



# The Commonwealth of Massachusetts

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## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 10-58-A

August 20, 2010

Investigation by the Department of Public Utilities on its own Motion commencing a rulemaking pursuant to G.L. c. 30A, § 2 and 220 C.M.R. §§ 2.00 et seq. revising 220 C.M.R. §§ 17.00 et seq.

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ORDER ADOPTING FINAL REGULATIONS

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## I. INTRODUCTION

On June 9, 2010, pursuant to St. 2008, c. 169, § 83 (“Section 83”), G.L. c. 30A, § 2 and 220 C.M.R. §§ 2.00 et seq., the Department of Public Utilities (“Department”) suspended the applicability of two provisions of Section 83 and adopted emergency regulations amending 220 C.M.R. §§ 17.00 et seq., to allow solicitations for long-term contract proposals for renewable energy generation that is not limited to within the Commonwealth of Massachusetts, its state waters, or adjacent federal waters (“emergency long-term contract regulations”). Order Adopting Emergency Regulations on Long-Term Contracts for Renewable Energy, D.P.U. 10-58 (2010). With this Order, the Department adopts final regulations designated as 220 C.M.R. §§ 17.00 et seq., which are attached as Appendix A.

## II. BACKGROUND

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, twice in a five-year period to “solicit proposals from renewable energy developers and, provided reasonable proposals have been received, enter into cost-effective long-term contracts to facilitate the financing of renewable energy generation within the jurisdictional boundaries of the [C]ommonwealth, including state waters, or in adjacent federal waters.” St. 2008, c. 169, § 83. On June 12, 2009, the Department promulgated regulations, 220 C.M.R. §§ 17.00 et seq., implementing the long-term contracting provisions of Section 83. Long-Term Contracts for Renewable Energy, D.P.U. 08-88-A (2009). These regulations, which became final upon

publication in the Massachusetts Register on June 26, 2009, contained the geographic limitation set out in Section 83 (“2009 long-term contract regulations”).

On April 16, 2010, TransCanada Power Marketing LTD (“TransCanada”) brought a lawsuit against various state officials, including the commissioners of the Department,<sup>1</sup> challenging the constitutionality of Section 83 and the 2009 long-term contract regulations on the basis that the application of the statute and the regulations discriminate against out-of-state renewable energy generators.<sup>2</sup> D.P.U. 10-58, at 3. Section 83 provides in relevant part:

If any provision of this section is subject to a judicial challenge, the department of public utilities may suspend the applicability of the challenged provision during the pendency of the judicial action until final resolution of the challenge and any appeals, and shall issue such orders and take such other actions as are necessary to ensure that the provisions that are not challenged are implemented expeditiously to achieve the public purposes of this provision.

In accordance with Section 83, the Department issued an Order on June 9, 2010, suspending the applicability of the geographic limitation and adopted emergency regulations amending

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<sup>1</sup> The defendants named in the TransCanada lawsuit, brought in the U.S. District Court for the District of Massachusetts (Central Division) are: (1) Ian A. Bowles, Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (“Secretary Bowles”); (2) Philip Giudice, Commissioner of the Massachusetts Department of Energy Resources; (3) Paul J. Hibbard, Chairman of the Department; (4) Tim Woolf, Commissioner of the Department; and (5) Jollette A. Westbrook, Commissioner of the Department. Paul J. Hibbard has since resigned as Chairman of the Department, and Ann G. Berwick was appointed by Secretary Bowles to replace him.

<sup>2</sup> Although some claims have been dismissed, the claims involving Section 83 and the 2009 long-term contract regulations are still pending. A hearing on TransCanada’s motion for preliminary injunction, which seeks to enjoin the requirement that long-term contracts for renewable energy be available only to resources located in Massachusetts, is scheduled for October 15, 2010.

220 C.M.R. §§ 17.00 et seq. by removing from 220 C.M.R. § 17.01(1) the words “within the Commonwealth of Massachusetts, its waters, or adjacent federal waters.” D.P.U. 10-58, at 5. The Department also suspended the applicability of the geographic requirement in Section 83 that, where feasible, additional employment be created in the Commonwealth. D.P.U. 10-58, at 5. Accordingly, the Department amended 220 C.M.R. §§ 17.00 et seq. by removing the words “in the Commonwealth of Massachusetts” from 220 C.M.R. § 17.05(1)(c)(4). D.P.U. 10-58, at 5.

