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VIA HAND DELIVERY AND E-MAIL

June 20, 2011

Robert J. Shea, Presiding Officer
Energy Facilities Siting Board
One South Station
Boston, MA 02110

**RE: Brockton Power Company, LLC, EFSB 07-7A
Our File No. 2538/Opposition to Brockton Power's Reconsideration Motion**

Dear Presiding Officer Shea:

Please find enclosed the original and five copies of the City Of Brockton's Opposition To Brockton Power Company, LLC's Motion For Reconsideration.

Please docket and file same. Thank you.

Very truly yours,



Nathaniel Stevens

cc: Service List (via first-class mail or e-mail)



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COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

Brockton Power Company, LLC)
_____))

EFSB 07-7A

**CITY OF BROCKTON'S OPPOSITION TO
BROCKTON POWER COMPANY LLC'S
MOTION FOR RECONSIDERATION**

Intervenor City of Brockton ("City") hereby opposes Brockton Power Company, LLC's ("Brockton Power") June 13, 2011 Motion For Reconsideration of the Energy Facility Siting Board's June 9, 2011 vote directing the Siting Board staff to draft a Tentative Decision denying Brockton Power's proposal to use up to 2.1 million gallons per day of City of Brockton municipal water to cool its proposed 350 Megawatt power plant (the "vote").

Brockton Power's motion is procedurally improper and the conditions it proposes are not "simple and workable." Thus, the motion should be denied.

Brockton Power's Motion Is Procedurally Improper

Brockton Power's motion should be rejected on four, independent procedural grounds.

First, there is no ruling or order of the Presiding Officer to be reconsidered. 980 CMR 1.09(8) provides that "[a]ny party may file a written motion requesting the Presiding Officer to reconsider a ruling as long as the motion is received within five days of the issuance of the ruling." Here, the Presiding Officer has not issued any ruling or decision that could be reconsidered. It was the Siting Board, not the Presiding Officer, who voted to order the Siting Board staff to take certain action. There is no provision in the Siting Board's regulations governing adjudicatory proceedings (980 CMR 1.00) or conduct of Board Business (980 CMR 2.00) that allows a party to challenge such a vote of the Siting Board itself.

Second, all of the cases Brockton Power cites to support its assertion that it now can file a motion for reconsideration concern motions for reconsideration of a written decision or order. All but one pertain to a final or tentative decision or order of the Siting Board or Department of Public Utilities. The June 9, 2011 Siting Board vote is not on a written decision or a written tentative or final decision. One case Brockton Power cited concerned the Presiding Officer's ruling on a motion to intervene prior to the close of the evidentiary hearing (Ruling re: Alliance Against Power Plant's Location's Motion for Reconsideration of Ruling Denying its Petition to Intervene, EFSB 07-7/DPP 07-58/DPU 07-59 (Feb. 8, 2008)). The June 9, 2011 Siting Board vote is not a ruling on a motion to intervene, and said vote was well after the close of the evidentiary hearing.

This vote was made by the seven-member Siting Board at a Board meeting chaired not by the Presiding Officer, but by Acting Siting Board Chairman Steven Clarke, Assistant Secretary for Energy in the Executive Office of Energy and Environmental Affairs. Presiding Officer Shea was there to present his May 24, 2011 Issues Memorandum prepared after the conclusion of the evidentiary hearings. This vote was part of the deliberation of the Siting Board, not a ruling by the Board. Mr. Shea also answered, with assistance of two Siting Board staff members, questions of the Siting Board members.

Third, Brockton Power's challenge to the Siting Board's vote is premature. Brockton Power can raise, in due course, its concerns when it comments on the Tentative Decision, as allowed by 980 CMR 1.08(2)(b), or in an appeal pursuant to M.G.L. c. 25, § 5 and M.G.L. c. 164, § 69P. Brockton Power's motion is an attempt to comment on the expected tentative decision before it has been prepared.

