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By Electronic Filing

Mark D. Marini, Secretary
Department of Public Utilities
One South Station, 5th Floor
Boston, MA 02110

Re: Joint Petition for Approval of Long-Term Contracts for Procurement of Clean Energy Generation pursuant to Section 83D (D.P.U. 18-64, 18-65, 18-66)

Dear Secretary Marini:

Please find enclosed the Initial Brief of the New England Power Generators Association, Inc. (“NEPGA”) for filing in the above-referenced proceedings.

Thank you for your attention to this matter. Please contact me if you have any questions.

Sincerely yours,

HOLLAND & KNIGHT LLP



Mark C. Kalpin

Enclosure

cc: Alan Topalian, Hearing Officer
Service Lists: D.P.U. 18-64, 18-65, 18-66

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I. BACKGROUND

A. Section 83D and the RFP

The Commonwealth's Energy Diversity Act of 2016 amended the Green Communities Act, St. 2008, c. 169, to create a separate procurement mandate for large-scale hydropower and/or renewable energy, titled Section 83D ("Section 83D"). *See* St. 2016, c. 188, § 12. On February 2, 2017, Fitchburg Gas and Electric Light Company, d/b/a Unitil ("Unitil"), Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid ("National Grid"), and NSTAR Electric Company and Western Massachusetts Electric Company, each d/b/a Eversource Energy ("Eversource Energy") (collectively, the "Distribution Companies") jointly filed a request with the Department pursuant to Section 83D and the Department's regulations, 220 CMR § 24.00, *et seq.* (the "Department's Regulations"). In that joint filing, the Distribution Companies sought approval of a proposed timetable and method for the solicitation and execution of long-term contracts for renewable energy through a request for proposals ("RFP") process. *See* D.P.U. 17-32. The Department issued an order in that docket, dated March 27, 2017, that approved that request subject to a number of modifications and directives (the "Order"). *Id.*

In its Order, the Department approved the solicitation by the Distribution Companies under the RFP process of bids for long-term contracts in four separate categories, the following two of which are relevant here:

1. Clean Energy Generation from Incremental Hydroelectric Generation; and
2. Clean Energy Generation from incremental hydropower generation and/or new Class I RPS eligible resources with Class I environmental attributes and/or RECs via long-term contract with a transmission project under a Federal Energy Regulatory Commission ("FERC") tariff.

Id. at 7. Of interest in these Proceedings, the RFP, as approved by the Order, defined the term “Incremental Hydroelectric Generation” as:

Firm Service Hydroelectric Generation that represents a net increase in MWh per year of hydroelectric generation from the bidder and/or affiliate as compared to the 3 year historical average and/or otherwise expected delivery of hydroelectric generation from the bidder and/or affiliate within or into the New England Control Area.

Id. at 30.²

B. The Section 83D Petitions

On July 23, 2018, the Distribution Companies each filed a petition (collectively, the “Petitions”) with the Department seeking approval of a 20-year long-term PPA pursuant to Section 83D. Those PPAs were selected pursuant to the RFP process approved by the Department in its Order, and both the Petitions and PPAs are the subject of these Proceedings.

Under the PPA between each Distribution Company and H.Q. Energy Services (U.S.) Inc. (“HQ”), the Distribution Company proposed to acquire its pro rata share of an annual aggregate quantity of 9,554,940 megawatt-hours (“MWh”) of electric power and associated environmental attributes from existing hydroelectric generation in Canada to be delivered into New England, during the next 20 years, over new transmission infrastructure. If approved, the proposed new transmission infrastructure, which is referred to as the NECEC Transmission Line (“NECEC” or

² The Department’s regulations contain the following definitions that are relevant to these Proceedings:

Clean Energy Generation means either: (a) firm service hydroelectric generation from hydroelectric generation alone; (b) new Class I RPS eligible resources that are firmed up with firm service hydroelectric generation; or (c) new Class I renewable portfolio standard eligible resources.

Firm Service Hydroelectric Generation means hydroelectric generation provided without interruption for one or more discrete periods designated in a long-term contract, including but not limited to multiple hydroelectric run-of-the-river generation units managed in a portfolio that creates firm service through the diversity of multiple units.

the “Project”), would deliver that electric power in accordance with a transmission service agreement by and between Central Maine Power Company and each Distribution Company.

