

# The Commonwealth of Massachusetts

## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 22-70

November 4, 2022

Petition of NSTAR Electric Company d/b/a Eversource Energy for approval by the Department of Public Utilities of two long-term contracts for procurement of offshore wind energy generation, pursuant to St. 2008, c. 169, § 83, as amended by St. 2016, c. 188, § 12; St. 2021, c. 8 § 91 et seq.; and St. 2021, c. 24, §§ 69, 72; and 220 CMR 23.00.

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D.P.U. 22-71

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 for procurement of offshore wind energy generation, pursuant to St. 2008, c. 169, § 83, as amended by St. 2016, c. 188, § 12; St. 2021, c. 8 § 91 et seq.; and St. 2021, c. 24, §§ 69, 72; and 220 CMR 23.00.

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D.P.U. 22-72

Petition of Fitchburg Gas and Electric Light Company, d/b/a Unitil for approval by the Department of Public Utilities of two long-term contracts for procurement of offshore wind energy generation, pursuant to St. 2008, c. 169, § 83, as amended by St. 2016, c. 188, § 12; St. 2021, c. 8 § 91 et seq.; and St. 2021, c. 24, §§ 69, 72; and 220 CMR 23.00.

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INTERLOCUTORY ORDER ON COMMONWEALTH WIND LLC'S MOTION FOR A  
ONE-MONTH SUSPENSION OF THE PROCEEDINGS

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## I. INTRODUCTION AND PROCEDURAL HISTORY

On May 25, 2022, NSTAR Electric Company d/b/a Eversource Energy (“NSTAR Electric”), Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid (together “National Grid”); and Fitchburg Gas and Electric Light Company d/b/a Unitil (“Unitil”) (collectively, “Companies”) filed petitions with the Department of Public Utilities (“Department”) seeking approval of two long term contracts to purchase offshore wind energy generation (referred to as power purchase agreements or “PPAs”) with Mayflower Wind Energy LLC (“Mayflower Wind”) and Commonwealth Wind, LLC (“Commonwealth Wind”). The Companies filed the long-term contracts pursuant to An Act Relative to Green Communities, St. 2008, c. 169, § 83, as amended by St. 2016, c. 188, § 12; St. 2021, c. 8 § 91 et seq.; and St. 2021, c. 24, §§ 69, 72 (“Section 83C”) and the Department’s regulations at 220 CMR 23.00. The Department docketed the NSTAR Electric petition as D.P.U. 22-70; the National Grid petition as D.P.U. 22-71; and the Unitil petition as D.P.U. 22 72.<sup>1</sup>

On June 2, 2022, the Attorney General filed notices of intervention in these matters pursuant to G.L. c. 12, § 11E(a). On June 22, 2022, the Department granted the petitions to intervene as a full party submitted in each proceeding by Commonwealth Wind and the Massachusetts Department of Energy Resources (“DOER”) and the petition to intervene as a limited participant submitted in each proceeding by Mayflower Wind.

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<sup>1</sup> While the Department has not consolidated these proceedings, the Department addresses the proceedings in a single order given the overlap of counsel and issues.

On September 27, 2022, the Companies, the Attorney General, DOER, and Commonwealth Wind each notified the Department that they did not require evidentiary hearings. On October 18, 2022, the Companies, Attorney General, and DOER filed initial briefs.

On October 20, 2022, Commonwealth Wind submitted a motion requesting a one-month suspension of these proceedings pursuant to 220 CMR §§ 1.02(5) and 1.04(5) (“Motion to Stay”). On October 27, 2022, Mayflower Wind submitted a response to the Motion to Stay. On November 1, 2022, Commonwealth Wind submitted a reply brief and a motion to reopen the evidentiary records in these proceedings to submit an affidavit (“Motion to Reopen”). The same day, the Companies and the Attorney General filed letters in lieu of reply briefs.<sup>2</sup>

## II. POSITIONS OF THE PARTIES

### A. Commonwealth Wind

Commonwealth Wind maintains that the offshore wind generation project (“Project”) underlying its PPAs with the Companies is no longer viable because of recent global commodity price increases due, in part, to the war in Ukraine, interest rates, supply chain constraints, and persistent inflation (Motion to Stay at 4, citing John Chesto, Supply Chain Issues Slow

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<sup>2</sup> On its own motion, the Department admits into evidence the following exhibits and all corrected, revised, and/or supplemental versions thereof filed with the Department as of October 18, 2022: JU-1 through JU-5; WP Support Tab A through WP Support Tab F; EDC-EL-1; EDC-EL-2; EDC-RBH-1 through EDC-RBH-6; AG-VM-1; DOER-JTMS-1; DOER-1 through DOER-3; DPU 1-1 through DPU 1-16; DPU 2-1 through DPU 2-21; DPU 3-1 through DPU 3-10; DPU-DOER 1-1; DPU-DOER 1-2; AG 1-1 through AG 1-21; AG 2-1 through AG 2-29; AG 3-1 through AG 3-3; AG 4-1; AG 5-1; and AG 5-2.

