

COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

Petition of Brockton Power Company, LLC for)
Approval to Construct a 350 MW Combined Cycle)
Power Plant in the City of Brockton, Massachusetts) EFSB 07-7/D.P.U. 07-58/ 07-59
and for Zoning Exemptions from the Bylaws of)
the City of Brockton and for Approval to Construct an)
Electric Transmission Line in the City of Brockton)

ACTION BY CONSENT

I. SECOND INTERIM EXTENSION REQUEST

On February 13, 2017, Brockton Power Company, LLC, (“Brockton Power” or “Company”) filed with the Energy Facilities Siting Board (“Siting Board”) a “Request for an Additional Interim Extension and Notice Regarding Forward Capacity Auction 11” (“Second Interim Extension Request”). In the Second Interim Extension Request, Brockton Power seeks a six-month extension of the currently effective first interim extension (“First Interim Extension”), granted by the Siting Board using Action by Consent (“ABC”) on August 6, 2016.¹ Both the First Interim Extension and the Second Interim Extension Request pertain to the Siting Board’s approval of Brockton Power’s petition to construct a 350 megawatt generating facility (“Project”) in the City of Brockton. Brockton Power Company, LLC, EFSB 07-07/ D.P.U. 07-58/D.P.U. 07-59 (2009) (“Initial Approval”).^{2, 3} The First Interim Extension is due to expire on February 28, 2017.

¹ The Company filed its request for the First Interim Extension (“First Interim Extension Request”) on August 3, 2016.

² The Project was modified pursuant to a final decision issued by the Siting Board on September 28, 2011, which approved two out of three proposed project changes (the “Project Change Approval”). The Project Change Approval did not change the date by which construction of the Project was to commence. We consider the both interim extension requests to refer to the Project as modified by the Project Change Approval.

³ The Supreme Judicial Court affirmed the Initial Approval in City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196 (2014). Furthermore, the Supreme Judicial Court

Brockton Power stated that it has been unable to commence construction of the Project due the pendency of an adjudicatory proceeding before the Massachusetts Department of Environmental Protection (“MassDEP”) involving an appeal of the Conditional Approval of Major Comprehensive Plan Application (“Air Permit”) issued by the MassDEP to Brockton Power on July 7, 2011 (Second Interim Extension Request at 2). MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) issued a Recommended Decision affirming the issuance of the Air Permit on July 29, 2016 (*id.* at 2). On September 28, 2016, the MassDEP Commissioner issued an order to the parties requesting that they submit memoranda addressing whether the Final Decision to be issued should adopt, modify, or reject the Recommended Decision (*id.* at 4-5). Brockton Power, the MassDEP, and Alternatives for Communities and Environment, (which represented local residents) each submitted a memorandum on October 21, 2016 (*id.* at 4-5). As of the date of the Second Interim Extension Request, MassDEP has not yet issued the Final Decision on the Air Permit appeal (*id.* at 5).

Brockton Power represents that it is “ready, willing and able to construct” the Project (*id.* at 5). Without a Final Decision from MassDEP on the Air Permit appeal, however, the Company asserts that it is prohibited by MassDEP regulations from commencing construction (*id.* at 5). Brockton Power contends that allowing the Second Interim Extension Request is the most pragmatic way to allow time for MassDEP’s Final Decision (*id.* at 9). The Company stated that “at or before the conclusion of the requested six-month extension, depending on MassDEP’s Final Decision, Brockton Power will: (a) request a formal extension of the Initial Approval and undergo full Siting Board review of the extension request in accordance with Siting Board precedent; (b) commence construction; and/or (c) modify the Project that was approved by the Siting Board to conform to MassDEP’s Final Decision, if necessary.” *Id.* at 9.

The Second Interim Extension Request also includes information about Brockton Power’s recent decisions relative to the ISO-New England Forward Capacity Auction (“FCA”) #11. Specifically, the Company provided an affidavit executed by Jay M. Cashman (“Affidavit”), who is the Managing Member of JCI Energy, LLC. Mr. Cashman asserts that since August 5, 2016, JCI Energy, LLC has been the sole Member of Brockton Power Company, LLC (Affidavit at 1). Prior to that time, JCI Energy, LLC held only a non-voting minority interest in Brockton Power (*id.*). The prior majority owners of Brockton Power decided not to participate in FCA#11 due to the absence of a Final Decision on the Air Permit and resulting uncertainties about project development (Affidavit at 1-3). Mr. Cashman further represented that Brockton Power will enter FCA #12 and will make the required filings for a show of interest in April 2017, regardless of whether MassDEP issues its Final Decision by that time (Affidavit at 3).

II. STANDARD OF REVIEW FOR FINAL DECISION

In this Action by Consent, the Siting Board does not evaluate, in any way, the merits of the Company's Second Interim Extension Request. In evaluating a formal extension request,⁴ should one be made, the Board will balance the interests of the public, the Company, and the parties to the proceeding, to determine whether good cause exists to extend the Approval to Construct. Cape Wind Associates, LLC, EFSB 02-2C/EFSB 07-8B, Action by Consent (April 30, 2015); Brockton Power, LLC, EFSB 99-1, Action by Consent (March 10, 2003); Sithe West Medway Development LLC, EFSB 98-10, Action by Consent (April 10, 2003). To determine whether good cause exists for an extension, the Siting Board will determine: (1) whether there have been changes either in background conditions (e.g., land use surrounding the project) or applicable regulations, sufficient to alter the underlying assumptions upon which the Siting Board based its approvals; and (2) whether the length of the requested exemption is reasonable. Only after such an inquiry will the Siting Board have sufficient information to balance the interests of the public, the parties, and the Company. Cape Wind Associates, LLC, EFSB 02-2C/EFSB 07-8B, Action by Consent (April 30, 2015); Brockton Power, LLC, EFSB 99-1, Action by Consent (March 10, 2003); Sithe West Medway Development LLC, EFSB 98-10, Action by Consent (April 10, 2003).