C. NEPGA

NEPGA is a private, not-for-profit trade association representing competitive (non-utility) electric power generators in New England. Its member companies are responsible for generating and supplying electric power for sale within the New England wholesale power system, and play a significant role as active participants in the ISO-NE competitive wholesale electric markets.³

NEPGA’s member companies represent approximately 26,000 megawatts of electric generation, or roughly 90% of the installed capacity in New England. In Massachusetts, NEPGA represents nearly 85% (or roughly 9,740 MW) of generation capacity located in 25 cities and towns, across a diverse portfolio of fuels and technologies. Its member companies employ over 1,000 workers in the Commonwealth and contribute tens of millions of dollars in annual state taxes. NEPGA’s mission is to support competitive wholesale electricity markets in New England. NEPGA believes that sustainable, competitive markets guided by stable public policies are the best means to provide long-term reliable and affordable supplies of electricity for consumers, and that a sensible, market-based approach furthers economic development, jobs and a balanced environmental policy for the region.⁴

³ In 1997, the Commonwealth enacted An Act Relative to Restructuring the Electric Utility in the Commonwealth, St. 1997, c. 164 (the “Restructuring Act”). Massachusetts was one of the first states in the nation to restructure its electric industry, which was done (in part) in an effort to address the high cost of electricity in the region.

⁴ Since the passage of the Restructuring Act, Massachusetts has received tremendous benefits from participating in the ISO-NE competitive wholesale electric market. Access to the most efficient generating resources in the region has been maximized, and system reliability has increased. This increased competition has reduced wholesale electricity supply prices, and the price of electricity has gone down by nearly twenty percent (20%). At the same time, massive reductions in carbon dioxide emissions – amounting to approximately 60% since 1990 – have been realized. And all of this has been accomplished without any long-term contractual or financial risk to ratepayers.

D. NEPGA’s Initial Comments on the Petitions

On April 15, 2018, NEPGA filed its Initial Comments in these Proceedings. As an initial matter, NEPGA acknowledged in those comments that the Commonwealth has the authority under Section 83D to authorize the Distribution Companies to enter into the type of PPAs and TSAs that are the subject of these Proceedings, but only if done in accordance with the requirements of Section 83D. On this point, NEPGA stated that the procurement of electric power envisioned by the PPAs is not new and incremental, nor is it required to be delivered on a reliable basis during the critical winter months. As a result, NEPGA cautioned that the approval by the Department of these “out-of-market” PPAs was not in compliance with the requirements of Section 83D, the Department’s Regulations, the Order, or the RFP.

Given these concerns, NEPGA stressed that it was essential that the Department exercise both caution and due diligence in its review of the proposed PPAs – especially as the out-of-market procurements envisioned by the PPAs had the potential to directly and negatively affect the operation and continued viability of the ISO-NE competitive wholesale market (a result which could have a significant negative effective on Massachusetts ratepayers and the security of electricity supplies during the critical winter months). To assist and help guide the Department in its review, NEPGA provided the Department with a detailed list of questions and associated areas of concern that needed to be evaluated in these Proceedings.⁵

NEPGA requested that it be allowed by the Department to participate in the Proceedings as a “full-participant.” The Department denied that request, and instead allowed NEPGA to participate in the Proceedings only as a “limited participant.” As a result, NEPGA has had no

⁵ NEPGA incorporates by reference into this Initial Brief each of the questions and areas of concern that were enumerated in its Initial Comments.

ability until now – other than through the filing of its Initial Comments – to participate in or otherwise influence the scope of the Department’s investigation of the Petitions, or ensure that the issues and areas of concern that were identified in NEPGA’s Initial Comments were fully evaluated by the Department. Based on its review of the evidentiary record, however, NEPGA believes that its overarching concern – namely, that the PPAs and Project do not comply with the requirements of Section 83D, the Department’s Regulations, the Order or the RFP – has been confirmed.

