



# The Commonwealth of Massachusetts

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## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 09-138

December 29, 2009

Petition of Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid for approval of a proposed timetable and method for the solicitation and potential execution of a long-term contract for renewable energy with Cape Wind Associates, LLC pursuant to St. 2008, c. 169, § 83.

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**FOR: MASSACHUSETTS ELECTRIC COMPANY AND**

**NANTUCKET ELECTRIC COMPANY, d/b/a**

**NATIONAL GRID**

Petitioner

## I. INTRODUCTION

On July 2, 2008, Governor Patrick signed into law Chapter 169 of the Acts of 2008, an Act Relative to Green Communities (“Green Communities Act”). The Green Communities Act requires each electric distribution company, beginning July 1, 2009, to twice in a five-year period solicit proposals from renewable energy developers. St. 2008, c. 169, § 83 (“Section 83”). Distribution companies may also voluntarily solicit additional proposals over the five-year period. The electric distribution company shall select a reasonable method of soliciting proposals from renewable energy developers, which may include public solicitations, individual negotiations or other methods. Pursuant to Section 83, the timetable and method for solicitation and execution of such contracts shall be proposed by the electric distribution company in consultation with the Commonwealth of Massachusetts Department of Energy Resources (“DOER”) and is subject to review and approval by the Department of Public Utilities (“Department”). On June 12, 2009, the Department promulgated regulations, 220 C.M.R. § 17.00 et seq., to implement the provisions of Section 83. Long-Term Contracts for Renewable Energy, D.P.U. 08-88-A at 12 (2009).

On December 3, 2009, Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid (“National Grid” or “Company”) filed a petition requesting that the Department approve a Memorandum of Understanding (“MOU”) that it entered into on December 1, 2009, with DOER and Cape Wind Associates, LLC (“Cape Wind”). The MOU sets forth a proposed timetable and method by which National Grid will solicit a proposal from Cape Wind and potentially execute a long-term contract for energy, capacity, renewable

energy certificates and related products from Cape Wind's proposed 468 megawatt ("MW") offshore wind-energy generating facility (MOU ¶1).

Specifically, the MOU provides that National Grid and Cape Wind will, subject to the Department's approval of the MOU, immediately commence contract negotiations with the objective of executing a power purchase agreement ("PPA") for renewable energy and related products from Cape Wind, as described above (id.). The MOU further provides that National Grid and Cape Wind will use their best efforts to complete negotiations and, to the extent that a mutually satisfactory agreement can be reached, execute a long-term contract within 60 days of the execution of the MOU (id.). At the end of the 60-day negotiation period, National Grid and Cape Wind agree to: (1) provide the Department with an update of the status of their negotiations, or (2) submit a contract for Department approval, pursuant to Section 83, 220 C.M.R. § 17.00 et seq. and other applicable Department precedent (id. ¶2). If at any time such a long-term contract with Cape Wind is submitted to the Department, it will be reviewed by the Department in a separate adjudicatory proceeding (see id.).

This matter was docketed as D.P.U. 09-138. The Department requested comments from interested persons. Comments were filed on December 18, 2009.<sup>1</sup>

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<sup>1</sup> Comments on the MOU were submitted by the following 20 entities: The Alliance to Protect Nantucket Sound ("Alliance"); the Attorney General of the Commonwealth of Massachusetts ("Attorney General"); Cape Wind Associates, LLC ("Cape Wind"); City of Boston, Environment Department ("City of Boston"); Clean Water Action ("Clean Water"); Clean Power Now ("CPN"); Conservation Law Foundation, the Natural Resources Defense Council, the Union of Concerned Scientists, and Environment Massachusetts (collectively, "CLF et al."); Barbara Durkin ("Durkin"); Environmental League of Massachusetts ("ELM"); William E. Griswold ("Griswold"); HealthLink; Peter A. Kenney ("Kenney"); James E. Liedell ("Liedell"); International Brotherhood of Electrical Workers, Local 103 ("Local 103"); International

This petition is the second request for approval of a proposed timetable and method for soliciting proposals from renewable energy developers, filed pursuant to Section 83 and 220 C.M.R. § 17.00 et seq. Today, the Department approved a joint petition by Fitchburg Gas and Electric Light Company d/b/a Unitil, National Grid, Western Massachusetts Electric Company, and DOER to solicit proposals for contracts for renewable energy through a public request for proposals (“RFP”). Fitchburg Gas and Electric Light Company et al., D.P.U. 09-77 (2009).

