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COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD
DEPARTMENT OF PUBLIC UTILITIES
EFSB 07-7A/DPU 07-58/DPU 07-59

PROCEDURAL CONFERENCE, held at the
Department of Public Utilities, One South Station,
Boston, Massachusetts, on Monday, May 3, 2010,
commencing at 2:03 p.m., concerning:

BROCKTON POWER COMPANY, LLC

SITTING: Robert J. Shea, Esq., Presiding Officer
James Buckley, Assistant General Counsel
Enid Kumin, Analyst
Mary Menino, Analyst

----- Reporter: Alan H. Brock, RDR, CRR -----

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3	1 May 3, 2010 2:03 a.m. 2 P R O C E E D I N G S 3 MR. SHEA: Let's go on the record, 4 please. Good afternoon. My name is Robert Shea and 5 I'm the hearing officer, presiding officer in this 6 case. This is a procedural conference in the 7 recently filed Brockton Power LLC project change 8 proceeding. The project change proceeding is 9 treated as a continuation of the original 10 proceeding. All of the parties to the original 11 proceeding are also parties to this project change 12 proceeding, and the same rule applies to limited 13 participants. 14 The original proceeding consisted of 15 three consolidated petitions. The first petition 16 was filed by Brockton Power LLC with the Energy 17 Facilities Siting Board. It sought permission to 18 construct an energy generating facility, and it was 19 assigned EFSB No. 07-7. 20 The second and third petitions were 21 filed by Brockton Power with the Department of 22 Public Utilities. The second petition sought 23 several specific exemptions as well as a 24 comprehensive exemption from the Brockton zoning bylaws. That matter was assigned DPU No. 07-58. The third petition sought permission to construct and operate a transmission line that would link the generating facility to the grid, and it was assigned DPU No. 07-59. The three petitions were consolidated and referred to the Siting Board for decision. In a final decision dated August 7th, 2009, the Siting Board approved the petition to construct a generating facility, subject to specific stated conditions. The board also approved Brockton Power's petition to construct a transmission line that would link the generating facility to the grid. The Board denied, however, the request for specific zoning exemptions and also denied the request for a comprehensive zoning exemption. The project-change petition was filed on April 9th, 2010. It has been assigned EFSB No. 07-7A. The DPU designations stay the same. On April 16th of this year we received a letter from McGregor & Associates, the newly appointed counsel to the City of Brockton. This firm requested 30 days from the receipt of the project change, which they had received on April	5

<p style="text-align: right;">6</p> <p>1 12th, 2010, in which to file a response. Brockton 2 Power objected on the grounds that all requests for 3 relief should be made in the form of a motion and 4 that the motion was premature. 5 Having summarized the matter, let me 6 introduce the panel. To my far left is Enid Kumin, 7 a technical analyst who is involved in the 8 underlying case and is involved in this case as 9 well. To my immediate left is Mary Menino, who is 10 also a technical analyst with the EFSB staff and who 11 is involved in the underlying case and is involved 12 in this case as well. As I mentioned before, my 13 name is Robert Shea. I was a presiding officer in 14 the underlying Brockton Power case, and I'll be the 15 presiding officer in this project change matter. 16 And to my immediate right I'd like to introduce our 17 new assistant general counsel, James Buckley. He is 18 assistant general counsel to the Energy Facilities 19 Siting Board and the Siting Division of the 20 Department of Public Utilities. 21 Now I'd like to go around the table and 22 from the left ask people to introduce themselves, so 23 their names may be taken down by the stenographer. 24 MR. ROSENZWEIG: Appearing on behalf of</p>	<p style="text-align: right;">8</p> <p>1 of the Brockton and West Bridgewater intervenor 2 residents. 3 MR. SHEA: Thank you. 4 MS. PELOQUIN: And Lauren Peloquin, 5 appearing on behalf of National Grid. 6 MR. SHEA: I would like to hear from the 7 parties on the issue of how they think we should 8 proceed from here. Why don't I start with the left, 9 with Mr. Rosenzweig. How would you propose to 10 proceed substantively in this matter? 11 MR. ROSENZWEIG: From the perspective of 12 Brockton Power, we filed, as you noted, a project 13 change filing responsive to the Siting Board's final 14 decision in certain areas on April 9th of this year. 15 The underlying decision is a final decision. It's 16 on appeal at the SJC. 17 But taking that decision as a given, the 18 final decision as a given, there are three areas of 19 changes that we have identified in our project 20 change filing. We would submit that those changes 21 are well documented in our filing and are 22 self-evident in the materials we have put forth. We 23 would not object to any discovery procedures that 24 the Board or the parties might want to implement in</p>
<p style="text-align: right;">7</p> <p>1 Brockton Power, David S. Rosenzweig and Michael J. 2 Koehler, from the law firm of Keegan Werlin, 265 3 Franklin Street, Boston. 4 MR. SHEA: Thank you, Mr. Rosenzweig . 5 MS. LaMARRE: I'm Carolyn LeMarre. I'm 6 the executive director of the Taunton River 7 Watershed Alliance. I'm also an attorney. 8 MR. SHEA: Thank you, Ms. LaMarre. 9 MR. STEVENS: I'm Nathaniel Stevens of 10 McGregor & Associates in Boston, representing the 11 City of Boston. 12 MR. SHEA: Thank you, Mr. Stevens. 13 MR. MCGREGOR: I'm Gregor I. McGregor, 14 of McGregor & Associates. The firm is special 15 counsel to the City, and Nathaniel is my associate, 16 and I will be representing the City in this 17 proceeding. 18 MR. SHEA: Thank you, Mr. McGregor. 19 MR. HOLGERSON: John Holgerson, Gay, Gay 20 & Field in Taunton, Mass., on behalf of the Town of 21 West Bridgewater. 22 MR. SHEA: Thank you, Mr. Holgerson. 23 MR. BENSON: Eugene Benson, Alternatives 24 for Community & Environment, in Roxbury, on behalf</p>	<p style="text-align: right;">9</p> <p>1 a reasonable fashion, so long as it is done in an 2 expeditious and fair manner. And from there we 3 would expect that the record developed would be 4 investigated by the Siting Board in typical fashion 5 and a final decision would be rendered. 6 MR. SHEA: Thank you, Mr. Rosenzweig. 7 Ms. Peloquin? 8 MS. PELOQUIN: We have no comment. 9 MR. SHEA: Ms. LaMarre? 10 MS. LaMARRE: I would like to request 11 that this be considered a new filing and not just a 12 change of project. The reasons for this are that 13 it's a very comprehensive change of just about every 14 environmental impact -- every environmental issue 15 that could be addressed in this, from noise to air 16 pollution to the size of the buildings to the 17 water -- not only the source of water, but the 18 downstream impacts. 19 I first of all think that there would 20 be -- because of this different source of water, 21 there may be some different people that would want 22 to be -- different parties who would want to be 23 intervenors in this case, such as the Jones River 24 Watershed or any of the other environmental</p>

