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July 28, 2010

VIA MESSENGER

Mark D. Marini, Secretary
Department of Public Utilities
One South Station
Boston, MA 02110

Re: D.P.U. 10-76: Joint Petition 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, Western Massachusetts Electric Company, and the Commonwealth of Massachusetts Department of Energy Resources for approval of a proposed timetable and methods for the solicitation and execution of long-term contracts for renewable energy, pursuant to Emergency Rulemaking on Long-Term Contracts for Renewable Energy, D.P.U. 10-58 (2010)

Dear Secretary Marini:

Enclosed for filing in D.P.U. Docket 10-76, please find the Comments of TransCanada Power Marketing Ltd.

In order to acknowledge receipt, please date stamp the enclosed copy of this letter and return to our messenger. If you have questions, please contact me. Thank you for your attention to this matter.

Sincerely,

/s/ Robert M. Buchanan, Jr.

Robert M. Buchanan, Jr.

Enclosure

cc: Shaela Collins, Hearing Officer
Distribution List in D.P.U. 08-88
Distribution List in D.P.U. 09-77
Parties that submitted the Revised RFP

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Joint Petition by Fitchburg Gas and Electric Light
Company d/b/a Unital, Massachusetts Electric
Company and Nantucket Electric Company d/b/a
National Grid, NSTAR Electric Company, Western
Massachusetts Electric Company, and the
Commonwealth of Massachusetts Department of
Energy Resources for approval of a proposed
timetable and methods for the solicitation and
execution of long-term contracts for renewable
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Long-Term Contracts for Renewable Energy,
D.P.U. 10-58 (2010).

D.P.U. 10-76

**COMMENTS OF TRANSCANADA POWER MARKETING LTD.
ON THE AMENDED RFP**

1. TransCanada Power Marketing Ltd. (“TransCanada”) hereby responds to the Notice Of Filing And Request For Comments dated July 19, 2010. The distribution companies and the Massachusetts Department of Energy Resources (“DOER”) submitted a revised Request For Proposals (“the Revised RFP”) on July 14, 2010. Having reviewed the Revised RFP, TransCanada comments as follows.

2. TransCanada is a power marketing company with its principal place of business in Westborough, Massachusetts. It purchases electricity from generation sources, and it resells that electricity to distribution companies and to retail customers in Massachusetts and throughout the northeastern United States. TransCanada’s corporate affiliates are developing the Kibby Wind Farm in the State of Maine, and are seeking regulatory approval for an additional wind facility on Sisk Mountain, an area in the

proximity of the Kibby project. TransCanada seeks an open and fair opportunity to bring wind energy generated in Maine to market in Massachusetts.

3. The Department of Public Utilities (“Department”) issued its Order, on June 9, 2010, as a result of TransCanada’s challenge to provisions of Section 83 of Chapter 169 of the Acts of 2008 (“Section 83”). TransCanada filed suit in U.S. District Court on April 16, 2010, challenging Section 83, the regulations at 220 CMR 17.00 et seq., and the Request For Proposals issued on January 15, 2010 (“the January RFP”). See TransCanada v. Bowles, et al., Civil Action No. 4:10-40070. These measures discriminated against out-of-state generators. They required the distribution companies to enter long-term contracts, but limited the required contracts to renewable energy generators located within the Commonwealth of Massachusetts (or in state waters or adjacent Federal waters), barring them to out-of-state competitors. Discrimination of this nature violates the Commerce Clause of the U.S. Constitution.

4. The Department’s Order seeks to remedy this constitutional violation (A) by amending the regulations at 220 CMR 17.00 et seq.; (B) by suspending the jurisdictional limitation in Section 83; and (C) by mandating that the distribution companies re-open the RFP to allow bids from out-of-state generators. It remains to be seen whether the remedy will be sufficient. A sufficient remedy would need to be permanent, effective, and comprehensive. A sufficient remedy is required by law and will be in the public interest. An open market will benefit the ratepayers of Massachusetts by bringing in competition from out-of-state renewable energy generators. This competition will tend to reduce prices, which will encourage the public to adopt renewable energy more quickly.

5. The June 9 Order sought to remedy the constitutional violation by re-opening the January RFP so that out-of-state generators would be able to submit bids.

Page 6 of the Order directed as follows:

At a minimum, the distribution companies, in consultation with DOER, shall re-open the RFP for a reasonable period of time to allow eligible out-of-state generators to submit proposals for long-term contracts....

This directive should be fulfilled promptly, so that in-state generators do not have an unfair timing advantage.

a. To date the RFP process has been tainted by unconstitutional discrimination. The January RFP limited eligible bidders to generators located within Massachusetts. TransCanada and other out-of-state generators have not yet received an opportunity to bid. The contracts that have been submitted to date should not be approved unless TransCanada and other out-of-state generators receive a fair opportunity to compete on the merits.

b. TransCanada and other out-of-state generators should be given an opportunity to submit bids as promptly as possible. After they are submitted, the bids from out-of-state may be compared on the merits to the contracts previously negotiated with in-state generators. If the new out-of-state bids are better on the merits, then the previously negotiated contracts cannot be viewed as cost-effective and should not be approved.

6. TransCanada is concerned that it will face indirect discrimination by the application of factors not warranted under Section 83. Drawing on Page 6 of the Department's June 9 Order, Page 4 of the Revised RFP states that evaluation of the bids will include a consideration of "whether the PPA sought would facilitate the financing of

the proposed project.” This factor is also stated in the Revised RFP at Pages 14 and 15, and in its Appendix B at § 7.12 and implied in § 5.8. This factor should not be part of the bid evaluation, because it is not consistent with the statute. See Comments of TransCanada submitted July 15, 2010 in Docket No. 10-58.

a. Section 83 specifically states a temporal requirement, which is met by TransCanada. The third paragraph of Section 83 states as follows (emphasis added):

The regulations shall: . . . (d) require that the renewable energy generating source to be used by a developer under the proposal meet the following criteria: (1) have a commercial operation date, as verified by the department of energy resources, on or after January 1, 2008. . . .

