COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

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. § 17 et seq.	:	**Docket No. 10-54**

INTIAL BRIEF OF NEW ENGLAND POWER GENERATORS ASSOCIATION

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The New England Power Generators Association ("NEPGA")[1] submits its Initial Brief in connection with the May 10, 2010 request, as supplemented by the June 4, 2010 Petition ("Petition"), of Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid ("National Grid" or the "Company") for the approval of two long-term power purchase agreements ("PPAs") executed between National Grid and Cape Wind Associates, LLC ("Cape Wind") for the purchase of wind power and associated renewable energy certificates ("RECs"), pursuant to St. 2008, c. 169, § 83 ("Section 83 of the Green Communities Act" or "Section 83").[2] The first PPA ("PPA-1) is for the purchase of 50% of the output of a 468 megawatt ("MW") off-shore wind farm being developed by Cape Wind, representing

[1] NEPGA is a private, non-profit entity that advocates for the business interests of non-utility electric power generators in New England. NEPGA member companies represent approximately 27,000 megawatts ("MWs") of electric generating capacity throughout the New England region, with approximately 12,000 MWs in Massachusetts. The comments contained in this filing represent the position of NEPGA as an organization, but not necessarily the position of any particular member with respect to any statement, concept, issue or position expressed herein.

[2] Petition of National Grid, June 4, 2010, D.P.U. 10-54 (2010). The PPAs were subsequently amended pursuant to a proposed Settlement Agreement ("Settlement") entered into between National Grid, Cape Wind, the Attorney General of the Commonwealth of Massachusetts ("Attorney General") and the Department of Energy Resources ("DOER"). As set forth in the Settlement, the amended bundled base pricing for PPA-1 is now estimated to be $187 per MWh (reduced from $207 per MWh as originally proposed) , with an estimated cost over $1.5 billion and a net present value above market cost of over $700 million. Exh. NG-MNM-S, at 3-4, 8-9.

approximately 3.5% of National Grid's electric distribution load in Massachusetts. Exh. NG-RAR, at 1. The second PPA ("PPA-2") is intended to be assigned by the Company to one or more other purchasers of the remaining 50% of the Cape Wind project's output.[3] Exh. NG-RAR, at 1-2.

As set forth in detail below, the PPAs are products of an individual stand-alone solicitation process pursuant to which National Grid negotiated with Cape Wind for the proposed off-shore wind facility. In negotiating with Cape Wind, National Grid ignored the established state-wide process that had been approved by the Department and adopted by the other electric distribution companies and failed to undertake any reasonable process for soliciting renewable energy contract proposals. As implemented, National Grid's individual negotiation process violated the competitive solicitation requirements of Section 83 of the Green Communities Act ("GCA") and failed to comply with long-standing precedents adopted by the Department of Public Utilities ("Department" or "DPU") that require an open and transparent process in the solicitation of long-term contracts.[4] Section 83 and Department precedents require that generation resources be competitively solicited in the best interest of ratepayers.

The Department has recognized that a competitive process is an essential component, perhaps the most essential component, to encourage full participation by as many parties as possible in an open and transparent process so ratepayers are protected from unnecessary costs. Massachusetts' recently implemented policies to encourage development of renewable resources are not substitutes

[3] PPA-2 "is premised on the assumption that National Grid will assign its entitlement to the output covered by the agreement to a third party before any deliveries of that output are made. In entering into the second [PPA] it is National Grid's intention simply to create a mechanism for a seamless assignment of a preapproved agreement, in order to facilitate Cape Wind fully subscribing 100% of its project's output." Petition, at 1-2.

[4] As noted herein, the Department's precedents relating to long-term contracts and the solicitation process, applicable in the instant case, include its orders and analysis pursuant to G.L. c. 164, § 94A and G.L. c. 164, § 1(B).

for the Department's statutory responsibility to serve the best interests of ratepayers in the Commonwealth.

The Department should deny the Petition as presented at this time without prejudice and require National Grid and Cape Wind to undertake a fully competitive process as required by Section 83 and Department precedents. Section 83 and the applicable precedents were not meant to provide legal justification for the solicitation and selection of one project with unique attributes in a single solicitation as proposed here. Accordingly, NEPGA respectfully urges the Department to deny National Grid's petition as presented in this case, without prejudice, and allow the Company to resubmit the proposal following a competitive solicitation in compliance with Section 83 and Department precedent.

II. PROCEDURAL HISTORY

On September 14, 2009, Fitchburg Gas and Electric Light Company, d/b/a Unitil, National Grid, NSTAR Electric Company ("NSTAR"), and Western Massachusetts Electric Company ("Distribution Companies") and the Department of Energy Resources ("DOER"), jointly filed a petition with the Department under Section 83 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. See Fitchburg Gas and Electric, et al., D.P.U. 09-77 (2007). The Department approved the Petition on December 29, 2009 (Fitchburg Gas and Electric, et al., Order DPU 09-77 (2009)).

