COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

BROCKTON POWER COMPANY LLC PROJECT CHANGE	)))))	EFSB 07-7A/D.P.U. 07-58/07-59 July 16, 2010

RULING ON **INTERVENORS'** REQUEST THAT **BROCKTON POWER'S** PROJECT CHANGE FILING BE TREATED AS A NEW PETITION

I. SUMMARY

The Presiding Officer denies the request by ACE (a/k/a Brockton and West Bridgewater Residents),[1] Taunton River Watershed Alliance ("TRWA"), the Town of West Bridgewater and the City of Brockton (collectively, the "Intervenor Opponents") to process Brockton Power Company LLC's ("Brockton Power" or "Company") April 9, 2010, Project Change filing ("PCF") as a new petition to construct under G.L. c. 164, § 69J¼, rather than a continuation of its original petition in this docket. However, to ensure that all issues relevant to the proposed changes are fully presented and considered and all parties' rights are protected, the Presiding Officer grants the Intervenor Opponents' request to allow discovery, evidentiary hearings and other adjudicatory process as described below. The Board also will hold another public comment hearing in the City of Brockton to afford members of the general public an opportunity to comment on the proposed changes.

II. BACKGROUND

A. Underlying Proceeding

On July 12, 2007, Brockton Power filed a petition with the Energy Facilities Siting Board ("Board" or "EFSB") requesting approval, pursuant to G.L. c. 164, § 69J¼, to construct a 350 megawatt (MW) combined cycle, gas-fired power plant to be located in the City of Brockton (EFSB 07-07). At the same time, Brockton Power filed two petitions with the Department of Public Utilities ("DPU") seeking: (1) individual and comprehensive zoning exemptions from the City of Brockton zoning by-laws, pursuant to G.L. c. 40A, § 3, (D.P.U. 07-58); and (2) permission, pursuant to G.L. c. 164, § 72, to construct and operate a transmission line that would link the generating facility to the New England grid (D.P.U. 07-59). The DPU Chair consolidated the three petitions and referred them to the Board for decision. See G.L. c. 25, § 4.

[1] "ACE" is a consolidation of 26 residents of Brockton and West Bridgewater represented by their counsel, Alternatives for Communities and Environment.

Two other organizations (National Grid and Custom Blends LLC) intervened in the proceeding in addition to the Intervenor Opponents listed above, and six persons or entities were admitted as limited participants. After extensive discovery, the Siting Board conducted 20 days of evidentiary hearings, admitting over 800 exhibits into the record. All parties and limited participants had the opportunity to file briefs and reply briefs, and most did.

After holding three deliberative meetings, the Board issued its Final Decision on August 7, 2009 (the "Final Decision"). In the Final Decision, the Board approves the petitions to construct the generating facility (G.L. c. 164, § 69J¼) and transmission line (G.L. c. 164, § 72), subject to specific stated conditions (Final Decision at 117-120), but denies Brockton Power's request for individual and comprehensive zoning exemptions under G.L. c. 40A § 3 (id.).[2]

1. The Final Decision -- Project Change Filing Regarding Cooling Water

As noted above, in the Final Decision, the Board approves Brockton Power's petition to construct subject to various conditions. One of those conditions involves the project's water resource impacts. During the proceeding, Brockton Power stated that it preferred to use recycled municipal wastewater from the City of Brockton's Advanced Wastewater Treatment Facility ("AWRF") for cooling water makeup (Final Decision at 29-30).[3] The Company stated that, while not preferred, as an alternative, it could use water from the City of Brockton's municipal water system (i.e., potable water) for cooling water makeup (Final Decision at 31).

