COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS. SJC-10934

ALLIANCE TO PROTECT NANTUCKET SOUND, et al.,
Petitioners,

v.

DEPARTMENT OF PUBLIC UTILITIES, et al.,
Respondents.

On Reservation and Report from the Supreme Judicial Court for Suffolk County

BRIEF OF THE CONSERVATION LAW FOUNDATION, CLEAN POWER NOW, NATURAL RESOURCES DEFENSE COUNCIL AND UNION OF CONCERNED SCIENTISTS

Susan M. Reid, BBO# 647807
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 350-0990

Matthew F. Pawa, BBO# 652933
Pawa Law Group, P.C.
1280 Centre Street, Suite 230
Newton Centre, MA 02459
Tel: (617) 641-9550

Katherine Kennedy, Esq.
Brandi Colander, Esq.
(appearing *pro hac vice*)
Natural Resources Defense Council
40 West 20th ST, 11th Floor
New York, NY 10011
Tel: (212) 727-4637

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SJC RULE 1:21 CORPORATE DISCLOSURE STATEMENTS

The Conservation Law Foundation (CLF) states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Chapter 180 of the Massachusetts General Laws, without any parent corporation, that it has issued no stock, and that there is thus no publicly held company that owns any such stock.

The Union of Concerned Scientists (UCS) states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Chapter 180 of the Massachusetts General Laws, without any parent corporation, that it has issued no stock, and that there is thus no publicly held company that owns any such stock.

The Natural Resources Defense Council states that it is a nonprofit corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Section 201 of the New York Not-for-Profit Corporation Law, without any parent corporation, that it has issued no stock, and that there thus is no publicly held company that owns any such stock.

Clean Power Now, Inc. states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Chapter 180 of the Massachusetts General Laws, without any parent corporation, that it has issued no stock, and that there thus is no publicly held company that owns any such stock.

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STATEMENT OF THE ISSUES

I. Whether the Massachusetts Department of Public Utilities (the "Department") properly interpreted the plain language of Section 83 of the Green Communities Act, St. 2008, c. 169, § 83 ("Section 83") in determining that: (a) Section 83 authorizes the solicitation of long-term contracts for renewable energy through "individual negotiations" and does not require competitive solicitations; (b) Section 83 establishes a three (3) percent floor, rather than ceiling, on total electric load that must be met through long-term renewable energy contracts under Section 83; and (c) to be approved pursuant to Section 83, long-term contracts must "facilitate the financing" of renewable energy facilities.

II. Whether the Department acted reasonably in applying a "cost-effectiveness" standard rather than a "least-cost" requirement in evaluating and approving the power-purchase agreement ("PPA-1") entered between Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid ("National Grid") and Cape Wind Associates, LLC ("Cape Wind"), consistent with the requirements of Section 83.

III. Whether the Department's approval of PPA-1 pursuant to Section 83 is consistent with the Commerce Clause of the United States Constitution.[1]

STATEMENT OF THE CASE

The Conservation Law Foundation, Union of Concerned Scientists, Natural Resources Defense Council and Clean Power Now (collectively, "CLF et al.") adopt and incorporate by reference the Statements of the Case as set forth in the Brief of the Department of Public Utilities and the Brief of National Grid and Cape Wind, each filed with the Court in this docket on July 28, 2011.

STATEMENT OF THE LEGAL AND FACTUAL BACKGROUND

This appeal arises from the Department's decision on a petition filed by National Grid seeking approval pursuant to An Act Relative to Green Communities, ("Green Communities Act" or "Act"), St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 et seq. for two long-term PPAs with Cape

[1] Intervenor-Appellees CLF et al. have not endeavored to respond to each and every argument that Appellants APNS, Transcanada, NEPGA and AIM have introduced in their briefs; instead, we have focused on issues most salient to our particular zones of expertise and interest as intervening parties. As to issues on which this brief is silent, we adopt and incorporate by reference the Department's and National Grid/Cape Wind's arguments in their briefs filed on July 28, 2011.