On December 3, 2009, National Grid, Cape Wind and DOER jointly filed a Petition with the Department seeking approval of a Memorandum of Understanding ("MOU") executed on December 1, 2009 that set forth the terms and conditions for a confidential process between the parties to solicit and execute a long-term contract under Section 83 for renewable energy from Cape Wind. On December 29, 2009, the Department approved the petition (Massachusetts

Electric Company and Nantucket Electric Company d/b/a National Grid, Order DPU 09-138 (2009)). In its Order, the Department required National Grid to demonstrate that all applicable laws, regulations, and precedents have been met. D.P.U. 09-138, at 12.[5]

On April 16, 2010, TransCanada Power Marketing Limited ("TransCanada") filed a lawsuit in U.S. District Court for the District of Massachusetts alleging that the language of Section 83 of the GCA requiring renewable energy be procured from sources "within the Commonwealth of Massachusetts, its waters or adjacent federal waters" violated the Commerce Clause of the U.S. Constitution because it discriminated against out-of-state generators wishing to participate in the Section 83 long-term contract solicitation and negotiation process.

On May 10, 2010, National Grid filed a Petition with the Department seeking approval of PPAs with Cape Wind for an off-shore wind generating facility, pursuant to Section 83.

On May 24, 2010, the Department issued a Notice of Filing and Public Hearing ("Notice of Filing"), and set forth a schedule for filing of direct testimony, interventions, and public hearings. On June 4, 2010, pursuant to the Notice of Filing, National Grid filed direct testimony in support of its request for regulatory approval of the PPAs under Section 83.

On June 9, 2010, the Department issued an order adopting emergency regulations ("Emergency Regulations") effective immediately, suspending the applicability of the in-state language of Section 83 of the GCA. The Department removed the geographic prohibition on electric distribution companies considering out-of-state resources under the GCA to provide renewable energy in long term contracts. The DPU required that all distribution companies "re-open the RFP for a reasonable period of time to allow eligible out of state generators to submit

[5] For the reasons set forth herein, National Grid has failed to meet its burden.

proposals for long-term contracts for energy and or renewable energy certificates." See Order Adopting Emergency Regulations, DPU 10-58, at 6 (2010).

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,-72,-73 (2010)). The DPU dismissed these contracts on the grounds that they did not comply with the emergency regulations, which require all electric distribution companies to consider out-of-state resources when soliciting contracts for renewable energy under Section 83.

The Department conducted 13 days of hearings from September 8 through September 24, 2010. This brief is submitted as set forth in the Department's Order of September 24, 2010.

II. STANDARD OF REVIEW

The Department must conclude that National Grid's proposed long-term contracts are consistent with Section 83, Department regulations and Department precedents. Petition of Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid, D.P.U. 09-138, (2009) at 12.[6] Specifically, National Grid has "the burden to demonstrate that all applicable laws, regulations, and precedent have been met" and to show that its solicitation is "consistent with the public interest and result in just and reasonable rates." Id. Section 83 requires that National Grid undertake a reasonable solicitation of proposals and demonstrate that the resulting contracts are reasonable and cost effective. Similarly, the Department's long-standing precedents relating to the solicitation and procurement of long-tem contracts and basic

[6] The Department also required National Grid to demonstrate compliance with the requirements set forth in D.P.U. 10-58. See Order Adopting Emergency Regulations, D.P.U. 10-58, at 6 (2009). The Company's explanation, set forth in Exh. RR-DPU-NG-2, does not provide any substantive basis to distinguish National Grid's consideration of Cape Wind's PPAs with the NSTAR PPAs. As noted in IV. below, NEPGA submits that this case should be dismissed for the same reasons as set forth in Department's Order in the NSTAR case. See Petition of NSTAR, D.P.U. 10-71/10-72/10-73.

service, require a determination of whether National Grid has demonstrated that the subject contracts are reasonable, in the best interests of the petitioner's customers and cost effective. NSTAR Electric Company, D.P.U. 07-64-A, at 60-62 (2007); New England Electric System/Nantucket Electric Company, D.T.E. 95-67, at 21 (1995). As part of its determination, the Department requires that any procurement of renewable resources must be consistent with "reasonable business practices," employ an open and competitive solicitation process and meet the Department's "fundamental interest in open, competitive and transparent procurement process." NSTAR Electric Company, D.P.U. 07-64-A, at 27-28 (2007).

As noted below, National Grid has failed to meet its burden to demonstrate that the individual negotiation process employed in this case was consistent with the requirements of Section 83 and applicable precedents. National Grid did not undertake the reasonable, open and competitive transparent procurement process required by Section 83 and by the Department in its prior decisions.