In the Final Decision, the EFSB agrees that the proposed use of AWRF water for cooling water makeup is preferable to using City of Brockton municipal water supply. (Final Decision at 42). Thus, the Board conditions its finding that water resource impacts of the proposed facility would be minimized on, among other conditions, Brockton Power's use of AWRF water as the facility's primary cooling water source (id.) However, recognizing the most recent record evidence indicating some uncertainty around the availability of the City's AWRF water supply, the Siting Board imposes the following condition:

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[2] The Town of West Bridgewater, the City of Brockton and ACE appealed the Final Decision to the Supreme Judicial Court. See SJ-2009-0453, SJ-2009-0465, and SJ-2009-0470. The Single Justice subsequently consolidated the appeals into one proceeding. The appeal is currently stayed until December 3, 2010, pending the Siting Board's decision on the PCF. See Docket, SJ-2009-0453, Entries numbered 10 (consolidation), 17 (joint motion of appellants to stay appeal), and 20 (Order granting joint motion to stay appeal by Spina, J.).

[3] The Company explains that steam turbine condenser cooling is provided via a closed cycle cooling system equipped with a seven-cell wet mechanical cooling tower (PCF at 2-2). Originally, the Company proposed to use AWRF wastewater for this wet cooling tower i.e., for "cooling water makeup." The Company's preferred source for the balance of the plant's water requirements (e.g., sanitary, HRSG makeup, evaporative cooler operations) was, and remains, the City's municipal water supply system (Final Decision at 29-30, PCF at 2-2).

> The Siting Board directs the Company to work with the City of Brockton with respect to water supply issues associated with use of Brockton AWRF water, and to provide a report to the Siting Board with respect to the outcome of such efforts. Furthermore, if the Company intends to use potable water for the majority of the water requirements of its proposed facility, the Siting Board directs the Company to provide a project change filing to the Siting Board, together with an analysis as detailed as that done for AWRF water, but directed to those issues that are germane to the use of potable water, including opportunities for water conservations.

Final Decision at 117 (Condition No.2).

The Siting Board concludes that subject to the various water-related conditions and "any further ruling or conditions that the Siting Board may issue as part of its review of a project change review," that water resource impacts of the proposed facility, including impacts related to water use and wastewater would be minimized (Final Decision at 42).

2. Final Decision -- Non-Minor Project Changes

In approving the Petition to Construct, the Board notes that its findings are based upon the record in the case as presented by Brockton Power (Final Decision at 120). Thus, the Board states that Brockton Power "has the absolute obligation to construct and operate its facility in conformance with all aspects of its proposal as presented to the Board" and requires:

> Brockton Power to notify the Siting Board of any changes other than minor variations to the proposal so that the Siting Board may decide whether to inquire further into a particular issue. Brockton Power is obligated to provide the Siting Board with sufficient information on changes to the proposed project to enable the Siting Board to make these determinations.

Final Decision at 120-21.

B. Brockton Power's Project Change Filing

On April 9, 2010, Brockton Power submitted the PCF to the Board. The PCF proposes three Project changes. First, the Company proposes to use municipal water for cooling water makeup instead of wastewater from the City's AWRF (PCF at 1-1).[4] Second, the Company

[4] In the PCF, Brockton Power states that the filing also serves as its report to the Board on its discussions with City officials about use of treated effluent from the City's AWRF (PCF at 2-1 and cover letter thereto at 1, 2). Brockton Power reports that it communicated and attempted to communicate a number of times with City officials, but that the Company never received a response from the City (PCF at 1-4, 2-1). The Company states that by late February it decided that the City would not respond, so Brockton Power prepared its project change filing (PCF at 2-1).

proposes to eliminate the use of Ultra Low Sulfur Distillate ("ULSD") as a backup fuel, leaving natural gas as the project's only fuel (id.). Third, the Company proposes to change the design of the facility so that, in its view, the project will comply with the City of Brockton's zoning ordinance's height restrictions.[5]

C. Procedural Conference

On May 3, 2010, a procedural conference was held to discuss the orderly processing of the PCF. Each of the Intervenor Opponents, ACE, TRWA, the Town of West Bridgewater and the City of Brockton, argued that Brockton Power's PCF should be treated as a new petition and not as a continuation, or project change, of the underlying proceeding because the changes proposed are so far-reaching (May 3, 2010 Transcript at 9, 11, 13-14, 15). Furthermore, many of the Intervenor Opponents asserted that a new proceeding was warranted because a new public hearing should be held in Brockton and a new opportunity to intervene should be granted, especially since Brockton Power now proposes to use City water and some local residents may wish to intervene just because of that issue (Tr. at 17-21; Tr. at 9).[6]

