

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT

No. _____

COMMONWEALTH WIND, LLC,)
))
Plaintiff-Appellant,)
))
v.)
))
DEPARTMENT OF PUBLIC UTILITIES,)
))
Defendant-Appellee.)

**PETITION FOR APPEAL BY COMMONWEALTH WIND, LLC
D.P.U. 22-70/22-71/22-72**

1. On December 30, 2022, the Department of Public Utilities (the “Department”) issued an Order (the “Final Order”) approving power purchase agreements (the “PPAs”) between Commonwealth Wind, LLC (“Commonwealth Wind”) and three Massachusetts distribution companies pursuant to An Act Relative to Green Communities, St. 2008, c. 169, § 83C (“Section 83C”)¹ and 220 C.M.R. § 23.00 in the proceedings docketed as D.P.U. 22-70, D.P.U 22-71, and D.P.U. 22-72.
2. The purpose of Section 83C is “[t]o facilitate the financing of offshore wind energy generation resources in the commonwealth.” Section 83C(a); 220 C.M.R. § 23.01(a).
3. To achieve that purpose, Section 83C requires the Massachusetts electric distribution companies to “solicit proposals for offshore wind energy generation; and provided, that

¹ 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.

reasonable proposals [are] received . . . enter into cost-effective long-term contracts.”

Section 83C(a).

4. The Department must approve the resulting contracts before they become effective and must find that they meet certain specified criteria. Section 83C(e).
5. The PPAs are long-term contracts procured through the third Section 83C solicitation, under which Commonwealth Wind would develop an approximately 1,232 megawatt (“MW”) offshore wind energy generation facility (the “Project”) located south of Martha’s Vineyard and Nantucket, expected to be operational in approximately four to five years, and the electric distribution companies would purchase energy and renewable energy credits generated by the Project. Final Order at 3.
6. The Department approved the PPAs despite Commonwealth Wind – the party that must finance and develop the Project – submitting uncontested evidence and briefing that, due to dramatic and sudden changes in global markets, the PPAs would *not* facilitate the financing of the Project because the terms of the PPAs could no longer support financing, and requesting that the Department dismiss the proceedings as to the PPAs. *See, e.g.*, Reply Brief of Commonwealth Wind (Nov. 1, 2022); Affidavit of Sy Oytan (Nov. 1, 2022); Motion to Dismiss of Commonwealth Wind (Dec. 16, 2022).
7. Rather than consider Commonwealth Wind’s evidence or allow time to appropriately supplement the record to reflect undisputed and widely-recognized market changes that occurred during the pendency of the Department’s proceedings, the Department, by the Final Order and an Interlocutory Order issued on November 4, 2022 (the “Interlocutory Order”): (i) denied Commonwealth Wind’s motion to temporarily suspend the proceedings (which sought time to fully develop a record on the significance of new

market conditions); (ii) refused to admit into the record Commonwealth Wind’s updated evidence on the financeability of the Project under the PPAs; (iii) denied Commonwealth Wind’s motion to dismiss the proceedings as to the PPAs (which was filed on the basis that the PPAs would not facilitate financing of the Project); and (iv) found that “the PPAs will facilitate the financing of the Commonwealth Wind . . . project[.]” Final Order at 23-24, 46; Interlocutory Order at 13.

8. In order to conclude that the PPAs would facilitate financing of the Project, the Department (i) excluded Commonwealth Wind’s timely evidentiary submissions from the record, (ii) discounted Commonwealth Wind’s statements in its briefs and motions, and (iii) relied instead on a statement that Commonwealth Wind made when submitting its bid in September 2021 – more than a year earlier and before relevant market changes had occurred – that PPAs would assist it in obtaining financing. Final Order at 10-11, 21-24.
9. Contrary to the Department’s finding, there was no “testimony from the developers” that the PPAs would assist with financing. Final Order at 23 & 23 n.23.
10. By approving the PPAs despite the reality that the Project cannot be financed and will not proceed under the PPAs, the Department has unnecessarily created uncertainty regarding the implementation of Section 83C, which is a critical component of the Commonwealth’s efforts to meet its greenhouse gas emission reductions. *See* G.L. c. 21N §§ 3, 3A, 4 (requiring greenhouse gas emission limits and sublimits); Bethany A. Card, Determination of Statewide Greenhouse Gas Emissions Limits and Sector Sublimits for 2025 and 2030, June 30, 2022 (setting 2025 limits of 33% reduction from 1990 levels by 2025 and 50% reduction by 2030, with more aggressive limits for the electric power sector); 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’s Clean Energy and Climate Plan is “anchored by” offshore wind development that is expected to be in operation by 2030).