III. ARGUMENT

A. National Grid Did Not Undertake a Reasonable and Competitive Solicitation

National Grid executed two PPAs with Cape Wind following extensive individual negotiations over a five month period outside of the state-wide RFP process. Exh. MNM at 6-7; Tr. of 9/13/2010 Hearing at 913-915. Although the state-wide RFP process was specifically crafted to meet Section 83 requirements and the timing requirements of various tax and financing incentives, National Grid chose to engage in a separate, individual stand alone process with Cape Wind to negotiate the PPAs submitted for approval in this case. Exh. NG-MNM, at 6; Exh. NG-MNM-R at 8, 11-12; Tr. of 9/13/2010 Hearing at 776. National Grid selected this separate process to procure off-shore wind even though many other available cost effective renewable technologies met the requirements of Section 83 and could reasonably have been considered. Tr.

of 9/13/10 Hearing at 883 (solar, on-shore wind, biomass, and landfill methane gas could "qualify for a contract that the Department would find cost effective").

Notwithstanding this universe of other reasonable alternatives, National Grid created a self serving list of unique attributes associated with off-shore wind to justify its selection of Cape Wind. Exh. NG-SFT at 87-88, 94; 108-117.[7] Indeed, given its selection criteria, no other project was deemed to exist. Tr. of 9/8/10 Hearing at 424. Thus, even though there may have been other appropriate options (and some were in fact submitted in the RFP), National Grid did not consider these other opportunities. Exh. NG-MNM at 8, 32.

Indeed, although National Grid witness Mr. Milhous admitted that there may be other renewable projects that may sell at lower cost, none of theses lower cost projects had the unique attributes of Cape Wind and the ability to help lead Massachusetts and the region to a strong renewable energy future. Exh. NG-MNM, at 10; Exh. NG-MNM-R at 8.[8] It is clear that in light of the attributes, National Grid ignored both the costs and the need to undertake a reasonable and competitive solicitation process. The Company determined, without quantitative analysis, that the benefits of the project were greater than the projected above market costs. Tr. of 9/23/2010 Hearing at 2353-2354.

Given the purported benefit of Cape Wind, National Grid failed to undertake any type of quantitative analysis or project by project evaluation, which would have included a comparative project evaluation of price and non-price factors similar to what was required in the state-wide

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[7] For example, the Company considered it important that the Cape Wind project "advance the offshore wind industry as an integral part of the renewable energy future for Massachusetts and the region" foster development of the off-shore wind industry, be of a certain size that was unique to Cape Wind , with a very specific geographic location,. Exh. NG-MNM at 32); Tr. of 9/8/10 Hearing at 424; Tr. of 9/23/2010 Hearing at 2567-2568. Some of the other alleged attributes, less focused on Cape Wind, could be met by other technologies. For example, solar projects and other renewable generation (on-shore wind for example) could, like Cape Wind, fulfill RPS requirements and advance state and regional renewable generation goals. Tr. of 9/8/10 Hearing at 891-892.

[8] On-shore wind had a lower price but was not deemed "large enough." Tr. of 9/8/10 Hearing at 362-363.

RFP process. Exh. NG-SFT, at 117; Exh. NG-MNM-R at 11; Tr. of 9/13/2010 Hearing at 900-902.; Exh. NEPGA-NG-2-2. Instead, National Grid's individual solicitation process focused entirely on financing the Cape Wind project at virtually any price. Exh. NG-MNM-R at 5.

Significantly as well, in proceeding with individual negotiations, and negotiating the contract, National Grid was undaunted by the challenges associated with Cape Wind. As noted, the fact that Cape Wind's bundled price was higher than forecast for similar power or that there might be other projects available at lower prices were of little consequence. Exh. NG-RAR, at 10. Moreover, the project was selected even though as one of the first large scale off shore wind farms in the nation, it would utilize untested innovative technologies, be subject to first mover risks and have an over market cost in excess of almost $700 million for half the output, with an over market cost of over $1.5 billion for the entire output. Exh. NG-SFT, at 85; Tr. of 9/13/2010 Hearing at 875-881; Exh. NG-MNM-S, at 3-4, 8-9.[9]

On its face, from a factual perspective, the Company did not undertake a reasonable and competitive solicitation.[10] Instead, it chose to solicit a bid from a particular energy generator

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[9] National Grid justifies the higher price by incorrectly characterizing Section 83 as "expressly and implicitly recogniz[ing] that the pricing under long term contracts are bound to be above market." Exh. NG-RAR, at 11. The Act and Department precedent suggest just the opposite: cost effectiveness is defined in many cases to be a lower than market cost or at marginally above market cost. For example, the Department has determined, pursuant to G.L. c. 164 § 94A that "in the public interest, a contract should likely result in net savings for customers." NSTAR, DPU 07-64-A at 58. National Grid also justifies the cost as comparable to other off shore wind projects—such an analysis is inconsistent with principles of diversity of supply and ratepayer impact. Moreover, in this case, higher costs to ratepayers are justified as appropriate given the policy goals of promoting wind power as a renewable resource to meet regional RPS requirements, now and in the future. The Company's (and other intervenors) reliance on RPS renewable energy policy as justification for this project is misplaced. See Massachusetts Electric Company v. Department of Public Utilities, 419 Mass. 239, 240-242 (Mass 1994) (the Department's authority does not extend to mandating consideration of environmental externality values in deciding on new power sources).