II. STANDARD OF REVIEW

Section 83D, the Department’s Regulations and the Order require that any Project (and resultant PPA) selected under the RFP must consist of Clean Energy Generation from Incremental Hydroelectric Generation, and also must:

1. provide enhanced electricity reliability within Massachusetts;
2. contribute to reducing winter electricity price spikes;
3. be cost effective to Massachusetts electric ratepayers over the term of the PPA, taking into consideration potential economic and environmental benefits to the ratepayers;
4. avoid line loss and mitigate transmission costs to the extent possible and ensure that transmission cost overruns, if any, are not borne by ratepayers;
5. allow PPAs for Clean Energy Generation resources to be paired with energy storage systems;
6. guarantee energy delivery in winter months;
7. adequately demonstrate project viability in a commercially reasonable timeframe; and
8. create and foster employment and economic development in Massachusetts, where feasible.

III. THE PPAs FAIL TO COMPLY WITH THE APPLICABLE REQUIREMENTS

A. The PPAs do not Procure Incremental Hydroelectric Generation

In its Initial Comments, NEPGA expressed grave concern that the PPAs would not result in the procurement of Incremental Hydroelectric Generation, as required by the Order and the RFP. In this regard, NEPGA noted that:

1. All of the HQ resources from which Qualified Clean Energy will be procured under the PPA currently exist and are operational.
2. According to a presentation made by HQ in Boston on June 15, 2016,⁶ HQ imported 15.2 TWh of electricity generated from its hydroelectric resources into the ISO-NE market on an annual basis.
3. The PPA defines Baseline Hydroelectric Generation (the quantity above which constitutes Incremental Hydroelectric Generation) as either 3 TWh/year (in the case of the each of the Eversource and Unitil PPAs) or 9.45 TWh/year (in the case of the National Grid PPA).⁷
4. Assuming that HQ has continued to import the full 15.2 TWh into New England since 2016, will the Department's approval of the proposed Baseline Hydroelectric Generation quantity in the PPAs ensure that new Incremental Hydroelectric Generation actually is procured in response to the RFP and Section 83D?⁸

Based on the evidence introduced in these Proceedings, it is uncontroverted that NEPGA's concern has been confirmed, and that the PPAs will not result in the guaranteed procurement of Incremental Hydroelectric Generation.⁹ On this point, the witness for the Massachusetts Attorney General's Office ("AGO") provided the best analytical framework for evaluating this issue:

⁶ See <http://www.hydroquebec.com/data/international/pdf/2016-06-15-martel-presentation-strategic-plan.pdf>.

⁷ See *Joint Testimony of Waltman/Brennan/Furino*, at 15.

⁸ The *Independent Evaluator Report*, at 52 - 53, indicates that this specific issue was raised by National Grid during the evaluation process, and that its concerns were not addressed. Notwithstanding that fact, the Joint Testimony filed by the Distribution Company in this proceeding states that the "PPA provides for a delivery of an aggregate of 9,554,940 MWh annually of incremental hydroelectric generation" *Joint Testimony of Waltman/Brennan/Furino*, at 36. This is an important point, as the Independent Evaluator's Report indicates that one proposal from an existing resource located within ISO-NE was disqualified on the grounds that it would not produce incremental generation. See *Independent Evaluator Report*, at 22.

⁹ This requirement was clearly enunciated by the Department in its Order, when it stated that "[b]ecause Section 83D was designed to 'facilitate the financing of Clean Energy Generation resources,'" any PPA must ensure there will be a "net increase from incremental generating capacity." *Order*, at 33.

The proposed contracts do not require that HQ provide incremental hydroelectric generation as specified in the RFP. ... That is, to be considered “incremental,” the RFP requires the bidder to provide energy in addition to the bidder’s 3-year historical average of deliveries into New England (or more than the bidder would have otherwise delivered). The 2014-2016, 3-year imports from HQ into New England is 14.8 TWh. Thus, for the 9.55 TWh of Qualified Clean Energy from the contracts to be fully incremental energy delivery, total deliveries would need to be 24.35 TWh annually.¹⁰

Using this analytical framework, which is consistent with the analysis provided by NEPGA in its Initial Comments and other witnesses in these Proceedings,¹¹ the AGO’s witness then proceeded to evaluate whether the PPAs would result in the procurement of Incremental Hydroelectric Generation:

The three EDCs’ proposed contracts establish different requirements for the Minimum Baseline quantity. The National Grid contract establishes a Minimum Baseline of 9.45 TWh, which is substantially below the 14.8 TWh of historical deliveries. This implies that HQ must deliver a total of 19.0 TWh annually to New England (9.45 TWh of Minimum Baseline plus 9.55 TWh from the contract). Even though the contracts nominally represent incremental hydro of 9.55 TWh annually, HQ will be required to deliver to New England only 4.2 TWh more than it has delivered historically. In other words, less than half the contract energy is required to be incremental; for the remainder, HQ can simply substitute contract energy at the contract price for energy that it has historically sold into New England. In fact, the Minimum Baseline for National Grid may be reduced further (though not increased) by several potential adjustments.