11. Section 83C provides for the solicitation of 5,600 MW of offshore wind energy generation capacity by June 30, 2027, and the next solicitation under Section 83C must occur by May of 2023. Section 83C(b) (subsequent solicitations must occur within 24 months of a previous solicitation).² However, the Final Order approves PPAs for 1,200 MW of capacity that cannot be financed and built under the PPAs, just as the Commonwealth must determine the parameters and available capacity for its next solicitation.
12. The Final Order, including its incorporation of the Interlocutory Order, is a final decision of the Department.
13. Commonwealth Wind is an aggrieved party in interest.
14. Commonwealth Wind hereby appeals the Final Order and Interlocutory Order, and respectfully requests that the Final Order be set aside and vacated as to the PPAs because, as further explained below, they are based upon errors of law, are unsupported by substantial evidence, are arbitrary, capricious, and constitute an abuse of discretion, and are otherwise not in accordance with law.

² The third solicitation under Section 83C was issued on May 7, 2021. Exh. JU-1 at 11, 14.

JURISDICTION

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

PARTIES

16. Commonwealth Wind is a Delaware limited liability corporation with a principal place of business at 2701 NW Vaughn St., Suite 300, Portland, OR 97210. Commonwealth Wind is wholly owned by Avangrid Renewables, LLC, a U.S.-based renewable energy developer with more than 8,000 MW of owned and controlled wind and solar generation in 22 states. Avangrid Renewables, LLC is in turn owned by Avangrid, Inc., a U.S.-publicly traded company.
17. The Department is an agency of the Commonwealth of Massachusetts, established pursuant to G.L. c. 25, § 1, having its offices at One South Station, Boston, Massachusetts.

FACTS

18. In order “[t]o facilitate the financing of offshore wind energy generation resources in the commonwealth,” Section 83C and the Department’s regulations at 220 C.M.R. § 23.00, direct NSTAR Electric Company (“Eversource”), Massachusetts Electric Company and Nantucket Electric Company (together “National Grid”), and Fitchburg Gas and Electric Company (“Unitil”) (collectively the “Distribution Companies”) to solicit proposals for offshore wind energy generation. Section 83C(a); 220 C.M.R. § 23.03(1).
19. Provided that reasonable proposals are received, Section 83C directs the Distribution Companies to enter into cost-effective long-term contracts for offshore wind energy

generation for an amount equal to approximately 5,600 MW of aggregate nameplate capacity by June 30, 2027.³ See Section 83C(a); Section 83C(b); 220 C.M.R. § 23.03(1).

20. The Distribution Companies, in coordination with the Massachusetts Department of Energy Resources (“DOER”) developed a request for proposals (“RFP”) to enter into long-term contracts for offshore wind energy generation for the third solicitation under Section 83C, which the Department approved in D.P.U. 21-40. Final Order at 10 n.16.
21. On May 7, 2021, the Distribution Companies, together with DOER, issued the RFP. Exh. JU-1 at 14.
22. Commonwealth Wind submitted proposals in response to the RFP on September 15, 2021. *Id.* at 9 n.3.
23. The Distribution Companies selected Commonwealth Wind’s Project as a winning bid. *Id.* at 8-9, 33.
24. Following contract negotiations with the Distribution Companies, Commonwealth Wind entered into the PPAs with the Distribution Companies for approximately 1,200 MW of the Project in April 2022. *Id.* at 9; Exh. JU-3 at 1.
25. On May 25, 2022, each of the Distribution Companies filed a Petition for Approval of Proposed Long-Term Contracts for Offshore Wind Energy Generation Pursuant to Section 83C and the Department’s regulations at 220 C.M.R. § 23.00. Final Order at 1.
26. The Department docketed the petitions as D.P.U. 22-70, D.P.U. 22-71, and D.P.U. 22-72. *Id.*

³ Long-term contracts for offshore wind generation procured pursuant to Section 83C have previously been approved in dockets D.P.U. 18-76/18-77/18-78 and D.P.U. 20-16/20-17/20-18.