Development of Major Mass. Offshore Wind Farm, Boston Globe (September 22, 2022)).<sup>3</sup>

Commonwealth Wind asserts that the Project cannot move forward absent amendments to the PPAs under review (Motion to Stay at 4).

Commonwealth Wind contends that the requested suspension would allow the parties to examine the effect of current economic conditions and consider potential approaches to restore the Project's viability, including cost saving measures, tax incentives, prices increases, and improvements to the Project's efficiencies (Motion to Stay at 2). Commonwealth Wind maintains that it remains committed to the Project and that, even with a short delay, the Project's expected commercial operation date in 2028 can greatly help the state achieve its climate policy goals (Motion to Stay at 5-6). Commonwealth Wind asserts that during the suspension it will demonstrate to the parties that the Project, "with a modest increase in the PPA price needed to achieve viability," will meet the requirements of Section 83C (Motion to Stay at 6).

Commonwealth Wind argues that the purpose of its motion is "to advance the Project in an expeditious, transparent and ultimately successful manner, not to cause delay," and that Commonwealth Wind "remains committed to working with the Companies to keep the PPAs on track to obtain approval and to minimize the impact of delays on that process" (Motion to Stay at 6).

Commonwealth Wind also moves to reopen the evidentiary record pursuant to 220 CMR § 1.11(8) to enter into the record an affidavit from Sy Oytan, senior vice president for offshore projects at Avangrid Renewables, LLC, which owns Commonwealth Wind

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<sup>3</sup> The Department takes official notice that Commonwealth Wind's parent, Avangrid, Inc., made the statements included in referenced the Boston Globe article. 220 CMR 1.10(2).

(“Affidavit”) (Motion to Reopen at 1). Commonwealth Wind argues that the Affidavit meets the standard of review to submit additional evidence after the close of the record because (1) the testimony includes new information that was previously unknown or unavailable; (2) the testimony is material; and (3) the testimony could have a significant impact on the outcome (Motion to Reopen at 2). Commonwealth Wind alleges that prior to September 28, 2022,<sup>4</sup> Commonwealth Wind could not submit the testimony because of uncertainty concerning the impact of global economic changes on its ability to finance its Project (Motion to Reopen at 3). Commonwealth Wind maintains that it received preliminary information from third-party experts in October 2022 that provided the certainty necessary to support the testimony (Motion to Reopen at 3-4). Therefore, Commonwealth Wind contends that these circumstances are distinguishable from prior Department decisions that denied motions to reopen the hearings because the information was previously known to the movant (Motion to Reopen at 4-5, citing Blackstone Gas Company, D.T.E. 01-81, at 21 (2002); Chicopee Municipal Lighting Plant, D.P.U. 16-39, at 13 (2019).<sup>5</sup>

B. Mayflower Wind

Mayflower Wind argues that the Department should grant the Motion to Stay because the suspension is needed to address the impact of current extraordinary global economic conditions on the PPAs (Mayflower Response at 1-2). Mayflower Wind also proposes to use the suspension

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<sup>4</sup> As discussed above, on September 28, 2022, the Department cancelled evidentiary hearings and closed the record following the parties’ assertions that evidentiary hearings were not necessary.

<sup>5</sup> Commonwealth quotes D.P.U. 16-39, not Sheffield Water Company/Mountain Water Systems, Inc., D.P.U. 16-37 (2016).

to determine whether additional time beyond one month is needed to resolve the issues identified in Commonwealth Wind's Motion to Stay (Mayflower Response at 3).<sup>6</sup> Mayflower Wind argues that it would be administratively efficient to grant the Motion to Stay, otherwise the process could run its course culminating with a decision on the PPAs, only to have amendments to the as-approved PPAs trigger additional adjudicative process (Mayflower Response at 4).

C. Companies

The Companies maintain that a stay is unnecessary because they do not intend to renegotiate the PPAs (Companies Reply Letter at 1). The Companies contend that the PPAs were selected by the Companies, in consultation with DOER, pursuant to a robust competitive solicitation and thorough evaluation (Companies Reply Letter at 1). Further, the Companies assert that they negotiated the PPAs in good faith and have supported their approval with unchallenged substantial evidence (Companies Reply Letter at 1).