Contrary to Brockton Power's contention in its motion (at 4) that some members appeared "unfamiliar" with portions of the administrative record, it was clear from the Siting Board's discussion at its June 9, 2011 meeting that most, if not all, of the members had reviewed and understood the evidence concerning Brockton Power's proposed use of municipal water. Brockton Power can raise this for what it is worth at the appropriate time, which is not now. Anyway, since a tentative decision is going to be prepared, not even a quorum of the members are required to review the evidence. 980 CMR 1.08(2) (unless a quorum of the Siting Board has heard the matter or read the evidence, a tentative decision shall be issued); see also 980 CMR 2.05(1) (Siting Board may delegate its duties other than the responsibility for the final decision).

Fourth, Brockton's motion is not allowed without leave of the Presiding Officer as the hearing has closed. 980 CMR 1.07(3). Brockton Power lacks such permission.

Brockton Power's Proposed Conditions Should Be Rejected

The conditions Brockton Power asks the Siting Board to adopt are neither "simple" nor "workable" (Motion at 6). The conditions are complex and unworkable.

In its Motion, Brockton Power proposes several conditions that it asks the Siting Board to include in a tentative decision approving its use of the City's municipal water for plant cooling. These conditions should be rejected for the following reasons.

Generally, these conditions are a blatant attempt to purchase approval of the project, belatedly, without complying with the statutory requirements for approval by submitting a substantially complete and accurate description of the proposal at the beginning or before the hearing closed.

The proposed conditions are contrary to the evidence submitted during the evidentiary hearing. Brockton Power now seeks approval for a direct connection (not through City of

Brockton infrastructure) to Aquaria. Yet, during the evidentiary proceedings, Brockton Power stated that, "Brockton Power has not requested in its PCF that the Siting Board approve an option that would allow the Company to obtain potable water directly from Inima/Aquaria as a sole source supplier." IR ACE-C-W-16; see also IR EFSB-C-C-4 n.1; IR EFSB-C-C-6 (copies of IRs attached). Brockton Power has "not actively considered" whether it could purchase water directly from Aquaria. IR EFSB-C-C-6. The environmental impacts of any direct connection to Aquaria were not considered during the hearing, as required by G.L. c. 164, § 69J¼, so the Siting Board cannot now approve such a connection, and thus Brockton Power's proposed conditions.

Brockton Power assumes, without citing any authority or evidence in the adjudicatory hearing, that it has the right to have Aquaria water delivered ("wheeled"¹) through the City's existing water system to reach the proposed plant.

In proposing these conditions, Brockton Power also wrongly assumes that it has met its burden of proof. As several of the Siting Board members who voted in favor stated during the June 9, 2011 meeting, Brockton Power has not done so. Siting Board Member Jolette Westbrook stated, "I do not have clear comfort in saying that the testimony presented by the company, for lack of a better term, outweighs the testimony provided by intervenor witnesses. And to me, that plays into who has the burden of proof in a case." June 9, 2011 Tr. at 115-16; see also, Tr. at

129. Board Member Ann Berwick agreed:

So I don't think Brockton Power has provided us with an accurate or an adequate discussion of environmental impacts. I think they've dealt with that issue by simply saying the water would come from Aquaria. For that reason, I'm just not feeling that they have really borne their burden of proof. I agree with Ms. Westbrook. For me, it's a difficult decision, and it boils down to a burden-of-proof question. I don't feel that Brockton Power with respect to this aspect of the proposed project change has actually borne its burden of proof.

¹ During the evidentiary hearings, conveying Aquaria water through the City of Brockton water infrastructure to a third-party (community) was often described as "wheeling through" the City's water system. See, e.g., December 22, 2010 Hearing Transcript at 995.

Tr. at 121. Acting Chairman Clarke later in the meeting concurred:

So, you know, as Ms. Berwick had mentioned, the burden of proof is on the developer in regards to the environmental sort of challenges and issues, on Silver Lake in particular. So I guess I do share that concern, that there is a possibility you could have a situation where Silver Lake in particular is further distressed.