The Company contested the Intervenor Opponents' assessment of the situation (Tr. at 21-25). Company Counsel cited extensive Board precedent for addressing project changes such as the PCF, and always as a continuation of the proceeding initiated by the original petition. Counsel did acknowledge that such precedent sometimes required that discovery or even evidentiary hearings be held on the proposed project change (Tr. at 21-23). Counsel asserted, however, that it would be unprecedented for the Board to treat a project change as a new filing (id.). Furthermore, counsel argued that to do so would discourage applicants from undertaking such beneficial activities as considering refinements to its original proposal and responding to community concerns (id. at 23).

At the conclusion of the procedural conference, the parties were invited to submit written memoranda of law on the objection raised by the Intervenor Opponents (Tr. at 38-40). Initial briefs were due by May 17 and reply briefs by May 24 (Tr. at 42) (see also, Ruling Following Procedural Conference dated May 4, 2010, at 1). All parties except National Grid submitted written memoranda of law. The Company, the City of Brockton, and ACE also filed reply memoranda.

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[5] Specifically, in its PCF Brockton Power proposes the following design changes: (1) eliminating the originally proposed HRSG building at a height of 130 feet and substituting for it four 116-foot sound walls; (2) redesigning the main power facility building which was originally proposed with a maximum height of 64 feet to a maximum height of 60 feet; and (3) redesigning the natural gas metering and compressor building, the water treatment building, the cooling tower electric equipment building, the MV switchgear building, the fire pump house, the switchyard control building and the aqueous ammonia storage building so each is less than 25 feet in height (PCF 4-1; 4-2).

[6] Counsel for National Grid was present but did not take a position on the disputed issues.

III. POSITIONS OF THE PARTIES

A. The Intervenor Opponents

Each of the Intervenor Opponents, with the exception of West Bridgewater, argues that the language of G.L. c. 164, § 69J¼ is incompatible with the Siting Board's long-standing practice of processing project change filings as a continuation of the underlying petition (ACE Brief at 4-11; City of Brockton Brief at 6-7; TRWA Brief at 1). For example, ACE argues that by explicitly providing in G.L. c. 164, § 69J¼, ¶ 6 for the filing of an amended petition in the event that an original petition is denied or approved with conditions, the legislature intended that the filing of an amended petition be the only method by which an applicant could respond to the conditional approval of a project by the Board without commencing a new proceeding (ACE Brief at 4-11).

In support of its position, ACE notes that there are no statutory provisions or regulations that specifically allow for, or even mention, project changes (ACE Brief at 4; see also City Brief at 1). The City notes that MassDEP and MEPA have specific "regulatory or policy procedures for entertaining project changes," while the Board does not (City Brief at 4).

Consequently, the Intervenor Opponents conclude that the PCF filing must be treated as an attempt to file an amended petition (ACE Brief at 5; City Brief at 3; TRWA Brief at 1). However, because amended petitions must be filed within 180 days of the Final Decision and the Company submitted the PCF 245 days after the Final Decision was issued, the Intervenor Opponents argue that the PCF fails as an amended petition and must be considered as a completely new petition (ACE Brief at 4; City of Brockton Brief at 2-3; TRWA Brief at 1-2).

Furthermore, the Intervenor Opponents argue that the proposed project changes are much more significant than prior EFSB project change cases. Rather, they argue that the generating facility approved by the Board with conditions in August 2009 is not the generating facility that Brockton Power now proposes to construct and operate (ACE Brief at 9; see also, City Brief at 2-3, and TRWA Brief at 2-3). Even if project change filings are permitted, the Intervenor Opponents contend that the Company's proposed changes will really amount to a new project and not just a changed project (ACE Brief at 9; City Brief at 2-3; TRWA Brief at 2-3).

