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December 10, 2010

By E-Mail and By Hand

Mark D. Marini, Secretary
Department of Public Utilities
One South Station, 2nd Floor
Boston, MA 02110

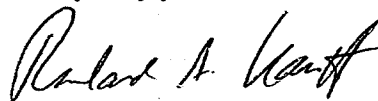
Re: Petition of Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, For Approval by the Department of Public Utilities of Two Long-term Contracts to Purchase Wind Power and Renewable Energy Certificates, Pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 1700 et. seq., D.P.U. 10-54—Petition for Appeal by New England Power Generators Association, Inc.

Dear Secretary Marini:

Pursuant to G.L. c. 25 § 5, New England Power Generators, Association, Inc. ("NEPGA") hereby submits this Notice of Appeal of the Order, dated November 22, 2010, issued by the Department of Public Utilities ("D.P.U") in the above-referenced docket, to the Supreme Judicial Court for Suffolk County. A Certificate of Appeal and a Certificate of Service are also enclosed.

If you have any questions, please contact me.

Very truly yours,



Richard A. Kanoff

Enc.

cc: Laura Bickel, Hearing Officer
Service List

Murtha Cullina LLP | Attorneys at Law

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
No.

NEW ENGLAND POWER GENERATORS)
ASSOCIATION, INC.)
Plaintiff-Appellant,)
v.)
DEPARTMENT OF PUBLIC UTILITIES)
Defendant-Appellee.)

PETITION FOR APPEAL

Introduction

1. The appeal by the New England Power Generators Association, Inc. (“NEPGA”) disputes an agency decision approving a power purchase agreement (referred to as “PPA-1”) between a Massachusetts electric distribution company, Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid (together “National Grid” or “Company”), and Cape Wind, LLC (“Cape Wind”). On November 22, 2010, the Massachusetts Department of Public Utilities (“Department”) issued an Order in docket D.P.U. 10-54 (“Order”) which approved PPA-1 and authorized National Grid’s purchase from the Cape Wind off-shore wind facility of 234 megawatts (“MW”) of energy, capacity and renewable energy credits (“RECs”) over a term of fifteen (15) years, with an

option to extend the term for ten (10) years. The contract price to be paid by National Grid's ratepayers to fund PPA-1 over the 15 years of the long-term contract is expected to exceed 1.5 billion dollars.

2. NEPGA participated as a full party in the D.P.U. 10-54 proceeding before the Department and is aggrieved by the Department's Order. NEPGA now appeals and respectfully requests that the Order be set aside because it is based upon errors of law and regulation, unsupported by substantial evidence of record, unwarranted by facts found on the record as submitted, arbitrary, capricious, an abuse of discretion and otherwise unlawful.
3. This is a case of first impression involving the interpretation of the recently enacted Section 83 of the Green Communities Act, St. 2008, c. 169 ("Section 83"). Under Section 83, and related statutes governing long term electric energy procurements, *e.g.*, G.L. c. 164, § 94A and G.L. c. 164, §1B(d), an electric distribution company soliciting and contracting for energy supply for a period of greater than one year must undertake a competitive procurement. Although the Department has long recognized the need for electric distribution companies to undertake a competitive procurement process for the purchase of long term contracts as part of their efforts to procure electricity for consumers, the Order held that a competitive solicitation process for PPA-1 was not required. For the reasons noted below, the Department's ruling should be reversed and remanded with instructions for National Grid to procure renewable power supplies in a manner that complies with applicable state law.

Jurisdiction

4. The Supreme Judicial Court for Suffolk County has jurisdiction over the subject matter of this action, and authority to order the relief requested, pursuant to G.L. c. 25, § 5.

Parties

5. NEPGA is a private, non-profit entity that advocates for the business interests of non-utility electric power generators in New England. NEPGA's member companies represent approximately 27,000 MW of electrical generating capacity throughout the New England region, with approximately 12,000 MW in Massachusetts.
6. The Department is an agency of the Commonwealth, established pursuant to G.L. c. 25, § 1, having its offices at One South Station, Boston, Massachusetts 02110.

Procedural Background

7. On September 14, 2009, Fitchburg Gas and Electric Light Company, d/b/a Unitil ("Unitil"), National Grid, NSTAR Electric Company ("NSTAR"), Western Massachusetts Electric Company ("WMECo") and the Department of Energy Resources ("DOER") jointly filed a petition with the Department under Section 83, docketed as D.P.U. 09-77, for approval of a proposed timeline and method of soliciting long-term contracts for renewable energy through a state-wide request for proposal ("RFP" or "state-wide RFP") process. The Department approved the

petition in D.P.U. 09-77 on December 29th, 2010 and adopted specific rules for competitive solicitations and bidding. In addition, the Department held that any proposed contracts would be subject to further Department review including a determination regarding, *inter alia*, contract development and negotiation and whether the contracts are consistent with the public interest and result in just and reasonable rates. *Joint Petition by Fitchburg Gas, et al.*, D.P.U. 09-77 at 23.