Wind ("Cape Wind PPAs") for wind power and other associated attributes from a 130-turbine offshore wind project proposed for Nantucket Sound.

Legal Background and Context:

The Green Communities Act was signed into law on July 2, 2008. St. 2008, c. 169, § 83. Section 83 of the Act requires each of the Commonwealth's electric distribution companies to solicit proposals for long-term contracts from renewable energy developers at least twice over a five-year period beginning on July 1, 2009, and, if the proposals received are reasonable, to enter into cost-effective long-term contracts to facilitate the financing of renewable energy generation. Id. Section 83 also explicitly authorizes "individual negotiations" for soliciting long-term contracts. Id.

Section 83 of the Green Communities Act is designed to set in motion a robust system for promoting the development of new renewable energy generation, explicitly including offshore renewables. This important provision is geared toward catalyzing demonstrable progress toward the Commonwealth's clean energy goals by "facilitating the financing" of renewable energy projects through a requirement that electric distribution companies solicit

and enter long-term renewable energy contracts. Id. The Legislature imposed this requirement as part of a statute enacted "to provide forthwith for renewable and alternative energy and energy efficiency in the commonwealth[.]" St. 2008, c. 169, preamble.

Section 83 of the Act identifies several further objectives, including that participating renewable energy projects must be found to: "(i) provide enhanced electricity reliability within the commonwealth; (ii) contribute to moderating system peak load requirements; (iii) be cost effective to Massachusetts electric ratepayers over the term of the contract; and (iv) where feasible, create additional employment..." Id.

While Section 83 is the governing statute that necessarily framed the Department's review, in the underlying proceeding the Department also was required to review the Cape Wind PPAs in light of a broader framework of relevant laws and regulations, including the Massachusetts Renewable Energy Portfolio Standard ("RPS"), G.L. c. 25A, § 11F, as well as the Massachusetts Global Warming Solutions Act ("GWSA"), St. 2008, c. 298, codified in relevant part at G.L. c. 21N and c. 30, § 61.

The Massachusetts RPS requires retail electric suppliers to purchase an increasing proportion of their total supply from new renewable energy resources each year – with a current mandate of 6%, escalating 1% per year to reach 20% by 2025, for example, with the mandate continuing to escalate by 1% per year thereafter. G.L. c. 25A, § 11F(a).

The GWSA requires that greenhouse gas emissions across all sectors, explicitly including the electric generation sector inclusive of imported electricity, be reduced 10 to 25 percent below 1990 levels by 2020, and at least 80 percent by 2050, with interim reduction targets to be set for 2030 and 2040. M.G.L. c. 21N. Pursuant to the GWSA, the Department also was required to "consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise." G.L. c. 30, § 61.

These are the principal statutes and regulations that established the framework for the Department's review of the Cape Wind PPAs.

Procedural and Factual History:

On December 3, 2009, National Grid filed a petition requesting that the Department approve a Memorandum of

Understanding ("MOU") that it entered into on December 1, 2009, with the Department of Energy Resources ("DOER") and Cape Wind. The MOU set forth a proposed timetable and method by which National Grid would solicit a proposal from Cape Wind and potentially execute a long-term contract for energy, capacity and renewable energy certificates ("RECs") from the Cape Wind project. Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid, D.P.U. 09-138 (2009). The Department initiated Docket DPU 09-138 to consider the petition, and following the submission and review of public comments, approved it in an Order issued on December 29, 2009. Id. No party challenged that order approving National Grid's request to engage in individual negotiations with Cape Wind.[2] Following the Department's approval of that proposed method and timetable for solicitation, National Grid solicited and entered two long-term PPAs with Cape Wind – one that called for National Grid to purchase 50 percent of Cape Wind's energy, capacity, Renewable Energy Certificates ("RECs") and other environmental attributes for a term of 15 years (PPA-1), and a second, essentially identical, contract for

[2] Appellants admit, as they must, that no challenge was made to the Department's final order in D.P.U. 09-138. APNS Br. at Add. 414; NEPGA Br. at n. 13.

the other 50 percent of Cape Wind's output that National Grid would assign to another purchaser (PPA-2). National Grid petitioned the Department for approval of those PPAs, and the Department docketed the matter as D.P.U. 10-54.