<p style="text-align: right;">10</p> <p>1 organizations throughout the area that really have 2 taken a look at the water-supply needs of the 3 Taunton River and this whole area in detail. And 4 this is a major change in that respect. 5 Secondly, I think that the change in the 6 type of water used could have affected their site 7 selection initially. They chose this site because 8 it was located near the wastewater treatment plant, 9 which was going to be their source. Now they could 10 have gone to a multiplicity of other communities to 11 have sited this project. So I think that the site 12 review needs to open up again. 13 Lastly, I really think that the 14 environmental justice community is still an issue 15 that needs to be given due consideration in this. 16 The recent developments in the past few months have 17 really underscored the need for this. First of all, 18 you can look at the statistics, and you can say that 19 this kind of a plant, this kind of an operation, 20 will not affect the community. But how many times 21 in just most recent months have we seen an explosion 22 in Connecticut of a gas-sourced power plant. 23 Secondly, we're now dealing with another major 24 catastrophe that nobody thought was going to happen,</p>	<p style="text-align: right;">12</p> <p>1 For instance, and not with any 2 limitation, the change of water source is such a 3 fundamental change, for reasons I could spin out if 4 we have a chance to submit in writing within the 30 5 days we requested, or if you want something in 6 writing today, we're prepared. We have any number 7 of inconsistencies and holes in the project change 8 notice itself. Reversing course on where the water 9 comes from and using potable water, if you will, 10 domestic water, that's been treated to drink, has 11 major environmental impacts as well as site-specific 12 impacts, as you just mentioned. 13 Secondly, the project configuration has 14 changed. Again, there are some inconsistencies and 15 holes in the project change notification about how 16 the project's going to be configured. Among other 17 things, where is the pipe back to the sewerage 18 system? To the pipes into the treatment plant, to 19 the treatment plant, to the discharge point of the 20 treatment plant? What will be the impacts on the 21 river, as you mentioned, in dry and wet seasons? 22 And for that matter, what are the implications in 23 any enforcement proceedings pending against the City 24 about the plant and the permits that govern, Federal</p>
<p style="text-align: right;">11</p> <p>1 with a seven-year-old water pipe dying on us and 2 affecting almost half the communities in the State 3 of Massachusetts. 4 And lastly, just take a look at the 5 environmental impact that nobody said would ever 6 happen with the Gulf. I'm not saying that this 7 proportion of disaster would necessarily be the 8 result of this project, but I'm just saying, you 9 can't statistically say that the environmental 10 justice community doesn't deserve to be heard, given 11 the track record of recent disasters. 12 So I think that's very important. 13 MR. SHEA: Thank you, Ms. LaMarre. 14 Mr. McGregor and Mr. Stevens? 15 MR. MCGREGOR: Thank you. On behalf of 16 the City, we do think that the appropriate way to 17 proceed is with a new application. We think the 18 so-called project changes are so significant, so 19 major as to affect the underlying balancing that the 20 Board does under its statute. Among other reasons, 21 some of these impacts were not reviewed or some of 22 them were not reviewed as the principal impact or 23 some of the underlying assumptions of the plan 24 originally have now been undercut by reversal.</p>	<p style="text-align: right;">13</p> <p>1 and state, about the effluent from the plant. 2 And finally, there is substantial but 3 not complete elimination of ultra-low-sulfur diesel. 4 While gas is proposed to be the backup fuel for the 5 gas fuel for the plant -- hardly a backup -- 6 independent of that, which we're not pressing at 7 this time, ultra-low-sulfur diesel fuel is not 8 completely eliminated by this switch, and there will 9 remain air-quality impacts, perhaps even different 10 air-quality impacts, given the different nature of 11 cooling of the plant. And black-start generators 12 will still be on premises to serve their purposes, 13 and fuel still has to be stored and delivered, which 14 will be by trucks, for that use. 15 So for those reasons, in broad overview 16 only, I think a new proceeding is appropriate. If 17 the Board were to disagree, if Your Honor were to 18 disagree, then we think it is plainly appropriate to 19 reopen hearings and reopen discovery. 20 MR. SHEA: Thank you, Mr. McGregor. 21 Mr. Holgerson? 22 MR. HOLGERSON: My remarks will mirror 23 somewhat Attorney McGregor's. I put it more 24 generally: The panel, I think, has to decide</p>