Tr. at 135-136. Board Member James Colman, who voted in favor of the motion to deny Brockton Power's request to use Brockton's municipal water, shared the opinion of his three colleagues who voted the same way he did:

So I think it does come down to what the impact would be on a daily basis or on an accumulation of number of days, not on an annual basis – what the environmental impact of that would be. While I personally believe that it would have minimal impact, apparently there's nothing in the record that demonstrates this.

Tr. at 137. Even Board Member Robert Sydney, who voted against the motion, recognized that the issue was whether Brockton Power had met its burden of proof:

And so I think, if we're just talking about the potable water situation, then we're just essentially required to drill down into what the various witnesses have said and whether or not you think the proponents met the burden of proof of demonstrating that this is -- this option results in the least environmental impact.

Tr. at 123. Brockton Power in its Motion conveniently omits the opinion of the majority and instead focuses on the attempts of those who sensed they would be out-voted to fashion a possible compromise.

Brockton Power's proposed conditions are redundant and ignore the evidence in the record showing the extensive work that the City and its consultants at CDM have done during recent years to analyze and make recommendations for the management of all the City's water sources, including Silver Lake. Such work is embodied in the November 2009 draft Comprehensive Water Management Plan ("CWMP") (which includes a Draft Drought Management Plan), a copy of which Brockton Power included in its Project Change Filing (as Appendix A).

Since Brockton Power clearly is aware of the CWMP, one can only conclude now that Brockton Power does not like the CWMP's (draft) recommendations and wishes instead to fund a study (and implementation of its recommendations) in hopes of the City's water system being managed to its advantage.

Brockton Power's proposed conditions also intrude on the authority of the City of Brockton to manage its own water system. Suggesting that a municipality share administration of its water system with two regional nonprofit organizations² is inappropriate, not to mention without any legal basis as a matter of municipal law and the Siting Board's authority under G.L. c. 164, §§ 69H and 69J¼. Siting Board Member Colman expressed doubt that the Siting Board has authority to impose a condition requiring the City of Brockton to take any particular action with respect to it managing its municipal water supply system. Tr. at 144.³

² It is presumptuous for Brockton Power to assume that the City of Brockton, Jones River Watershed Association, and the Taunton River Watershed Association wish to jointly administer the proposed study, especially where the Watershed Associations have been long-time critics of the City's management of its water sources.

³ "While that approach sounds attractive, it's not clear to me -- I don't mean this in any way to be a criticism of the City of Brockton. But I don't see how we can approve in an order to the company -- can force the City to do any particular thing, because the company - we can tell the company, 'You have to be cooperative, you have to talk.' "

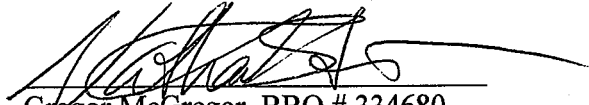
Conclusion

For the foregoing reasons, Brockton Power's Motion For Reconsideration should be denied.

Respectfully submitted,

CITY OF BROCKTON

By its attorneys,

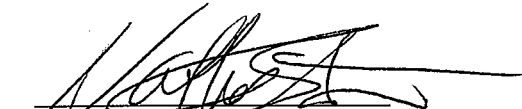


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Dated: June 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on June 20, 2011, as required by the Procedural Ground Rules of March 20, 2008, by first-class mail and e-mail to the Energy Facilities Siting Board Presiding Officer and by email to the parties that agreed to email service, and by first class mail, postage prepaid to the other parties.



Nathaniel Stevens

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

**SECOND SET OF INFORMATION REQUESTS OF
THE ENERGY FACILITIES SITING BOARD TO
BROCKTON POWER COMPANY, LLC
EFSB 07-7A/D.P.U. 07-58/D.P.U. 07-59**

Dated: August 20, 2010

Respondent: Jon Winslow and Guş Sambrano

Information Request EFSB-C-C-4

Please refer to the response to EFSB-C-C1. Please indicate why use of Aquaria water as the sole water supply for the Project – but not otherwise – would require an interconnect to the Pearl Street West Chestnut metering station.

