

KEEGAN WERLIN LLP

ATTORNEYS AT LAW  
265 FRANKLIN STREET  
BOSTON, MASSACHUSETTS 02110-3113  
\_\_\_\_\_  
(617) 951-1400

TELECOPIERS:  
(617) 951-1354  
(617) 951-0586

DAVID S. ROSENZWEIG  
E-mail: drosen@keeganwerlin.com

June 13, 2011

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

Re: Brockton Power Company, LLC, EFSB 07-7A/D.P.U. 07-58/D.P.U. 07-59

Dear Mr. Shea:

On behalf of Brockton Power Company, LLC (“Brockton Power” or the “Company”), enclosed please find the Company’s Motion for Reconsideration. The Company requests a hearing before the full Siting Board to consider its Motion for Reconsideration

I have enclosed a Certificate of Service. Thank you for your attention to this matter.

Very truly yours,



David S. Rosenzweig

Enclosures

cc: James Buckley, Esq.  
Service List

**COMMONWEALTH OF MASSACHUSETTS**  
**ENERGY FACILITIES SITING BOARD**

Brockton Power Company LLC Project Change Filing	) ) ) )	EFSB 07-7A/D.P.U. 07-58/D.P.U. 07-59
---	------------------	--------------------------------------

**CERTIFICATE OF SERVICE**

I certify that I have this day served the foregoing upon the Siting Board by hand delivery and on the Service List by electronic and regular mail.



---

Michael J. Koehler, Esq.  
Keegan Werlin LLP  
265 Franklin Street  
Boston, MA 02110  
(617) 951-1400

Dated: June 13, 2011

**COMMONWEALTH OF MASSACHUSETTS**  
**ENERGY FACILITIES SITING BOARD**

Brockton Power Company, LLC	)	EFSB 07-7A/D.P.U. 07-58/D.P.U. 07-59
-----------------------------	---	--------------------------------------

**MOTION OF BROCKTON POWER COMPANY, LLC FOR  
RECONSIDERATION**

**I. INTRODUCTION**

On June 9, 2011, the Energy Facilities Siting Board (the “Siting Board”), by a vote of 4-3, directed Siting Board staff to draft a Tentative Decision denying Brockton Power Company, LLC’s (“Brockton Power” or the “Company”) proposal to use water from the City of Brockton’s (the “City”) municipal water supply system (“BMWS”) for wet mechanical cooling purposes (the “June 9<sup>th</sup> Ruling”).<sup>1</sup> Notwithstanding the substantial record evidence demonstrating that the BMWS (including the firm commitment volumes from Aquaria) has ample capacity to provide cooling tower makeup flows to Brockton Power and that the potential environmental impacts associated with the Company’s use of City water have been properly minimized in accordance with Siting Board precedent, the Siting Board voted to reject the proposal rather than issue a conditional approval that would address the concerns raised by certain members of the

---

<sup>1</sup> The Siting Board also directed staff to draft a Tentative Decision approving the Company’s proposal to eliminate ultra low sulfur distillate (“ULSD”) (by a 6-1 vote) and approving the Company’s proposed facility design changes (by a unanimous vote) (June 9<sup>th</sup> Tr. at 108, 110). With a broader view, certain members of the Siting Board openly commented that the Project, as modified through the Project Change Filing (“PCF”), is much improved overall. As Mr. Galligan noted, “although we’re voting discretely on each of them, I have stood back and looked holistically on all the benefits the changes would bring, and I think they are tremendous [and] I think they are an overall benefit to the environment” (June 9<sup>th</sup> Tr. at 133). Mr. Colman made a similar observation, noting that “I agree with Mr. Galligan that overall this is a much better project” (June 9<sup>th</sup> Tr. at 138).

Siting Board during their deliberations. The Company asserts that the outcome of the Siting Board's vote in this regard is based on a mistake or inadvertent error, i.e., that the Company's proposed use of BMWS could not be reasonably conditioned in a way to mitigate the concerns raised by certain members of the Siting Board.<sup>2</sup> Further, the Board's vote was also the result of previously unknown or undisclosed facts that were a part of the record evidence, but were apparently unknown to the Board, regarding measures the Company had proposed to ensure that its supply of municipal water was sourced directly from the Aquaria desalinization plant (see Exh. EFSB-C-W-8). As described more fully below, there is a very reasonable and workable condition that could be imposed by the Siting Board in order to mitigate the concerns expressed by certain members of the Board. Accordingly, the Company hereby moves that the Siting Board reconsider its decision to deny the Company's proposed alternative to use BMWS water in light of the reasonable and workable condition proposed below.