8. On December 3, 2009, National Grid filed a petition with the Department, docketed as D.P.U. 09-138, seeking approval of a Memorandum of Understanding (“MOU”) executed on December 1, 2009 with DOER and Cape Wind. The MOU set forth the terms and conditions for a confidential process between National Grid and Cape Wind to solicit and execute a long-term contract for energy, capacity and RECs from Cape Wind. On December 29th, 2010 the Department approved the petition and the MOU. In its Order, the Department stated that any such contract for renewable energy ultimately signed following negotiations between National Grid and Cape Wind is subject to review and approval by the Department before it will be deemed effective. D.P.U. 09-138 Order at 12. The Order specifically states that National Grid has the burden to demonstrate that: (i) all applicable laws, regulations, and precedents have been met; (ii) the contracts are in the public interest; and (iii) the contracts result in just and reasonable rates. *Id.* Any adjudication would also include a review of relevant substantive issues with respect to the evaluation of proposed projects, including contract development and negotiation of specific terms and conditions contained in the resulting contract. *Id.*

9. On May 10, 2010, National Grid filed a Petition with the Department, docketed as D.P.U. 10-54, for review and approval of two long term contracts to purchase wind power and RECs from Cape Wind pursuant to Section 83 and 220 C.M.R. § 17.00 *et seq.* On June 4, 2010, and as set forth in the Notice of Filing, National Grid filed direct testimony in support of its request for regulatory approval of the PPAs under Section 83. The testimony, supported by the record in the case, indicated that National Grid engaged in individual negotiations with Cape Wind and did not undertake any type of competitive process in its transaction with Cape Wind.

10. On June 9, 2010, the Department issued an order in Docket D.P.U. 10-58 adopting emergency regulations (“Emergency Regulations”) effective immediately, suspending the applicability of the in-state language of Section 83. The Department removed the geographic prohibition on electric distribution companies considering out-of-state resources. In addition, the D.P.U. required that all distribution companies “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.” D.P.U. 10-58 at 6.¹ The Department also stated that National Grid, with respect to the Cape Wind contracts, must demonstrate compliance with the emergency long-term contract regulations. *Id.*

¹

Section 83 requires electric distribution companies to solicit proposals for projects “within the jurisdictional boundaries of the [C]ommonwealth.” The Department issued the order in D.P.U. 10-58 as a result of the April 16, 2010 TransCanada Power Marketing Limited (“TransCanada”) challenge to the constitutionality of Section 83 on the basis that the application of the statute and regulations discriminates against out-of-state renewable energy generators. *Id.* at 3.

11. On August 13, 2010, the Department issued an order dismissing three separate PPAs filed by NSTAR under Section 83 for the purchase of wind power and associated RECs. *NSTAR Electric Company, Order of Dismissal Without Prejudice, DPU 10-71,10-72,10-73 (2010)*. The D.P.U. dismissed these contracts on the grounds that they did not comply with the Emergency Regulations, which, as noted, require all electric distribution companies to consider out-of-state resources when soliciting contracts for renewable energy under Section 83.
12. In the instant Order, the Department determined that the individual negotiation process used by National Grid to solicit and negotiate PPA-1 satisfied the solicitation requirements of Section 83 without the need for multiple solicitations as part of a RFP process or as part of individual negotiations. D.P.U. 10-54 at 40-43. The Department failed to correctly interpret the solicitation provisions of Section 83 to require a competitive procurement process. Section 83 requires electric distribution companies to solicit more than one proposal for the purpose of entering into a cost effective long-term contract and does not allow for the individual solicitation of one proposal as was the case here. In reaching its conclusion that “National Grid’s individual negotiation with Cape Wind “satisfies the solicitation process of Section 83,” the Department misinterpreted the plain meaning of Section 83. *Id.* at 41.
13. In its Order, the Department also misinterpreted G.L. c. 164, § 1B(d), which requires a competitive procurement of long-term contracts, whose energy will be used to supply power to so-called “basic” or “default” service customers that have not elected to be served by the competitive market. The Order erred in failing to

apply Section 1B(d) to PPA-1. It incorrectly asserts an “irreparable conflict” with Section 83 and erroneously concludes that the “competitive solicitation requirement of Section 1B(d) does not apply to long-term contracts entered into pursuant to Section 83.” *Id.* at 46. The Department also misconstrues the applicable legal precedents that require statutes to be read so as to give “reasonable effect to both” and the nature of the purported “inconsistency” between Section 83 and G.L. c. 164, § 1B(d).

