engaging the LEP community, it flouted its own obligations to those very same residents. For example, the Board stated in its December 1, 2017 Final Decision regarding the Initial Proceeding:

> Based on a linguistic analysis of the populations in the Project area communities, . . . the Presiding Officer directed Eversource to implement a number of public outreach measures consistent with the enhanced public participation component of the EJ Policy, including publication of the Notice of Public Hearing in Spanish and Portuguese as well as English; publication of the Notice in English-language, Spanish-language and Portuguese language newspapers; and the provision of a Spanish and Portuguese-speaking translator at the public hearing.[65]

In the Tentative Decision in the Project Change Proceeding, the Board reiterated the obligations it had imposed on Eversource.[66] The Tentative Decision also acknowledged that efforts by Eversource to reach out to and consider "language access needs of the community . . . have not measured up to the expectations of the community [and] encourage[d Eversource] to continue to find ways to engage with the community during design, construction, and operation of the Substation."[67]

[65] Final Decision at 145.

[66] Tentative Decision at 8-9.

[67] *Id.* at 84.

At the same time, as detailed above, the Board had failed in its own Title VI obligations to the communities impacted by the review proceedings. Despite the Board's indifference to these residents, the Tentative Decision claims that the Board "takes seriously its Language Access Policy obligations" and finds itself to be "fully compliant," the Tentative Decision's only concession being that the interpretation services provided were "evidently not to GreenRoots' and CLF's complete satisfaction."[68] In truth, despite holding Eversource accountable to a set of articulated language access requirements, the Board itself completely disregarded the population it is intended to serve.

With respect to the third prong—the nature and importance of the program to "people's lives"—the Board appears to have little regard for the Project's enormous health, safety, and environmental impacts on Chelsea, East Boston, and the surrounding communities. Affected residents, including and especially those LEP individuals and families who live in close proximity to the proposed substation site, were deprived of any meaningful opportunity to question the Board as to, for example, the need for a non-renewable electric power facility, given the national, regional, and local shift towards renewable energy, or the efficacy of siting an environmental hazard in an active flood plain.

Finally, as to the fourth prong—the resources available to the recipient and the costs—Respondents are statewide entities with primary responsibility over utility siting and oversight in one of the wealthiest states in the country. Indeed, it is notable that when the City of Boston—a much smaller entity—elected to hold a May 22, 2020 City Council hearing on the proposed substation, LEP residents were offered greater opportunities for engagement under challenging

[68] *Id.* at 84.

pandemic conditions, including a simultaneously Spanish–language interpreted hearing over an online platform.

In sum, the Board's conduct of the energy facility siting review process constitutes a dereliction of the Board's duties under Title VI. The Board's deprivation of the LEP community of opportunities for meaningful participation had the inescapable effect of discriminating on the basis of national origin. And, given the Board's knowledge of this effect, and its systematic, deliberate efforts to maintain this exclusion, a finding of intentional discrimination is also warranted.

i. The Board has Denied Requests for Interpretation Services to LEP Residents of East Boston and Chelsea and Attempted to Segregate LEP Residents from English Speakers.

The Board's actions in denying interpretation services and resisting requests to ensure that interpretation services were adequate for LEP residents of East Boston and Chelsea, constitute further evidence of both disparate impact and intentional discrimination.

The Board's actions surrounding the final hearing in the Initial Proceeding constitute a flat-out denial of interpretation services. Well in anticipation of the November 30, 2017 hearing, GreenRoots notified the Board that LEP residents planned to attend. Writing on behalf of ninety signatories, including four limited participants, GreenRoots made clear that LEP residents would need interpretation services in order to participate fully in the proceeding—a proceeding of great import for residents who are concerned about the health, safety, and environmental impacts of the Project. In response to GreenRoots' request, the Board provided an interpreter only:

> (1) to translate for the Board any oral comments by a Spanish speaker who is granted leave by the Board Chairman to present comments; and (2) to translate any questions and answers that may occur between Board members and a Spanish speaker.[69]

In essence, the Board made certain only that its members could fully understand any testimony offered by the public, but refused to ensure that the public—notably LEP residents—could understand a word of the two-and-a-half-hour proceeding. Such conduct flies in the face of the spirit and letter of Title VI and the EPA's accompanying regulations. Presiding Officer Sedor reiterated the Board's denial of interpretation services and its intent to put the interests of the Board above those of an impacted environmental justice community when she told GreenRoots Executive Director Roseann Bongiovanni that simultaneous interpretation at the hearing would be "disruptive."