In a separate docket, the Department approved a statewide public solicitation process for long-term contracts through a competitive request for proposals ("Initial RFP") requested by NSTAR, National Grid and other utilities. A.4497. Consistent with the Department's regulations at that time, the Initial RFP solicited proposals only from projects located within Massachusetts or adjacent federal waters. NSTAR entered three long-term contracts resulting from proposals solicited in the Initial RFP. However, in the face of claims brought by TransCanada under the dormant Commerce Clause, the Department initiated docket D.P.U. 10-58, wherein it suspended the applicability of Section 83's geographic limitation and adopted emergency regulations amending 220 C.M.R. §§ 17.00 et seq. to allow for solicitation of long-term renewable energy contracts that were not limited to in-state resources. Additionally, the Order required that the Initial RFP be reopened to allow all eligible out-of-state resources to submit proposals for long-term renewable energy contracts. A.

4532. Further, the Department's order called on National Grid to demonstrate compliance with the directives of D.P.U. 10-58 in connection with the solicitation and review of PPA-1. A. 4533-34.

In August 2010, the Attorney General, Cape Wind, National Grid, and DOER jointly filed with the Department a settlement agreement as well as amended versions of the Cape Wind PPAs. The amended PPAs were modified to reduce the price and to incorporate several mechanisms that would pass along cost savings to electric customers.[3]

The Department conducted three weeks of evidentiary hearings. More than a dozen witnesses were cross-examined, and some 838 exhibits were introduced.

On November 21, 2010, the Department issued a 351-page Final Order approving PPA-1 and declining to approve PPA-2. The Order laid out in detail the bases for the Department's decision, including (i) an analysis of how PPA-1 meets the threshold requirements of Section 83, (ii) the Department's application of Section 83's "cost-effectiveness" standard to its review of PPA-1, based on extensive evidence of record, (iii) the Department's analysis and conclusion that

[3] The terms of the Amended PPAs are described in detail in DPU Br. at 7-9 and National Grid/Cape Wind Br. at 10-11; CLF et al. incorporate that information by reference here.

Cape Wind PPA-1 is in the public interest, and (iv) the Department's determination that National Grid did not rely on the geographic restriction of Section 83 in seeking approval of the PPAs with Cape Wind. See e.g., A. 7814-15, 8001-02,8014-30, 8097.

More specifically, the Department found Cape Wind PPA-1 to be cost-effective because "the expected benefits . . . to National Grid customers exceed the expected costs to National Grid customers." A. 8001. This conclusion was based on factors including the Department's quantification of the contract's costs, a comparison of those costs to alternatives, detailed analysis of the estimated value of the energy, RECs, capacity and other attributes that would be purchased by National Grid under the contract, consideration of the extent to which the Cape Wind project is likely to beneficially suppress market prices by displacing other generating resources, and the benefits of Cape Wind for ensuring that important statutory renewable energy and greenhouse gas reduction mandates are met. See e.g., A. 7876-7818. Even without fully crediting evidence introduced by CLF et al. and other parties regarding the full extent of market price suppression benefits of Cape Wind, see e.g., A. 7828-7995, the Department estimated that

the monthly bill impact for a typical National Grid customer would be 95 cents. A. 8064-68. In connection with its "public interest" analysis, the Department found that PPA-1 will provide net benefits to National Grid ratepayers, determined that the pricing terms of PPA-1 are reasonable – particularly in light of provisions that will adjust the price downward if certain financing thresholds are met, and found that the pricing is consistent with the price of comparable projects. See e.g., A. 8029-31, 8057-60.