## II. SUMMARY OF COMMENTS

### A. Introduction

In its petition, National Grid notes that Section 83 of the Green Communities Act and the Department’s regulations governing the solicitation and execution of long-term contracts for renewable energy developers permit an electric distribution company to select a reasonable method of soliciting proposals from renewable energy developers, which may include public solicitations, individual negotiations, or other methods (Petition at 1). National Grid argues that while it has been an active participant in the state-wide RFP process which is the subject of D.P.U. 09-77, the completion date of that process is uncertain and, therefore, the availability of certain tax and financing programs for projects such as Cape Wind is potentially in jeopardy (id.). National Grid argues that the Cape Wind project presents an opportunity to advance the

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Brotherhood of Electrical Workers - Local 223 (“Local 223”); Boston and New England Maritime Trades Council, AFL-CIO (“Maritime Trades Council”); Energy Consumers Alliance of New England d/b/a Massachusetts Energy Consumers Alliance (“Mass Energy”); Building and Construction Trades Council of the Metropolitan District, AFL-CIO (“MBBT”); New England Clean Energy Council (“NECEC”); and University of Massachusetts (“UMASS”).

renewable energy goals of the Commonwealth and, therefore, National Grid and DOER have concluded that it is the public interest for National Grid to engage in individual negotiations over a 60-day period as a method of potentially entering into a long-term contract with Cape Wind (id. at 1-2; MOU ¶1). Comments in favor of and opposed to National Grid's proposal are summarized below.

B. Comments in Support of Petition

Several commenters support National Grid's proposal because they contend that the proposed timeline and method of solicitation and potential execution of a long-term contract with Cape Wind is consistent with Section 83 and the Department's regulations governing long-term contracts for renewable energy at 220 C.M.R. § 17.00 et seq. The Attorney General, Cape Wind, and CLF et al. each contend that National Grid's proposal is consistent with Section 83 which explicitly authorizes any reasonable method of soliciting proposals from renewable energy developers, including individual negotiations (Attorney General Comments at 3; Cape Wind Comments at 1; CLF et al. Comments at 7). The Attorney General states that, given the explicit language of Section 83 permitting both individual negotiations as well as public solicitations as proposed in D.P.U. 09-77, any reasonable method need not be pursued exclusive of others (Attorney General Comments at 3). The Attorney General, Cape Wind and CLF et al. note that National Grid has complied with the requirement of Section 83 to consult with DOER in developing its proposal, as evidenced by DOER's signature on the MOU (CLF et al. Comments at 7; Cape Wind Comments at 1-2; Attorney General Comments at 3).

The Attorney General and CLF et al. stress that the issue of whether the result of the individual negotiations between National Grid and Cape Wind succeed at fulfilling the policy

objectives and requirements of Section 83 is not before the Department at this time (Attorney General Comments at 2, 5; CLF et al. Comments at 5, 7). The Attorney General notes that any proposed long-term contract reached between National Grid and Cape Wind through individual negotiations will be the subject of a separate and full adjudication before the Department where such issues may be considered (Attorney General Comments at 4-5). The Attorney General and CLF et al. also argue that the Department need not reach the cost-effectiveness inquiry required by Section 83 in order to approve timetable and method of solicitation proposed in the MOU (id. at 5; CLF et al. Comments at 5). At the time any long-term contract resulting from these individual negotiations is presented to the Department for review, the Attorney General contends that National Grid will bear the burden of demonstrating that the contract is cost-effective and that the terms of the contract are superior to other likely contracts that may result from the public solicitation process proposed in D.P.U. 09-77 or from other individual negotiations (Attorney General Comments at 5). Finally, although the Attorney General supports National Grid's individual negotiations with Cape Wind, she contends that National Grid should nonetheless strive to meet underlying principles contemplated by the process under review in D.P.U. 09-77, including clarity, certainty of terms and conditions, and transparency (id. at 4).