[10] The Company did not solicit comparable projects to the Cape Wind project using similar attributes, and it did not engage in any meaningful substantive comparison of the alternatives, even alternatives that were as "well advanced" in terms of the permit process and wind resource studies as Cape Wind. Notably, the Company could have undertaken a solicitation to determine whether there was any project that would in fact meet the comparable set of attributes that were used to select Cape Wind. As Dr. Tierney stated: the Company "could have solicited projects that could demonstrate that they had the [same] scale, timing, location, size, permitting status..."as Cape Wind. Tr. of 9/13/2010 Hearing at 886.

through individual negotiations based upon certain unique attributes associated with only that project. Its selection process was biased at the outset by a decision to select an off shore wind facility in order to promote the region's renewable energy polices. In effect, it selected Cape Wind and then created a process that produced a price that would enable Cape Wind to procure financing. Exh. NG-MNM-R at 5 (the Company was simply negotiating the "lowest price possible that we thought would support the financing of the Cape Wind project").

Moreover, as noted below, in undertaking its individual negotiation with Cape Wind, National Grid failed to comply with the requirements of Section 83 and with G.L. c. 164, § 94A, governing the procurement of long-term contracts. The Company did not undertake to solicit multiple proposals as required by Section 83 and did not comply with the Department's long-standing requirements to employ an open, competitive and transparent procurement process. Petition of NSTAR Electric Company, D.P.U. 07-64-A, at 59-61. Accordingly, National Grid's solicitation process was unreasonable and inconsistent with the open and transparent process required by the Department and its Petition should be dismissed without prejudice as set forth below.

B. The Company's Solicitation Fails to Meet the Requirements of Section 83

The individual attribute based process used by National Grid as set forth above to negotiate the PPAs is contrary to the requirements of Section 83. Section 83 provides that distribution companies are to solicit proposals (more than one) for the purpose of entering into cost-effective long term contracts and does not allow for the individual solicitation of one proposal. The following analysis will make this clear.

Section 83 requires each distribution company to solicit proposals as follows:

> Commencing on July 1, 2009, and continuing for a period of 5 years thereafter, each distribution company...shall be required twice in that five

> year period to solicit proposals from renewable energy developers and provide reasonable proposals have been received, enter into cost-effective long-term contracts to facilitate the financing of renewable generation within the jurisdictional boundaries of the commonwealth, including state waters, or in adjacent federal waters.... The timetable and method for solicitation and execution of such contracts shall be proposed by the distribution company in consultation with the department of energy resources and shall be subject to review and approval of the department of public utilities.... [11]

As set forth in Section 83, National Grid and other distribution companies are required to (i) solicit proposals using a reasonable process from renewable energy developers twice in a five year period and (ii) enter into cost effective long term contacts to facilitate the financing of renewable energy generation, provided reasonable proposals have been received.[12] The process is straightforward and the statute is unambiguous: each distribution company is required to solicit proposals from renewable energy developers and assuming reasonable contracts are received, enter into long-term contracts to facilitate financing of renewable energy projects.[13]

Notably, the statute requires a solicitation of "proposals" by each distribution company. The first paragraph of the statute clearly states that each distribution company solicit proposals—not one proposal but proposals, plural. If the legislature had meant one proposal the statute would have said so—it would have read, each distribution company shall be required to solicit "one or more proposals". The plain meaning in the statute is clear—every company must solicit multiple proposals.

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[11] The Department's regulations,, 220 C.M.R. § 17.00. et. seq., echo the statutory language.

[12] In addition to its failure to undertake a reasonable solicitation process, the Company has ignored the "pilot" nature of Section 83, its clear directive that distribution companies are required to undertake more than one solicitation, e.g., at least two procurements, and the defined cap of 3% of the distribution companies' total energy demand. See Section 83; Tr. of 9/13/2010 Hearing at 770-773.

[13] In addition, each distribution company is required to consult with DOER and obtain Department approval of timetable, method of solicitation and execution of such contracts.

In the second paragraph of Section 83, the statute begins to refine what is required as part of any solicitation of proposals and in the development of these contracts. The paragraph reads:

> For purposes of this section a long-term contract is defined as a contract with a term of 10 to 15 years. In developing the provisions of the proposed long term contracts, the distribution company shall consider multiple contracting methods, including long-term contracts for renewable energy certificates, hereinafter referred to as RECs, for energy and for a combination of both RECs and energy. The electric distribution company shall select a reasonable method of soliciting proposals from renewable energy developers, which may include public solicitations, individual negotiations or other methods. The distribution company may decline to consider contract proposals having terms and conditions that it determines would require the contract obligation to place an unreasonable burden on the distribution company's balance sheet...