Given the significant changes to the proposed facility, ACE asserts that the Board's consideration of the PCF will require it to take new evidence about the changes (ACE Brief at 4). ACE argues that Board regulations do not permit new evidence to be received after a Final Decision is rendered, another indication that significant project changes like those now proposed by Brockton Power must be filed as an amended petition if timely and as a new petition if not (ACE Brief at 4; see also, City Brief at 4 and TRWA Brief at 2).

Alternatively, the Intervenor Opponents assert that if Brockton Power's PCF is processed as part of the underlying proceeding, then the Board should require a new notice and intervention period, allow additional discovery, and hold additional public and evidentiary hearings (ACE

Brief at 12-20; City Brief at 6-8; TRWA Brief at 5). They assert that such additional notice, discovery and hearings are consistent with Board precedent in prior project change cases, due process and the Commonwealth's Environmental Justice Policy.

B. Brockton Power

Brockton Power argues that Board precedent requires that this project change be considered as such, and not as a new filing (Brockton Power Brief at 6 – 14). In support of its argument, Brockton Power attaches a table to its brief entitled the "Siting Board Decision Matrix" (Brockton Power Brief, Exhibit A). The matrix lists all fourteen EFSB project change decisions issued from December of 1997 through December of 2009 (Brockton Power Brief at 4). In none of these cases did the Board treat the proposed project change as a new proceeding (id.). Thus, there is considerable regulatory precedent to process a project change as a continuation of the original petition (id.).

The Company also asserts that ACE's reading of G.L. c. 164, § 69J¼, ¶ 6, is flawed (id. at 9). This paragraph, the Company argues, applies only to cases in which the Board has either rejected the section 69J¼ petition or conditioned its approval in a way that is unacceptable to the petitioner (id.). This paragraph gives a petitioner an opportunity to address the issues that lead to such a rejection or approval upon unacceptable conditions without the need for the petitioner to start the review process anew (id. at 9-10).

Rather than view the PCF as a new filing or an amended petition, Brockton Power argues it should simply be seen as a response to conditions in the Final Decision. By using the specific words "project change filing" relating to potable water, the Company concludes that the Board clearly did not intend to trigger a completely new Board review process (Brockton Power Brief at 12). Rather, the Board meant what it said: potable water issues would be addressed through a project change filing as that process is understood in light of Board precedent (id. at 12-15).

The Company disagrees that a new public hearing is warranted. It contends that the extensive outreach and public participation that occurred in this docket is more than adequate to satisfy any statutory or constitutional requirements (Brockton Power Reply Brief at 14). The Company similarly concludes that the EJ Policy does not require additional notice or public hearings to process the PCF. According to the Company, the Board's finding in the Final Decision that construction of the proposed facility would be compatible with the EJ Policy demonstrates that satisfactory outreach efforts have already occurred (id. at 16).

Finally, Brockton Power states that it does not oppose "reasonable inquiry" into its PCF, which it defines to include discovery and evidentiary hearings (Brockton Power Reply Brief at 3, 17).

IV. ANALYSIS AND DECISION

A. Board's Decision Regarding Procedures for Project Changes

As noted above, in its Final Decision, the Board explicitly requires Brockton Power to provide the Board with a project change filing if (1) Brockton Power changes its source of cooling water; or (2) makes any other non-minor change to its project as the project was presented to the Board during the underlying proceeding. Thus, in its Final Decision, the Board dictates the procedure that the Company must use if it decides to make such project changes. Consistent with its long-standing prior practice, the Board does not require the Company to file a new petition and start the adjudicatory process over again if the Company decides to make such changes. Instead, the Final Decision requires the Company to submit to the Board a project change filing for further Board review of such changes. Thus, the Board has already decided in its Final Decision what process should be used post-decision to address changes to the project's cooling water supply or other non-minor project changes and the PCF is procedurally consistent with that final Board decision.[7]

B. The Board's Authority

As noted above, in the Final Order, the Board directs the Company to submit project change filings if the Company proposes to make changes to its cooling water supply or make other non-minor project changes. The Intervenor Opponents now argue that the Board had no authority to do so. The Intervenor Opponents' argument, however, ignores the Board's broad authority over the construction of energy facilities, its explicit statutory authority to impose conditions and enforce its orders and the Board's right to establish procedures through adjudication.