III. ANALYSIS AND FINDINGS

A. Motion to Stay

The Department has the discretion to grant a stay as circumstances warrant. Aquarion Water Company of Massachusetts, D.P.U. 08-27-A, Order on Motion of Town of Oxford to Reopen Hearings and Adequacy of Required Report on Unaccounted-For Water at 7 (2009); see The Berkshire Gas Company, D.P.U. 15-58, Interlocutory Order on Motion to Stay at 9-10

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<sup>6</sup> Mayflower Wind also filed a motion to stay the proceedings in NSTAR Electric Company, D.P.U. 20-16; Massachusetts Electric Company/Nantucket Electric Company, D.P.U. 20-17; and Fitchburg Gas and Electric Light Company, D.P.U. 20-18. In these proceedings, the Department is considering proposed amendments to contracts approved on November 5, 2020. The Department will address Mayflower Wind's motion to stay in a separate Order.



(finding that a stay was not warranted where the outcome of other pending dockets would not impact the outcome of the instant proceeding). “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. North American Company, 299 U.S. 248, 254 (1936).

Commonwealth Wind contends that the purpose of the requested stay is to advance the Project with minimal delay and in the most administratively efficient manner. As an initial matter, the Companies have indicated that they do not intend to renegotiate the PPAs with Commonwealth Wind. The Companies explain that the PPAs are the result of a robust competitive solicitation, were negotiated in good faith, and executed on April 8, 2022. Accordingly, the Department finds that the need for a stay in the proceedings to allow for a renegotiation is doubtful. Nevertheless, the Department will analyze the merits of the Motion to Stay. For the reasons discussed below, the Department declines to grant the Motion to Stay.

In its motion requesting a one-month suspension of the proceedings, Commonwealth Wind cites 220 CMR §§ 1.02(5), 1.04(5) and 1.06(5)(b), which govern requests for an extension of a procedural deadline (Motion to Stay at 1, 4). Currently there are no remaining procedural deadlines for these proceedings. Accordingly, to the extent that Commonwealth Wind seeks a stay in the procedural schedule, the Department finds the request moot. At the time Commonwealth Wind filed its Motion to Stay, the record for the proceeding was closed and briefs had already been filed. The only remaining procedural step was a November 1, 2022 deadline for reply briefs. Although the deadline for reply briefs has passed, the Department finds that Commonwealth Wind did not demonstrate good cause for delaying reply briefs given the

late stage of the proceedings and, as discussed further below, that if Commonwealth Wind did successfully renegotiate the PPAs, the Department would need to effectively restart the proceedings.

To the extent that Commonwealth Wind's Motion to Stay is actually a request for the Department to generally stay the proceedings by not considering or issuing a decision on the filings, the Department finds that any stay will unlikely minimize delays or promote administrative efficiency. Commonwealth Wind represents that contract amendments, including "modest" price increases, are necessary to make the Projects economically viable (Motion to Stay at 6). Even assuming swift negotiations,<sup>7</sup> material changes to the terms of the PPAs, such as price, would necessitate, for each of the Companies: (1) new filings for the Department's and intervenors' review, including testimony, analyses, and supporting documentation demonstrating that the amended PPAs comply with Section 83C; (2) notices of filing and public comment; and (3) additional process including potentially discovery, intervenor testimony, evidentiary hearings, and briefs. Further, the Department's review of amended pricing provisions in the PPAs outside of the statutory solicitation process would raise questions concerning compliance with Section 83C and G.L. c. 164, § 94A that have not previously been presented to the Department.<sup>8</sup> A renegotiation of material terms of the PPAs, such as the price, would delay the Department's decision by several months, not several weeks. In effect, the parties to the PPAs

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<sup>7</sup> Based on the Department's decades of experience with settlement negotiations, the number of parties involved, and the complexity of the PPAs, a swift renegotiation seems optimistic.

<sup>8</sup> The Department also would have to consider the impact of amended pricing terms on remuneration.

would be starting over, and as such there is no delay avoided or efficiency gained by granting a stay as opposed to the Companies withdrawing their petitions and submitting renegotiated PPAs, if any, at a future date.

Finally, the PPAs set forth deadlines for regulatory approval (Exh. JU-3 Commonwealth PPA at § 8). The Department does not have the authority to override these deadlines in the contracts negotiated at arm's length between Commonwealth Wind and the Companies. Therefore, even if the Department were to stay our review of the filings for 30 days, the deadlines for our regulatory approval will not be altered and the Department would need to conduct its review and draft a decision in a shorter timeframe to meet the deadlines. Accordingly, any stay could actually result in a greater administrative burden for the Department. For the reasons set forth above, the Department denies Commonwealth Wind's Motion to Stay.