First, the term of the contract is defined to be between 10 to 15 years. This is appropriate as it is axiomatic that shorter contracts undermine the ability of renewable projects to obtain financing. Second, the solicitation provides flexibility in the contract method, allowing for contracts for RECs and for RECs and energy. This allows flexibility in contract terms as it allows transactions to appropriately consider and monetize REC and/or energy markets. Similarly, the second paragraph provides flexibility in the methodology by which each distribution company may solicit proposals: a "reasonable method" was required and public solicitations, individual negotiations or other methods were acceptable. Given that multiple proposals are required, Section 83 appropriately recognized various approaches that might create the best opportunity to procure "reasonable" contracts from the solicitation of these multiple proposals.

Thus, the first two paragraphs of Section 83 require (i) more than one proposal to be solicited from developers; (ii) a reasonable process for soliciting proposals; (iii) reasonable contracts; and (iv) the development of cost effective contracts. As a whole, Section 83 does not allow for the individual solicitation of one proposal; instead it was designed to allow for flexibility in the solicitation of multiple reasonable proposals and in the negotiation of reasonable

contracts for each of the multiple proposals that the statute was designed to produce. In the absence of a reasonable process to solicit multiple proposals as required by Section 83, there is no assurance that any proposal will produce a reasonable and cost effective contract. In other words, National Grid's solicitation process was unreasonable because there was no solicitation at all. Similarly, the contract cannot be deemed cost effective in the absence of a reasonable solicitation process that includes consideration of more than one proposal.

Moreover, as set forth in detail in Section III. C below, the Legislature was undoubtedly aware that the Department itself routinely required the solicitation of multiple proposals in an open and competitive process. See Petition of NSTAR Electric Company, D.P.U. 07-64-A; KeySpan Energy Delivery New England, D.T.E. 06-09 (2006), The Department routinely reviews power purchase contracts pursuant to its supervisory authority under G.L. c. 164, § 94A and pursuant to G.L. c. 164, § 1B. It is unlikely that the Legislature intended Section 83 to undermine the long-standing procedures in place with respect to the Department's review pursuant to its statutory authority. Indeed, it is reasonable to assume that the Legislature intended that the various provisions of this statute be read in harmony with other relevant statutes and with Department precedents.[14]

Accordingly, in this case, the plain meaning and the historical context are indicative of the Legislature's intent to promote the development of cost effective renewable generation through the solicitation of multiple proposals. There is nothing ambiguous about the language of Section 83. There are no terms that are unclear. "When statutory language is clear and unambiguous it must be construed as written." LeClair v. Town of Norwell, 430 Mass. 328, 335

[14] Courts "construe statutes that relate to the same subject matter as a harmonious whole and avoid absurd results. . . . See also School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, 438 Mass. 739, 751 [(Feb. 28, 2003)] (absent explicit command to contrary, statutes are construed as harmonious whole and not so that they undercut each other). Town of Canton v. Comm'r of Mass. Highway Dept., 455 Mass. 783, 791-92 (Jan. 19, 2010).

(1999). National Grid (and DOER) essentially argue that the Legislature intended a result that is fundamentally different from that required by the plain terms of Section 83. The evidence of legislative intent and public policy strongly support the application of Section 83 as it was written. "The words of a statute are the main source for the ascertainment of legislative purpose, and when the text of a statute is clear and unambiguous, it must be construed in accordance with its plain meaning." Commonwealth v. Ray, 435 Mass. 249, 252 (2001).[15]

Thus, National Grid's conclusion that Section 83 somehow supports an individual solicitation (and its expansive consideration of attributes) is simply not supported by the terms of the statute itself. The trouble with this suggestion is that it requires "[the Department] to add words to the statute that the Legislature did not see fit to put there." Cooney, 69 Mass. App. Ct. at 638. National Grid's interpretation of Section 83 violates the fundamental rules of statutory construction. It is impermissible to "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose." General Elec. Co. v. Department of Environmental Protection, 429 Mass. 798, 803 (1999) (quoting King v. Viscoloid Co., 219 Mass. 420, 425 (1914)); see also Dartt v. Browning-Ferris Indus., 427 Mass. 1, 8 (1998) (stating that "we will not add to a statute a word that the Legislature had the option to, but chose not to, include"). The Department must still apply the statute as written and has no authority to usurp the Legislature's role and rewrite the statute. See Leopoldstadt, Inc. v. Commissioner of Div. of Health Care Finance and Policy, 436 Mass. 80, 92 (2002) ("It is the function of the court to construe a statute as written and an event or contingency for which no

[15] In addition, Section 83 does not define attributes. Section 83 does not reference Cape Wind's site, off-shore wind status, green house gas and climate change impacts, use of innovative technologies, or any of the various other specific attributes used by National Grid in support of its individual negotiation process. Moreover, Dr. Tierney admits that the term "attributes" as used in this case is derived from her non-lawyer interpretation of Section 83 and may not necessary be the same set of criteria as used in Section 83. Her use of the term attributes is really shorthand for why the project provides value. Tr. of 9/13/10 Hearing at 890-891.

provision is made does not justify judicial legislation.") (quoting Prudential Ins. Co. of Am. v. Boston, 369 Mass. 542, 547 (1976)).