<p style="text-align: right;">14</p> <p>1 whether or not the statutory standard has been met 2 on the evidence that it's already heard on these 3 three project changes. Yes, there was evidence 4 during the 20 days of hearing regarding the use of 5 potable water, but I do not believe that that 6 evidence satisfies or should satisfy the statutory 7 standard in all its regards because I think there 8 are still some issues left open, some of which 9 Attorney McGregor has touched on. While the same 10 may not be true of the use of the ultra-low-sulfur 11 distillate, because of the fact that it's being 12 essentially eliminated -- perhaps not completely, 13 but essentially eliminated -- that aspect may not be 14 applicable. 15 However, certainly the downsizing of the 16 plant and the fact that the Board, the panel, the 17 last time didn't hear what the visual impacts will 18 be, what the noise impact will be -- even granted 19 it's a downsizing, that doesn't necessarily mean 20 that the standards are necessarily met if the plant 21 is being restructured in any physical way. I think 22 the panel has to be satisfied that these issues have 23 all been addressed sufficiently on the evidence it's 24 already heard. And I would definitely take the</p>	<p style="text-align: right;">16</p> <p>1 regulatory allowance to file a notice of project 2 change. 3 I understand the general language that 4 Mr. Rosenzweig has noticed in the decision, but I 5 don't think that language allows the Board to 6 authorize a notice of project change like this. 7 Secondly, I will point out, on the issue 8 of potable water, that the initial petition did not 9 mention potable water as an option for use in the 10 cooling tower. So therefore, to allow the notice of 11 project change would bypass many of the legislative 12 safeguards that were put into place: opportunity 13 for public comment on the initial petition, which 14 we'll be losing here if there's a notice of project 15 change; opportunity for parties to intervene, as 16 Ms. LaMarre pointed out. There may have been some 17 parties who would have intervened if they knew that 18 the Board would be considering the use of potable 19 water and there are also issues about potable water 20 that I think other people might have wanted to take 21 notice of and have not had the opportunity to take 22 notice of. 23 If the Board, despite these objections, 24 agrees to hear the notice of project change, I agree</p>
<p style="text-align: right;">15</p> <p>1 position that on at least two of the three project 2 changes -- putting the ultra-low-sulfur distillate 3 aside -- that's not the case. And I think the panel 4 should reopen the hearing. This is a continuation, 5 as you mentioned at the outset. I think the panel 6 should reopen the hearing to address those issues, 7 to satisfy itself that the statutory standards are 8 indeed met with these changes, and to allow counsel 9 a limited form of discovery to address the specific 10 issues that have not already been addressed and that 11 arise anew as a result of these suggested project 12 changes. 13 MR. SHEA: Thank you, Mr. Holgerson. 14 Mr. Benson? 15 MR. BENSON: I agree with statements of 16 the Taunton River Watershed Alliance, Brockton, and 17 the Town of West Bridgewater that a new petition is 18 required in this matter. Our belief is that the 19 statutory and regulatory process does not allow for 20 this notice of project change under these 21 circumstances. The statute I think is very clear, 22 that the company has 180 days after the ruling to 23 file an amended petition. This is more than 180 24 days. There's no statutory allowance to file -- or</p>	<p style="text-align: right;">17</p> <p>1 that there should be discovery. We strongly believe 2 there needs to be evidentiary hearings. There are a 3 number of issues that we believe will not get 4 resolved in discovery, and if the previous hearing 5 is any indication, when the witnesses take the stand 6 and testify, it turns out there will be more 7 information required and more information learned 8 through that testimony. So we think that 9 evidentiary hearings after discovery are necessary 10 and then briefing and then a revised decision. 11 MR. SHEA: Let me ask you -- I'll give 12 you a chance to respond in a second, Mr. Rosenzweig. 13 And I'll start with Ms. LaMarre and go down -- if 14 your position is when that there needs to be -- when 15 you say a new filing, does it need to be a new 16 filing with new publication in the newspapers and a 17 new public hearing? 18 MS. LaMARRE: Yes, I believe it does. I 19 think that the public, who have been subjected to 20 Brockton's water situation for decades and are now 21 dealing with, you know, okay, all of a sudden we can 22 sell this water to somebody else -- I think that 23 they need to have a voice on their water usage that 24 they're currently paying for.</p>