The incrementality requirements of the Eversource and Unitil contracts are even less stringent. They are based on a Minimum Baseline quantity of 3.0 TWh so that the total clean energy deliveries into New England, including deliveries under the new contract, can be below historical average deliveries. Thus, HQ could satisfy its long-term contract obligations by delivering only 12.55 TWh annually (9.55 contract + 3.0 Baseline), which would be 15% less clean energy than it has delivered historically.¹²

¹⁰ Exh. AG-DM, at 5-6 (emphasis supplied, internal citation omitted).

¹¹ See Exh. NEER-RSW-S-1, at 6 -7 (“[O]ur contention that NECEC will not result in 9.55 terawatt-hours (“TWh”) of incremental renewable energy to New England is uncontested. In the *Joint Rebuttal Testimony of Waltman et al.* 26–27, the EDCs offer an alternative calculation that indicates NECEC would result in an incremental 5.6 TWh per annum of flow relative to historical deliveries; we estimated that it would be 3.9 TWh per year. Both of these figures are significantly below the contracted 9.55 TWh per year. Thus, the Commonwealth will not receive the full benefit of NECEC’s capacity or the energy purchased under the PPAs”).

¹² Exh. AG-DM, at 7-8.

Based on this conclusion, the AGO’s witness unequivocally stated that the PPAs “do not ensure that the Qualified Clean Energy acquired via the contracts will comprise fully incremental energy deliveries into New England, as the RFP specified,” and that the PPAs “would allow most (and potentially all) of the contract energy delivered to substitute for historical deliveries.”¹³ Given this noncompliance with the fundamental requirements of Section 83D, the Department’s Regulations, the Order and the RFP, the Department must reject (and most certainly cannot approve) the PPAs.

B. The PPAs do not Guarantee Energy Delivery in Winter Months or Contribute to the Reduction of Winter Price Spikes

NEPGA also expressed concern in its Initial Comments that the PPAs would not result in the guaranteed delivery of electricity during the critical winter months in Massachusetts. On this point, NEPGA noted that:

The PPAs allow HQ to cure a Delivery Shortfall by delivering the Shortfall Cure Amount of Qualified Shortfall Energy to the Distribution Companies during a corresponding period of time in the Shortfall Cure Period – that is, either in the same Contract Year or in the subsequent Contract Year.

Based on this concern, NEPGA posed the following simple question:

How does the right to cure a delivery default in the subsequent Contract Year (that is, a year later than delivery was required and the energy was needed for reliability purposes) ensure that the energy is delivered on a firm and reliable basis?

The evidence in the Proceedings, yet again, confirms that NEPGA’s concern was well-founded. As several witnesses testified during the hearing, the “unequivocal and undisputed fact is that the PPAs allow, and, in fact, specifically contemplate that [HQ] may choose to not deliver

¹³ *Id.*, at 3. In its Rebuttal Testimony, the AGO’s witness addressed the rebuttal testimony filed by the Distribution Companies, and clarified that “Whether HQ is able to deliver incremental energy is important, of course, but is not the only relevant question. Equally important is whether the proposed PPAs require HQ to deliver fully incremental energy. Although the EDCs claim that HQ has made a commitment to deliver incremental energy, the proposed PPAs as currently written do not require incrementality.” Exh. AG-DM-Rebuttal-1, at 17 (emphasis in original, internal citations omitted).

to New England for up to several months out of the year and instead cover its position financially.”¹⁴ Even if HQ does not utilize this right to avoid delivering “firm” electric energy, it nevertheless has the right to cure a delivery default in the corresponding season of either the current or subsequent year, such that it could “choose to cure its shortfall on an unseasonably warm 60 degree day instead of a 5 degree day within the same week and satisfy the contract.”¹⁵

Because the PPAs allow HQ to cure a delivery default by supplying Qualified Shortfall Energy at any time during any winter month in either the current or subsequent contract year, there simply is no basis for the Department to conclude that PPAs would guarantee energy delivery in critical winter months. And because the PPAs allow HQ to not deliver electric energy when it is most need (that is, in the critical winter months), there similarly is no basis for the Department to conclude that the PPAs would reduce winter electricity price spikes. As a result, the Department must reject the PPAs as a result of their failure to comply with these critical statutory and regulatory requirements.

