



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 10-71

August 13, 2010

Petition of NSTAR Electric Company for approval by the Department of Public Utilities of a long-term contract to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. §§ 17.00 et seq., from New England Wind, LLC

D.P.U. 10-72

Petition of NSTAR Electric Company for approval by the Department of Public Utilities of a long-term contract to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. §§ 17.00 et seq., from Pioneer Valley Wind, LLC

D.P.U. 10-73

Petition of NSTAR Electric Company for approval by the Department of Public Utilities of a long-term contract to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. §§ 17.00 et seq., from American Pro Wind, LLC

ORDER OF DISMISSAL WITHOUT PREJUDICE

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I. INTRODUCTION

On July 2, 2010, NSTAR Electric Company (“NSTAR Electric” or “Company”) filed three petitions with the Department of Public Utilities (“Department”) seeking approval pursuant to St. 2008, c. 169, § 83 (“Section 83”) and 220 C.M.R. §§ 17.00 et seq. of three separate long-term contracts to purchase wind power and associated renewable energy certificates (“RECs”) with New England Wind, LLC; Pioneer Valley Wind, LLC; and American Pro Wind, LLC. The Department docketed the petitions respectively as D.P.U. 10-71, D.P.U. 10-72, and D.P.U. 10-73 (together “long-term contract proposals”).^{1, 2}

The Attorney General of the Commonwealth (“Attorney General”) intervened pursuant to G.L. c. 12, § 11E. On July 7, 2010, the Attorney General filed a consolidated notice of retention of experts and consultants in these dockets pursuant to G.L. c. 12, § 11E(b) (“Expert Notice”).³

¹ Because these filings involve common questions of law, fact and policy, the Department has determined that they should be consolidated for purpose of rendering a single order. Cf. 220 C.M.R. § 1.09.

² In each case, the Company filed a motion seeking confidential treatment, for a period of three years, of information and analysis relating to: (1) bids submitted as a result of a competitive solicitation of proposals for long-term renewable energy generation pursuant to Section 83; (2) contract pricing and related terms for the long-term contract proposals; and (3) proprietary consultant work-product related to long-term price forecasts for energy. The Department stamp approved these motions on August 13, 2010.

³ Because of the Department’s decision dismissing NSTAR Electric’s petitions, we do not find it necessary to rule on the Expert Notice.

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.” See Section 83. On June 9, 2010, in accordance with Section 83, the Department issued an Order suspending the applicability of this geographic limitation and adopted emergency regulations amending the existing regulations for long-term contracts for renewable energy by removing from 220 C.M.R. § 17.01(1) the words “within the Commonwealth of Massachusetts, its waters, or adjacent federal waters.”⁴ Order Adopting Emergency Regulations on Long-Term Contracts for Renewable Energy, D.P.U. 10-58, at 5 (2010).⁵

In amending 220 C.M.R. §§ 17.00 et seq. and adopting the emergency regulations, the Department recognized that there were matters already pending pursuant to the requirements of

⁴ The Order explains the circumstances leading to the Department’s decision to adopt the emergency regulations. D.P.U. 10-58, at 1-4.

⁵ In D.P.U. 10-58, the Department also suspended the applicability of the geographic requirement in Section 83 that, where feasible, additional employment be created in the Commonwealth. 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.

Section 83 and the existing 220 C.M.R. §§ 17.00 et seq. 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 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, NSTAR Electric Company, and Western Massachusetts Electric (together, “electric distribution companies”) and the Commonwealth of Massachusetts Department of Energy Resources (“DOER”).⁶ Thus, with 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. Id. 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.⁷ Id. at 6. Finally, consistent with Department practice and administrative law

⁶ 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).

⁷ Separately, on May 10, 2010, National Grid filed a petition for approval by the Department pursuant to Section 83 and 220 C.M.R. §§ 17.00 et seq. 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

principles, the Department stated that all future long-term contract filings would have to demonstrate compliance with the emergency regulations. Id.

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.

III. ANALYSIS

An electric company must be in "compliance with the provisions of law and the orders, directions and requirements of the [D]epartment." G.L. c. 164, § 76; see Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy, 440 Mass. 625, 635 (2004). The Department has authority to dismiss, as patently defective, filings that contravene a Department directive in a previous proceeding. Massachusetts Electric Company

demonstrate, in the pending D.P.U. 10 -54 docket, compliance with the Order in D.P.U. 10-58 and the accompanying emergency regulations. D.P.U. 10-58, at 6.

v. Department of Public Utilities, 383 Mass. 675, 678-681 (1981); Western Massachusetts Electric Company, D.P.U. 1300, at 12-13 (1983). In D.P.U. 1300, we held that “directives in Department Orders to address specific issues should be regarded as creating specific filing requirements which must be included in subsequent rate filings.” D.P.U. 1300, at 12.

