

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF PUBLIC UTILITIES**

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Petition of NSTAR Electric Company d/b/a  
Eversource Energy for Approval of Proposed Long-  
Term Contracts for Offshore Wind Energy  
Generation Pursuant to Section 83C of an Act  
Relative to Green Communities, St. 2008, c. 169, as  
amended by St. 2016, c. 188, §12; St. 2021, c. 8 §§  
91 *et. seq.*

D.P.U. 22-70

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Petition of Massachusetts Electric Company and  
Nantucket Electric Company d/b/a National Grid  
for Approval of Proposed Long-Term Contracts for  
Offshore Wind Energy Generation Pursuant to  
Section 83C of an Act Relative to Green  
Communities, St. 2008, c. 169, as amended by St.  
2016, c. 188, §12; St. 2021, c. 8 §§ 91 *et. seq.*

D.P.U. 22-71

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Petition of Fitchburg Gas and Electric Light  
Company d/b/a Unitil for Approval of Proposed  
Long-Term Contracts for Offshore Wind Energy  
Generation Pursuant to Section 83C of an Act  
Relative to Green Communities, St. 2008, c. 169, as  
amended by St. 2016, c. 188, §12; St. 2021, c. 8 §§  
91 *et. seq.*

D.P.U. 22-72

**MOTION TO DISMISS OF COMMONWEALTH WIND, LLC**

Pursuant to 220 C.M.R. § 1.06(5)(e) and the Interlocutory Order on Commonwealth Wind LLC’s Motion for a One-Month Suspension of the Proceedings, issued by the Department of Public Utilities (“Department”) on November 4, 2022, Commonwealth Wind, LLC (“Commonwealth Wind”) hereby moves that the Department dismiss the above-captioned proceedings as to the power purchase agreements (“PPAs”) between Commonwealth Wind and

the Massachusetts electric distribution companies (“EDCs”) in connection with the offshore wind generation facility being developed by Commonwealth Wind (the “Project”).

The PPAs do not meet the fundamental statutory threshold that they must “facilitate the financing of offshore wind energy generation.” Section 83C(a).<sup>1</sup> Unfortunately, despite diligent efforts by Commonwealth Wind to find a path forward for the Project under the PPAs that did not necessitate dismissing these proceedings, the PPAs remain unable to meet this threshold requirement, and it does not appear that there is a viable pathway that would allow that threshold to be met. Approving the PPAs would therefore not advance the purposes of Section 83C because the Project cannot be financed and constructed under the current terms of the PPAs.

Because it is not possible for the Department to approve the PPAs consistent with the statutory requirements, the Department should dismiss this proceeding as to the PPAs. The best path forward to advance the purposes of Section 83C and the Commonwealth’s clean energy goals is for the offshore wind energy generation capacity currently included in the PPAs to be procured in the next solicitation under Section 83C. Commonwealth Wind would bid into that solicitation and offer Massachusetts a project with cost-effective pricing, a superior timeline for completion, and exceptional economic development opportunities.

## **I. BACKGROUND**

Commonwealth Wind previously advised the Department and the parties that, due to changes in economic conditions that were outside of Commonwealth Wind’s control, the Project could not move forward under the current PPAs without amendments. *See, e.g.* Commonwealth Wind Motion to Suspend at 2, 4; Commonwealth Wind Reply Brief at 3, 8-9. Commonwealth Wind sought a suspension of these proceedings in order for the parties to consider options that

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<sup>1</sup> Section 83C of An Act Relative to Green Communities, St. 2008, c. 169, as amended by St. 2016, c. 188 §12, St. 2021, c. 8, § 91 et seq., St. 2021, c. 24, §§ 69 and 72, and St. 2022, c. 179, § 61 (“Section 83C”).

might return the Project to economic viability and allow the Commonwealth and its ratepayers to benefit from the cost-effective wind generation the Project is still able to provide. *See, e.g.* Commonwealth Wind Motion to Suspend at 1-3, 6; Commonwealth Wind Reply Brief at 3, 15-16.