14. In its Order, the Department held that G.L. c. 164, § 94A, and longstanding precedents that require a competitive solicitation process in the procurement of long term contracts, also are not applicable to the Department’s review of long-term contracts pursuant to Section 83. *Id.* at 46-47. In past decisions, the Department has consistently interpreted G.L. c. 164, § 94A to require an “open and competitive process” for long term energy supply contracts so as to result in the best possible outcome for customers. *NSTAR Electric Company, D.P.U. 07-64-A, (2008)* at 61-62. In reaching its conclusion in the instant case, the Department ignored its prior rulings and misapplied applicable precedents.
15. The Department determined National Grid complied with its order in D.P.U. 10-58 and the Emergency Regulations adopted therein. *Id.* at 285, 307-310. In reaching this conclusion, the Department failed to consider record evidence and ignored applicable precedents that required that out-of-state resources be considered. *Petition of NSTAR, D.P.U. 10/71/10-72/10-73 (2010)*.
16. In its Order, the Department defined price suppression as a “reduction in wholesale energy market clearing prices that results from the addition of low-cost

generation resources to those markets.” *Id.* at 120. The Department included price suppression as a benefit in its determination of the cost effectiveness of the project. *Id.* at 125, 209. The Department calculated the benefit associated with price suppression to range between \$87 million and \$124 million. *Id.* at 131. The Department’s determination of cost effectiveness, including its consideration that price suppression should be deemed a benefit, be included in any calculation of cost effectiveness and be valued between \$87-\$124 million, is not supported by substantial evidence.

Legal Claims

17. That the Order, as to its finding that Section 83 does not require a competitive process, should be set aside because it is in violation of G.L. c 30A, §14 (7) in that it is based upon errors of law, lacks foundation in substantial evidence, is arbitrary and capricious, is an abuse of discretion or otherwise not in accordance with law.
18. That the Order, as to its finding that G.L. c. 164, § 1B(d) is inapplicable and does not require a competitive process, even though the PPA-1 supply will be used to serve basic service customers, should be set aside because it is in violation of G.L. c 30A, § 14 (7) in that it is based upon errors of law, lacks foundation in substantial evidence, is arbitrary and capricious, is an abuse of discretion or otherwise not in accordance with law.
19. That the Order, as to its finding that G.L. c. 164, § 94A is inapplicable to the PPA-1 long-term contract and does not require a competitive process, should be set aside because it is in violation of G.L. c 30A, § 14 (7) in that it is based upon

errors of law, lacks foundation in substantial evidence, is arbitrary and capricious, is an abuse of discretion or otherwise not in accordance with law.

20. That the Order, as to its finding National Grid complied with the requirements in D.P.U 10-58 and the Emergency Regulations adopted therein, should be set aside because it is in violation of G.L. c 30A, § 14 (7) in that it is based upon errors of law, lacks foundation in substantial evidence, is arbitrary and capricious, is an abuse of discretion or otherwise not in accordance with law.
21. That the Order, as to its finding that price suppression provided a benefit and was an appropriate element of cost effectiveness, should be set aside because it is in violation of G.L. c. 30A, § 14 (7) in that it is based upon errors of law, lacks foundation in substantial evidence, is arbitrary and capricious, is an abuse of discretion or otherwise not in accordance with law.

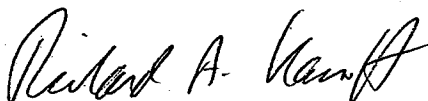
Prayer for Relief

WHEREFORE, NEPGA requests that this Court:

1. Set aside and reverse the Department's rulings approving PPA-1;
2. Remand this case to the Department for the purpose of entering an order consistent with this opinion; and
3. Grant such other relief as the Court deems necessary and proper.

Respectfully submitted,

NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC.



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Date: December 10, 2010

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
No.

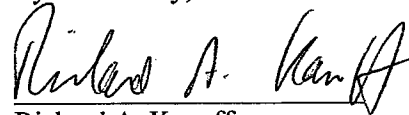
_____)
NEW ENGLAND POWER GENERATORS)
ASSOCIATION, INC.)
)
Plaintiff-Appellant,)
)
)
v.)
)
DEPARTMENT OF PUBLIC UTILITIES)
)
Defendant-Appellee.)
_____)

CERTIFICATE OF APPEAL

Pursuant to G.L. c. 25, § 5, New England Power Generators Association, Inc. certifies that there is such probable ground for the appeal of the November 22, 2010 Department of Public Utilities Order in Docket D.P.U. 10-54 to make it a subject fit for judicial inquiry and that this Petition for Appeal is not intended for delay.

NEW ENGLAND POWER
GENERATORS ASSOCIATION, INC.

By its attorney,



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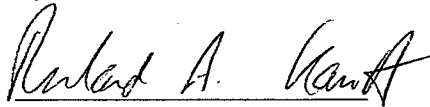
Dated: December 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this day I have served a copy of the New England Power Generators Association, Inc's Petition for Appeal and Certificate of Appeal by hand to the Secretary of the Department of Public Utilities, and upon each person designated on the official service list compiled by the Massachusetts Department of Public Utilities in D.P.U. 10-54.

NEW ENGLAND POWER
GENERATORS ASSOCIATION, INC.

By its attorney,



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Date: December 10, 2010