In short, the plain meaning of the statute requires multiple solicitations, even assuming individual negotiations. As set forth above, Section 83 requires each utility to solicit proposals, in the plural, not one or more proposals. There is no exception to the requirement that multiple solicitations are required. National Grid's solicitation, involving individual negotiations with Cape Wind is inconsistent with Section 83 and must not be approved. Accordingly, the Department should dismiss the Petition without prejudice and allow consideration of the PPAs following a solicitation that meets the requirements of Section 83.

C. The Company Failed to Comply with Department Procurement Requirements

Similarly, National Grid's solicitation failed to comply with long-standing Department precedents requiring open and transparent solicitations. As noted, Section 83 should be read in harmony with G.L. c. 164, § 94 and the Department's existing requirements. It is well established that any solicitation process must be "competitive" and meet the Department's fundamental interest in an "open, competitive, and transparent procurement process." See NSTAR Electric Company, D.P.U. 07-64-A at 60-61. The Department has interpreted the open, competitive and transparent standard to require companies to demonstrate that (i) the evaluation process has been clearly stated to each potential bidder; (2) the evaluation criteria were provided; and (3) a pre-bid conference allowed bidders to receive clarification and better understand that company's objectives. Id., fn. 22 citing DTE 04-09.[16]

[16] There is no dispute regarding the applicability of the above referenced precedents in this case. In its testimony, Cape Wind agrees that the approach taken by the Department in D.P.U 07-64-A is "appropriate and entirely consistent with delegation of authority provided to the Department by the Legislature for evaluating PPAs under Section 83." Exh. CW-DJD-1, at 24.

Instructively, in approving NSTAR's recent wind power solicitation, the Department reiterated its ongoing commitment to an open competitive process and stated:

> "[It] will require the use of an open and competitive processes, using reasonable business practices, in a manner that reflects the ongoing evolution of regional market designs, regulatory requirements, and the nature of products available on the market. This will be important to ensure that solicitations result in the best possible outcome for customers and to ensure that potential bidders are given the confidence that their bids will be considered fairly and appropriately." Id. at 61-62.

Similarly, in other cases, the Department has recognized requirements for a competitive process including: (1) the solicitation must be public, open to all qualified bidders, and distributed to a broad range of interested parties; (2) the solicitations must contain unambiguous disclosures of the source of supply and the criteria used to evaluate and select winning bids; (3) communications between the distribution company and individual bidders are prohibited prior to bid selection date and (4) winning bids are selected in accordance with selected criteria. KeySpan Energy Delivery New England, D.T.E. 06-09, at 15 (2006); KeySpan Energy Delivery New England, D.T. E. 04-09, at 10-11 (2004).

Thus, the Department's historically approved methodology of solicitations, whether public solicitations or otherwise, involved a process that produced multiple solicitations and bids by multiple parties. For example, NSTAR used a consultant to identify a universe of renewable energy facilities and solicited bids from multiple facilities prior to and as part of its process to engage in individual negotiations for contract with two prospects. See D.P.U. 07-64-A, at 60-61. In contrast, National Grid's unilateral negotiation with Cape Wind did not include any type of competitive solicitation and thus failed to comply with Department requirements. There was no open and competitive process used, there was no criteria developed, and there was no selection process based upon selected criteria. There is no basis in the present case to make an exception

for National Grid, particularly given its burden to comply with all of the Department requirements. Moreover, as noted below, National Grid chose not to engage the state-wide RFP process and took the risk that it would be able to comport with the requirements of Section 83 and the Department's regulations and precedents outside of that process.

In short, National Grid was required by Section 83 and by Department's precedents to adopt a solicitation process that allowed for multiple proposals in an open, transparent and competitive process as a means to assure a competitive market based cost for ratepayers. National Grid's unilateral negotiation with Cape Wind failed to meet requirements of Section 83 and comply with G.L. c. 164, § 94A. Accordingly, the Department should determine that National Grid has not met its burden of proof and dismiss its Petition without prejudice.

D. National Grid's Individual Solicitation was Inconsistent with the Requirements of the State-Wide Process

The state-wide RFP process, approved by the Department on December 29, 2009, fully comported with Section 83, with Legislative intent and with Department precedents for an open and transparent solicitation. Fitchburg Gas and Electric Light, et al., D.P.U. 09-77, at 20-21.

National Grid participated in the state-wide RFP process from the outset. In conjunction with other Distribution Companies and DOER, it devoted significant effort to creating the solicitation process as required by Section 83 and as approved by the Department in D.P. U. 09-77. Tr. of 9/13/10 at 820-821. The Company understood that the solicitation process as submitted and approved fully conformed with Section 83 and created a schedule that would allow developers sufficient time to participate in the RFP process and secure available federal incentives. Id. at 829-831.