In its November 4 Interlocutory Order, the Department determined that suspending the present proceedings to allow the parties to evaluate options for amending the PPAs would not be procedurally efficient. *See* Interlocutory Order at 7-8. The Department expressed doubt that renegotiation was the appropriate path forward. *Id.* at 6. And the Department specifically noted that amending pricing provisions in the PPAs would raise legal questions “that have not previously been presented to the Department.” *Id.* at 7, 12. Instead, the Department directed Commonwealth Wind to notify the Department and the EDCs within three business days whether the proceeding should progress or be dismissed with the possibility of a future filing.<sup>2</sup> *Id.* at 13. In rendering its decision, the Department stressed the importance of administrative efficiency and certainty regarding the contracts. *Id.*

Following the Interlocutory Order, Commonwealth Wind attempted negotiation and worked diligently and urgently with the parties to find an alternative to dismissing these proceedings. Key stakeholders expressed a preference that Commonwealth Wind not request dismissal at that time, but rather continue to discuss other options. Although a final resolution was not found, those efforts yielded sufficient results that Commonwealth Wind was encouraged enough to request that the proceeding should continue rather than to request immediate dismissal. As a result, Commonwealth Wind filed a notice that the proceedings should not be

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<sup>2</sup> On November 8, 2022, Commonwealth Wind requested a two-business-day extension to file its response to the Department’s Interlocutory Order. On November 9, 2022, the Hearing Officer granted that extension.

dismissed at that time, but restated that the PPAs would need to be amended for the Project to be economically viable. *See* Notice of Commonwealth Wind, LLC Pursuant to the Department’s November 4 Interlocutory Order, Nov. 14, 2022.

Since filing that Notice on November 14, Commonwealth Wind has attempted to work urgently and in good faith with the parties to identify a realistic path forward for the Project under the PPAs. However, as the Department noted in its Interlocutory Order, the EDCs have stated that they do not intend to renegotiate the PPAs. Interlocutory Order at 5. Commonwealth Wind attempted to engage the EDCs in discussions following the Interlocutory Order, but they declined to meet or confer at this time to discuss solutions. Although Commonwealth Wind has had discussions with the other parties in this proceeding, unfortunately, at this point, there has been no progress with the EDCs, and there does not appear to be a viable path that would allow the Project to move forward under the PPAs. As a result – and considering the importance of administrative efficiency and certainty regarding these PPAs, which the Department stressed in its Interlocutory Order – Commonwealth Wind can no longer support the continuation of these proceedings. The Project cannot be financed and built under the current PPAs, and these proceedings should be dismissed as to the PPAs for the reasons described in Commonwealth Wind’s Prior Submissions<sup>3</sup> and below.

## **II. STANDARD OF REVIEW**

The Department’s regulations provide that “[a] party may move at any time after the submission of an initial filing for dismissal or summary judgment as to all issues or any issue in the case.” 220 C.M.R. § 1.06(5)(e). “The Department may order dismissal by motion of a party

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<sup>3</sup> “Prior Submissions” refers to Commonwealth Wind’s Motion for a One-Month suspension (Oct. 20, 2022), Commonwealth Wind’s Reply Brief (Nov. 1, 2022), and Commonwealth Wind’s Limited Motion to Reopen the Evidentiary Record (Nov. 1, 2022).

or upon its own motion if the Department concludes as a matter of law that the Department has neither the authority nor the discretion to grant the relief requested, that the filing itself is patently deficient in form or a nullity in substance, or that the non-moving party has otherwise failed to state a claim upon which relief can be granted.” *Town of Russell*, D.P.U. 10-50, at 4 (Dec. 28, 2012); *accord Bay State Gas Co.*, D.P.U. 19-GSEP-05, at 7-8 (April 30, 2020).