In amending 220 C.M.R. §§ 17.00 et seq. and adopting the emergency long-term contract regulations, the Department recognized that there were matters already pending pursuant to the requirements of Section 83 and the 2009 long-term contract regulations. D.P.U. 10-58, at 6. In particular, the Department had previously approved the timetable and method of solicitation and execution of long-term contracts for the supply of renewable electric energy and renewable energy certificates (“RECs”) under a public request for proposals (“RFP”), which was issued on January 15, 2010, by Fitchburg Gas and Electric Light Company d/b/a Unitil, Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid (“National Grid”), NSTAR Electric Company (“NSTAR Electric”), and Western Massachusetts Electric (together, “electric distribution companies”) and the Commonwealth of Massachusetts Department of Energy Resources (“DOER”).<sup>3</sup> Thus, with

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<sup>3</sup> See D.P.U. 10-58, at 6. On December 29, 2009, the Department approved the timetable and method of solicitation and execution of long-term contracts for renewable energy contained in the RFP that contained the geographic limitation discussed above (i.e., limited to eligible in-state bidders). See Fitchburg Gas and Electric Light Company et al., D.P.U. 09-77 (2009).

respect to the RFP, the Department directed the electric distribution companies in consultation with DOER to state how they intended to comply with the Department's Order and emergency regulations. D.P.U. 10-58, at 6. In D.P.U. 10-58, the Department specifically required that the RFP be opened for a reasonable period of time to allow eligible out-of-state bidders to submit proposals for long-term contracts for renewable energy and/or RECs to be delivered to Massachusetts electric distribution companies.<sup>4</sup> The Department also recognized that the suspension of the geographic limitation might increase the number of proposals for long-term contracts. D.P.U. 10-58, at 6. The Department stated that, in allocating the limited resource of Section 83 long-term contracts to a wider pool consisting of both in-state and out-of-state generation, "the distribution companies should be mindful of the express language of the statute, which calls upon distribution companies to 'enter into cost-effective long-term contracts to *facilitate the financing* of renewable energy generation'." D.P.U. 10-58, at 6, citing St. 2008, c. 169, § 83 (emphasis in original).

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<sup>4</sup> D.P.U. 10-58, at 6. On July 14, 2010, consistent with the Department's directives and emergency regulations adopted in D.P.U. 10-58, the electric distribution companies and DOER (together, "Petitioners") jointly filed a request for approval of a revised RFP ("Revised RFP"), which was docketed as D.P.U. 10-76. The Revised RFP includes a timetable and method for the solicitation and execution of long-term contracts for renewable energy and/or RECs as required by Section 83. Consistent with D.P.U. 10-58, the Revised RFP would be open for a period of 35 days, during which time eligible bidders, from inside and outside the Commonwealth of Massachusetts, may newly submit or refresh bids. Subsequently, each electric distribution company may submit final contracts for Department approval, pursuant to Section 83 and 220 C.M.R. § 17.03. On July 19, 2010, the Department issued a notice seeking comment on the Revised RFP. The comment period on the Revised RFP closed on August 3, 2010, and the Department has not yet ruled on the Revised RFP.

In addition, on May 10, 2010, National Grid filed pursuant to Section 83 and the 2009 long-term contract regulations a petition for approval by the Department of two long-term contracts executed with Cape Wind Associates, LLC (“Cape Wind contracts”). Massachusetts Electric Company and Nantucket Electric Company, D.P.U. 10-54. Because the Cape Wind contracts were the product of individual negotiations rather than of the RFP issued in January 2010, the Department directed National Grid to demonstrate, in the pending D.P.U. 10-54 docket, compliance with the Order in D.P.U. 10-58 and the accompanying emergency long-term contract regulations. D.P.U. 10-58, at 6. Finally, consistent with Department practice and administrative law principles, the Department stated that all future long-term contract filings would have to demonstrate compliance with the emergency regulations. D.P.U. 10-58, at 6.