In December 2010, petitions for appeal of the Department's final Order with the Massachusetts Supreme Judicial Court pursuant to G.L. c. 25, § 5 were filed by the Alliance to Protect Nantucket Sound ("APNS"), Associated Industries of Massachusetts ("AIM"), the New England Power Generators Association ("NEPGA") and TransCanada Power Marketing Ltd. ("Transcanada"), all challenging the Department's approval of PPA-1. On March 11, 2011, these appeals were consolidated by the Court into Docket SJC-10934.

SUMMARY OF THE ARGUMENT

Appellants' claims, which predominantly turn on demonstrable misinterpretations of Green Communities Act Section 83, should be rejected and the Department's decision approving Cape Wind PPA-1 pursuant to Section 83 should be upheld. Notwithstanding Appellants' claims to the contrary, the Department properly construed the plain meaning of Section 83 and gave effect to all of its provisions. Section 83 hardly could be more explicit in authorizing solicitation of long-term renewable energy PPAs through "individual negotiations," and the plain language of the statute refutes Appellants' arguments that "sole-source" or "individual" negotiations somehow ought to have been disallowed in favor of a public solicitation requirement. Pages 14-17. Moreover, the Appellants waived this argument given that they did not challenge the Department's order in D.P.U. 09-138 where the Department approved the "individual negotiation" method of solicitation between National Grid and Cape Wind. Page 17. Nor does G.L. c. 164, § 94 compel a different result, because that earlier-adopted statute can and must be read in harmony with Section 83's more recent, explicit authorizations. Pages 17-18.

The Department also correctly interpreted and applied the plain language of Section 83 with respect to creating a minimum requirement, not a cap, on long-term contracting for renewable energy. Pages 19-20. Further, the Department reasonably interpreted and applied Section 83's central, explicit mandate to "facilitate the financing" of renewable energy. Pages 21-25.

In addition, the Department reasonably interpreted and applied Section 83's "cost-effectiveness" requirement in reviewing and approving PPA-1, and appropriately declined to adopt Appellants' unsupported contention that a "least cost" standard somehow should be required. The Department's interpretation appropriately was based on the plain language of Section 83 and is consistent with other statutory provisions that distinguish between "least cost" and "cost-effectiveness" standards. Pages 25-28. Moreover, the Department acted reasonably in declining to adopt APNS' proposed "Bright Line" test, now re-framed as an "ACP Option", neither of which "tests" are supported by the plain language or intent of Section 83. Pages 28-32. In addition, there is no support in the record or the law for APNS' new argument that the "opportunity costs" of PPA-1

somehow stand in the way of the Department's thoughtfully reasoned determination that it is cost-effective. Page 32.

Having properly interpreted the applicable "cost-effectiveness" standard, the Department acted reasonably, based on substantial evidence of record, in finding that Cape Wind PPA-1 is cost-effective in light of factors including modest estimated potential impacts on customer bills and the unparalleled benefits of the Cape Wind project in meeting the objectives of Section 83, such as reliability benefits, ability to contribute to meeting peak electric demand, and the capacity of the project to deliver very large quantities of clean, renewable power at an optimal location – making a critical contribution toward ensuring the Massachusetts RPS and GWSA mandates are met. Pages 32-36.

Appellants' claims that the Department's approval of PPA-1 somehow contravened the Commerce Clause of the U.S. Constitution similarly are unfounded. The Department reasonably set aside the geographic limitations in Section 83 pursuant to its severability clause. Pages 37-39. Moreover, the individual negotiation and consequent PPA between National Grid and Cape Wind, in connection with a project located in federal waters, were not influenced by

any geographic limitation. Pages 40-41. In addition, the Department demonstrably acted with "reasoned consistency" in allowing the National Grid/Cape Wind negotiation and PPA to go forward – based on an approved solicitation method that included no geographic restriction – while requiring the Massachusetts utilities' Initial RFP to be re-tailored to remove a challenged geographic restriction. Pages 41-46.