### **III. ARGUMENT**

At this juncture, the best option for advancing the purposes of Section 83C and the Commonwealth’s broader clean energy and emission reduction policies is to dismiss this proceeding as to the PPAs such that the offshore wind energy generation provided for in the PPAs can be procured in the next solicitation under Section 83C. No interest is advanced by approving PPAs that cannot and will not lead to the development of offshore wind energy generation; instead, the Commonwealth should conduct a robust fourth solicitation under Section 83C as soon as possible.<sup>4</sup> In addition to being required by Section 83C, a dismissal eliminates concerns that other paths forward might raise novel legal issues related to renegotiation of the PPAs. Dismissal is the most administratively efficient option, and provides the greatest certainty for the Commonwealth’s solicitation process under Section 83C. Commonwealth Wind will then have an opportunity in the fourth Section 83C solicitation to demonstrate to the Department, the Commonwealth, and other parties that the Project remains the most promising and price competitive offshore wind project in the region and is best positioned to help the Commonwealth achieve its clean energy goals.

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<sup>4</sup> Subsequent solicitations under Section 83C must occur within 24 months of a previous solicitation. Section 83C(b). The third solicitation under Section 83C was issued on May 7, 2021. Exh. JU-1 at 11, 14. A fourth solicitation must, therefore, be issued by May 7, 2023.

Section 83C requires dismissal. To be approved under Section 83C, power purchase agreements must “facilitate the financing of offshore wind energy generation.” Section 83C(a); *accord* 220 C.M.R. § 23.01(1); *NSTAR Electric Co./Massachusetts Electric Co./Fitchburg Gas and Electric Light Co.*, D.P.U. 20-16/20- 17/20-18, at 23 (2020) (“As a threshold matter, the Department must find that the proposed contracts facilitate the financing of an eligible offshore wind energy generating resource.”); *see also* Commonwealth Wind Reply Brief at 5, 8.<sup>5</sup> The PPAs do not meet this threshold and must be dismissed. Moreover, because the PPAs will not facilitate the financing of the Project, they will also not deliver the specific statutorily required benefits and will not meet the statutory criteria set forth in Section 83C(e)(1)(v) and restated at 220 C.M.R. § 23.05(1). The inability of the PPAs to meet these requirements is another reason why these proceedings must be dismissed.<sup>6</sup> *See* Commonwealth Wind Reply Brief at 11-12.

When Commonwealth Wind bid into the third solicitation under Section 83C in September of 2021, its bid price was supported by then current and reasonably anticipated future economic conditions. Many of those economic conditions remained stable at the time the PPAs were signed, in early April of 2022. However, since that time, the global economy has changed both dramatically and swiftly in ways that could not have been managed or predicted by Commonwealth Wind. Among other factors, the prolonged war in Ukraine has unsettled markets and increased costs for many products, inflation has been persistent, interest rates have increased in a manner unprecedented in recent times, commodity prices have risen sharply, and

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<sup>5</sup> This threshold requirement is central to the purposes of Section 83C. It appears in the first words of Section 83C itself and in the first words of the Department’s implementing regulations. *See* Section 83C(a); 220 C.M.R. § 23.01(1). The reason the Legislature enacted and has continued to amend Section 83C is to facilitate financing of offshore wind generation projects so that they can be built and deliver associated benefits. *See* Commonwealth Wind Reply Brief at 7-8, 10-11.

<sup>6</sup> Among others, these criteria include a requirement that PPAs be with Projects that “Adequately demonstrate project viability in a commercially reasonable timeframe.” Section 83C(e)(1)(v)(F).

supply shortages and supply-chain constraints once thought to be temporary remain pervasive. In particular, input costs for offshore wind projects have risen in an unprecedented manner, as reflected in recent announcements from major turbine suppliers that – contrary to historic trends – prices for turbines will rise significantly going forward.<sup>7</sup> Those changes have dramatically upended the Project’s cost assumptions, rendering the PPAs uneconomic and insufficient to support financing. Simply put, it is now far more expensive to construct the Project than could have been reasonably foreseen even earlier this year.

