



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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March 2, 2007

Eurika Durr
Clerk of the Board, Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, NW, Suite 600
Washington, DC 2005-3135

Re: **Dominion Energy Brayton Point, LLC
(Formerly USGen New England, Inc.)
Brayton Point Station
NPDES Permit No. MA-0003654
NPDES Appeal No. 07-01**

Dear Ms. Durr:

On behalf of the Massachusetts Department of Environmental Protection, please find enclosed for docketing and review by the Environmental Appeals Board the original, and five copies, of each of the documents listed below:

1. Motion of the Massachusetts Department of Environmental Protection for Leave to File Amicus Brief in Support of EPA NPDES Permit No. MA-0003654; and
2. Amicus Brief of the Massachusetts Department of Environmental Protection in Support of the Remand Determination Issued By Region 1 in Relation to NPDES Permit No. MA-0003654 for Brayton Point Station.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Brown", written in a cursive style.

Robert G. Brown
Attorney for the Massachusetts
Department of Environmental Protection

Cc: Wendy B. Jacobs, Esq.
John M. Stevens, Esq.
Elisabeth M. DeLisle, Esq.
Mark A. Stein, Esq.

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ENVIR. APPEALS BOARD

In re:)
)
)

Dominion Energy Brayton Point, LLC)
(Formerly USGen New England, Inc.))
Brayton Point Station)

NPDES Permit No. MA-0003654)
_____)

NPDES Appeal No. 07-01

MOTION OF THE
MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION
FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF EPA NPDES PERMIT NO. MA-0003654

The Massachusetts Department of Environmental Protection (“MassDEP”) hereby moves, pursuant to 40 C.F.R. 124.19, for leave to file the enclosed amicus brief with the Environmental Appeals Board (the “EAB”) in support of the Remand Determination issued by the Region 1 office (“Region 1” or “Region”) of the United States Environmental Protection Agency (“EPA”) on November 30, 2006, in relation to Region 1’s reissuance of National Pollution Elimination System (“NPDES”) Permit No. MA-0003654 for the Brayton Point Station (“BPS”) on October 6, 2003 (the “Permit”),¹ and to request that the EAB deny Dominion Energy Brayton Point, LLC’s Petition for Review for its failure to make the requisite showing under 40 C.F.R. 124.19(a).

¹ Region 1 reissued the Permit for BPS to USGen New England, Inc. (“USGen”), the owner of BPS at the time. USGen New England, Inc. subsequently transferred ownership and title in Brayton Point Station to Dominion Energy Brayton Point, LLC.

By way of background, on November 5, 2003, USGen filed a Petition for Review of the Permit with the EAB pursuant to 40 C.F.R. 124.19, NPDES Appeal No. 03-12. On February 19, 2004, the EAB granted review of the Petition. *See* Order Granting Review, NPDES Appeal No. 03-12, slip op. at 5-11. The EAB's Order Granting Review also granted amicus curiae status to the Commonwealth of Massachusetts and several other entities. *Id.* at 6-7. After considering all of the briefs filed, as well as the arguments presented at oral argument, the EAB issued a Remand Order on February 1, 2006 ("Remand Order"), in which it concluded that, for the most part, Petitioner failed to demonstrate that the Region clearly erred in establishing the conditions of the Permit. *See* Remand Order, NPDES Appeal No. 03-12, slip op. at 5. The EAB also found no issues involving either the Region's exercise of discretion or an important policy consideration that warranted a change to the conditions of the Permit. *Id.* The EAB did find, however, that a remand was warranted with respect to the following two narrow substantive issues:²

1. *Revised Noise Impact Analysis ("NIA") Used in Determining the Best Technology Available (BTA) Under Section 316(b)*. The EAB directed Region 1 to supplement its response to comments with a rationale that addresses the concerns raised by Petitioner on appeal regarding the NIA or to modify the permit requirements, as appropriate. *See* Remand Order, NPDES

² The EAB's Remand Order also directed Region 1 to amend the permit to fix a typographical error regarding the expression of total iron limits in the permit (*See* Remand Order, NPDES Appeal No. 03-12, slip op. at 291 – 292, Part VI.D, for the discussion of this issue) and to place in the record the attachment to a memorandum prepared by its consultant concerning a production foregone re-analysis (*See* Remand Order, NPDES Appeal No. 03-12, slip op. at 267 – 268, Part VI.B.4.b.iii.c(5), for the discussion of this issue).

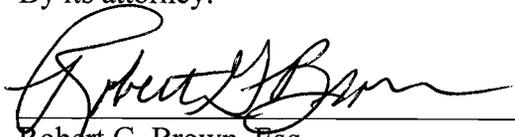
Appeal No. 03-12, slip op. at 283 – 288, Part VI.C.3.c, for the discussion of this issue.

2. *Five Day Exceedance Value Used to Derive Thermal Effluent Limits Under Section 316(a)*. The EAB directed Region 1 to provide a rational explanation for its selection of five days as the critical temperature exceedance threshold value. The EAB stated that as an alternative Region may decide to modify this value. If the Region did so, it must provide a sufficient explanation for the new value. See Remand Order, NPDES Appeal No. 03-12, slip op. at 133 – 135, Part VI.A.3.b.ii.d, for the discussion of this issue.

MassDEP has an interest in this proceeding because: (i) NPDES Permit No. MA-0003654 was jointly issued by EPA and MassDEP and consists of two separate and independent federal and state permit authorizations containing identical conditions; and (ii) MassDEP issued a Water Quality Certification for the federal permit pursuant to Section 401 of the Federal Clean Water Act. MassDEP's brief is relevant to how Region 1 appropriately addressed the issues regarding the NIA and the five-day value in its Remand Determination, as requested by the EAB, and why Petitioner is not entitled to a further review of the Permit by the EAB.

Respectfully submitted,

Massachusetts Department of Environmental Protection
By its attorney:



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Date: March 2, 2007

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of the Massachusetts Department of Environmental Protection for Leave to File Amicus Brief in Support of EPA NPDES Permit No. MA-0003654 in the matter of Dominion Energy Brayton Point, LLC (Formerly USGen New England, Inc.) Brayton Point Station, NPDES Appeal No. 07-01, were served by United States First Class Mail on the following persons this second day of March, 2007:

Wendy B. Jacobs, Esq.
John M. Stevens, Esq.
Elisabeth M. DeLisle, Esq.
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Attorney for the Massachusetts Department of
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Date: March 2, 2007