We recognize that a party should be left to complete its own balance of risk and reward in making tactical litigation decisions as long as tactical advantage is not achieved at the expense of the Department. The Berkshire Gas Company, D.P.U. 17-145, at 41 (2018); see Cahaly v. Benistar Property Exchange Trust Company, Inc., 85 Mass. App. Ct. 418, 429 (2014). The Department does not normally comment upon a party's litigation strategy. Nevertheless, in this case we feel obligated to depart from our normal practice.

In its Motion to Stay, Commonwealth Wind represents for the first time in these proceedings that its Project is no longer economically viable, and the reasons given for this change in economic viability are inflation, interest rates, and supply shortages driven by the COVID-19 pandemic and the war in Ukraine. Commonwealth Wind asserts that it has been in

discussions with the other parties about the financial outlook of its Project for a month but made no effort to disclose this material information to the Department before filing its Motion to Stay (Motion to Stay at 3). While the Department will not speculate as to when Commonwealth Wind first determined its Project was no longer viable under the terms of the PPAs, it is evident that the economic impacts of the COVID-19 pandemic and war in Ukraine on its Project became apparent some time before Commonwealth Wind notified the Department.<sup>9</sup>

The Department's regulatory process is driven by the principle that our decisions must be based on a complete and accurate record. Riverside Steam and Electric Company, D.P.U. 88-123-B at 58 (1991); see, e.g., G.L. c. 30A, § 11(4) (only the evidence in the record is considered by an agency in making a decision). The companies regulated by the Department hold the key to the information necessary for the Department's decisions. Thus, full disclosure of information by regulated companies is essential for the Department to properly fulfill its function of regulating in the public interest. In support of this principle of full disclosure, the Department's procedural regulations require a party to a proceeding to seasonably amend its responses to discovery, direct examination, and cross examination as soon as it obtains information that a response was incorrect or incomplete or that a response, though correct when made, is no longer true or complete. 220 C.M.R. 1.06(6)(c)(5); Bay State Gas Company, D.P.U. 09-30, at 174 (2009); Fitchburg Gas and Electric Light Company, D.T.E. 02-24/25,

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<sup>9</sup> In support of its Motion to Stay, Commonwealth Wind cites a report that it notified investors on September 22, 2022, that the project had been postponed and would not be finished until 2028 instead of 2027. The report further states that the CEO of Avangrid notified investors that Commonwealth Wind plans to renegotiate the PPAs and seek a "modest" price increase. John Chesto, Supply Chain Issues Slow Development of Major Mass. Offshore Wind Farm, Boston Globe (September 22, 2022).

at 32-33; D.P.U. 88-123-B at 57-58; see also, Aquarion Water Company of Massachusetts, D.P.U. 08-27-B at 22 (2010).

The Department has expended precious resources over the last several months investigating PPAs that, according to Commonwealth Wind, no longer facilitate financing for the Project. Whatever its reasons, Commonwealth Wind waited until after the filing of initial briefs in these proceedings to come forward. Of course, a party will be held to the predictable consequences of its strategic choices, regardless of outcome. D.P.U. 17-145, at 41; see Wilson v. Town of Mendon, 294 F.3d 1, 13 (1st Cir. 2002) (holding that a party “having chosen a strategy . . . cannot now complain of being hoisted on a petard of his own contrivance”).

B. Motion to Reopen the Evidentiary Record

The Department’s Procedural Rule on reopening hearings, 220 CMR 1.11(8), states, in pertinent part, “[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause.” See also 220 CMR 1.11(7) (good cause required to allow parties to file evidentiary documents or exhibits subsequent to hearing). Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B at 4-7 (1990); Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A at 11-12 (1986).