27. On June 22, 2022, the Department granted Commonwealth Wind's petition for leave to intervene as a full participant in D.P.U. 22-70, D.P.U. 22-71, and D.P.U. 22-72. *Id.* at 4.
28. To comply with Section 83C, the PPAs must "facilitate the financing of offshore wind energy generation." Section 83C(a).
29. There were no evidentiary hearings in these proceedings.
30. On October 20, 2022, during the briefing period before the Department, Commonwealth Wind filed a motion for a one-month suspension of the proceedings to allow the parties to examine the implications of unprecedented commodity price increases, interest rate hikes, and supply shortages on the overall viability of the Project, including whether the Project could be financed under the terms of the PPAs. Final Order at 6.
31. That motion explained that, due to changes in international markets, the Project was no longer viable under the PPAs "and would not be able to move forward" without taking steps to restore the Project to viability, such as amending the PPAs. The motion requested that the Department provide the parties an opportunity to both find a path to viability for the Project and to develop a record for the Department that reflected current realities. Commonwealth Wind Motion for a One-Month Suspension of Proceedings at 2.
32. The Department did not rule on Commonwealth Wind's motion for a suspension prior to the November 1, 2022 deadline for submitting reply briefs, so on November 1, 2022, Commonwealth Wind filed a reply brief. That brief:
 - a. Reiterated that sudden and dramatic changes to the global economy had rendered the Project uneconomic under the PPAs such that the PPAs would *not* facilitate the financing of the Project as required by Section 83C(a) and would, therefore, not lead to the benefits associated with the development of offshore wind energy

generation that are required of PPAs under Section 83C(e) and 220 C.M.R. § 23.05(1);

- b. Requested again that the Department pause the proceedings to allow the parties an opportunity to address the changes in economic circumstances affecting the Project, and allow the Department to receive evidence so that it could render a decision based on current information that would best advance the interests of ratepayers and the purposes of Section 83C; and
- c. Explained that absent amendments to the PPAs, the Department must deny the Distribution Companies' petitions for approval of the PPAs because the PPAs (i) would *not* facilitate the financing of the Project, contrary to the established threshold requirement under Section 83C; (ii) would not satisfy the other statutory and regulatory criteria for approval, since no offshore wind energy generation facility would be built under the PPAs; and (iii) would not be in the public interest because, far from leading to the development of the Project, approval without PPA amendments would put the Project into jeopardy.

33. At the same time, Commonwealth Wind filed a limited motion to reopen the evidentiary record to admit an affidavit of Sy Oytan the Senior Vice President for Offshore Projects at Avangrid Renewables, LLC, the sole owner of Commonwealth Wind.⁴

34. The affidavit of Sy Oytan provided sworn evidence that global events including unexpectedly high and persistent inflation, supply shortage and increases in supply costs, the Russian invasion of Ukraine, and rapid increases in interest rates had negatively

⁴ Although Commonwealth Wind moved to reopen the record, the record had not been closed as of the motion. *See infra* ¶¶ 35-37..

affected the economics of the Project to the point where the PPAs would no longer facilitate the financing of the Project due to the Project's negative net present value. Affidavit of Sy Oytan.

35. On November 4, 2022, the Department issued the Interlocutory Order denying both Commonwealth Wind's motion for a one-month suspension of the proceedings and Commonwealth Wind's limited motion to reopen the evidentiary record to admit the Oytan Affidavit, and directing Commonwealth Wind to notify the Department and the Distribution Companies within three business days whether Commonwealth Wind intended to move forward with the PPAs or to file a request to dismiss the proceedings. Interlocutory Order at 13.
36. Although the Department asserted in the Interlocutory Order on November 4, 2022, that it had closed the record on September 28, 2022 (Interlocutory Order at 4 n.4), the Department did not provide any notice to the parties that it had closed the record on that date (*see* Hearing Officer Memorandum, Sept. 28, 2022). Instead, the Department only notified the parties of this position for the first time in the Interlocutory Order.
37. In fact, the Department kept the record open at least until it issued the Interlocutory Order on November 4, 2022, because it admitted all other previously proposed evidence into the record on that date. Interlocutory Order at 2 n.2.
38. On November 14, 2022, Commonwealth Wind filed a timely response to the Interlocutory Order. That response stated that if the Department did not support a pause in the proceedings, as previously requested by Commonwealth Wind, then the Department should continue with the proceeding so that the parties could use available time to

continue ongoing discussions that might lead to changes that could return the Project to viability. Commonwealth Wind Notice Pursuant to Interlocutory Order.