<p style="text-align: right;">18</p> <p>1 Secondly, I think that the regulations 2 in this state regarding Aquaria -- the permit, 3 rather, for Aquaria -- said that any other town that 4 wanted to use Aquaria water would have to go through 5 the complete environmental permitting process. I 6 just really don't see where it's fair under the 7 intent of this permit and under the intent of the 8 environmental laws in this state, that a private 9 company can back-door its way in when a Town or a 10 City would have to go through a complete process. 11 So I believe that this should be held to 12 the standard that any other community who would want 13 to use Aquaria water has to be held to. 14 MR. SHEA: Mr. McGregor, is it your 15 position that there needs to be a new public 16 hearing, publication within the newspapers, and 17 public meeting, public comment, opportunity to 18 intervene? 19 MR. MCGREGOR: Yes, Your Honor. There 20 is indeed a whole constituency out there, and 21 probably not involved the first time around, on the 22 prospect of using 20 percent of Brockton's water for 23 a commercial user, this power plant, when Brockton 24 has a contractual arrangement, not otherwise, with a</p>	<p style="text-align: right;">20</p> <p>1 policy, because we are dealing with a site that 2 borders three different EJ communities, that 3 notification prong of the EJ policy in my opinion 4 would require a change like this to be public- 5 noticed and have a public hearing and comment on it, 6 given the proximity of the proposed site to the EJ 7 communities and given the application of the EJ 8 policy, at least as I understand it -- and keeping 9 in mind that this Board found -- the Board and this 10 panel found that the EJ policy, although the 11 co-counsel for the Town and the City and ACE all 12 disagreed with the Board's position, this Board and 13 this panel found that the EJ policy is primarily one 14 of notification. And if in fact that's what the 15 panel is going to hinge its interpretation of the EJ 16 policy on, I don't see how the panel cannot provide 17 for public notification and a public hearing, given 18 the EJ communities that border the site. 19 MR. SHEA: Thank you, sir. Mr. Benson? 20 MR. BENSON: Well, I agree, and I would 21 just like to add, from a statutory requirement, I 22 don't think the Board has any choice but to reject 23 the notice of project change and to require Brockton 24 Power to basically start at the beginning and filing</p>
<p style="text-align: right;">19</p> <p>1 private water source called Aquaria, the 2 desalinization company. And that itself has spun 3 off other legal issues and proceedings and claims 4 that are pending elsewhere. Also, there are 5 interbasin transfers of waters inherent in the 6 Brockton system. There are enforcement or 7 conservation requirements imposed by the State on 8 the Brockton system. All of those, if you will, 9 have their own constituencies, have their own 10 applicable laws and regulations, and some have 11 resulted in other ancillary administrative 12 proceedings, and all of those would come up in the 13 public notice, public meeting, public comment and 14 hearing process. 15 MR. SHEA: Thank you, sir. 16 Mr. Holgerson, the same question. 17 MR. HOLGERSON: Yes, I do believe that 18 notification and a public hearing is necessary, 19 because, if you recall, when the public hearing was 20 originally held in Brockton, there was little, if 21 any, discussion about the use of potable water. As 22 far as the source of the water going to be used, it 23 was the effluent from the AWRF. 24 Secondly, under the equal-justice</p>	<p style="text-align: right;">21</p> <p>1 a new petition. Chapter 164, Section 69J 1/4 says, 2 and I'm paraphrasing in part, in the event of a 3 conditional approval, which is what Mr. Rosenzweig 4 is relying upon, the applicant may within 180 days 5 submit an amended petition. Well, this is far 6 beyond 180 days. What they're doing is submitting 7 an amended petition under the guise of a project 8 change notice, where this is really nothing but an 9 amended petition. They are far outside the 180-day 10 requirement. So in addition to the reasons that 11 were raised by my fellow counsel, I believe the 12 Board has no choice but to reject this and to 13 require them to start from the beginning. 14 MR. SHEA: Mr. Rosenzweig, you've been 15 incredibly patient. Thank you for your patience. 16 You know what it's like to sit there and hear people 17 contradict your point of view, your argument. So 18 please tell us what you think about this question: 19 Would it require -- would the project change require 20 a separate notification, publication in the papers, 21 another public meeting, opportunity to intervene, 22 and everything? 23 MR. ROSENZWEIG: No, I don't believe 24 that's the case. The Siting Board has extensive</p>