ARGUMENT

I. In Evaluating and Approving PPA-1, the Department Properly Construed the Plain Meaning of Section 83.

In asking this Court to overturn the Department's well-reasoned approval of Cape Wind PPA-1, Appellants AIM, APNS, NEPGA and Transcanada would have the Court ignore the plain language of Section 83 and, consequently, contravene the most basic tenets of statutory construction. Comm'r of Corr. v. Superior Court Dep't of the Trial Court, 446 Mass. 123, 124 (2006) ("Statutory language should be given effect consistent with its plain meaning. Where, as here, that language is clear and unambiguous, it is conclusive as to the intent of the Legislature."); see also Commonwealth v. Vega, 449 Mass. 227, 231 (2007) ("Any reading of the statute that ignored [a term] would violate the canon that

a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.")

Contrary to Appellants' assertions, the plain language of Section 83 (a) explicitly authorizes the solicitation of long-term renewable energy contracts through "individual negotiations" rather than competitive solicitations; (b) sets a three (3) percent floor for entering long-term renewable energy contracts, not a ceiling; and (c) is intended to "facilitate the financing" of renewable energy projects.

A. Section 83 Explicitly Authorizes Solicitation by "Individual Negotiation."

Notwithstanding Appellants' protestations to the contrary, Section 83 neither bars long-term renewable energy contract solicitation through individual negotiations nor mandates that every PPA arise from competitive bidding.[4] The plain language of Section 83 is dispositive – and it explicitly allows for solicitation of

[4] It is baffling that NEPGA admits that individual negotiations are acceptable (NEPGA Br. at 23), but then goes on to assert that "sole source negotiation" is contrary to the statute.

long-term renewable energy contracts through "individual negotiations." Section 83 reads, in pertinent part, as follows:

> 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.

St. 2008, c. 169, § 83. Appellants disregard both this clear statutory language as well as the Department's final, unchallenged order in D.P.U. 09-138 (approving individual negotiation between National Grid and Cape Wind) as they endeavor to lodge an untimely challenge to the solicitation process that gave rise to Cape Wind PPA-1.

Appellants argue that National Grid was required to use a competitive solicitation process and, as part of that process, to compare Cape Wind to all other bids. See e.g., NEPGA Br. at 22-24. Yet interpreting Section 83 to require multiple proposals for each solicitation would directly conflict with the explicit identification of acceptable solicitation methods in the statute.

This Court repeatedly has held that when interpreting a statute, "'[t]he starting point of [the Court's analysis] is the language of the statute, 'the principle source of insight into Legislative purpose.'" Simon v. State

Examiners of Electricians, 395 Mass. 238, 242 (1985) (citing Commonwealth v. Lightfoot, 391 Mass. 718, 720 (1984)). Accordingly, NEPGA's and APNS' argument that Section 83 somehow prohibits "sole-source" procurement, an argument that is contrary to the plain language of Section 83, is unavailing. See NEPGA Br. at 8, 17, 19, 21.

NEPGA also strains to assert that National Grid's solicitation method was improper because, as NEPGA would have it, each electric distribution company must solicit multiple "proposals" (emphasis added). Again ignoring the plain language of Section 83 regarding the propriety of individual negotiations, NEPGA argues that the Department's approval of such individual negotiations somehow lacks "valid textual support," and posits that "Section 83 does not permit a distribution company to obtain one proposal via one individual negotiation – as National Grid did here." NEPGA at 24. However, interpreting Section 83 to require multiple proposals for each solicitation would directly conflict with Section 83's explicit identification of "individual negotiations" as an acceptable solicitation method – an issue that was decided, and not challenged, in D.P.U. 09-138.