### III. PROCEDURAL HISTORY

The emergency long-term contract regulations have been in effect since June 9, 2010 and expire within three months of that date unless the Department promulgates final regulations after an opportunity for public comment. See G.L. c. 30A, § 2; 220 C.M.R. § 2.05(4). On June 9, 2010, the Department issued a notice of public hearing and request for comments on the emergency long-term contract regulations as required by the accompanying Order. D.P.U. 10-58, at 7. On June 15, 2010, notice of the public hearing was published in both The Boston Globe and the Boston Herald. On June 25, 2010, notice of the public hearing was also published in the Massachusetts Register Number 1159. Pursuant to notice duly issued, on July 15, 2010, the Department held the public hearing to receive comments on the emergency

long-term contract regulations. Written comments were also due on July 15, 2010. In this Order, the Department adopts as final the emergency long-term contract regulations as published in Massachusetts Register Number 1159 on June 25, 2010.

#### IV. COMMENTS

##### A. Allco Renewable Energy Limited

On June 15, 2010, Allco Renewable Energy Limited (“Allco”), which invests in, and arranges financing for, renewable energy projects, filed comments (Allco Comments at 1). Allco contends that the RFP that was issued in January 2010 should be reopened to all bidders with a sufficient amount of time to allow prospective bidders the opportunity to mobilize renewable energy projects (Allco Comments at 2). Allco contends that three changes should apply to the Revised RFP (Allco Comments at 3). First, Allco requests that there be at least 120 days within which to submit bids in response to the Revised RFP (Allco Comments at 3). Second, Allco requests that the developer security provisions of the Revised RFP should be conformed to those proposed in the Cape Wind contracts (Allco Comments at 3). Lastly, Allco requests that the Revised RFP should be amended to state that a utility may seek up to 3.5 percent of its load as opposed to the 1.5 percent currently stated (Allco Comments at 3). Allco contends that a fair and deliberate RFP process will reduce costs to Massachusetts customers (Allco Comments at 3, Att.).

On July 15, 2010, Allco submitted additional comments requesting an extension of the comment period until sometime after the distributions companies make the filings required by the Department in D.P.U. 10-58 (Allco Additional Comments at 2). Allco contends that the

emergency long-term contract regulations should be amended to make clear that Section 83 requires two distinct solicitations to occur within a five-year period (Allco Additional Comments at 3-4). Allco argues that it is implicit in the requirement of two solicitations that voluntary additional proposals cannot eliminate the requirement of either solicitation (Allco Additional Comments at 3, n.3). According to Allco, National Grid's individual negotiations with Cape Wind supplements and cannot, from a statutory perspective, displace the first solicitation (Allco Additional Comments at 4).

Allco asserts that, absent compelling circumstances, the emergency long-term contract regulations should be amended to limit the use of any one project to no more than 50 percent of a distribution company's obligations under Section 83 (Allco Additional Comments at 5). Allco states that the distribution companies have no economic stake in negotiating a long-term contract price because the distribution company passes the cost through to the ratepayers (Allco Additional Comments at 5-6). As a result, in the absence of a competitive RFP, Allco contends that the distribution company should be required to provide other concrete, project specific, financial information to support its alleged cost-effectiveness (Allco Additional Comments at 6). According to Allco, incorporating this requirement into the emergency long-term contract regulations will assist the Department in identifying cost-effective renewable energy proposals (Allco Additional Comments at 6-7).

B. Ross Weaver

On June 25, 2010, Ross Weaver, who is a National Grid commercial customer, filed comments stating that he is concerned about the cost of wind energy and the lack of benefits

(Weaver Comments at 1). Mr. Weaver contends that wind farms do not lower the carbon footprint of mankind because other generators will still be consuming fossil fuels and emitting carbon dioxide in order to provide power when the wind stops blowing (Weaver Comments at 1). Mr. Weaver asserts that the unreliability and the intermittence of the power produced by wind farms will not allow Massachusetts or New England to decommission a single fossil-fuel power plant (Weaver Comments at 1). Instead, he maintains, wind farms simply layer an additional cost on top of existing generation capabilities, which is borne by taxpayers, businesses and ratepayers (Weaver Comments at 1-2). Mr. Weaver asserts that taxpayer money is better spent upgrading the power grid to a smart grid, adding capacity in Massachusetts load zones and reducing demand (Weaver Comments at 2).