Response

To deliver “Aquaria water as the sole water supply for the Project,” or for the Project to use the “Aquaria facility as sole source of water supply” (see Information Request EFSB-C-C1), an independent water pipeline would need to be installed to transport water directly from the Pearl Street and West Chestnut Street metering station to the Project site.¹ This pipeline would prevent the mixing of water from other sources within the BMWS.

That said, a simple way to supply the Project’s entire water requirement from Aquaria would be to match City deliveries from Aquaria to the Project’s water use. This could be done on a daily basis, or a monthly or quarterly average basis (thus minimizing daily swings in production at Aquaria). This approach does not require a direct and independent pipeline connection between the Project and Aquaria. Aquaria water would enter the BMWS at Pearl Street and West Chestnut Street, and be delivered to the Project through the BMWS. Please see the Company’s response to Information Request EFSB-C-W8 for further information.

¹ Please note that the Company is not proposing, as is suggested in several information requests, a direct connection between it and Aquaria for purposes of supplying potable water.

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

**SECOND SET OF INFORMATION REQUESTS OF
THE ENERGY FACILITIES SITING BOARD TO
BROCKTON POWER COMPANY, LLC
EFSB 07-7A/D.P.U. 07-58/D.P.U. 07-59**

Dated: August 20, 2010

Respondent: Jon Winslow

Information Request EFSB-C-C-6

Please refer to the response to EFSB-C-C2. To the Company's knowledge, is water delivery from Aquaria to the Company possible without agreement from the City of Brockton, i.e., independently, by direct agreement between the Company and Aquaria?

Response

The Company has not actively considered whether it is possible to obtain water delivery from Aquaria without the agreement of the City of Brockton (i.e., independently, by direct agreement between the Company and Aquaria). The PCF requests potable water from the City of Brockton Municipal Water System rather than through a direct supply from Aquaria. For more information, please see the Company's response to Information Request EFSB-C-C-4.

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

**FIRST SET OF INFORMATION REQUESTS OF
ALTERNATIVES FOR COMMUNITY AND ENVIRONMENT TO
BROCKTON POWER COMPANY, LLC
EFSB 07-7A/D.P.U. 07-58/D.P.U. 07-59**

Dated: August 20, 2010

Respondent: Jon Winslow

Information Request ACE-C-W-16

Please explain whether you are requesting approval from the Siting Board to: 1) use potable water you obtain directly from the City of Brockton; 2) use potable water you obtain directly from Aquaria (as a sole-source supplier); or 3) use both alternatives. (In other words, the table you provided in response to EFSB-C-C1 includes three alternatives: AWRP; BMWS; and Aquaria. Previously the Siting Board gave you conditional approval to use AWRP water. Are you now requesting approval of the BMWS alternative, the Aquaria alternative, or both alternatives?)

Response

Although the Company's Project Change Filing ("PCF") states that the use of AWRP water for cooling tower make up continues to be Brockton Power's preferred alternative, Brockton Power has requested that the Siting Board approve the use of potable water from the City of Brockton's Municipal Water System (BMWS) as an alternative for the Project's cooling tower make-up.

The BMWS municipal water supply is supplemented by the contract to purchase potable water from the Inima/Aquaria facility in Dighton, MA. The Inima/Aquaria facility is a source of the City's water supply, in addition to the City's traditional water supply sources. Please see the Company's responses to Information Requests EFSB-C-C1 and EFSB-C-W8. Please also see the Company's response to Information Request EFSB-C-C-4 for additional information about Aquaria as a "sole-source" supplier.

Contrary to the implication in the information request, Brockton Power has not requested in its PCF that the Siting Board approve an option that would allow the Company to obtain potable water directly from Inima/Aquaria as a sole source supplier. Brockton Power notes that the concept of a direct connection between the Company and Aquaria was introduced by virtue of the Siting Board's information requests, EFSB-C-W8 and EFSB-C-C1, instead of a specific proposal initiated by Brockton Power.