III. DECISION

Under the First Interim Extension, the Siting Board required that, "if Brockton Power seeks any additional extensions of time, Brockton Power shall file such request at least fourteen days prior to the expiration of the deadline to be extended." (First Interim Extension ABC at 2). The Siting Board notes that the Second Interim Extension Request was filed timely, on February 13, 2017.

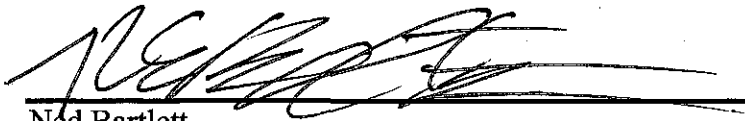
While the Company has provided a variety of information in the Second Interim Extension Request, including: the status of an anticipated Final Decision from MassDEP on its Air Permit; the Company's decision to forego participating in FCA #11 and its intentions regarding participation in the upcoming FCA #12; and the effect of recent Company ownership changes on development activity, the Siting Board finds that there is both insufficient time and evidence to evaluate this information and issue a decision on the merits of whether an additional extension of time is warranted to maintain the effectiveness of the Initial Approval. Moreover, Brockton Power is not seeking such a determination at this time. The Company is simply seeking an administrative action by the Siting Board to prevent the Initial Approval from lapsing, for a six-month extension period. As mentioned above, this is essentially a procedural request.

⁴ The Siting Board considers the First Interim Extension Request and the Second Interim Extension Request to be procedural in nature. Consequently, the Board has addressed these matters in summary fashion through Actions by Consent. A formal extension request is more substantive, and it can be treated as an adjudicatory proceeding (Cape Wind Associates LLC EFSB 02-2C/07-8B (April 6, 2016) Final Decision on Request for Extension of Deadlines).

The Siting Board's regulations authorize the Siting Board to render any decision (except final decisions in an adjudicatory proceeding) by issuing an Action by Consent if the Siting Board, in its discretion, "determines that expeditious action is necessary." 980 C.M.R. § 2.07(1). The Siting Board finds that expeditious action is necessary in this case to avoid expiration of the Initial Approval. Accordingly, as provided by 980 C.M.R. § 2.07, the Siting Board issues this Action by Consent.

The Siting Board's grant of an additional interim extension is based on the circumstances of this request, and is subject to the following conditions: (a) Brockton Power must apprise the Siting Board, in writing, of the status of its pending litigation at two-month intervals beginning two months from the date of this Action by Consent; (b) the Siting Board may, in its discretion, require Brockton Power, upon 30 days written notice, to submit a request for a formal extension of the Initial Approval, and if such a request is not submitted as required, this Second Interim Extension shall terminate without any further action by the Siting Board; and (c) the Siting Board may, in its discretion, upon 30 days written notice and Brockton Power's opportunity to comment on the termination, terminate this Second Interim Extension for such reasons as it deems appropriate. This Second Interim Extension shall expire within 90 days of the issuance of the Final Decision by MassDEP on the Air Permit, unless the Second Interim Extension is terminated sooner pursuant to clauses (b) or (c) above. Furthermore, if Brockton Power seeks any additional extensions of time, Brockton Power shall file such request at least 21 days prior to the expiration of the deadline to be extended. During its effectiveness, this Second Interim Extension shall preclude the Initial Approval from lapsing; however Brockton Power may not commence construction of the Project unless and until it submits a formal extension request and receives a Final Decision of the Siting Board granting such extension.

Signed:



2/27/17

Ned Bartlett
Chairman, Energy Facilities Siting Board
Undersecretary, Executive Office of Energy and Environmental Affairs

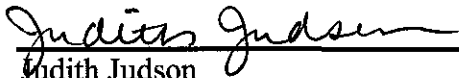
Date

Angela M. O'Connor
Chairman, Department of Public Utilities

Date

Jolette A. Westbrook
Commissioner, Department of Public Utilities

Date



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Judith Judson
Commissioner, Department of Energy Resources

Date

Gary Moran
Deputy Commissioner, Department of Environmental Protection

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Erica Kreuter
Executive Office of Housing and Economic Development

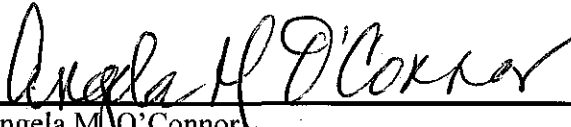
Date

Joseph C. Bonfiglio
Public Member, Labor

Date

Signed:

Ned Bartlett Date
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Undersecretary, Executive Office of Energy and Environmental Affairs

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Erica Kreuter
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Joseph C. Bonfiglio
Public Member, Labor

2/27/2017
Date

Glenn Harkness

FEBRUARY 27, 2017

Glenn Harkness, PE
Public Member, Energy

Date

Mark C. Kalpin, Esq.
Public Member, Environmental

Date

Glenn Harkness, PE
Public Member, Energy

Date



2/27/2017

Mark C. Kalpin, Esq.
Public Member, Environmental

Date