## **II. STANDARD OF REVIEW**

The Presiding Officer has discretion to hear and act on motions for reconsideration. Ruling Re: Alliance Against Power Plant Location's Motion for Reconsideration of Ruling Denying its Petition to Intervene, EFSB 07-7/D.P.U. 07-58/D.P.U. 07-59 (Feb. 8, 2008) (allowing motion for reconsideration and vacating initial decision to deny intervention); see 980 C.M.R. § 1.09(8) ("Any party may file a written motion requesting that the Presiding Officer reconsider a ruling as long as the motion is

---

<sup>2</sup> In so stating, the Company does not in any way imply malice by the Board in reaching its decision. Rather, the outcome of the vote appeared to be more a function of the perceived difficulty in framing a condition, on the spot, that would be reasonable in light of the stated environmental-impact concerns of certain Board members and that would be feasible to implement.

received within five days of the issuance of the ruling”). Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that the Siting Board take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). A motion for reconsideration may be based on an argument that the treatment of an issue was the result of mistake or inadvertence. Russell Biomass LLC, D.T.E./D.P.U. 06-60-A at 3-4 (2008) (granting motion for reconsideration where Department omitted analysis of proponent’s request for individual zoning exemptions); NSTAR Electric Company, D.T.E./D.P.U. 07-4-A (2007); Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

### **III. ARGUMENT**

In accordance with the standard for motions for reconsideration, the Siting Board’s decision to deny, rather than to conditionally approve, the Project’s use of BMWS water is predicated on the mistaken belief that it could not develop a condition that would minimize potential impacts to the City’s historic water supply system (i.e.,

Silver Lake and the Brockton Reservoir) during the highly infrequent occasions when a portion of the water supply serving the Project may not come from the Aquaria desalinization plant.<sup>3</sup> Similarly, this Motion for Reconsideration conforms to the established standard insofar as certain Board members appeared to be unfamiliar with the record evidence wherein the Company described how it could match its water consumption with supplies from Aquaria (see, e.g., Exh. EFSB-C-W-8). In the response to Information Request EFSB-C-W-8, the Company indicated:

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. Although this option has not been analyzed in any depth, the Project could also theoretically receive the entire water supply from Aquaria using an estimated 3-mile long pipeline as the Siting Board identified in Information Request EFSB-C-C1.

As is clear in the transcript of the Siting Board's deliberations, certain members of the Siting Board expressed a strong interest in approving the Project subject to a reasonable and enforceable condition that would mitigate potential environmental impacts in the unusual event that the City, contrary to the most likely operating scenario demonstrated in the record,<sup>4</sup> served the Project from its existing historic sources rather than from Aquaria.<sup>5</sup> In particular, during deliberations, Board members Mr. Sydney, Mr.

---

<sup>3</sup> Recent precedent from the Supreme Judicial Court affirms that the City has a clear entitlement to use its full registered volume from Silver Lake. See Water Department of Fairhaven v. Department of Environmental Protection, 455 Mass. 740, 747 (2010). It should be noted that the City was one of the lead appellants in the Fairhaven case. Id. at 751, n.1.

<sup>4</sup> See Company Initial Brief at 8-20; Company Reply Brief at 2-12.

<sup>5</sup> Although the Company does not seek to reargue the evidentiary record in this motion, it believes that a full and fair consideration of the record would lead to the conclusion that such occasions will be, at worst, rare, and more likely, non-existent.

Galligan and Mr. Colman, each expressed a significant interest in conditionally approving the Project subject to a reasonable and enforceable condition (June 9<sup>th</sup> Tr. at 113, 141-144).<sup>6</sup> Specifically, Mr. Sydney proposed as follows:

But I'm wondering if there might be something in the tentative decision that could require certain monitoring of – paid for by the developer, of the water levels and, coincident with that, some kind of annual compliance filing for the first years on the environmental impact, so that we get a very clear picture of what's going on, and to the effect that if there's any kind of diminution of quality, that the company would be directed to work with the municipality and DEP to reduce the amount of water that they're allowed to use, if necessary.