In adopting the emergency long-term contract regulations in D.P.U. 10-58, we expressly stated that petitioners filing long-term contracts under Section 83 must demonstrate compliance with the emergency regulations. D.P.U. 10-58, at 6. Furthermore, with respect to the RFP that was issued on January 15, 2010, we specifically directed the Company and the other electric distribution companies to comply with the emergency regulations by amending the RFP to allow eligible out-of-state bidders an opportunity to submit proposals. Id.

Notwithstanding these clear directives, the Company has filed long-term contract proposals resulting from the RFP that was issued on January 15, 2010, which was limited to eligible in-state bidders (D.P.U. 10-71/10-72/10-73, Petitions at 3; D.P.U. 10-71/10-72/10-73, Exhs. NSTAR-JGD-1, at 8, 16-20). Thus, NSTAR Electric’s long-term contract proposals clearly fail to comply with the Order in D.P.U. 10-58 and the emergency regulations. The Company maintains, however, that D.P.U. 10-58 should not affect or delay the Department’s review and approval of its long-term contract proposals (D.P.U. 10-71/10-72/10-73, Petitions at 3; D.P.U. 10-71/10-72/10-73, Exhs. NSTAR-JGD-1, at 8-9). The Company states that the proposals are for cost-effective renewable resources that enable the Company to fulfill its obligation to sign long-term contracts to facilitate the financing of renewable generation under

Section 83 (D.P.U. 10-71/10-72/10-73, Petitions at 3; D.P.U. 10-71/10-72/10-73, Exhs. NSTAR-JGD-1, at 8-9).

The Company explains that it executed the long-term contracts on June 4, 2010, five days before the Department issued the Order in D.P.U. 10-58 (D.P.U. 10-71/10-72/10-73, Petitions at 3). The Company states that it was obligated to file the long-term contract proposals within 30 days of the date of contract execution in order to comply with the terms of the contracts and the RFP and the regulations of the Department that were legally binding at the time the contracts were executed (D.P.U. 10-71/10-72/10-73, Petitions at 3; D.P.U. 10-71/10-72/10-73, Exhs. NSTAR JGD-1, at 8).

Moreover, the Company states that completion of the Revised RFP could take as much as six months (D.P.U. 10-71/10-72/10-73, Exhs. NSTAR-JGD-1, at 9). The Company asserts that such delay could jeopardize the ability of these renewable projects to qualify for currently available tax credits (D.P.U. 10-71/10-72/10-73, Petitions at 3; D.P.U. 10-71/10-72/10-73, Exhs. NSTAR-JGD-1, at 9). The Company contends that without these tax credits customers will pay higher prices for renewable power (D.P.U. 10-71/10-72/10-73, Exhs. NSTAR-JGD-1, at 9).

Given the Department's explicit directives in D.P.U. 10-58, these arguments are unpersuasive. Because the Company's filings are a product of the RFP issued in January 2010, the Company must first participate in the Revised RFP process underway in D.P.U. 10-76 in order to satisfy our directives and emergency regulations in D.P.U. 10-58. Furthermore, the fact that the long-term contract proposals were executed before the

Department issued the Order in D.P.U. 10-58 in no way excuses the Company from complying with the specific requirements contained therein. By the time the Company filed these long-term contract proposals with the Department on July 2, 2010, the emergency long-term contract regulations had been in effect for several weeks. Thus, we dismiss the Company's filings without prejudice.

We do not dismiss these filings lightly. Indeed, we are mindful of the efforts on the part of the Company and its counterparties to comply with the spirit of the Green Communities Act and to provide customers with cost-effective renewable energy. Nevertheless, the Company must comply with the emergency regulations and the accompanying Order in D.P.U. 10-58, including the Department's directive to allow eligible out-of-state bidders the opportunity to submit bids.

The Department's action by this Order will not affect the rights of NSTAR Electric or its counterparties in any future long-term, renewable contract filing with the Department.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the request of NSTAR Electric Company for approval of a long-term contract to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. §§ 17.00 et seq., from New England Wind, LLC, is hereby **DISMISSED WITHOUT PREJUDICE**.

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.