Pursuant to G.L. c. 164, §§ 69H and 69J¼, the Board has a broad mandate to ensure that the projects it reviews will "provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Under this broad mandate, the Board has the authority to utilize a process that allows it to review changes made to a project after a final decision to ensure that those changes do not alter the Board's decision that the project meets the statutory requirements of G.L. c. 164, §§ 69H and 69J¼.

The Board's express statutory authority provides additional authority for the Board's decision to require the Company to submit project change filings rather than a new petition. Pursuant to G.L. c. 164, § 69J¼, ¶6, first sentence, the Board has the explicit authority to

[7] The Presiding Officer notes that no party challenged, either during the underlying proceeding or on appeal, the Board's tentative or final decisions to utilize its long-standing project change process for post-decision project changes in this case.

approve a petition to construct "subject to stated conditions." [8] The Board also has the explicit authority to enforce compliance with its orders. G.L. c. 164, § 69H provides that the Board "shall have the opportunity to issue orders with respect to any matter over which it has jurisdiction." Any applicant that violates a Board order is subject to penalties.

Consistent with G.L. c. 164, § 69J¼, ¶6, first sentence, in the Final Decision, the EFSB conditions its finding that water resource impacts of the proposed facility would be minimized if, among other conditions, Brockton Power uses wastewater from the City's AWRF for cooling water makeup. Similarly, the Board conditions its approval on Brockton Power constructing and operating the facility in conformance with all aspects of its proposal as presented to the Board in the underlying proceeding. In each case, the Board utilizes the project change process to ensure compliance with the stated condition. There is no question that the Board has the explicit statutory authority to condition its approval of a petition to construct and to enforce compliance with its orders. See G.L. c. 164, § 69J¼, ¶6, first sentence; G.L. c. 164, § 69H(4); Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45, 51 (2006). Such authority would be meaningless, however, if the Board also did not have the related authority to monitor compliance with final decision conditions by requiring applicants to inform the Board of proposed changes.

The fact that the Board's regulations and statute do not contain a specific provision entitled "project changes" does not make the Board's long-standing project change process unlawful. The Supreme Judicial Court has held many times that an administrative agency may adopt policies through adjudication as well as through rulemaking. Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45, 51 (2006), citing Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 312-313 (1981).

C. The Reasonableness of the Board's Project Change Process

The Board's decision in the Final Decision to utilize the project change process to monitor compliance with conditions and address proposed changes is consistent with a long line of Board cases. See e.g. Cape Wind, EFSB 02-2A/D.T.E. 02-53 (2008); Fore River Development, LLC-Project Change, 15 DOMSB 403 (2006); Sithe Mystic Development LLC-Project Change, 13 DOMSB 118 (2001); Sithe Edgar-Project Change, 13 DOMSB 81 (2001); IDC Bellingham LLC-Project Change, 12 DOMSB 372 (2001) and 11 DOMSB 27 (2000). In reviewing a proposed project change the Board evaluates the proposed change to ensure that it continues to result in an overall project that will contribute to a reliable energy supply consistent with the minimization of environmental impacts and costs. Id. Depending on the scope of the

[8] Supreme Judicial Court precedent has found an implied statutory authority to condition a permit or license from the power to approve or disapprove the permit. Mello v. License Com'n of Revere, 435 Mass. 532, 534 (2001). Thus, even without the explicit language in Section 69J¼, the Board likely would have the authority to impose conditions when it approves a petition to construct.

proposed change, the Board has applied varying procedures to consider the proposed changes, but has never started anew. The proposed changes here are similar in scope to prior project change cases where the Board allowed discovery and evidentiary hearings, but did not require a new petition. See IDC Bellingham, LLC - Project Change, 11 DOMSB 27 (2000) (conducting discovery and evidentiary hearing regarding proposed change of turbine); Cape Wind, EFSB 02/2A (conducting discovery and evidentiary hearing regarding various changes to proposed transmission line).