Finally, Mr. Weaver observes that natural gas prices have fallen about 65 percent since 2008, from \$11 per MMBtu<sup>5</sup> to around \$4 per MMBtu (Weaver Comments at 2). Mr. Weaver asserts that wind competes directly with natural gas, and that the drop in natural gas prices makes it a more competitive resource (Weaver Comments at 2). Mr. Weaver contends that the natural gas industry believes pricing will remain close to current prices and that U.S. supplies will last approximately 100 years due to new shale gas extraction technology (Weaver Comments at 2).

Mr. Weaver requests that the Department reject the Cape Wind contracts on the grounds that costs will be incurred by ratepayers for a product that does not deliver the

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<sup>5</sup> MMBtu is one million British Thermal Units, which is a standard measurement for heat.

promised carbon dioxide emissions reduction at a time when Massachusetts ratepayers are already burdened with high rates (Weaver Comments at 2). In support of his comments, Mr. Weaver attached a paper written by Glenn R. Schleede entitled “The True Cost of Electricity from Wind is always Underestimated and its Value is always Overstated,” which, Mr. Weaver purports, provides a broader analysis of the cost of wind energy (Weaver Comments at 2).

C. TransCanada Power Marketing Ltd.

On July 15, 2010, TransCanada, which is a power marketing company with its principal place of business in Westborough, Massachusetts, filed comments (TransCanada Comments at 1). TransCanada asserts that it is seeking an open and fair opportunity to bring power from Kibby Wind Farm in the State of Maine, which is being developed by corporate affiliates, to market in Massachusetts (TransCanada Comments at 1). TransCanada explains that it brought suit challenging Section 83, the 2009 long-term contract regulations and the RFP issued in January 2010 because, by barring out-of-state resources, these measures violated the Commerce Clause of the United States Constitution (TransCanada Comments at 1-2). TransCanada views the emergency long-term contract regulations and accompanying Order as an important first step to remedy the unconstitutional discrimination, but seeks a permanent, effective and comprehensive remedy, which is in the public interest (TransCanada Comments at 2-3). Accordingly, TransCanada seeks a consent judgment in its lawsuit to remove permanently from Section 83 the geographical limitation, the applicability of which the Department’s Order merely suspends (TransCanada Comments at 2, 4). In terms of an

effective remedy, TransCanada states that out-of-state resources should have a fair and equal opportunity to compete for long-term contracts (TransCanada Comments at 2-3). To achieve a comprehensive remedy, TransCanada contends that in-state generators should not be advantaged, directly or indirectly (TransCanada Comments at 3).

TransCanada supports the changes contained in the emergency long-term contract regulations (TransCanada Comments at 3). However, TransCanada argues that the best way to facilitate the financing of renewable energy generation in furtherance of 220 C.M.R. § 17.01 is to set a level playing field for open competition and a fair opportunity to compete (TransCanada Comments at 3-4).

TransCanada asks the Department to clarify that its emphasis on the words “facilitate the financing” in Section 83 should not be used to undervalue a bid from an out-of-state resource that otherwise meets Section 83’s specific commercial operation date as reflected in 220 C.M.R. § 17.05 (TransCanada Comments at 6).<sup>6</sup> Pursuant to statutory construction principles, TransCanada argues, Section 83’s requirement to achieve commercial operation on or after January 1, 2008 overrides any general purpose of the statute (TransCanada Comments at 5). According to TransCanada, specific governs the general in statutory construction (TransCanada Comments at 5, quoting Commonwealth v. Russ R., 433 Mass. 515, 521

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<sup>6</sup> Section 83 provides, in relevant part, that distribution companies shall twice in a five-year period “solicit proposals from renewable energy developers and, provided reasonable proposals have been received, enter into cost-effective long-term contracts to facilitate the financing of renewable energy generation.” In addition, under Section 83, an eligible renewable generator must “have a commercial operation date, as verified by the [D]epartment of [E]nergy [R]esources, on or after January 1, 2008.”