<p style="text-align: right;">22</p> <p>1 precedent on project changes that have been 2 submitted by other applicants in other matters and 3 has undertaken review of those, along the procedures 4 that Brockton Power has followed here -- that is to 5 say, a filing with supportive information and, where 6 necessary, discovery is undertaken and hearings, but 7 without the need for renoticing or, if you will, 8 starting from scratch with a new petition. 9 The filing that Brockton Power made was 10 directly responsive to the Siting Board's final 11 decision. There's the paragraph on the concluding 12 page which says that an applicant has an affirmative 13 mandatory obligation if it is to pursue changes 14 other than minor modifications to its proposal, to 15 present those to the Siting Board. It doesn't 16 contemplate any starting from scratch or renoticing 17 or beginning anew. 18 In addition, as it relates to the issue 19 of potable water, there was a particular directive 20 on Page 42 of the final decision that if the company 21 intends to use potable water as an alternative for 22 the majority of its requirements, the Siting Board 23 directed that Brockton Power present to the Siting 24 Board a detailed analysis focused on those issues</p>	<p style="text-align: right;">24</p> <p>1 intervenors. That's what the Siting Board's process 2 is all about. And we look forward to going forward 3 in the process. 4 MR. BUCKLEY: Can I ask a question, 5 before we move on? As a new person to this process: 6 You mentioned other project change -- or other cases 7 where project changes have been treated as a project 8 change, rather than a new filing. Can you help me 9 out as to what kind of project changes were proposed 10 in that and at least implicitly were not found to be 11 new applications? 12 MR. ROSENZWEIG: Well, the most recent 13 one that I'm aware of is in the Cape Wind case, 14 where Cape Wind during the original proceeding 15 discussed various attributes of its proposed 16 transmission line and what its preferred technology 17 was or methodology was for making a landfall at the 18 original time of the petition. It described a 19 jet-plowing technique to make the landfall from 20 ocean to shore. It analyzed in the original 21 proceeding an HDD technology and didn't think it 22 would be feasible. As the project evolved and 23 refined, it determined that an HDD was a feasible 24 technology for making a landfall. It presented an</p>
<p style="text-align: right;">23</p> <p>1 and then the Siting Board would undertake its 2 review. There is no contemplation in the Siting 3 Board's final decision on those issues, which were 4 investigated during the original proceeding, that 5 there would be a new filing, renoticing, a new 6 petition that would be required in order to consider 7 those types of project changes. 8 That hasn't been the Siting Board's 9 practice in the past, and such a procedure would be 10 a huge discouragement for a project applicant, such 11 as Brockton Power, to consider refinements to its 12 proposal, to respond to concerns that may have been 13 raised in the community, to do what it can to 14 minimize impacts. If it were going to have to start 15 anew and begin a clock back three years in order to 16 implement changes that it arguably believes, and 17 will be for the Siting Board to determine, are 18 improvements to its proposal, that would be a very 19 unfortunate precedent to be established by the 20 Siting Board. 21 So we don't believe that any such new 22 proceeding needs to be initiated here. We are 23 certainly amenable to addressing all the questions 24 and concerns that have been raised by the</p>	<p style="text-align: right;">25</p> <p>1 analysis, among other refinements to its project, 2 but that was the most principal one. And the Siting 3 Board undertook a review of that change. 4 MR. SHEA: In that Cape Wind case was 5 there further discovery and further hearings in the 6 project change phase? 7 MR. ROSENZWEIG: There was. There was, 8 I think, an additional two hearing days as well as a 9 round or two of discovery, one by the Siting Board 10 staff and one by intervenors, to consider the 11 project changes that Cape Wind proposed. 12 There have been prior Siting Board cases 13 involving generating facilities that have similar 14 changes in terms of its use of backup fuel that have 15 evolved, if you will, subsequent to its permitting, 16 where DEP may have required a different mix of fuels 17 and mix of natural gas versus backup fuel, and it 18 required the project to, if you will, come back to 19 the Siting Board with a project change filing, and a 20 similar procedure was followed. 21 MR. BUCKLEY: Thank you. 22 MR. SHEA: Pardon me, Mr. Rosenzweig. I 23 understand from your argument that your client is 24 proceeding under the terms of the final decision in</p>

<p style="text-align: right;">26</p> <p>1 the underlying case. And therefore I'll ask you: 2 Do you believe that Mr. Benson's citation to Chapter 3 164, Section 69J 1/4, is relevant to this? 4 MR. ROSENZWEIG: Well, that's not an 5 issue that I heard until I heard from Mr. Benson 6 today. But I do not believe what we have filed is 7 an amended petition. Some of this may be semantics. 8 But I believe what we have is our original petition, 9 where we're implementing proposed modifications that 10 don't really amend the fundamentals, from our 11 perspective, the petition that was originally 12 reviewed and approved by the Siting Board. The 13 project has not changed in terms of its size, its 14 location. Issues of proximity of abutters has not 15 changed as a result of our project change filing. 16 And so, as you sit here now, I would not 17 consider this an amended petition within the context 18 of the statute. It's never been interpreted that 19 way in the past by the Siting Board, where, as I 20 said, several other proceedings involved project 21 changes that ensued more than 180 days after the 22 final decision by the Siting Board in those 23 proceedings. 24 MR. SHEA: Does no one on the other side</p>	<p style="text-align: right;">28</p> <p>1 was not something that was not part of this case the 2 first time. 3 The same thing with potable water: We 4 raised the issue that they have not mentioned it in 5 their petition and the Board should reject it at 6 that point. We presented evidence about potable 7 water. We wanted to call a witness about potable 8 water once we realized that they intended to go 9 ahead with it, and we were not allowed to present 10 that late witness about it. And we also informed 11 them the city council had passed an ordinance that 12 basically made it very unlikely that they would be 13 able to use the effluent from the wastewater 14 treatment plant and they basically had no choice on 15 the water issue. 16 So I don't think it's anything like the 17 ones Mr. Rosenzweig talked about, where the Board 18 said, "Something new has happened in the world and 19 maybe we should take a look at it." And the 20 reconfiguration is clearly their attempt to get 21 around the Board's decision not to waive local 22 zoning and site plan requirements, and they 23 acknowledge as much in their notice of project 24 change.</p>
<p style="text-align: right;">27</p> <p>1 want to offer a quick rebuttal? You will get more 2 opportunity to rebut in writing, but just a summary 3 rebuttal? 4 MR. BUCKLEY: And I'd welcome any 5 comment or any answer to the same question I posed 6 to Brockton Power's attorney as to how project 7 changes in the past are or are not like this kind of 8 project change. 9 MR. BENSON: I think what I wanted to 10 say may be responsive to both of those, and please 11 let me know if it's not. I think the three issues 12 that Brockton Power has raised in its notice of 13 project change are not ones that occurred to them 14 sometime after this hearing was over, where they 15 went ahead and all of a sudden something changed out 16 in the world and they needed to respond to it in 17 some way. 18 The issue of getting rid of ultra-low- 19 sulfur diesel was one that we pressed for during the 20 entire 20 days of hearing and briefed extensively, 21 and we believe that the Board was wrong in its 22 decision about that and very much appreciate that 23 Brockton Power has chosen to basically remove 24 ultra-low-sulfur diesel as a backup fuel. But it</p>	<p style="text-align: right;">29</p> <p>1 So those are not the types of things, I 2 would suggest, where the Board might say, "Oh, these 3 are minor changes and the project's going along the 4 same way." No, these are significant changes. They 5 are changes that were at the Board the first time, 6 and they're changes where, I think if you have to 7 weigh what Mr. Rosenzweig is talking about, which is 8 what's the burden on a project proponent in having 9 to file a new petition, against the scheme that the 10 legislature set up, which is 180 days and no more to 11 file an amended petition and the need for public 12 notice, public hearing, opportunity for 13 intervention, which would be lost if you see this as 14 a notice of project change, plus, as has been 15 pointed out, the need to be responsive to 16 environmental-justice concerns. I think 17 Mr. Rosenzweig is not in the right place on those 18 issues. 19 MR. SHEA: Thank you. Mr. Holgerson, 20 please? 21 MR. HOLGERSON: I would just add, as far 22 as the prior precedent is concerned -- and I will 23 certainly stand to be corrected by Attorney 24 Rosenzweig if I'm incorrect about this. But it</p>

