



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 10-58

June 9, 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.

ORDER ADOPTING EMERGENCY REGULATIONS

I. INTRODUCTION

By this Order, and pursuant to St. 2008, c. 169, section 83 (“Section 83”), G.L. c. 30A, § 2 and 220 C.M.R. §§ 2.00 et seq., the Department of Public Utilities (“Department”) suspends the applicability of two provisions of Section 83 and adopts 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. The emergency regulations are designated as 220 C.M.R. §§ 17.00 et seq. and are effective upon filing with the Secretary of the Commonwealth.

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. Section 83 states that the timetable and method for solicitation and execution of such contracts shall be proposed by the electric distribution company in consultation with the Department of Energy Resources (“DOER”) and shall be subject to review and approval by the Department.

The Green Communities Act requires the Department to adopt regulations consistent with Section 83. On June 12, 2009, the Department promulgated regulations, 220 C.M.R. §§ 17.00 et seq., to implement the long-term contracting provisions of Section 83. Long-Term Contracts for Renewable Energy, D.P.U. 08-88-A (2009). These regulations became final upon publication in the Massachusetts Register on June 26, 2009.

On September 14, 2009, the electric distribution companies jointly with DOER filed a petition with the Department pursuant to Section 83 and 220 C.M.R. § 17.04 seeking approval of a proposed timeline and method for soliciting proposals for long-term contracts for renewable energy through a public request for proposals (“RFP”) process. On December 29, 2009, the Department issued an Order approving the petition. Fitchburg Gas and Electric Light Company et al., D.P.U. 09-77 (2009). On January 15, 2010, the electric distribution companies in consultation with DOER issued an RFP soliciting bids for renewable energy generation sources located in Massachusetts, its waters, and adjacent federal waters. The RFP anticipated that the deadline for submitting bids would be February 19, 2010, and that any contracts would be filed with the Department for approval by July 21, 2010.

On December 3, 2009, Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid (“National Grid”) filed a petition with the Department seeking approval, pursuant to Section 83 and 220 C.M.R. §§ 17.00 et seq., of a memorandum of understanding (“MOU”) that it entered into on December 1, 2009, with DOER and Cape Wind Associates, LLC (“Cape Wind”). The MOU set forth a proposed timetable and method by which National Grid would 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 wind-energy generating facility located in Nantucket Sound off the coast of Massachusetts. Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid, D.P.U. 09-138, at 1-2 (2009). On December 29, 2009, the Department issued an Order approving the MOU as consistent with the requirements of Section 83 and 220 C.M.R. §§ 17.00 et seq. D.P.U. 09-138, at 10-12. The Department stated that any proposed long-term contract for renewable energy between National Grid and Cape Wind is subject to the review and approval of the Department before it becomes effective. D.P.U. 09-138, at 12, citing St. 2008, c. 169, § 83; 220 C.M.R. § 17.03(2); see also G.L. c. 164, § 94A.

On April 16, 2010, TransCanada Power Marketing LTD ("TransCanada") brought a civil action in United States District Court for the District of Massachusetts (Central Division) against various state officials, including the commissioners of the Department,¹ arguing, among other things, that Section 83, the long-term contract regulations at 220 C.M.R. §§ 17.00 et seq., and the RFP issued on January 15, 2010, discriminate against out-of-state generators in violation of the Commerce Clause of the United States Constitution. On June 1, 2010, TransCanada filed a motion for a preliminary injunction in the court proceeding seeking to enjoin the defendants from (1) enforcing Section 83 and regulations 220 C.M.R. §§ 17.00 et

¹ The defendants named in the TransCanada lawsuit are: (1) Ian A. Bowles, Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs; (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.

seq. to the extent they provide that long-term contracts for renewable energy must be entered with generators located in Massachusetts, and (2) proceeding with or approving any contract solicited under the RFP, which was issued on January 15, 2010.

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 between National Grid and Cape Wind. The Department docketed the filing as Massachusetts Electric Company and Nantucket Electric Company, D.P.U. 10-54. On June 4, 2010, in that docket, National Grid filed a Motion to Suspend the Application of the Jurisdictional Boundaries Clause of Section 83 of the Green Communities Act and Associated Regulations.