June 9<sup>th</sup> Tr. at 141-142. Mr. Galligan echoed his support for this type of proposal (June 9<sup>th</sup> Tr. at 143-144). In response, Mr. Colman indicated that such an approach sounded “attractive,” but that he wanted to be sure that the Siting Board didn't delve into an area over which it did not have jurisdiction:

I had thought, you know, if there were a way we could make it that the facility could only take Aquaria water -- but I don't know if we have the authority to do that. I don't know how that would ever work out. I don't know how that could be done. If anybody on the Board has an idea on how that could be done, I'd be interested in hearing it, but I don't see how it could be done.

June 9<sup>th</sup> Tr. at 145.

With this Motion, the Company proposes the following condition that would fully address the interchange among Board members Sydney, Galligan, Colman and Berwick,<sup>7</sup> and leave the risk of compliance entirely on Brockton Power:<sup>8</sup>

---

<sup>6</sup> Siting Board member Dan Kuhs joined Mr. Sydney and Mr. Galligan in supporting a conditional approval, rather than a rejection, of the Company's proposal to use municipal water (June 9<sup>th</sup> Tr. at 147).

<sup>7</sup> Siting Board member Ann Berwick similarly stated that she “appreciate[d] the sentiment, and I share the sentiment” to find a middle ground, but that such a middle ground “doesn't feel workable to me” (June 9<sup>th</sup> Tr. at 146-47).

<sup>8</sup> During the Siting Board's deliberations, the parties were not given opportunity to comment or provide suggestions.

As a condition of the Siting Board's approval of the Company's proposal to use water from the City of Brockton's municipal water system for cooling water makeup, the Siting Board directs the Company to obtain its cooling water from the Aquaria desalination plant in Dighton, MA. Water from Aquaria can be delivered to the Project: (i) via the existing Aquaria connection to the City's system at Pearl Street and West Chestnut Street, and be delivered to the Project through the City's existing pipelines, or (ii) by an alternative pipeline from the Aquaria plant. Within ninety (90) days of the completion of the Project's first year of operations, the Company shall make a compliance filing with the Siting Board describing the measures that have been implemented to secure cooling water from the Aquaria plant.

As a further condition of the Siting Board's approval of the Company's proposal to use water from the City of Brockton's municipal water system for cooling water makeup, the Siting Board directs that the Company be required to fund an annual study setting forth information and making "best practice" recommendations to the City of Brockton regarding its withdrawals from the Silver Lake system on an annual, quarterly, monthly, and daily basis. The study shall be conducted by an independent third-party and shall be administered jointly by the Jones River Watershed and Taunton River Watershed Associations and City of Brockton Water Commission. For informational purposes, the Company shall submit a copy of the study to the Siting Board and the Massachusetts DEP on an annual basis within thirty (30) days of its completion.

As a further condition of the Siting Board's approval of the Company's proposal to use water from the City of Brockton's municipal water system for cooling water makeup, in addition to the payments made for the use of municipal water, the Company shall make a payment of \$100,000 per year for the betterment of the Silver Lake ecosystem. The payment shall be directed by the City of Brockton Water Commission and shall be used for the implementation of the best practice recommendations outlined in the referenced independent third-party study.

Significantly, the imposition of the proposed condition would not require the Siting Board to attempt to police or rely upon the City's management of its water supply system. It is simple and workable. In addition, the proposed condition directly addresses the concern of certain members of the Siting Board, will lead to direct mitigation for any potential adverse impacts and does so in a way that puts the risk of compliance squarely on Brockton Power.



In light of the existence of a reasonable and enforceable condition for which Brockton Power would bear the risk of compliance, the Company urges the Siting Board to reconsider its vote directing the staff to draft a Tentative Decision to deny the Company's proposed use of BMWS water, and instead, to direct the staff to prepare a Tentative Decision approving the Company's proposed use of BMWS water subject to the condition proposed above.

The Company requests a hearing before the full Siting Board to consider its Motion for Reconsideration.

#### **IV. CONCLUSION**

**WHEREFORE**, Brockton Power respectfully requests that the Siting Board grant its Motion to Reconsider its June 9<sup>th</sup> Ruling and instead approve the Company's PCF in its entirety subject to the condition offered above.

Respectfully Submitted,

**BROCKTON POWER COMPANY, LLC**

By its Attorneys,



---

David S. Rosenzweig, Esq.  
Michael J. Koehler, Esq.  
Keegan Werlin LLP  
265 Franklin Street, 6<sup>th</sup> Floor  
Boston, Massachusetts 02110  
(617) 951-1400

Date: June 13, 2011