<p style="text-align: right;">30</p> <p>1 would seem to me that, given the existence, the 2 relatively short existence of the environmental 3 justice policy, that there probably isn't precedent 4 indicating that, given the notification requirements 5 set forth in that policy, that it's perfectly okay 6 not to have a further notification, public 7 notification, and a further public hearing. 8 I would again reiterate what I said 9 earlier, that I don't believe there is prior 10 precedent for this, and I believe that the panel, 11 the Board, should be governed by its own 12 determination that it is a notification issue and 13 that therefore there should be a renotification -- 14 only because we're talking about a site where there 15 are three separate EJ communities bordering it. And 16 I would be surprised to learn that there's prior 17 precedent that somehow says under the EJ policy you 18 don't need to have that prior notification, you 19 don't need to have that public hearing. It seems to 20 me that would undermine the whole purpose and intent 21 of that policy. 22 MR. SHEA: Mr. McGregor? 23 MR. MCGREGOR: If Brockton Power wins on 24 this, whatever proceeding the Board conducts will be</p>	<p style="text-align: right;">32</p> <p>1 wheels of justice grind very finely and result in a 2 very valuable permission in the certificate -- and 3 they say 180 days is enough, and after that, because 4 things can change -- ownerships can change, 5 assumptions can change, site characteristics can 6 change, finances can change -- you need to start 7 over. 8 MR. SHEA: Thank you, Mr. McGregor. 9 MR. ROSENZWEIG: Just to comment on a 10 couple of points. Mr. Holgerson invited me to 11 correct him, I understand, if I had more information 12 on the issue than he did. 13 There was a project change filing made 14 by Pioneer Valley Energy Center at the end of last 15 year in a very recent time frame, for a generating 16 facility in Westfield, that was presented to the 17 Siting Board and subsequent to any statutory or 18 regulatory changes that might otherwise have put EJ 19 more affirmatively before the Siting Board. And in 20 review of that project change, the Siting Board did 21 not require any renotification, if you will, of the 22 application. In fact, in that case they felt the 23 project change was not of the kind that required 24 additional discovery and hearings, and approved the</p>
<p style="text-align: right;">31</p> <p>1 dragging behind it a bucket of cement, alleged 2 jurisdictional defect, that will be added to the 3 case in the SJG. 4 MR. BUCKLEY: What's the definition of 5 "win" in this case? 6 MR. MCGREGOR: If he succeeds in 7 proceeding with what you agree to characterize 8 merely as a notice of project change. 9 And as I heard the argument back and 10 forth and Your Honor's questions, I'm reminded that 11 outside this act, outside this room, outside this 12 board, we're familiar with changes after initial 13 licensing, under MEPA, NEPA, Chapter 91, air, water, 14 wetlands act. And the agencies in general are not 15 persuaded by semantics. Is it a change of project 16 plan, or is it a change of project feature, or is it 17 a change of application, or are they merely seeking 18 a change in the permit? Usually something that 19 changes a matter of substance or significance needs 20 to alter all of those. 21 So the decision of what it is should not 22 hang on what the applicant calls it. Here the 23 legislature's thought about what degree of finality 24 is given to careful, long proceedings, where the</p>	<p style="text-align: right;">33</p> <p>1 project change filing as it was submitted. 2 MR. BUCKLEY: Can I interrupt you on 3 that last point for a minute? It sounds like you on 4 like Brockton Power, at least from what you said 5 earlier, is expecting this project change to have 6 further discovery and perhaps further hearings. Am 7 I reading too much into your prior statements? 8 MR. ROSENZWEIG: I was suggesting we 9 would not be opposed to that. That would be up to 10 the staff and the Board to determine what procedures 11 were appropriate, and we wouldn't propose that 12 additional process to address the concerns of 13 parties. We're mindful of them, and we're willing 14 to address them as they're fairly raised. 15 The one other point I wanted to make is 16 that the argument presented by Mr. Benson with 17 regard to zoning, that somehow Brockton Power is 18 bypassing local review: It was particularly because 19 the Siting Board denied the company's request for a 20 zoning exemption that the company rightfully 21 ascertained and identified what it could do to 22 comply with local zoning. That can't be viewed as a 23 negative. That's exactly the type of directive we 24 were responsive to from the Siting Board, that since</p>