Indeed, National Grid had a viable mechanism available to procure the Cape Wind contract. There was no compelling justification of it to abandon an established process in favor

of an individual approach. As a matter of public policy, the Department should insist in the future that companies, in the case of individual solicitations, not only comply with the Section 83 and Department requirements but also comply with salient elements of the state-wide RFP process.

The state-wide RFP process provides a point of comparison and a standard, consistent with the requirements set forth above, for the type of solicitation that would fulfill both Section 83 and the Department's requirements. It is truly instructive to compare and contrast National Grid's solicitation with not only Section 83 and the Department precedents as set forth above but also with the state-wide process adopted by all of the other distribution companies. As noted below, the state-wide process set up a clearly defined, approved, open and transparent process that National Grid could have adopted. In comparison with the state-wide RFP process, National Grid's solicitation process was woefully inadequate and further demonstrates how National Grid failed to undertake an open, competitive and transparent process in its consideration of the Cape Wind PPAs.

As noted, on September 14, 2009, following a coordinated and cooperative process, DOER, National Grid and the other Distribution Companies filed with the Department a Request for Approval of Timetable and Method of Solicitation and Execution of Long-Term Contracts for Renewable Energy pursuant to the requirements of Section 83. D.P.U. 09-77 at, Exh. NEPGA-1. In submitting its requests, National Grid and the other Distribution Companies proposed a strict schedule for approval, the commencement of the RFP process, the submittal of bids and the associated evaluation and decision. National Grid and the Distribution Companies recognized that the proposed deadlines set forth in the RFP were required by the Department in

light of the tight time constraints imposed by federal incentive opportunities.[17] Indeed, National Grid and the other Distribution Companies stressed that "any modification of the schedule could delay the process and jeopardize a renewable energy developer's ability to secure federal financial incentives." D.P.U. 09-77, at 16. Comments of the Distribution Companies in D.P.U 09-77 at 4. Clearly, the state-wide RFP was designed and scheduled to allow adequate time for developers to meet requirements associated with federal incentives.[18]

The schedule was approved by the Department as submitted without modification as a reasonable method of solicitation:

> ...[T]he timetable and methods of solicitation and execution of contracts included in the proposed RFP are consistent with the requirements of Section 83 and 220 C.M.R. § 17.00 et. seq. (see RFP Section 2.2 et. seq.)...Because the Petitioners have implemented the requirements of Section 83 in their proposed RFP, we find that the Petitioner's proposed RFP provides a reasonable method of soliciting and executing long-term contracts for renewable energy. Fitchburg Gas and Electric Light, et. al., D.P.U. 09-77, at 20-21.

Significantly, the RFP process set out a three stage bid evaluation process. The proposals were subject to a consistent and defined review, evaluation and short list process—in short an open, transparent and competitive process. Overall, the process established specific criteria related to both eligibility and ranking and considered an assessment of cost and non/cost factors and judgment. See Request for Proposals for Long Term Renewable Energy Projects, September 14, 2009, Section 2, incorporated by reference from D.P.U. 09-77.[19]

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[17] The American Recovery and Investment Act of 2009 provides for cash grants of up to 30% of the cost of developing certain energy projects which are placed in service by a specified date. Wind facilities must be placed in service by December 31, 2012. In addition to qualify for a cash grant, a project must commence construction by December 31, 2010. D.P.U. 09-77, at 6, fn. 8.

[18] National Grid's stated concern regarding this point in its MOU as submitted in DPU 09-138 was without merit.

[19] D.P.U. 09-77, D.P.U. 10-58, D.P.U. 10-58A and D.P.U 10-76 were administratively noticed into this proceeding. Tr. of 9/13/10 Hearing at 845.

In the first stage bidders were required to satisfy strict eligibility and threshold requirements which included, among other things, a reasonable schedule that provides for the closing of construction on or by December 31, 2012 and a commercial operation date on or before 2015 and detailed information regarding site control, technical viability, experience, security and balance sheet impacts. Id., Section 2.2.

As part of the second stage review, proposals would be ranked by price and non-price factors with price factors weighed at 80 percent and non-price factors at 20 percent. Price factors include the total cost of the products bid and the estimated market value of the products, taking into production profile and location of the proposed project and locational marginal prices. Id. Section 2.3. Non price categories were established as necessary to assess the likelihood of the project reaching commercial operation and included siting and permitting, project development status and operational viability, experience of bidder and development team, financing and exceptions to a model PPA. Id. at 2.3.2. Each project would be ranked according to price and non-price factors. Id

Finally, a third stage evaluation was required whereby each Distribution Company was allowed discretion to consider additional factors such as the ranking in the second stage, cost effectiveness of bids, whether the proposed PPA will facilitate financing, risks associated with project viability, the extent to which additional employment will be created and diversity effect. Id. at 2.4.