(2001)). TransCanada maintains that, in deriving the purpose of a statute, the provisions must be taken as a whole and boilerplate statements of purpose may not be applied to contradict the specific provisions of a statute (TransCanada Comments at 5, citing St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 787 n.19 (1981) (“general statements of overall purpose contained in legislative reports cannot defeat the specific and clear wording of a statute”)). TransCanada maintains that the Legislature enacted Section 83 in order to facilitate the financing of renewable projects in general (TransCanada Comments at 9-10). TransCanada contends that Section 83 does not require that the long-term contract facilitate the financing of a particular project (TransCanada Comments at 9).

In addition, TransCanada asserts that the term “financing” means “the supplying of funds or capital,” which an entity’s corporate affiliates (such as the parent corporation and sister corporations of TransCanada) or third-party lenders can supply (TransCanada Comments at 5). TransCanada argues that it would be irrational to encourage third-party financing and not to encourage affiliated-party financing (TransCanada Comments at 5). TransCanada concludes that the ordinary meaning of the term financing includes funding for ongoing operations of an existing project, as well as funding of new construction (TransCanada Comments at 5-6). In sum, to avoid indirect discrimination, TransCanada states that projects seeking construction financing should not be valued more highly than projects already in operation (TransCanada Comments at 4, 10).

With respect to the Department’s directive to open the RFP to out-of-state resources, TransCanada asserts that it is necessary to expedite the RFP process due to expiring tax credits

and so as not to give in-state resources an unfair timing advantage (TransCanada Comments at 6, 8, 9). TransCanada states that, if possible, out-of-state resources should be given an opportunity to submit bids for a speedier evaluation (TransCanada Comments at 8).

Finally, TransCanada opposes the long-term contract proposals filed by NSTAR Electric in D.P.U. 10-71, D.P.U. 10-72 and D.P.U. 10-73 (TransCanada Comments at 6-7). TransCanada asserts that, in view of its lawsuit and the Department's directives in this docket, NSTAR Electric should not have filed the contracts for Department approval (TransCanada Comments at 7-9).

D. The Solar Alliance

On July 15, 2010, The Solar Alliance, which is a state-focused alliance of solar photovoltaic ("PV") manufacturers, integrators, and financiers dedicated to accelerating the deployment of solar PV, filed comments (The Solar Alliance Comments at 1). The Solar Alliance urges the Department to consider, in reviewing long-term renewable energy contracts, the unique beneficial characteristics of solar energy, which includes a high correlation between when solar resources are available and when demand for power is greatest (The Solar Alliance Comments at 1). The Solar Alliance contends that appropriately targeted distributed solar energy resources can defer or avoid transmission and distribution system upgrades and expansions and can offer localized energy value by providing congestion relief (The Solar Alliance Comments at 2). The Solar Alliance states that, although the Department may be compelled to entertain proposals for out-of-state renewable energy sources, it is also free to consider the benefits of resources within Massachusetts (The Solar Alliance Comments at 2).

E. Conservation Law Foundation

At the public hearing on July 15, 2010, the Conservation Law Foundation (“CLF”), which is a New England regional non-profit environmental advocacy organization, provided comments on the emergency long-term contract regulations (Tr. at 5). CLF stated that it supports the Department’s action to strip the geographic requirement from the 2009 long-term contract regulations (Tr. at 5-6). CLF explains that Section 83 provides authority for exactly this action by the Department, where TransCanada has brought litigation to challenge the geographic restrictions under the Commerce Clause (Tr. at 6). According to CLF, while some geographic restrictions can survive scrutiny under the Commerce Clause, these types of restrictions are inherently suspect, and at a minimum, they create a significant condition of market uncertainty (Tr. at 6). CLF concludes that removing the geographic restriction was a reasonable step by the Department (Tr. at 5-6).

V. FINAL REGULATIONS

Through emergency long-term contract regulations and the Order adopting them, the Department has eliminated the requirement limiting the availability of long-term contracts to only in-state renewable resources. We have done so in accordance with the authority provided in Section 83 in response to TransCanada’s lawsuit challenging the constitutionality of the in-state restriction contained in Section 83 and the 2009 long-term contract regulations. None of the comments has disputed our authority to take this action.<sup>7</sup>

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<sup>7</sup> Notably, TransCanada and CLF expressly supported the Department’s action.