<p style="text-align: right;">34</p> <p>1 a local zoning exemption was not being granted by 2 the Siting Board, that the company had to look at 3 what was possible to do to comply with local zoning, 4 zoning that the City has put forth as permissible in 5 terms of the types of buildings, developments that 6 can go on in the city without seeking a variance or 7 other procedures.</p> <p>8 MR. SHEA: I hope you don't mind. I 9 want to take a slight segue. I recognized all of 10 you, but I did not recognize that Senator Kennedy 11 from the legislature is here representing Brockton. 12 I know your predecessor in interest, who was Senator 13 Robert Creedon, intervened in this matter as a 14 limited participant. I guess I should ask you: 15 First of all, is there something you want to say? 16 And secondly, do you want to move to stand in the 17 shoes of Senator Creedon, who was a limited 18 participant when he was Senator for the same 19 district that you are now Senator of?</p> <p>20 SENATOR KENNEDY: I could never fill 21 Bobby's shoes. Those of you who know them, he's an 22 accomplished attorney and skilled in the craft of 23 law and politics. I'm here to represent Brockton, 24 yes, and the seven towns that I also serve as the</p>	<p style="text-align: right;">36</p> <p>1 million gallons a day. Obviously, the numbers don't 2 jibe. The pond doesn't hold that much reserve, and 3 that's why we had such a crisis.</p> <p>4 So the danger that's being presented 5 here by going to potable water is that you're going 6 to be taking water out of Silver Lake, interbasin 7 transfer, into Brockton, putting it through the 8 mill, then discharging it into East Bridgewater 9 downriver, again, which is contrary to the 10 interbasin act.</p> <p>11 When this company first came around, 12 they were selling their bill of goods that Brockton 13 was an ideal spot because their project was like a 14 three-legged stool. It needed to have three 15 components. It needed to be where a gas line was, a 16 major gas line, a major line of fossil fuels. We 17 have that, in the industrial park. It needed to be 18 near the grid. We had that with the high-tension 19 wires above. It needed to have an easy, accessible, 20 safe water source. That was the gray water from the 21 sewer.</p> <p>22 Now, three-legged stools stand pretty 23 solid. You take one of those legs out, now you only 24 have a two-legged stool, and that doesn't stand at</p>
<p style="text-align: right;">35</p> <p>1 Senator, being East Bridgewater, Northeaston, 2 Whitman, Halifax, Hanover, and Hanson, most of them 3 downwind from this proposed power plant.</p> <p>4 I won't rehash all the things that you 5 said. I was a city councilor in Brockton during the 6 dangerous days of the 1980s, when our water source 7 was gravely in peril of partially shutting down. 8 Silver Lake, which is our main source of water and 9 our only source of water until recently, had dropped 10 down 30 to 50 feet -- I've forgotten the exact 11 number -- and the original pipes were exposed to the 12 air. We had to drop our pumps even lower into the 13 center of the pond, and we were about to face 14 shutting down city businesses on a part-time basis 15 throughout the city. We were in that danger of 16 going into near-drought status.</p> <p>17 It was panic city in Brockton because of 18 the water crisis. We gradually dug ourselves out of 19 that crisis mode by finding alternative sources of 20 water, the most recent being the desalinization.</p> <p>21 But that is a supplemental source of 22 water, strictly supplemental. The bulk of our water 23 comes from Silver Lake. It generates about 9 1/2 24 million gallons a day. We used at one time 16</p>	<p style="text-align: right;">37</p> <p>1 all. This is what's happened now. They knew that 2 they were going to get in trouble, not being able to 3 get permission to buy the gray water. So they've 4 done an end run around and are going to the potable 5 water. Potable water is a precious, precious 6 resource for Brockton. It shouldn't be squandered 7 by one special-interest group that's going to use, I 8 guess, 20 percent of a very good resource.</p> <p>9 I was there when 20 percent meant 10 whether we would be able to operate and live our 11 lives day to day or shut down and go to brownouts in 12 a water sense and turn off our water every other 13 day. That's damn scary.</p> <p>14 The fact that they can't win down in 15 Brockton before the zoning board, before the health 16 department, before the environmental agency, it's a 17 clear indication that this is not a good plan for 18 Brockton or for the company. Now they're doing end 19 runs. If they're going to do end runs constantly, 20 it's a sure indication that the public is not being 21 well served by the system that's in place.</p> <p>22 So I agree with the opponents that if 23 you're going to have a major change like this, that 24 we should have the public fully informed. I leave</p>