A number of commenters recommend expeditious approval of National Grid's proposal in order to maximize the possible benefit of available federal incentives (id. at 5; CLF et al. Comments at 2, 8-9; Clean Water Comments at 1; CPN Comments at 2; ELM Comments at 1; HealthLink Comments at 1; Maritime Trades Council Comments at 1; Liedell Comments at 1; Cape Wind Comments at 2). The Attorney General, Cape Wind, and CLF et al., note that

federal incentives could lower costs to ratepayers by as much as 30 percent (CLF et al. Comments at 8; Cape Wind Comments at 2; Attorney General Comments at 4). Cape Wind states that time is of the essence because federal incentive programs, if not extended, may not be available if construction of the project is not commenced by December 31, 2010, and commercial operation achieved by December 31, 2012 (Cape Wind Comments at 2). The Attorney General notes that the 60-day negotiation period proposed in the MOU improves the chances of Cape Wind earning various federal tax, financing, and stimulus funds, when compared to the 185-day process envisioned by the statewide solicitation process under consideration in D.P.U. 09-77 (Attorney General Comments at 3). CLF et al. state that the solicitation timetable of 60 days strikes an appropriate balance between allowing sufficient time to negotiate key contract terms and moving the process forward to allow an opportunity to earn significant federal energy incentives (CLF et al. Comments at 8). CLF et al. argue that approval of the proposed MOU carries no risk because it places no obligation on National Grid to ultimately enter into a contract with Cape Wind (id. at 9).

Finally, numerous commenters support the proposal by expressing support for the Cape Wind project in general. For example, a number of commenters recommend that the Department approve National Grid's petition, citing environmental benefits of the Cape Wind project such as the reduction in greenhouse gas emissions and economic benefits such as job creation and electricity price stability, and the role of the project in meeting the Commonwealth's renewable energy goals (Cape Wind Comments at 1; City of Boston Comments at 1; Clean Water Comments at 1; CLF et al. Comments at 1-2, 6; CPN Comments at 2; ELM Comments at 1; Griswold Comments at 1; HealthLink Comments at 1; Local 103

Comments at 1; Local 223 Comments at 1; Liedell Comments at 1-2; Maritime Trades Council Comments at 1; Mass Energy Comments at 1-2; MBBT Comments at 1; NECEC Comments at 1; UMASS Comments at 1). Commenters argue that a long term contract is a critical and necessary precondition to finance and construct the Cape Wind project and, therefore, to reap the resulting benefits (City of Boston Comments at 1; Clean Water Comments at 1; CPN Comments at 2; ELM Comments at 1; Griswold Comments at 1; HealthLink Comments at 1; Local 223 Comments at 1; Maritime Trades Council Comments at 1; Mass Energy Comments at 1; NECEC Comments at 1).

C. Comments Opposed to Petition

APNS, Durkin, and Kenney recommend that the Department reject National Grid's petition, stating that approval of the MOU and any eventual contract with Cape Wind would not be in the public interest (APNS Comments at 1-2; Durkin Comments at 1; Kenney Comments at 1, 3). With respect to the solicitation process, APNS argues that the MOU should not be approved because it bypasses the open and competitive bidding process being reviewed by the Department in D.P.U. 09-77 (APNS Comments at 1-2). APNS argues that it is not reasonable to allow National Grid to proceed with an individual solicitation with Cape Wind in advance of the larger public solicitation process under review in D.P.U. 09-77 (id. at 5).<sup>2</sup> APNS argues that National Grid's proposal to conduct an individual contract negotiation

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<sup>2</sup> In addition, APNS and Kenney argue that a number of assertions in the MOU are misleading or inaccurate, such as those regarding Cape Wind's project planning and benefits, as well as the uncertainty of the timing of the Department's review of public solicitation process in D.P.U. 09-77 (APNS at Comments at 3-7; Kenney Comments at 1-4; 6-7).

with Cape Wind gives one distribution company and one generator an unfair advantage at the expense of ratepayers (id. at 4, 13-14).