When faced with requests relating to interpretation services in the Project Change Proceeding, the Board was similarly resistant. The initial reaction to the request for interpretation was to suggest that interpretation services could be provided in a separate room, thus segregating LEP individuals from the general public. The rationale was that the Board did not wish to interfere with the stenographers—again, putting the interests of the Board above the needs of the public and the Board's Title VI obligations. *See* 40 U.S.C. § 7.35(a)(4) (stating that subjecting an individual to "segregation in any manner or separate treatment in any way" related to receiving services under the program is prohibited discriminatory conduct). Moreover, as discussed above, when approached by GreenRoots counsel about inadequacies associated with the interpretation services, Presiding Officer Sedor refused to address the issue, stating that "[t]he Siting Board has gone very

[69] Email from Kathryn Sedor to Parties, Interested Persons, Greenroots, and Mr. Jesse Purvis (Nov. 21, 2017), *supra* note 38.

much out of its way to do the very best that it can to provide Spanish interpretation," "scrambl[ing], . . . investigat[ing], . . . [and] spen[ding] the money to get the best interpreters [it] can."[70]

These incidents resulted in the exclusion of LEP residents of East Boston and Chelsea from participating in the Project proceedings simply because of their national origin. Moreover, the Board's actions in denying interpretation services to LEP residents "support an inference for intentional discrimination on the basis of national origin." *Reyes*, 2019 WL 4044316, at *24.

ii. The Board's Inconsistent, Erratic, and Inadequate Provision of Interpretation and Translation Services has the Effect of Discriminating against LEP Residents of East Boston and Chelsea on the Basis of National Origin.

Even when the Board has chosen to provide interpretation and translation services, the services themselves have been inconsistent, erratic, and inadequate, substantially impairing the ability of LEP residents of East Boston and Chelsea to fully participate in the proceedings related to the Project.

First, as detailed above, the Board's attempt to provide interpretation services at the Project Change Proceeding evidentiary hearings demonstrated the Board's utter lack of understanding about how to include LEP individuals in its proceedings. The services were plagued by technical issues, insufficient staffing, and incompletely trained staff, resulting in substandard interpretation over several days of the hearings. The reliance of the interpreters on the stenographer's transcript, the lack of knowledge of technical terms, and the inexperience with simultaneous interpretation, amongst other issues, resulted in persistent mistakes in translation, time lags, and periods of silence in which whole sections of the proceeding were left out of the interpretation. *See* EPA LEP Guidance at 35,607-08 (noting that interpretation must be provided in a "timely manner" and that

[70] July 25, 2019 Hr'g Tr. II:244-45.

interpreters must be familiar with "any specialized terms or concepts peculiar to the entity's program or activity," as both "[q]uality and accuracy" are "critical in order to avoid serious consequences to the LEP person.").

Second, while the Board directed Eversource to produce Notices in three languages, the Board did not hold itself to the same standard for its own documents. Despite being fully aware of the breadth of LEP stakeholders in the Initial Proceeding, the Board took no action to translate its Tentative or Final Decisions in that matter. In the Project Change Proceeding, the Board saw fit to email a Spanish language translation of the Tentative Decision six days after the release of the English language version and less than twenty-three hours prior to the deadline for the final written comments to be received in this proceeding. It was not until more than eight hours following the posting of the Spanish language translation that all on the Service List were informed that the comment period would be extended until Tuesday, March 10, 2020—only at the behest of Boston City Councilor Lydia Edwards and still providing LEP speaking residents with less time to comment than their English-speaking counterparts.

The failure to provide a timely Spanish language translation of the Tentative Decision is a startling oversight, considering the history of these proceedings and the Board's own acknowledgement of its accountability to a significant population of Spanish-speaking stakeholders. A Spanish Tentative Decision required only a skilled translator and time. As the docket reveals, the final reply brief was submitted on September 18, 2019; the Presiding Officer ruled on the final Motion on January 10, 2020; and the record appears to have been complete on January 28, 2020, with Eversource's submission of an updated Exhibit List. The Board could have prepared for that moment anytime within that period. Moreover, the Procedural Schedule does not indicate a deadline by which the Tentative Decision needed to be completed and distributed. There

was nothing to prevent the Siting Board from preparing in advance to release both the English and Spanish version of the Tentative Decision on March 6, 2020, nor anything to prevent delaying the release of the English version when it became evident that the Spanish translation would be delayed. Indeed, the Tentative Decision itself acknowledges that the statutory command that the Board render a decision within 12 months of the filing of a petition "is directory not mandatory." *See* Tentative Decision at 22; *accord Box Pond Ass'n v. Energy Facilities Siting Bd*., 435 Mass. 408, 415 n.7 (2001).