C. The PPAs do not Provide Guaranteed Environmental Benefits (*i.e.*, Reductions in GHG Emissions) in a Manner that is Cost-Effective to Massachusetts Ratepayers

In the hearing, substantial questions were raised as to whether the PPAs – irrespective of their inability to satisfy the RFP’s full incrementality requirement – would nevertheless result in an overall increase in clean energy generation, such that overall emissions of greenhouse gases would be reduced and some level of environmental benefits would accrue to Massachusetts ratepayers. Unfortunately, the answer to these question also appears to be “no.”

¹⁴ *Exh. NEER-RSW-S-1*, at 16.

¹⁵ *Id.* at 18. This concern is not without basis, as during the polar vortex of January 2014, HQ “dramatically reduced” its exports of electric energy to ISO-NE. *Id.*, at 18-19.

As an initial matter, one of the primary purposes of Section 83D is to “facilitate the financing of clean energy generation through cost-effective long-term contracts.”¹⁶ As noted above with respect to the issue of “incrementality,” it is clear that the PPAs “would allow most (and potentially all) of the contract energy delivered to substitute for historical deliveries.”¹⁷ As such, the PPAs essentially require ratepayers to pay “for a service (*i.e.*, Incremental Hydroelectric Generation) that [HQ] did not deliver.”¹⁸ Since the PPAs “allow HQ to provide less clean energy to New England than it has historically,” the PPAs would not result in the financing of clean energy generation as is required by Section 83D.¹⁹

On this point, the testimony in the hearing strongly suggests that neither HQ nor the Distribution Companies will have the ability to definitively determine the identity of the specific HQ facilities that actually produce the electric energy that is purchased under the PPAs, let alone demonstrate that the generation purchased did not result from “resource shuffling” within the HQ system.²⁰ In this regard, under the PPAs, HQ is required only to deliver system power,²¹ and not electricity from specified renewable facilities, to satisfy its obligations.²²

¹⁶ Exh. AG-DM, at 5, 9.

¹⁷ *Id.*, at 3.

¹⁸ *Id.*, at 13 (citing the Department’s Order in D.P.U. 17-32, at 33 (2017)).

¹⁹ *Id.*, at 9.

²⁰ See *Joint Direct Testimony of Russo, Stoddard and Whitley*, at 10 (hereinafter “NEER-JDT”) (“There is no requirement or ability to definitively identify the source of power supplied to New England. While the PPAs define which resources HQUS can use, the EDCs have limited ability to trace the source of any supplied energy. In addition, because of the way in which HQUS operates, supplies to New England over NECEC would likely displace supplies to other regions such as New York or Ontario, which would result in the supply of marginal resources in those markets. If the marginal resources or supplies in other markets are thermal, NECEC would be effectively importing thermal power from other regions.”).

²¹ The HQ system “has energy generated from fossil and biomass sources, and, also, imports of energy from other regions that use fossil and nuclear plants to generate energy.” *Id.* Indeed, HQ’s system generated “305 GWh from thermal power stations in 2017.” Exh. AG-DM, at 14.

²² NEER-JDT, at 9. In this regard, the PPAs each define the energy “commodity” that is being purchased (*i.e.*, “Hydro-Quebec Power Resources”) as “those hydroelectric stations ... that produce electric energy, which consists *predominantly of low-carbon and renewable electric energy ...*” See Exh. NEER-RSW-S-1, at 14 (emphasis in original, internal citations omitted). See also Exh. AG-DM, at 3, n. 4; Exh. JU-3-B, at 4.