In addition, APNS, Kenney, and Durkin identify a number of issues with the Cape Wind project which they contend will result in a long-term contract for renewable energy that the Department must ultimately reject. First, while the Green Communities Act requires cost-effective resources, these commenters argue that offshore wind, in general, and the Cape Wind project, in particular, will produce electricity that far exceeds market costs (id. at 1, 6-7, 12; Durkin Comments at 1; Kenney Comments at 1-3). APNS asserts that the petition will greatly benefit Cape Wind through federal, state, and ratepayer subsidies leading to higher electricity rates (APNS Comments at 2). APNS and Kenney estimate that contract's energy costs would be two to three times market costs; APNS estimates that the cost to individual ratepayers will exceed \$200 per year (id. at 12; Kenney Comments at 4).<sup>3</sup>

Further, APNS contends that the Green Communities Act requires distribution companies to enter into contracts with renewable energy projects that enhance electric reliability but it argues that the reliability of the Cape Wind project has not been demonstrated (APNS Comments at 5-6). APNS argues that technical issues and the costs of grid integration must be addressed before the Department can weigh the true costs of the Cape Wind project (id. at 6). In addition, APNS contends that the Green Communities Act requires distribution

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<sup>3</sup> As evidence of the high costs of offshore wind, APNS states that National Grid recently announced that it had entered into a wind energy contract in Rhode Island which begins at a cost of 24.4 cents per kilowatt-hour ("kWh") escalating at 3.5 percent annually, bringing the cost to nearly 47 cents per kWh in the 20th year (APNS Comments at 12).

companies to contract with resources that contribute to satisfying peak loads, however, there has been no showing that this will be the case for the Cape Wind project (id.).

APNS also asserts that the Cape Wind project may not receive any federal subsidies as suggested in the Petition and MOU (id. at 7-8). APNS and Kenney argue that Cape Wind may be unable to secure wind turbine generators for its facility in time to take advantage of any federal subsidies (id. at 8-9; Durkin Comments at 17-20; Kenney Comments at 1-4). In addition, APNS contends that National Grid and Cape Wind failed to disclose that Cape Wind's state and local permits are being litigated in the courts (APNS Comments at 7).

APNS notes that the MOU fails to specify the length of the contract that National Grid will negotiate with Cape Wind (id. at 9). APNS and Kenney contend that Section 83 specifies a long-term contract length of ten to 15 years, whereas the high capital cost of the Cape Wind project would require a contract of between 20 to 25 years to permit a reasonable amortization of the investment (id.; Kenney Comments at 6). APNS and Kenney further argue that the proposal is inappropriate because the parties have placed no limits on the amount of energy to be procured and Cape Wind's projected output will be greater than the procurement authorized by Section 83, which will hinder competition and, therefore, harm other renewable energy generators and ratepayers (APNS Comments at 10-11; Kenney Comments at 6). APNS states that the proposal does not promote a renewable energy technology mix (APNS Comments at 10). Finally, Durkin argues that National Grid's proposal should not be approved because the Cape Wind project represents a threat to public safety, citing potential collisions, oil spills, hazards for air navigation, and interference with commercial fishing industry and ferry travel (Durkin Comments at 1-17).

### III. ANALYSIS AND FINDINGS

As described above, Section 83 of the Green Communities Act requires electric distribution companies to twice in a five-year period beginning July 1, 2009, solicit proposals for long-term contracts from renewable energy developers. Distribution companies may also voluntarily solicit additional proposals over the five-year period. Each electric distribution company shall select a reasonable method of soliciting proposals from renewable energy developers, which may include public solicitations, individual negotiations or other methods. St. 2008, c. 169, § 83. The electric distribution companies must consult with DOER in the development of the solicitation process. St. 2008, c. 169, § 83; 220 C.M.R. § 17.04(1). The Department must review and approve the timetable and method for soliciting and executing long-term contracts, as well as any executed contracts that result. St. 2008, c. 169, § 83.