The regulations of 220 CMR 17.05(1)(a) state this same specific requirement. Where the legislature states a specific requirement in a statute, the specific provision must be implemented, and it overrides any argument about the general purpose of the statute. “[I]t is a commonplace of statutory construction that the specific governs the general.” Commonwealth v. Russ R., 433 Mass. 515, 521 (2001) (quoting Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992)). The purpose of a statute must be derived from the provisions taken as a whole, giving effect to each of its specific provisions. Thus boilerplate statements of purpose may not be applied to contradict the specific provisions of a statute. See 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”). Where a generator’s bid meets the specific temporal requirement of Section 83, its bid is fully in compliance in this respect, and its bid should not be undervalued by consideration of “[w]hether the proposed PPA would facilitate the financing of the proposed project.”

b. The language quoted from Page 4 of the RFP incorrectly applies Section 83. The stated purpose of Section 83 is “to facilitate the financing” of renewable energy generators in general, not to sponsor any one particular project. Section 83 facilitates the financing of renewable energy generation by establishing a competition to win long-term contracts. All renewable energy generators, no matter whether they are located in-state or out-of-state, should have an equal and open opportunity to compete for these contracts. When open competition prevails, each long-term contract that is awarded on the merits will facilitate the financing of renewable energy generation throughout the region. When open competition does not prevail (as it has not prevailed to date under Section 83), this jeopardizes the financing of renewable energy generation throughout the region -- because those who are considering making investments in renewable energy will hesitate to do so if their projects face barriers and do not have a fair opportunity to compete.

c. The term “financing” means “the supplying of funds or capital.” The term “financing” thus includes within its ordinary meaning funding for ongoing operations of an existing project, as well as funding of new construction. These financial resources can be supplied either by an entity’s corporate affiliates (such as the parent corporation and sister corporations of TransCanada), or by third party lenders. It would be irrational to encourage third party financing and not to encourage affiliated-party financing.

d. The specific temporal requirement of Section 83 is met by TransCanada, because: Phase I(a) of the Kibby Wind Farm project achieved commercial operation in October 2009; Phase I(b) of the Kibby Wind Farm project is under

construction and has not yet achieved commercial operation; and the Sisk Mountain project has not yet been funded. A long-term contract pursuant to Section 83 will encourage the ongoing financing of the Kibby Wind Farm project, which achieved commercial operation after January 1, 2008, the date specified in Section 83. In addition, a long-term contract pursuant to Section 83 will encourage the initial financing of the Sisk Mountain project.

7. The timetable outlined on Page 17 of the Revised RFP also raises concern.

a. As many have noted, a federal tax credit is due to expire at the end of the year. In the testimony that it submitted in opening Docket Nos. 10-71, 10-72, and 10-73, NStar stated that: “It could take an additional six months or more by the time a new RFP ... is issued, responded to by bidders, the complex evaluations of these bids completed and new contracts negotiated and filed with the Department. Unless tax credits are extended, these new bids will not qualify [for the federal tax advantage].”
Prefiled Testimony of James G. Daly, Page 9.

b. In their cover letter submitting the Amended RFP on July 14, the distribution companies and DOER stated that: “Because of the limited nature of the changes to the approved RFP, the Petitioning Parties respectfully request expedited review of this filing.” TransCanada supports this request. TransCanada submits that for the same reason -- i.e. “[b]ecause of the limited nature of the changes to the approved RFP” -- it ought to be possible to receive and evaluate out-of-state bids on an expedited basis.

c. If possible, out-of-state generators should be given an opportunity to submit bids for a speedy evaluation. If that is not possible, then the existing contracts

should not be approved at this time, because out-of-state generators have not received a fair opportunity to compete.

8. TransCanada believes certain factors listed for the Third Stage Evaluation of the Revised RFP require further clarification:

a. Page 14 of the Revised RFP lists “cost effectiveness of the bids” as one of the facts that the distribution companies will consider in evaluating a bid. What is unclear, however, is the standard that the distribution companies will use to determine whether any individual bid is cost-effective. Further, what role will the common price forecast used by the distribution companies play in determining cost-effectiveness? Will a bid that exceeds the common price forecast on a present value basis be considered ineligible? At what point is a bid not cost-effective? Answers to these questions should be provided within the RFP to improve process transparency.

b. Page 14 of the Revised RFP also includes “risk associated with project viability of the bids” as a factor in project evaluation at the Third Stage Evaluation. Project viability, however, is already assessed as part of the Initial Non-Price Evaluation in the Second Stage Evaluation at Pages 13 and 14. It is unclear what purpose this second viability test has in the RFP process and further explanation is required.

Respectfully submitted,

TRANSCANADA POWER
MARKETING LTD.,

By its attorney,

/s/ Robert M. Buchanan, Jr.

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Dated: July 28, 2010

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

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CERTIFICATE OF SERVICE

I certify that I have this day caused the foregoing to be served upon the
Department of Public Utilities and the parties on the distribution lists in Rulemaking on
Long-Term Contracts for Renewable Energy, D.P.U. 10-88 and Fitchburg Gas and
Electric Light Company et al., D.P.U. 09-77 in accordance with the requirements of 220
C.M.R. 1.05.

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