When it filed its Notice on November 14, Commonwealth Wind was hopeful that a pathway to viability could be identified with cooperation among the parties and stakeholders. Some stakeholders had expressed a desire to continue discussions, and Commonwealth Wind was motivated to work expeditiously towards a solution. Since filing its Notice on November 14, Commonwealth Wind has continued to engage the parties and search for pathways that would make it possible for the PPAs to facilitate the financing of the Project. Unfortunately, the EDCs have declined to meet at this time to discuss solutions, no pathway has been identified, and the realities described above and identified in Commonwealth Wind’s Reply Brief and in the Affidavit of Sy Oytan, which was filed on November 1, 2022, remain true, unaddressed, and without any identified path to resolution:

- Global economic conditions have changed dramatically since the Project was bid. *See* Affidavit of Sy Oytan at ¶¶ 4-6.

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<sup>7</sup> *See, e.g.,* Alex Blackburne, *Struggling wind giants lift turbine prices as ‘last resort’ to fight inflation*, S&P Global Market Intelligence, Aug. 22, 2022 (“Vestas Wind Systems A/S, Siemens Gamesa Renewable Energy SA and Nordex SE have hiked the price of their turbines to long-term highs in 2022. Siemens Gamesa’s onshore machines are up 41% year over year in the second quarter . . . and market-leader Vestas is up 22% . . .”), available at <https://www.spglobal.com/marketintelligence/en/news-insights/blog/data-stories-three-steps-to-assess-carbon-reduction-performance>.

- As a result, the PPAs are uneconomic and insufficient to support financing. *See* Affidavit of Sy Oytan at ¶¶ 9-10.

Given these realities, approving the PPAs will not facilitate the financing of the Project. *See* Commonwealth Wind Reply Brief at 9-11. The statutory requirements of Section 83C cannot be met, and the appropriate action is to dismiss these proceedings.

It is critical that the Department consider the undisputed economic realities described above in rendering any decision on the PPAs, and particularly in determining whether the PPAs will “facilitate the financing of offshore wind energy generation” as required by Section 83C. Both the Project and the successful progress of procurements under Section 83C are crucial to achieving Massachusetts’ greenhouse gas emission limits. *See generally*, G.L. c. 21N, §§ 3, 3A, 4; Massachusetts Clean Energy and Climate Plan for 2025 and 2030, at iv, xiv, 3-5, 27, 62-65, 69-72, June 30, 2022, available at <https://www.mass.gov/doc/clean-energy-and-climate-plan-for-2025-and-2030/download> (noting that Massachusetts’ Clean Energy and Climate Plan is “anchored by” offshore wind development that is expected to be in operation by 2030). Rendering a decision that will directly bear on the advancement of the Project and the path of future Section 83C procurements requires careful consideration of a full, complete, and current record. This is especially true as the region faces sharply increasing energy costs this winter. The Department should consider the evidence that Commonwealth Wind, as the party that would need to finance the Project and the party that is the source of the other information on these issues in the record, has offered.<sup>8</sup> There is no substantial evidence in the record supporting a finding that the PPAs will facilitate financing.

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<sup>8</sup> In the Interlocutory Order, the Department determined not to admit Mr. Oytan’s affidavit into the record for the purposes of evaluating Commonwealth Wind’s Motion to Stay. *See* Interlocutory Order at 11-12. Instead, the Department directed Commonwealth Wind to either allow the proceedings to move forward or file a request to dismiss. *Id.* at 13. The evidence in the Oytan Affidavit is not contested and represents the only current evidence on



Moreover, Commonwealth Wind, as the “Seller” under the PPAs, has a unique and central interest in whether the PPAs are approved and whether the contracts meet the requirements of Section 83C. Commonwealth Wind is the party that would be most directly impacted by approval or dismissal of the PPAs. As the developer of the Project, Commonwealth Wind has an interest in seeing the Project move forward; that is Commonwealth Wind’s business. However, Commonwealth Wind is also the party that would bear the immediate obligations and consequences of approved PPAs. For instance, DPU approval of the PPAs would put into effect contractual obligations for Commonwealth Wind to meet critical milestones and construct an offshore wind facility. *See, e.g.*, Exh. JU-3 (Commonwealth) at § 3. Moreover, Massachusetts and its ratepayers will not get the benefits associated with the PPAs unless Commonwealth Wind performs. Because it is uniquely and substantially affected by whether the PPAs are approved and because its performance under the PPAs is critical to attaining any benefits for the Commonwealth or ratepayers, the Department should give significant weight to Commonwealth Wind’s request to dismiss this proceeding.