Instead, the comments have focused on other issues addressed in our Order in D.P.U.10-58. TransCanada raises an issue of statutory construction in connection with the emphasis in our Order upon Section 83's language about facilitating the financing of renewable generation. TransCanada seeks clarification that our focus on this language should not be interpreted as a reason to undervalue bids from out-of-state resources that otherwise satisfy the requisite commercial operation date. TransCanada argues that, by virtue of principles of statutory construction, the specific date requirement in Section 83 overrides the general statement of purpose about financing. We disagree.

In construing a statute, it is axiomatic that the intent of the Legislature must be ascertained from the language of the statute by giving effect to each word. E.g., Fordyce v. Town of Hanover, 457 Mass. 248, 257-258 (2010); Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 412, 414 (2009); In re Liquidation of American Mutual Liberty Liability Ins. Co., 440 Mass. 796, 800-801 (2004). Where possible, the various provisions of a statute are to be read in harmony with one another in recognition that the Legislature did not intend internal contradictions. Fordyce, 457 Mass. at 258.<sup>8</sup>

We have no difficulty reading the statutory provisions of "facilitate the financing" and the specific commercial operation date in harmony. Both are indicative of the Legislature's

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<sup>8</sup> The cases upon which TransCanada relies do not apply to alleged internal contradictions within a statute, and we thus find they are inapposite. See Commonwealth v. Russ R., 433 Mass. at 521 (discussing rules of statutory construction for conflicting statutes, including where general statute cannot be reconciled with specific statute); St. Martin Evangelical Lutheran Church, 451 U.S. at 787 n.19 (finding that general and ambiguous statements of intent contained in legislative reports cannot defeat wording of statute).

intention to promote the development of new (i.e., commercial operation on or after January 1, 2008) renewable generation, which is consistent with the Green Community Act's overall objective of promoting renewable energy resources. We therefore conclude that the threshold operational date in Section 83 is not inconsistent with consideration of whether the long-term contract will facilitate the financing of the renewable generation resource.<sup>9</sup>

Other comments focus on the RFP that was issued in January of 2010, which we found must be opened to allow eligible out-of-state bidders an opportunity to participate. To the extent that comments advocate for certain revisions to the RFP, those issues are beyond the purpose and scope of this rulemaking proceeding and are best addressed in D.P.U. 10-76, in which the Department is reviewing the Revised RFP for compliance with the Order in D.P.U. 10-58 and the accompanying emergency long-term contract regulations.

In addition, some comments focus on the Cape Wind contracts. We similarly find that these issues are beyond the purpose and scope of this rulemaking proceeding and are best addressed in D.P.U. 10-54, where the Department will review National Grid's compliance with the Order in D.P.U. 10-58 and emergency long-term contract regulations as part of its investigation of National Grid's request for approval of those contracts.

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<sup>9</sup> Even though TransCanada's comments on this issue and the Department's treatment of this issue do not require any modification to the emergency long-term contract regulations, we address the issue in this Order because the Department identified the statutory provision of "facilitate the financing of renewable energy generation" in the Order in D.P.U. 10-58. This same issue has been raised in comments in D.P.U. 10-76, which the Department will separately address in the context of that proceeding.

Some comments address the long-term renewable energy contracts proposed by NSTAR Electric. The Department dismissed those filings without prejudice on August 13, 2010 and any related issues are now moot. NSTAR Electric Company, D.P.U. 10-71/10-72/10-73, Order of Dismissal Without Prejudice (August 13, 2010).

Other comments seek to amend the emergency long-term contract regulations on topics unrelated to the elimination of the in-state requirement. We therefore find that these comments are not material and are beyond the scope of this rulemaking proceeding.

In sum, the comments relevant to this proceeding support the emergency long-term contract regulations and we will not modify the regulations before adopting them as final. We find that adoption of the emergency long-term regulations as final are in the public interest and are necessary for the public convenience.