The EFSB's project change process is a reasonable means of balancing parties' need for settled expectations with applicants' need for flexibility to make project changes and the Board's need to review those proposed changes. EFSB final decisions are often the culmination of an extensive adjudicatory process in which many issues are explored and resolved. Applicants and other parties need to be able to rely on the finality of those decisions. At the same time, however, the construction of an energy facility is an extremely complex undertaking, and the Board's approval under Section 69J¼ is the first in a line of permits that an applicant must obtain before it may construct its project. Therefore, an applicant needs to be able to make project changes after the Board's final decision in order to respond to other state and local agencies' concerns or requirements or that result from more detailed project development. For its part, the Board must be able to review any proposed project change to ensure that it is consistent with the Board's overall mandate under G.L. c. 164, § 69H and the specific statutory criteria set forth in Section 69J¼.

If the Board was required to start a new proceeding with every project change, applicants would have little incentive to implement changes that might improve their projects. Moreover, such a process would require the Board to duplicate its extensive prior review of matters even if they were unaffected by a proposed change. This would be highly inefficient, if not completely unworkable.

The Board's current project change process achieves a proper balance among the various objectives by allowing the Board to (1) retain as much finality as possible in its final decisions; (2) allow some flexibility to change projects as needed; (3) avoid duplicating an already completed review on matters that are resolved and unaffected by the proposed project change; (4) provide all parties with an opportunity to explore the proposed change and present evidence as needed; and (5) review the proposed change to ensure that the changed project continues to satisfy the statutory criteria under Section 69J¼ and provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost under Section 69H.

D. Section 69J¼, ¶6

The Intervenor Opponents assert that the following sentence of Section 69J¼ prohibits the Board's long-standing practice related to project changes: "In the event of rejection or conditional approval, the applicant may, within 180 days, submit an amended petition."[9] Contrary to the Intervenor Opponents' assertion, this sentence addresses the limited situation where an applicant seeks relief from the Board after the Board has rejected the applicant's petition or has imposed conditions from which the applicant seeks relief. In such a circumstance, the applicant may submit an amended petition, but must do so within 180 days. Thus, an applicant is given an opportunity to respond to an issue that caused the Board to reject the petition or impose what the applicant views as overly burdensome conditions via an amended petition. This sentence does not apply here because the Board did not reject Brockton Power's petition or impose any conditions that Brockton Power seeks to modify or eliminate. This reading of G.L. c. 164, § 69J¼ is reasonable and well within the discretion the Board is accorded by the Supreme Judicial Court. See e.g., Alliance to Protect Nantucket Sound, 448 Mass. 45, 50 (n.6).

Conversely, under the Intervenor Opponents' interpretation of this sentence, 180 days after issuing a final decision the Board would be stripped of its authority to consider project changes or to ensure compliance with any Board condition unless the Board started its review all over again via a brand new proceeding. As shown above, such a result is contrary to the language and intent of G.L. c. 164, §§ 69H and 69J¼, conflicts with long-standing Board precedent and would result in a completely unworkable siting process.

E. 980 CMR 1.09(1)

The Intervenor Opponents also argue that Board regulation 980 CMR 1.09(1) precludes the Board from monitoring compliance with final decision conditions via the project change process. 980 CMR 1.09(1) provides, in relevant part, "A party may, at any time before the Board

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[9] In its entirety, the sixth paragraph of G.L. c. 164, § 69J¼, states:

> If the board determines that the standards set forth above have not been met, it shall, within one year of the date of filing, either reject, in whole or in part, the petition, setting forth in writing its reasons for such rejection, or approve the petition subject to stated conditions. In the event of rejection or conditional approval, the applicant may, within 180 days, submit an amended petition. Public and evidentiary hearings on the amended petition shall be held on the same terms and conditions applicable to the original petition.

Section 69J, ¶ 5 is virtually identical to the amended petition provision in Section 69J ¼, ¶ 6.

renders a final decision, move that the hearing be reopened for the purpose of receiving new evidence." The Intervenor Opponents argue that because this provision allows for the submission of additional evidence between the end of the evidentiary hearings and the Board's final decision, the Board has no authority after issuing its final decision to obtain any further information about project implementation, compliance or project changes without starting over and conducting a new proceeding. As shown above, such a reading is contrary to the statute which specifically allows the Board to impose conditions and to enforce its orders.