Even if Section 83C did not require dismissal, dismissing these proceedings as to the PPAs would be the right course of action because it provides the administrative efficiency and certainty the Department sought in the Interlocutory Order. *See* Interlocutory Order at 13. The current PPAs are not viable and would not lead to development of the Project. After several months of discussions with the parties, no realistic path to amending the PPAs has emerged, and

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these critical threshold statutory issues available to the Department. Commonwealth Wind renews its request that the Department consider the evidence presented in the Oytan Affidavit for the purposes of this Motion to Dismiss. Even if the Department does not do so, Commonwealth Wind – *the Project’s proponent* – has now clearly and repeatedly stated that the Project is not economically viable under the PPAs in present economic circumstances and that the PPAs will not facilitate the financing of the Project. The only evidence offered that the PPAs will facilitate the financing of the Project are taken from statements that Commonwealth Wind made when it submitted its bid, but which Commonwealth Wind now withdraws as no longer applicable. *See* Commonwealth Wind Reply Brief at 10-11.

as the Department noted, even if it did, it would result in significant delay, might raise novel legal questions, and would require future Department proceedings. *Id.* at 7-8.

Dismissal also gives certainty to all stakeholders on the path forward: the Commonwealth can proceed with the next solicitation under Section 83C without worry that the PPAs (and the associated 1,200 MW of nameplate capacity) remain in limbo. To that end, Commonwealth Wind urges the Department to dismiss this proceeding now so that the Department of Energy Resources can include the 1,200 MW that is the subject of the PPAs in the next Section 83C solicitation. Doing so best positions Massachusetts to advance the purposes of Section 83C and achieve its clean energy goals and greenhouse gas emission limits, including meeting the 2030 targets, for which Massachusetts has assumed the deployment of at least 3.2 gigawatts of offshore wind energy generation. *See, e.g.*, Massachusetts Clean Energy and Climate Plan for 2025 and 2030, at iv, 24, 64, June 30, 2022, available at <https://www.mass.gov/doc/clean-energy-and-climate-plan-for-2025-and-2030/download>; *see also* G.L. c. 21N, §§ 3, 3A, 4; G.L. c. 25 § 1A (“In discharging its responsibilities under this chapter and chapter 164, the department shall, with respect to itself and the entities it regulates, prioritize safety, security, reliability of service, affordability, equity and reductions in greenhouse gas emissions to meet statewide greenhouse gas emission limits and sublimits established pursuant to chapter 21N.”).

Finally, Commonwealth Wind remains committed to the Project, which it firmly believes is the most cost-effective source of offshore wind energy generation for Massachusetts and can provide unparalleled benefits to Massachusetts and its ratepayers. Commonwealth Wind is committed to continuing the development of the Project following dismissal of this proceeding. Commonwealth Wind will take all reasonable steps to keep the Project on its current development timeline through the next Section 83C solicitation so that, if selected, the Project

remains poised to contribute to the Commonwealth's critical 2030 emission reduction requirements.

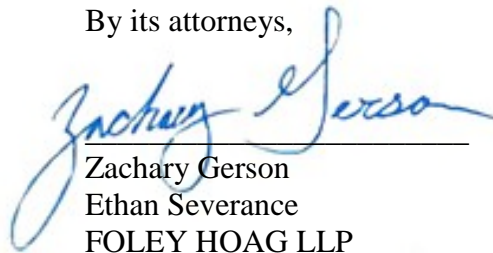
#### **IV. CONCLUSION**

For the reasons set forth above, Commonwealth Wind respectfully requests that the Department dismiss these proceedings as to the PPAs between Commonwealth Wind and the EDCs and make such further findings and issue such further directives as may be necessary to grant the relief requested herein.

Respectfully submitted,

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