#### VI. ADOPTION OF REGULATIONS

By this Order and pursuant to the provisions of St. 2008, c. 169, § 83, an Act Relative to Green Communities, we adopt as final the emergency regulations 220 C.M.R. §§ 17.00 et seq., Long-Term Contracts For Renewable Energy. These regulations become permanent upon filing a Notice of Compliance with the Office of the Secretary of the Commonwealth, State Publications and Regulations Division, and continue in effect from the original emergency effective date of June 9, 2010. See 950 C.M.R. § 20.05(2)(a).

#### VII. ORDER

Accordingly, after due notice, hearing and consideration, it is



220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 17.00: LONG-TERM CONTRACTS FOR RENEWABLE ENERGY

Section

17.01: Purpose and Scope

17.02: Definitions

17.03: General Terms and Conditions

17.04: Methods for Soliciting and Entering Long-term Contracts

17.05: General Criteria for Long-term Contracts and Renewable Energy Generation Sources

17.06: Use of Energy and RECs Obtained Through Long-term Contracts

17.07: Remuneration to Distribution Companies

17.08: Long-term Contracts and RPS Requirements

17.09: Exceptions

17.01: Purpose and Scope

(1) Purpose. 220 CMR 17.00 establishes regulations for electric distribution companies to enter into long-term contracts with renewable energy developers to facilitate the financing of renewable energy generation.

(2) Scope.

(a) 220 CMR 17.04 applies to electric distribution companies within the Commonwealth of Massachusetts.

(b) 220 CMR 17.05 and 220 CMR 17.06 apply to long-term contracts subject to 220 CMR 17.00 between renewable energy developers and electric distribution companies, and the resources proposed under such contracts.

17.02: Definitions

For the purposes of 220 CMR 17.00, the terms set forth in 220 CMR 17.02 will be defined as follows, unless the context otherwise requires.

Customer means a recipient of distribution service provided by a distribution company.

Department means the Department of Public Utilities.

DOER means the Department of Energy Resources.

Distribution Company shall be as defined in M.G.L. c. 164, § 1.

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Long-term Contract under 220 CMR 17.00 means a contract with a term of ten to 15 years.

Renewable Energy Generation Source means a source of generation of electricity or related attributes from renewable resources.

Renewable Energy Developer means an individual or company engaged in the business of developing renewable energy generation sources for the production of electricity and renewable energy generation attributes.

Renewable Resources are as defined in M.G.L. c. 25A, § 11F.

17.03: General Terms and Conditions

- (1) Commencing July 1, 2009 and ending June 30, 2014, each distribution company shall conduct at least two separate solicitations for long-term contract proposals from renewable energy developers. A distribution company may also voluntarily solicit additional proposals under 220 CMR 17.00 over the five-year period.
- (2) Long-term contracts executed by the distribution company shall be filed with and approved by the Department before they become effective.
- (3) Long-term contracts must meet the criteria established by 220 CMR 17.00, and other applicable Department precedent.

17.04: Methods for Soliciting and Entering into Long-term Contracts

- (1) Distribution companies shall coordinate with DOER in developing their timetables and methods for solicitations and contracting to ensure that the timing of their solicitations is appropriate and the methods will foster competitive bids. Distribution companies shall consider participating in a DOER-administered solicitation process prior to conducting their own solicitations. Distribution companies may consider additional reasonable methods of soliciting proposals from renewable energy developers including public solicitations, individual negotiations, or other methods.
- (2) In developing the provisions of long-term contracts, distribution companies shall consider multiple contracting methods such as long-term contracts for renewable energy certificates (RECs), for energy, or for a combination of RECs and energy.

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- (3) If a distribution company determines that the terms and conditions of a contract obligation would place an unreasonable burden on its balance sheet, it may decline to consider the contract proposal. Distribution companies shall report to and demonstrate for the Department the effect that a rejected contract proposal would have had on its balance sheet within ten business days of the rejection.
- (4) Prior to initiating a solicitation, a distribution company's timetable and methods for solicitation and contracting shall be subject to review and approval by the Department.
- (5) In any filing supporting the timetable and methods for solicitation and contracting, distribution companies shall:
  - (a) Describe proposed methods reviewed or selected;
  - (b) Document the agenda, content, and outcome of all consultations with DOER;
  - (c) Attach to their filing comments by DOER on the solicitation and contracting methods reviewed and selected;
  - (d) Identify areas of agreement and disagreement with DOER; and
  - (e) Respond to each question or concern raised by DOER in its comments with respect to the solicitation and contracting processes reviewed and selected.