39. The Department did not respond to Commonwealth Wind's response to the Interlocutory Order.

40. On December 16, 2022, having not succeeded in finding a path to viability for the Project under the PPAs in coordination with other stakeholders, Commonwealth Wind filed a motion to dismiss the proceedings as to the PPAs. Motion to Dismiss of Commonwealth Wind.

41. In that motion, Commonwealth Wind stated that the PPAs did not meet the fundamental statutory threshold of Section 83C(a): that the PPAs must "facilitate the financing of offshore wind energy generation." As a consequence, Commonwealth Wind stated that because the PPAs would not lead to an offshore wind energy generation facility, they would also not provide the other statutory and regulatory benefits that are required for PPA approval. *See* Section 83C(e); 220 C.M.R. § 23.05(1); Motion to Dismiss of Commonwealth Wind at 6.

42. Commonwealth Wind further explained that the best path forward for the purposes of Section 83C, the public interest, and achieving the Commonwealth's policy goals was to dismiss the current proceedings as to the PPAs – which would not lead to the development of an offshore wind energy generation facility – so that the offshore wind energy generation capacity tied up in those PPAs could be included in the next Section 83C solicitation, which is statutorily mandated to commence in the first half of 2023. Motion to Dismiss of Commonwealth Wind at 5.

43. Finally, Commonwealth Wind stated that there was not the requisite substantial record evidence to support a finding that the PPAs *would* facilitate the financing of the Project. Commonwealth also explained that the public interest favored dismissal. *Id.* at 8-10.
44. Neither the Attorney General nor the Department of Energy Resources opposed that motion. The Distribution Companies filed a one page *pro forma* opposition to that motion.
45. Commonwealth Wind’s motion to dismiss provided clear notice to the Department, the Distribution Companies and the public that the PPAs were no longer viable and that Commonwealth Wind could not and did not intend to proceed with the Project under the existing contracts.
46. On December 30, 2022, the Department issued the Final Order denying Commonwealth Wind’s motion to dismiss and approving the PPAs.
47. In concluding that “the PPAs will facilitate the financing of the Commonwealth Wind . . . project[],” as required by Section 83C, the Department relied on (i) a May 25, 2022 statement from the Distribution Companies that “Each developer stated the importance of having long-term power purchase agreements in place in order to attract necessary equity investing and financing commitments needed to finance their projects;” and (ii) a statement that Commonwealth Wind had made as part of its bid submission in September of 2021 – more than a year earlier and before relevant market changes had occurred. Final Order at 23.
48. The Department relied on these dated statements over the more recent, more specific, and more detailed factual briefing and sworn statements of Commonwealth Wind, the party

responsible for securing financing for the Project. Motion to Dismiss of Commonwealth Wind at 9; Reply Brief of Commonwealth Wind at 7-11; Affidavit of Sy Oytan.

49. The Department appears to have denied Commonwealth Wind’s motion to dismiss (and approved the PPAs) at least in part because Commonwealth Wind filed its motion to dismiss after the date on which the Interlocutory Order made a non-binding request that a motion to dismiss be filed. *See* Final Order at 11 n.15.

50. However, the Department acknowledged that whether the PPAs facilitate the financing of the Project is a threshold legal issue (Final Order at 22; *see also* *NSTAR Elec. Co./Massachusetts Elec. Co./Fitchburg Gas and Elec. Light Co.*, D.P.U. 20-16/20-17/20-18, Nov. 5, 2020 at 23 (a Department finding that long-term contracts under Section 83C facilitate the financing of an eligible resource is a “threshold matter”)). Indeed, 220 C.M.R § 1.06(5)(e) expressly states that a party can file a motion to dismiss at any time during the proceedings.

51. The Final Order enumerates numerous supposed benefits of the Project to Massachusetts and its ratepayers from approval of the PPAs. An affirmative finding of sufficient benefits is required to approve the PPAs under Section 83C and 220 C.M.R. § 23.05(1).