III. ANALYSIS

The Department has issued orders and regulations intended to carry out the public purposes of Section 83. The TransCanada lawsuit challenges the constitutionality of Section 83 and the Department's related regulations at 220 C.M.R. §§ 17.00 et seq. on the basis that the application of the statute and the regulations discriminate against out-of-state renewable energy generators.

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.

As a result of TransCanada's challenge to provisions of Section 83, the Department hereby exercises its authority to take necessary action to achieve the public purposes of the

statute and the Department's regulations at 220 C.M.R. §§ 17.00 et seq. Specifically, the Department suspends the applicability of the requirement in the first paragraph of Section 83 that renewable energy generation sources be located "within the jurisdictional boundaries of the [C]ommonwealth, including state waters or adjacent federal waters." Accordingly, the Department adopts and issues emergency regulations amending the current 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 Massachusetts, its waters or adjacent federal waters. Through the suspension and amendment to the regulations, the Department has removed the geographic limitation for renewable energy generation contained in 220 C.M.R. § 17.01(1). In addition, the Department suspends the applicability of the requirement in the fourth paragraph of Section 83 that, where feasible, additional employment be created "in the [C]ommonwealth." Accordingly, in issuing the emergency regulations, the Department has removed the words "in the Commonwealth of Massachusetts" contained in 220 C.M.R. § 17.05(1)(c)(4).

These emergency regulations are needed to provide certainty concerning the ability of electric distribution companies to enter into long-term contracts with renewable energy developers to facilitate the financing of renewable energy generation sources. To ensure that long-term contracting pursuant to Section 83 proceeds expeditiously in accordance with the legislative purpose of Section 83, immediate changes to 220 C.M.R. §§ 17.00 et seq. are required. The Department finds, therefore, that the emergency regulations are necessary for the public health, safety or general welfare of the citizens of the Commonwealth and that delay in implementation of the regulations would be contrary to the public interest.

In issuing this Order and amending these regulations, the Department recognizes that there are matters pending pursuant to the requirements of Section 83 and 220 C.M.R. §§ 17.00 et seq. With respect to the RFP process approved in D.P.U. 09-77, we direct the electric distribution companies in consultation with DOER to make a filing with the Department within seven days of the date of this Order specifying how they intend to comply with this Order and the accompanying emergency regulations. 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 for energy and/or renewable energy certificates to be delivered to Massachusetts electric distribution companies. The Department recognizes that the suspension of the geographic limitation is likely to increase the number of proposals for long-term contracts. 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.” St. 2008, c. 169, § 83 (emphasis added).

With respect to the long-term contracts developed through individual negotiations with Cape Wind and filed by National Grid in D.P.U. 10-54, National Grid will be required to demonstrate in D.P.U. 10-54 whether and how it complies or will comply with this Order and the accompanying emergency regulations. With respect to long-term contracts to be filed with the Department under Section 83 in the future, petitioners shall demonstrate compliance with these emergency regulations.

IV. ADOPTION OF THE REGULATIONS

By this Order, the Department amends and adopts as emergency regulations 220 C.M.R. §§ 17.00 et seq., Long-Term Contracts For Renewable Energy, consistent with the provisions of St. 2008, c. 169, § 83, an Act Relative to Green Communities. These regulations become effective today, upon filing with the Secretary of the Commonwealth, and will remain in effect for a period not to exceed three months.² See G.L. c. 30A, § 2.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the regulations, entitled “Long-Term Contracts For Renewable Energy,” attached hereto and designated at 220 C.M.R. §§ 17.00 et seq., are reasonably necessary for the public health, safety or general welfare within the meaning of G.L. c. 30A, § 2; and it is

FURTHER ORDERED: That the regulations attached hereto are hereby ADOPTED; and it is

FURTHER ORDERED: That the Secretary shall serve a copy of this Order on all jurisdictional electric distribution companies, on the Department of Energy Resources and on all parties to dockets D.P.U. 08-88, D.P.U. 09-77, D.P.U. 09-138, and D.P.U. 10-54; and it is

² The Department is issuing a procedural notice concurrently with this Order, which provides for a public hearing and comment on the emergency regulations.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 17.00: LONG-TERM CONTRACTS FOR RENEWABLE ENERGY

Section

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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.

17.08: Long-term Contracts and RPS Requirements

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- (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.