Finally, while Complainants cannot know the extent or quality of interpretation services that would have been provided at the March 11, 2020 hearing—at which the Board would have voted on a Final Decision in the Project Change Proceeding—it is uncontested that, as of the prior Friday morning, no provisions had been made to ensure that LEP residents of East Boston or Chelsea could fully participate in this critical event.[71]

Despite many and various requests by GreenRoots and CLF, the Board has systematically denied LEP residents of Chelsea and East Boston the opportunity to make their voices heard in a proceeding that will inevitably shape their lives, health, and safety, as well as the health and safety of their environment.

VI. RELIEF REQUESTED

Respondents' systemic and deliberate refusal to provide residents of East Boston with meaningful language access is a clear breach of its obligations under Title VI to refrain from intentional and disparate impact discrimination towards LEP residents. In light of Respondent's refusal to modify its practices and procedures—despite numerous requests from Complainants—the extent of the harm caused to LEP residents, the significance of the Project to the surrounding

[71] Email from Andrew Greene to Catherine Keuthen and David Rosenzweig (Mar. 6, 2020), *supra* note 58.

communities, and the extraordinary public health and economic impacts of the COVID-19 pandemic on LEP communities in Chelsea and East Boston, Complainants respectfully request that ECRCO:

1. Require the Board to halt its review of the Project, including and especially refraining from ruling on the Tentative Decision's recommended disposition, until:
    a. A thorough investigation of the Board's language access practices, particularly with respect to translation of written documents and oral interpretation at public meetings is completed;
    b. The state of emergency implemented because of the COVID-19 pandemic is lifted in the impacted municipalities and the Commonwealth of Massachusetts; and
    c. The Board has conducted at least three meetings in Spanish and any other language deemed necessary by the EPA regarding the Project with professional interpreters.
2. Suspend any further federal funding disbursements to EEA pending:
    a. An audit of the language access practices and Language Access Plans (LAP), if any, of all departments, offices, and boards under EEA's supervision, authority, or control; and
    b. The implementation of anti-bias and cultural competency trainings for all board members and staff of all departments, offices, and boards under EEA's supervision, authority, or control, including and especially hearing officers.
3. Suspend any further federal funding disbursements until the Board adopts and implements a comprehensive remediation plan for LEP resident engagement that includes, at a minimum:

a. The creation of a Language Access Plan (LAP) for the Board and the revision of the LAP utilized by DPU and relied upon by the Board;

b. The requirement that all proponents seeking EFSB review create project-specific outreach and engagement plans based upon EPA recommendations and best practices outlining the proponents' strategies for community engagement and inclusion;

c. Hiring a full-time language access consultant and/or auditor with primary responsibility for conducting annual demographic studies to determine language access needs, identifying language needs for each project, and maintaining a roster of interpreters and translators with expertise in energy and infrastructure;

d. The creation of community workshops, accessible virtually and in English, Spanish, Portuguese, Arabic, Mandarin, Haitian Creole, and any other language identified by the language access consultant and/or auditor, in every environmental justice community in Massachusetts outlining the role of the EFSB in energy facilities siting and the various multilingual opportunities for community feedback and engagement; and

e. Detailed training protocols to educate interpreters and translators as to the core concepts of energy and infrastructure, as well as to educate all EFSB staff in their language access obligations under Title VI.

4. Ensure that the Board achieve full compliance with federal civil rights law through a conciliation agreement that includes permanent provisions and sufficient reporting and monitoring mechanisms to ensure all required changes are made and institutionalized; and

5. Provide all other necessary and appropriate relief that justice may require.

VII. CONCLUSION

For these reasons, Complainants respectfully request that ECRCO promptly and thoroughly investigate the allegations set forth herein and take all actions necessary to ensure that Respondents are brought into full compliance with the applicable law.

Respectfully submitted,

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