Commonwealth Wind represents that it filed the Motion to Stay as soon as it reached the level of certainty needed to support its request and offers the Affidavit underlying the Motion to

Reopen as further evidence that the Motion to Stay should be granted (Motion to Reopen at 4). Commonwealth Wind further asserts that it could not state with certainty that the Project was not viable with the financing afforded by the PPAs prior to September 28, 2022 (Motion to Reopen at 4). Commonwealth Wind's statements are irreconcilable with the statements it made to its investors on September 22, 2022. It is clear that Commonwealth Wind reached a level of certainty in its internal assessment of the Project and the PPAs, a level of certainty strong enough to inform its investors that it was postponing the Project for a year, despite the November 1, 2027 commercial operating date provided in the PPAs, and that it would seek to renegotiate the contracts, before the records closed in these proceedings (John Chesto, Supply Chain Issues Slow Development of Major Mass. Offshore Wind Farm, Boston Globe (September 22, 2022)). Moreover, the circumstances here do not materially differ from the circumstances in D.P.U. 16-39, at 8. Just as the movant in that proceeding could have produced evidence it possessed sooner, Commonwealth Wind could have sought a third-party analysis on the impact of inflation, interest rate increases, and supply chain issues before it did and provided the information to the Department in accordance with the established procedural schedules. D.P.U. 16-39, at 8. Therefore, the Department finds that Commonwealth Wind has not shown good cause to reopen the evidentiary records in these proceedings. Accordingly, the Department does not admit the Affidavit into evidence in this proceeding and will not consider any portions of Commonwealth Wind's reply brief that rely on the information contained in the Affidavit.

Even if Commonwealth Wind had shown good cause to reopen the record, the information provided in the Affidavit does not alter the Department's conclusions regarding the Motion to Stay. Even assuming arguendo that all the assertions in the Affidavit are true, the

requested stay would not change any procedural deadlines, as discussed above, and will not create administrative efficiencies because any renegotiated contract would require a new notice and evidentiary review. Further, if the Companies and Commonwealth Wind reach new terms, then the Companies could file the updated contracts, which would require Department review in a new proceeding. As noted above, however, review of amended pricing provisions in the PPAs outside of the statutory solicitation process would raise questions concerning compliance with Section 83C and G.L. c. 164, § 94A that have not previously been presented to the Department.

C. Conclusion

For the reasons discussed above, the Department denies Commonwealth Wind's Motion to Stay and Motion to Reopen.

The proposed PPAs are filed pursuant to Section 83C and provide for the purchase of energy and renewable energy certificates for 20 years (Exh. JU-3 Commonwealth PPA at 5). Commonwealth Wind is a sophisticated market participant, well capable of factoring economic contingencies into its contract prices, negotiating contract terms to protect its interests in the event of unforeseen circumstances, and exercising its options under the existing PPAs. Less than six months after the Companies filed the PPAs with the Department, Commonwealth Wind is stating that the contracts it competitively bid on and freely negotiated are no longer viable.

Contracts entered into and approved pursuant to Section 83C are essential to achieving the Commonwealth's clean energy and climate goals. Accordingly, the Department is committed to efficiently reviewing long-term renewable energy contracts to ensure that the proposals will meet the requirements of law and deliver safe, reliable, and clean energy at an affordable price. The Department is therefore obligated to ensure that our review of the

proposed PPAs is done in an administratively efficient manner and avoid the unnecessary use of resources that could be dedicated to other important matters pending before the Department. In addition, the Companies' residents and businesses that financially support these contracts deserve certainty whether the Projects, if approved by the Department, will deliver consistent with the PPAs Commonwealth Wind and Mayflower Wind executed after a competitive solicitation. Accordingly, Commonwealth Wind and Mayflower Wind must now decide whether they intend to move forward with their contractual obligations under the PPAs or file a request to dismiss the proceedings. The Department directs Commonwealth Wind and Mayflower Wind to notify the Department and the Companies of their election within three business days of this Order.

IV. ORDER

Accordingly, after review and consideration, it is

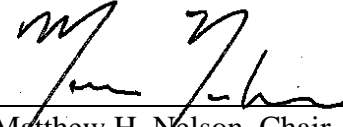
ORDERED: That Commonwealth Wind, LLC's motion for a one-month suspension of proceedings in NSTAR Electric Company, D.P.U. 22-70; Massachusetts Electric Company/Nantucket Electric Company, D.P.U. 22-71; and Fitchburg Gas and Electric Light Company, D.P.U. 22-72 is DENIED; and it is


FURTHER ORDERED: that Commonwealth Wind, LLC's motion to reopen the evidentiary records in NSTAR Electric Company, D.P.U. 22-70; Massachusetts Electric Company/Nantucket Electric Company, D.P.U. 22-71; and Fitchburg Gas and Electric Light Company, D.P.U. 22-72 is DENIED; and it is

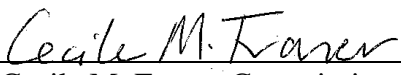


FURTHER ORDERED: That Commonwealth Wind, LLC shall comply with all other directives contained in this Order.

By Order of the Department,

  
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Matthew H. Nelson, Chair

  
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Robert E. Hayden, Commissioner

  
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Cecile M. Fraser, Commissioner