52. However, these supposed benefits are illusory: Commonwealth Wind made clear in its motion to dismiss that under the current PPAs, the Project cannot be financed, and thus cannot be built, and thus cannot deliver any of the asserted benefits. *See, e.g.*, Motion to Dismiss of Commonwealth Wind; Reply Brief of Commonwealth Wind.

53. The Final Order is a final order of the Department.⁵

⁵ On January 10, 2023, the Department issued a revised final order correcting a typographical error in its December 30, 2022 final order.

54. The Final Order makes findings of fact and conclusions of law.
55. Commonwealth Wind is a party in interest aggrieved by the rulings of the Department in the Interlocutory Order and now the Final Order.
56. Commonwealth Wind appeals the Interlocutory Order and Final Order and respectfully requests that they be set aside in their entirety because they are based upon errors of law, are unsupported by substantial evidence, are arbitrary, capricious, constitute an abuse of discretion, and are otherwise not in accordance with law.

LEGAL CLAIMS

57. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because the Department's denial of Commonwealth Wind's motion for a one-month suspension of proceedings improperly prevented the development of a full and accurate evidentiary record, and thereby led directly to legally unsupportable findings and determinations in the Final Order.
58. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because the Department's denial of Commonwealth Wind's limited motion to reopen the evidentiary record improperly prevented a full and accurate evidentiary record from being established, and thereby led directly to legally unsupportable findings and determinations in the Final Order.

59. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because the Department refused to accept or consider new, material, significant, uncontested, and credible sworn evidence submitted by Commonwealth Wind that directly contradicts the Final Order's essential findings and determinations.
60. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because the Department refused to accept or consider new, material, significant, uncontested, and credible sworn evidence submitted by Commonwealth Wind on the basis that the record had closed, despite the Department not having closed the record at the time the evidence was offered.
61. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because they wrongly concluded that the PPAs satisfy the statutory and regulatory requirements of Section 83C that PPAs must facilitate financing, despite clear and uncontested sworn evidence and repeated briefing that the Project cannot be financed under the PPAs as approved.
62. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because they wrongfully considered the benefits of the Project as evidence for approving the PPAs, despite clear and uncontested sworn evidence by Commonwealth Wind that the Project cannot be financed under the PPAs, and thus cannot be built, and thus will not deliver *any* of the asserted benefits.

63. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because they wrongfully relied upon evidence in the record of Commonwealth Wind's statements from September 2021 regarding the benefits of PPAs to financing, while refusing to acknowledge or credit subsequent evidence from Commonwealth Wind specifically refuting those September 2021 statements based on new information obtained as of October 2022.
64. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because contrary to the findings, the record contains no testimony from the developers that the PPAs would assist with obtaining financing.
65. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because they wrongfully relied upon testimony submitted by the Distribution Companies of witnesses who did not have personal knowledge of the financeability of the Project and who relied solely upon the subsequently-refuted September 2021 statements by Commonwealth Wind.
66. The Final Order and Interlocutory Order are based upon errors of law, are unsupported by substantial evidence, and are arbitrary, capricious, and constitute an abuse of discretion, because they are contrary to the Department's obligation to act in the public interest (*see, e.g., Attorney General v. Department of Telecomms. & Energy*, 438 Mass. 256, 268 (2002); *Wolf v. Department of Pub. Utils.*, 407 Mass. 363, 369 (1990)) and to "prioritize "reductions in greenhouse gas emissions to meet statewide greenhouse gas emission limits

and sublimits established pursuant to chapter 21N” (G.L. c. 25, § 1A), as approval of the PPAs for a Project that cannot be financed fails to secure any benefits for the Commonwealth or ratepayers.

PRAYER FOR RELIEF

WHEREFORE, Commonwealth Wind requests that this Court:

1. Set aside and vacate the Final Order;
2. Remand to the Department with orders that Commonwealth Wind’s motion to dismiss be granted; and
3. Grant such other relief as the Court deems appropriate and proper.

Respectfully submitted,
COMMONWEALTH WIND, LLC

By its attorneys,



Thaddeus Heuer (BBO #666730)
Zachary Gerson (BBO #675525)
Ethan Severance (BBO #703052)
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1000
theuer@foleyhoag.com
zgerson@foleyhoag.com
eseverance@foleyhoag.com

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