

**COMMONWEALTH OF MASSACHUSETTS  
ENERGY FACILITIES SITING BOARD**

BROCKTON POWER COMPANY LLC PROJECT CHANGE	) ) ) ) )	EFSB 07-7A/D.P.U. 07-58/07-59  August 9, 2011
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**RULING ON MOTION OF BROCKTON POWER  
COMPANY, LLC FOR RECONSIDERATION**

I. SUMMARY

On June 13, 2011, Brockton Power Company, LLC (“Brockton Power” or the “Company”) filed a “Motion for Reconsideration” in this Project Change proceeding (“Motion”). Brockton Power asked the Energy Facilities Siting Board (“EFSB,” the “Siting Board” or the “Board”) to reconsider its direction to Siting Board staff voted on during the Board’s meeting on June 9, 2011. The Board’s vote, directing staff on the approach to take in drafting a Tentative Decision in this proceeding, is not properly the subject of a motion for reconsideration.

II. BACKGROUND

On April 9, 2010, Brockton Power submitted the Project Change filing that is now pending before the Board. The Siting Board staff and parties conducted extensive discovery and evidentiary hearings on the filing. After briefs were filed by the parties, the Siting Board staff compiled an Issues Memorandum that was distributed to the parties and the Board members on May 24, 2011, and on which the parties submitted written comments.

On June 9, 2011, the Siting Board held a public meeting to discuss the Issues Memorandum and to give staff direction on writing the Tentative Decision to be submitted to the Board and to the parties for their comments. At the beginning of the meeting, counsel for the Company and ACE addressed the Board and responded to questions. The Board then discussed the Issues Memorandum and voted to direct Board staff as to how to draft the Tentative Decision, including denial of the Project Change insofar as it sought permission to obtain water from the Brockton Municipal Water Supply (“BMWS”) to cool the Project’s tower (Tr. at 110-148).

A. The Motion for Reconsideration

On June 13, 2011, the Company filed the Motion, asking 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” in the Motion (Motion at 2). As grounds for reconsideration, the Company asserts that the Board’s decision denying the use of water from BMWS was the result of “mistake or inadvertent error” (*id.*). Specifically, the Board allegedly

was mistaken when it concluded 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” (id.). To the contrary, the Company asserts, there is a “very reasonable and workable condition that could be imposed by the Siting Board” (id.). In the Company’s view, this condition has three components:

- 1) The Company must receive all of its cooling water from Aquaria, a water desalinization facility with which the City of Brockton (“City” or “COB”) has a 20-year contract to obtain significant quantities of potable water.
- 2) The Company must fund an annual study regarding withdrawals from Silver Lake.
- 3) The Company must pay \$100,000 per year for the betterment of the Silver Lake ecosystem, in addition to its payments for use of municipal water.

Id. at 6.

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” in its Motion (id. at 7). Brockton Power also requests a hearing before the full Siting Board on the Motion (id.).

#### B. The Arguments in Opposition to the Motion

On June 17, 2011, the Town of West Bridgewater (“West Bridgewater”) filed an Opposition to Brockton Power’s Motion (“West Bridgewater Opposition”). On June 20, 2011, ACE and the City filed memoranda of law opposing the Motion (“ACE Opposition” and “COB Opposition”). The Taunton River Watershed Association (“TRWA”) joined in the ACE Opposition.

ACE, the City, and West Bridgewater argue that the motion for reconsideration has been brought improperly, for a number of reasons. First of all, the City notes that the Company cites, as authority for its Motion, to the Board’s regulation addressing reconsideration (980 C.M.R. § 1.09(8), which allows a party to file a motion for reconsideration “requesting the Presiding Officer to reconsider a ruling.” In the present case, however, the Presiding Officer has not issued a ruling (COB Opposition at 1; ACE Opposition at 2; West Bridgewater Opposition at 3). These parties argue as well that the Board’s vote instructing the staff to prepare a Tentative Decision was not a ruling, but merely a preliminary step en route to issuing a ruling (ACE Opposition at 2; COB Opposition at 1; West Bridgewater Opposition at 3).

ACE, the City, and West Bridgewater also argue that the Motion is premature (COB Opposition at 2; ACE Opposition at 3; West Bridgewater Opposition at 2). They argue that, pursuant to 980 C.M.R. § 1.08(2)(b), the Company can propose its new condition and make any arguments it wishes during the comment period on the Tentative Decision once it is drafted (COB Opposition at 3; ACE Opposition at 3; West Bridgewater Opposition at 2).

### III. ANALYSIS AND DECISION

Brockton Power asserts that the Board should reconsider “its June 9<sup>th</sup> Ruling” (Motion at 7) because the Board did not consider an appropriate condition that could be imposed to mitigate the environmental impacts if the Project uses municipal water. In so doing, Brockton Power cites the *Siting Board’s rules* at 980 C.M.R. §1.09(8) for the relief it seeks. However, this section of the Board’s rules authorizes a party to file a motion asking the Presiding Officer to reconsider his/her ruling. As appropriately pointed out by the Intervenors, §1.09(8) is not applicable because the Presiding Officer has made no ruling whatsoever.

Brockton Power also cites *Department (as opposed to Siting Board)* cases that allow a motion for reconsideration to be filed after a *final* Department Order, pursuant to the Department’s rules at 220 C.M.R. §1.11(10). However, apart from the fact that this is a Department rule, the June 9<sup>th</sup> deliberation by the Board is far from constituting a final decision in this Project Change proceeding.

No rules of either the Siting Board or the Department permit a motion for reconsideration under the circumstances here. There was no Presiding Officer ruling to be reconsidered. There was no final Board order to be reconsidered.

Common sense buttresses this result. The Board’s vote was just an interim step in the process of arriving at a Tentative Decision, which is ultimately to be followed by a Final Decision. When it issues a Tentative Decision, the Board implements a procedure established by regulation that allows parties to file written comments or objections, and typically also allows the parties to present oral argument immediately prior to the Board’s public deliberation of the Tentative Decision. Only after that considerable process will the Board vote to decide on the Final Decision. 980 C.M.R. § 1.08(2), (3). Thus, Brockton Power can propose any condition it chooses in its written comments on the proposed Tentative Decision or at the public meeting of the Board at which the Tentative Decision will be reviewed, or both.

Accordingly, Brockton Power’s Motion to Reconsider is DENIED. For similar reasons, Brockton Power’s request for a hearing before the full Siting Board on its Motion is DENIED.

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Robert J. Shea  
Presiding Officer

Dated: August 9, 2011