Moreover, the unambiguous words of the regulation are meant to address one particular situation (introduction of evidence between the close of hearings and the final decision) not to set forth an all-encompassing limitation on the Board's authority to monitor compliance with final decision conditions or enforce its orders.

F. Procedure for the PCF

As noted above, the Board's long-standing project change process allows the Board to tailor its review of a project change to ensure that all parties are heard and all views considered before the Board makes a decision whether to approve a particular project change. In this case, the Presiding Officer agrees with the Intervenor Opponents that substantial procedure is warranted before the Board decides whether to approve the construction of the energy facility as proposed with the three project changes.[10] Brockton Power does not object to at least some discovery and evidentiary hearings (Brockton Power Reply Brief at 3, 17).

Thus, the procedural schedule in this case will allow all parties and the Board staff to conduct discovery;[11] provide intervenors with an opportunity (if they wish) to present a direct case with their own witnesses; and provide all parties with an opportunity to cross-examine other parties' witnesses, submit written briefs and address the Board directly. This process ensures that all parties' rights are fully protected. See G.L. c. 30A, § 11.[12] The Board also will hold

[10] This decision is consistent with the Final Decision's directive that if the Company proposes to use potable water as its primary water source, it must provide the Board with as much detail as the Company provided in the underlying proceeding on AWRF water.

[11] Board staff submitted its first round of Information Requests to Brockton Power on July 6, 2010.

[12] The Presiding Officer notes that all parties in the underlying proceeding remain parties and continue to have all the procedural rights accorded to parties by the Board's procedural regulations and the Administrative Procedure Act. See G.L. c. 30A, § 11, 980 CMR 1.00. The Presiding Officer also notes that for persons that are substantially and specifically affected by the changes proposed in the PCF, nothing in the Board's regulations precludes late-filed petitions to intervene. With respect to the EJ Policy, in the underlying proceeding the Board provided for enhanced outreach and there was tremendous public participation (Final Decision at 90-91, n 49). In its Final Decision, the Board concludes that construction of the facility would be

another public comment hearing in the City of Brockton to afford members of the general public an opportunity to comment on the proposed changes.[13] As indicated above, the scope of the adjudicatory proceeding and the public comment hearing will be limited solely to the issues raised by the PCF.

The Presiding Officer recognizes that this decision affords the public and parties more process than the Board has afforded in prior project change proceedings. The Siting Board also recognizes that G.L. c. 164, § 69J¼ only requires the Board to conduct one public comment hearing at the beginning of a case and that the Board has already conducted that hearing. However, given the broad public interest in this project and the scope of the proposed changes (particularly, the change in cooling water supply), the Presiding Officer concludes that, while not required, the Board has the discretion to establish the procedures that it will use in reviewing a project change filing and that the additional process is warranted here.

V. CONCLUSION

The Intervenor Opponents' motion is DENIED in part and GRANTED in part. The PCF will not be treated as a new proceeding, but a procedural order will be issued setting forth a schedule allowing for discovery, intervenor pre-filed testimony (if the intervenors so desire), evidentiary hearings and briefing. The Board also will hold another public comment hearing in the City of Brockton.

Robert J. Shea
Presiding Officer

Dated: July 16, 2010

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consistent with the EJ Policy (id.). The Board's prior decision to process proposed project changes in this case via the Board's project change procedures rather than starting over with a brand new case includes a decision not to repeat preliminary procedures or relitigate decided issues. As discussed above, such a decision is well within the Board's authority. Nonetheless, while the Board is not required to do so, it will conduct another public comment hearing to ensure that the general public has an opportunity to express its views on the PCF.

[13] The PCF proceeding will continue to be an open public process with all filings available to the public via the Board's website. The Presiding Officer also strongly encourages Brockton Power to engage in extensive community outreach regarding its proposed changes to inform the public and to receive public input about those changes.