In promulgating regulations regarding long-term contracts for renewable energy pursuant to Section 83, the Department sought to strike a balance between: (1) providing some level of certainty and guidance to both electric distribution companies and renewable energy project developers regarding the process for entering into these contracts; and (2) retaining sufficient flexibility to allow for a variety of methods for soliciting proposals and entering into contracts for diverse renewable resources. Long-Term Contracts for Renewable Energy, D.P.U. 08-88, at 10 (2009) (establishing 220 C.M.R. § 17.00 et seq.). The Department stated that our objective was to avoid predetermining or limiting the consideration of proposed contracts or evaluation models in advance. Id. at 10-11. These same considerations guide our review of National Grid's proposed timetable and method for the solicitation and potential execution of a long-term contract for renewable energy with Cape Wind.

The Department finds that National Grid's proposed timetable and method of solicitation and potential execution of a long-term contract with Cape Wind is consistent with the requirements of Section 83 and 220 C.M.R. § 17.00 et seq. Specifically, Section 83 permits an electric distribution company to select a reasonable method of soliciting proposals from renewable energy developers. See also 220 C.M.R. § 17.04(1). Section 83 enumerates a number of possible methods for soliciting long-term contracts for renewable energy, including public solicitations, individual negotiations, or other methods. See also 220 C.M.R. § 17.04(1). As the use of individual negotiations is expressly authorized in Section 83, we find that National Grid's proposal provides a reasonable method of soliciting and potentially executing a long-term contract for renewable energy. Today, in D.P.U. 09-77, we approved as reasonable the use of a statewide solicitation for long-term contracts for renewable energy which provides one vehicle for the Company to pursue long-term contracts with renewable resources. However, our approval in D.P.U. 09-77 of a statewide solicitation does not preclude National Grid from soliciting from renewable energy developers through individual negotiations, as expressly permitted in Section 83 and 220 C.M.R. § 17.04(1). Ultimately, Section 83 leaves to the distribution company "its choice of contracting methods and solicitation methods," subject to the requirement that it consult with DOER, and obtain approval from the Department regarding the timetable and methods of solicitation.

Most issues raised by commenters concern whether the Cape Wind project will satisfy the policy objectives of Section 83 or whether any resulting long-term contract between National Grid and Cape Wind will be cost-effective. As noted by the Attorney General, the Department need not address the issue of cost-effectiveness or other contract requirements

under Section 83 at this time in order to approve the method and timetable proposed in the MOU. Instead, we find that the appropriate time to address relevant substantive issues is if and when National Grid submits a proposed contract for Department approval. In such a proceeding, National Grid will have the burden to demonstrate that all applicable laws, regulations, and precedent have been met. See D.P.U. 08-88-A at 10-11; D.P.U. 09-77, at 23. Determinations about whether the contracts that result from this solicitation are consistent with the public interest and result in just and reasonable rates must be made in the context of individual adjudications, where the Department will weigh evidence and argument in order to make fact-based decisions on a case-by-case basis. See D.P.U. 08-88-A at 10-11; D.P.U. 09-77, at 23. Parties will have the opportunity to raise relevant substantive issues with respect to the evaluation of the proposed project, including contract development and negotiation and the specific terms and conditions contained in the resulting contract, in the context of the adjudication before the Department of the proposed long-term contract for renewable energy. D.P.U. 08-88-A at 10; D.P.U. 09-77, at 23.

Based on the above, the Department approves National Grid's proposed timetable and method of solicitation and potential execution of a long-term contract for renewable energy with Cape Wind as consistent with the requirements of Section 83 and 220 C.M.R. § 17.00 et seq. Any proposed long-term contract for renewable energy between National Grid and Cape Wind will be subject to the review and approval of the Department before it becomes effective. St. 2008, c. 169, § 83; 220 C.M.R. § 17.03(2).

IV. ORDER

Accordingly, after due notice and comment, it is

ORDERED: That the Petition of Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid for approval of a proposed timetable and method for the solicitation and potential execution of a long-term contract for renewable energy with Cape Wind Associates is APPROVED; and it is

FURTHER ORDERED: That Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid shall comply with all other directives contained in this Order.

By Order of the Department,

/s/

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Paul J. Hibbard, Chairman

/s/

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Tim Woolf, Commissioner

/s/

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Jollette A. Westbrook, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.