By way of comparison, National Grid's unilateral process did not place a premium on price versus non-price factors and did not limit judgment to a defined group of elements. On the contrary, as noted previously, National Grid's process emphasized non-price factors and the exercise of judgment regarding, among other things, attributes. Indeed, throughout the record,

National Grid and Cape Wind qualify and/or define price as somewhat less significant than the need for an off-shore wind facility that provides renewable energy and RECs. As noted, the goal in National Grid's procurement of the Cape Wind project was to exercise unfettered judgment in the selection of Cape Wind, based upon the specific non-price related attributes, and strike a deal at a price point robust enough to allow Cape Wind to be financed.

On the contrary, the stated goal of the RFP process was to focus on price and encourage the selection of proposals that provided the greatest value. Preferred projects provided "low cost renewable energy with limited risk and some degree of resource diversity." Id. at Section 2.4. Price was a significant element in the value proposition. Accordingly, the Distribution Companies (including National Grid at the time) and the Attorney General agreed that although Section 83 allowed consideration of certain specific non-price elements, the price component was the most important factor. The Department concurred with the Distribution Companies and DOER and agreed that an 80 percent/20 percent weighing would strike the right balance. D.P.U. 09-77 at 12, 19-25. In short, this 80/20 weighing factor is wholly consistent with Section 83 and reflects the requirement that contracts be "cost effective." Id. In contrast, as set forth in Section III. A herein, National Grid relied extensively on non-price factors in executing PPA-1.

In addition, the RFP solicitation considers attributes in a very different way than National Grid in its solicitation process. Notably, the state-wide RFP did not request and did not consider environmental attributes as additional non-price factors. Although, as discussed above, attributes were a central element of National Grid's selection of Cape Wind in the instant matter, many of these factors were deemed to be already included in the cost evaluation of the proposals and inconsistent with Section 83. For example, in comments cited by the Department in its Order, National Grid and the Distribution Companies clearly stated that "costs associated with future

regulation of carbon dioxide emissions, as well as the value of RECs and Regional Greenhouse Gas Initiative ("RGGI") allowances, will be accounted for in the evaluation of price factors as these costs will be reflected in the bids." D.P.U 09-77 at 12; Exh. NEPGA-1, at 4-5. Moreover, National Grid and the other Distribution Companies deemed recommendations suggesting that the RFP consider climate change impacts, net greenhouse gas emissions, sustainability or future changes in REC regulations to be "inconsistent with Section 83." Exh. NEPGA-1 at 6. The only attribute considered was whether the resource would be eligible as a REC resource: only those projects that were eligible for Class I RECs were to be evaluated without consideration of other attributes. Id.

Thus, although National Grid relied heavily in its process on non-price factors, these were the very elements that the state-wide RFP process deemed either less significant or inconsistent with Section 83. Not only was National Grid's process contrary to Section 83 and the Department precedents, it was inconsistent with the design and implementation of the state-wide RFP process. Given the obvious and significant discrepancies between the National Grid solicitation and state-wide RFP related to price, judgment and attributes, it seems unlikely that National Grid would have been able to select Cape Wind in the state-wide RFP. In any case, it is truly ironic and legally suspect for the reasons noted herein that National Grid chose to base its primary justification of its selection of the Cape Wind project on some of the very elements and attributes that in September, 2009 were "inconsistent with Section 83." As a matter of policy, the Department should not allow unilateral negotiations to become an end run around the extensive stakeholder process created to develop an open and transparent process in the state-wide RFP.

E. The Department Should Dismiss the Petition Without Prejudice Based Upon Its Determination in NSTAR Electric Company, D.P.U. 10-71/10-72/10-73.

On July 2, 2010, NSTAR filed three petitions with the Department seeking approval of long-term contract proposals resulting from the state-wide RFP. See Petition of NSTAR, D.P.U. 10-71/10-72/10-73. On August 13, 2010, the Department issued an Order of Dismissal without Prejudice applicable to all three petitions, finding that NSTAR failed to comply with the Emergency Regulations, D.P.U. 10-71/10-72/10-73, at 4-7. NEPGA submits that the Department's determination that the NSTAR PPAs violated the Department's Emergency Regulations under Section 83 is applicable here. The Department's Emergency Regulations and Section 83 require that electric distribution companies consider out of state resources as part of any solicitation pursuant to Section 83. National Grid, like NSTAR, conducted its solicitation and executed its PPAs during the period where out of state resources were not eligible resources under Section 83.

NEPGA submits that there is no legal basis to distinguish between the NSTAR PPA and National Grid PPA. Accordingly, as in the NSTAR case, the Department should dismiss the petition in the instant case for the same reasons as it dismissed the NSTAR petition.

III. CONCLUSION

For the foregoing reasons, NEPGA request that the Department dismiss National Grid Petition without prejudice for its failure to comply with the solicitation requirements of Section 83 and applicable Department regulations and precedents.

Respectfully submitted,

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