<p style="text-align: right;">38</p> <p>1 it up to your wisdom to do that. So thank you. 2 MR. SHEA: Thank you. I'd like to take 3 a short recess and confer with my colleagues on the 4 Bench. 5 (Recess taken.) 6 MR. SHEA: Let's go back on the record, 7 please. I think that it's been a very interesting 8 discussion, and attorneys present have raised some 9 important legal issues. And therefore I think that 10 we would benefit -- we, the staff, would benefit -- 11 by having these issues briefed. 12 Therefore, I don't want to go into great 13 detail -- I don't want to limit what you can brief, 14 but it's basically the issue of, as the intervenors 15 have brought up, many intervenors have asserted that 16 this is more than a project change filing and it 17 should be submitted as a separate filing, not a 18 project change. And then, of course, the company 19 has asserted that it is a project-change filing. 20 I would be interested to hear what you 21 have to say, your arguments on statute and 22 precedent. And also, the way that things are 23 denominated, if something is called a project 24 change, does it mean that it's a project change --</p>	<p style="text-align: right;">40</p> <p>1 into technical issues, that's your prerogative. 2 So two weeks for initial briefs, May 3 17th, and then a week for reply briefs, May 24th. 4 And then we'll set the discovery schedule, if it's 5 going to be set at all, at that time. 6 We, the Siting Board, do reserve the 7 right to issue discovery during this period, simply 8 because it may be the most expeditious way to 9 proceed. But by issuing discovery, we don't either 10 concede that it's a project change or that it's not 11 a project change, but rather that sometimes we have 12 to proceed along these dual tracks, and certainly no 13 one ever was harmed in an adjudicatory capacity from 14 a lack of information -- from too much information. 15 So I'll sent out an order, but we do 16 reserve the right to issue discovery. And the 17 intervenors may want to go on a double track also, 18 in the sense that they may want to draft some 19 preliminary discovery. But I'm not going to set a 20 deadline to that. I'll just sort of give it to you 21 as a heads-up at this point. 22 Mr. Rosenzweig, I'll start with you: Is 23 there anything else? 24 MR. ROSENZWEIG: Based on what you said</p>
<p style="text-align: right;">39</p> <p>1 but what I'm looking for is specifics, not a general 2 sort of representation of this filing as a project 3 change; rather, specifically, do you want a project 4 change approved or denied, or denied because it 5 really should be something else, or maybe not denied 6 but subject to certain procedural requirements -- or 7 what exactly you want. 8 But I do want in these briefs something 9 very specific, because we'll have to go forward on 10 the basis of the decision on those. 11 If it's not inconvenient, I'd like the 12 first round of briefs due in two weeks. Two weeks 13 from today would be May 17th. I'm not going to put 14 a strict page limit on it, because I know in the 15 underlying Brockton case we had 550 pages of briefs. 16 I don't want to see 550 pages of briefs on this 17 issue. Or, rather, I should say, I don't think it 18 would be appropriate to have 550 pages of briefs on 19 this issue. 20 But I do realize that sometimes when you 21 get into these cases that are very technical in 22 nature, sometimes there are technical issues. This 23 strikes me more as a legal issue, but I'm not going 24 to write your brief for you. If you want to get</p>	<p style="text-align: right;">41</p> <p>1 in terms of, let's say, potential discovery from the 2 intervenors, would Brockton Power be under an 3 obligation to respond to it within a certain time 4 frame, or is it something that it could work on but 5 hold the responses until after the briefing period 6 and a decision from the staff? 7 MR. SHEA: I'll address that in the 8 scheduling matter. 9 MR. BUCKLEY: I would expect that it 10 won't have to be a long time, but, you know, by the 11 time that you'd have the answer prepared, that there 12 would be an answer on the first question as to 13 whether this proceeding should go forth as a project 14 change or not. But I guess there wouldn't be a 15 deadline for responding to any responses that an 16 intervenor put on you until further order by the 17 presiding officer. 18 MR. ROSENZWEIG: Thank you. 19 MR. BUCKLEY: If that's helpful. I 20 mean, basically why we thought we could go forward 21 with discovery responses on the company is that only 22 the company then is affected. But in order to keep 23 things moving along, it would be in the company's 24 interest to answer our responses as quickly, even if</p>

<p style="text-align: right;">42</p> <p>1 the ruling of the presiding officer isn't out yet. 2 MR. ROSENZWEIG: Understood. 3 MR. SHEA: The intervenors: Does anyone 4 have a question on this? 5 MR. MCGREGOR: No, Your Honor. 6 MR. SHEA: Thank you very much for 7 coming out on this hot and waterless day. The order 8 that's issued here from the Bench is that all 9 parties should have an initial brief submitted to 10 the Siting Board staff and served on all other 11 counsel by May 17th and all reply briefs by May 12 24th. As I said, I would request some level of 13 specificity in the briefs as to what various parties 14 think is appropriate, and not just to simply -- 15 unless you think the thing to do is simply to deny 16 Brockton Power any relief and to send them back to 17 the drawing board. If you think that's appropriate, 18 that's fine. But specificity is appropriate, 19 because we're going to have to make specific rulings 20 on things like the scope of discovery and the scope 21 of the evidentiary hearings. 22 Thank you very much. I'll adjourn this 23 matter now. 24 (Recess taken.)</p>	
<p style="text-align: right;">43</p> <p>1 REPORTER'S CERTIFICATE 2 3 4 I, Alan H. Brock, the officer before whom the 5 foregoing proceedings were taken, do certify that 6 this transcript is a true record of the proceedings 7 on May 3, 2010. 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 _____ 23 Alan H. Brock, RDR, CRR 24</p>	

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