17.05: General Criteria for Long-term Contracts and Renewable Energy Generation Sources

- (1) Long-term contracts must be with renewable energy generation sources that:
  - (a) Have a commercial operation date, as verified by DOER, on or after January 1, 2008;
  - (b) Be qualified by DOER as eligible to participate in the Renewable Portfolio Standards (RPS) program, and to sell RECs under the program, pursuant to M.G.L. c. 25A, § 11F;
  - (c) Be determined by the Department to:
    1. Provide enhanced electricity reliability within the Commonwealth of Massachusetts;
    2. Contribute to moderating system peak load requirements;
    3. Be cost-effective to Massachusetts electric ratepayers over the term of the contract; and
    4. Create additional employment, where feasible; and
  - (d) Be a cost-effective mechanism for procuring renewable energy on a long-term basis.

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- (2) In evaluating long-term contracts, the Department will consider the recommendations of the Attorney General of the Commonwealth of Massachusetts, which shall be submitted to the Department within 45 days of the filing of long-term contracts.

17.06: Use of Energy and RECs Obtained Through Long-term Contracts

- (1) After purchasing renewable energy, or RECs, or both, a distribution company may:
  - (a) Sell the energy to its basic service customers, and retain RECs for the purpose of meeting the applicable annual RPS requirements;
  - (b) Sell the energy into the wholesale electricity spot market, and sell the purchased RECs through a competitive bid process; or
  - (c) Select an alternative transactional approach, in consultation with DOER and subject to review and approval of the Department.
- (2) If the distribution company sells both the energy and RECs as in 220 CMR 17.06(1)(b), it shall:
  - (a) Calculate the net cost of payments made under the long-term contracts against the proceeds obtained from the sale of energy and RECs;
  - (b) Credit or charge all distribution customers the difference between the contract payments and proceeds through a uniform, fully-reconciling annual factor in distribution rates, subject to review and approval by the Department; and
  - (c) Design a reconciliation process that allows the distribution company to recover all costs incurred under such contracts, subject to review and approval by the Department.

17.07: Remuneration to Distribution Companies

- (1) A distribution company may receive an annual remuneration equal to 4% of the annual payments under a contract.
- (2) The purpose of such remuneration shall be to compensate the company for accepting any financial obligation of the long-term contract.
- (3) 220 CMR 17.07 will be acted upon by the Department at the time of contract approval.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

17.08: Long-term Contracts and RPS Requirements

- (1) A distribution company's obligation to enter long-term contracts is separate and distinct from its obligation to meet RPS requirements.
- (2) 220 CMR 17.00 will not limit consideration of other short- or long-term contracts for power and/or RECs submitted by a distribution company for review and approval by the Department.
- (3) If RPS requirements terminate, a distribution company's obligation to solicit long-term contracts shall also cease. However, contracts already executed and approved by the Department will remain in full force and effect.
- (4) If a distribution company has entered into long-term contracts consistent with St. 2008, c. 169, § 83, it shall not be required by regulation or order to enter into contracts with terms of more than three years to meet its annual RPS requirements, pursuant to M.G.L. c. 25A, § 11F, unless the Department finds that such contracts are in the best interests of customers. Electric distribution companies may voluntarily execute long-term contracts to meet applicable annual RPS requirements, subject to the Department's approval.
- (5) Distribution companies shall not be obligated to enter into long-term contracts under St. 2008, c. 169, § 83 that would, in the aggregate, exceed 3% of total annual energy demand (in megawatt-hours) from all distribution customers in the service territory of the distribution company.

17.09: Exceptions

The Department may grant an exception from any provision of 220 CMR 17.00 for good cause shown.

REGULATORY AUTHORITY

220 CMR 17.00: St. 2008, c. 169, § 83.