In connection with its initial efforts in 2016 to develop a Clean Energy Standard (“CES”), the Massachusetts Department of Environmental Protection (“DEP”) first expressed the concern that “‘resource shuffling’ of Canadian hydro (*i.e.*, the contractual or transactional reassignment of clean energy without increasing the total amount of clean energy overall) could result in the CES delivering no additional clean energy to the Commonwealth,” and that “CES compliance could occur without any change in the amount of clean energy available for use in Massachusetts.”²³ At the same time, because the delivery of “fully incremental” generation is not required under the PPAs, the “lower deliveries would need to be made up with alternative generation, at least some of which would almost certainly be fossil, leading to greater overall Massachusetts GHG emissions.”²⁴

In light of this conclusion, it is clear that the PPAs do not provide guaranteed environmental benefits (in the form of reductions in GHG emissions) in a manner that is cost-effective to Massachusetts ratepayers.²⁵ As such, the Department is obligated to reject the PPAs and deny the Petitions.

²³ Exh. AG-DM, at 13 (quoting, in part, Massachusetts Department of Environmental Protection, *Background Document on Proposed New and Amended Regulations*, at 30 (December 16, 2016)). See also Exh. AG-DM-Rebuttal-1, at 17 (“HQ could, at its discretion, substitute Contract Energy for historical energy deliveries to New England, rather than providing Contract Energy that is incremental on top of the historical average. That is, it could shuffle existing resources from historical Baseline Hydro deliveries to the new contract sales into New England.”) (emphasis in original).

²⁴ Exh. AG-DM-Rebuttal-1, at 10. In this regard, the AGO’s witness stated that “[t]he Eversource/Unitil Minimum Baseline is so low that it would allow HQ to actually decrease clean energy deliveries relative to the historical average, wiping out the project’s GHG offsets entirely.” *Id.*, at 11. See also NEER-JDT, at 9 (“The PPAs have no enforcement provision to ensure that all contract deliveries are from the identified hydroelectric facilities, nor do they require that these facilities be operated in any particular way to ensure a net increase in clean energy on the Hydro Quebec system. To the extent that higher exports to New England require Hydro Quebec to increase generation at its fossil-fired facilities or to import additional power from non-renewable sources, these contracts provide no guarantee that additional clean energy is created nor that carbon emissions are reduced.”)

²⁵ Exh. AG-DM, at 13.

D. The PPAs Compliance with the Remaining Statutory and Regulatory Requirements has not been Demonstrated

Given the non-conformance of the PPAs with the fundamental requirements of Section 83D, the Department's Regulations, the Order and the RFP – namely, the requirements to procure Incremental Hydroelectric Generation on a firm basis, guarantee that energy delivery will occur in critical winter months, and provide guaranteed environmental benefits (in the form of reductions in GHG emissions) in a manner that is cost-effective to Massachusetts ratepayers – an in-depth review of compliance with the remaining statutory and regulatory requirements is not needed and would not alter the obligation of the Department to reject the PPAs. Notwithstanding this conclusion, however, there is ample evidence in the record in these Proceedings that raises serious questions as to the PPAs' and Project's compliance with these additional requirements. More importantly, that evidence fails to demonstrate that the PPAs do, in fact, satisfy those requirements.

For example, the PPAs and Project do not require (let alone envision) that the generation which is procured would be paired with energy storage systems, as required by Section 83D and the Order. In addition, since the Project and all-related construction employment would occur in Maine, it is clear that the PPAs fail to foster levels of employment and economic development in Massachusetts beyond those that would otherwise result under a long-term contract with any type energy generation source (that is, renewable or otherwise). Finally, serious questions (which remain unanswered) have been raised as to whether the PPAs require the Project to become operational within a commercially reasonable timeframe, and (more importantly) whether additional electric transmission facilities will be required to be constructed (at a substantial costs to Massachusetts and other ratepayers) to fully delivery the electric energy procured under the PPAs into regional electric market. NEPGA submits that these deficiencies and unresolved

issues, when coupled with the pronounced non-compliance discussed above, provide sufficient justification for the Department to reject the PPAs and the Petitions.

IV. CONCLUSION

Based on the forgoing factual evidence, which demonstrates that the PPAs fail to comply with many of the fundamental requirements of Section 83D, the Department's Regulations, the Order, and the RFP, NEPGA respectfully requests that the Department reject the PPAs and deny the Petitions that are the subject of these Proceedings.

Respectfully submitted,

NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC.

By its attorney:



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Dated: March 22, 2018