NEGPA's argument that "§ 94 compels a competitive procurement process" (NEPGA Br. at 36, 40) similarly is unavailing, given the plain language of Section 83. As an initial matter, NEPGA improperly asserts that the Department identified a statutory conflict between Section 94A and Section 83. Yet the only mention of a conflict between the statutes occurs in a footnote where the Department appropriately notes that if there were an inconsistency between the statutes, the "new and more specific statute," i.e., Section 83, governs. A. 7833, n. 57 (citing Doe v. Attorney General, 425 Mass. 210, 215–216 (1997)). Further, as the Department explained in D.P.U. 10-54, Section 94A is silent concerning the solicitation method for entering contracts greater than one year, whereas Section 83 explicitly permits electric distribution companies to procure long-term contracts through competitive solicitation or individual negotiations. A. 7855. Thus, the Department appropriately relied on the principle that "when two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." A. 7832-7833 (citing Bd. of Educ. v. Assessor of Worcester, 368 Mass. 511, 513–514 (1975)).

B. Section 83 Sets a Three Percent Minimum Long-term Renewable Energy Purchasing Requirement, Not a Limit.

Contrary to the assertions of AIM, Section 83 sets a minimum requirement for long-term contracting for renewable energy, not a cap. See e.g., AIM Br. at 4, 24, 27. The plain language of Section 83 provides that although distribution companies generally are not obligated to enter long-term PPAs for more than 3% of their loads, they are permitted to do so:

> Distribution companies shall not be obligated to enter into long-term contracts under this section that would, in the aggregate, exceed 3 per cent of the total energy demand from all distribution customers in the service territory of the distribution company. As long as the electric distribution company has entered into long term contracts in compliance with this section, it shall not be required by regulation or order to enter into contracts with terms of more than 3 years in meeting its applicable annual RPS requirements . . . unless the department of public utilities finds that such contracts are in the best interest of customers; provided, however, that the electric distribution company may execute such contracts voluntarily, subject to the department of public utilities' approval.

St. 2008, c. 169, § 83 (emphasis added); see also 220 CMR § 17.08(5). The text is abundantly clear that 3 percent is a cap only on the extent to which electric distribution

companies are obligated to enter long-term contracts, and that distribution companies explicitly are authorized, on a voluntary basis and subject to Department approval, to enter into long-term contracts pursuant to Section 83 for a greater proportion of their respective electric loads.

Had the General Court intended to set a cap, it could have written Section 83 to say that distribution companies "shall not enter into long-term contracts that would exceed 3 percent of the total electric demand from all distribution customers in the service territory of the distribution company." But this is not what Section 83 says. Opponents inappropriately argue in favor of an interpretation that would read right out of the statute both the language regarding the extent of the "obligation" to enter long-term contracts as well as the language regarding authority for distribution companies to "voluntarily" enter long-term renewable energy contracts exceeding 3 percent of the total electricity demand from

their respective customers. Id.[5] As such, Appellants' unsupported construction of Section 83 must be rejected.

C. Section 83, on Its Face, Specifically Is Intended to "Facilitate the Financing" of Renewable Energy, Including Offshore Projects, and the Department Appropriately Concluded That This Requirement Would Be Met with Cape Wind.

The plain language of Section 83 makes clear that the central objective of the renewable energy long-term contracting program is to "facilitate the financing of renewable energy generation." St. 2008, c. 169, § 83. Section 83 specifically is designed to promote the development of new renewable generation in order to reduce the Commonwealth's reliance on carbon-based fuels for electric production. A. 4555-4556.

Appellant Transcanada asks this Court to ignore the explicitly stated intent of the Section 83 program and instead focus the inquiry merely on whether a renewable energy project has a commercial operation date on or after January 1, 2008. Transcanada Br. at 20-23. According to Transcanada,

[5] As noted at p. 5, supra, total RPS requirements substantially exceed the long-term contracting floor set by Section 83.

> Section 83 and the regulations . . . set out a specific temporal element, which requires any eligible generator to have a commercial operation date on or after January 1, 2008. This specific requirement carries out the general purpose 'to facilitate the financing' of renewable energy generation.

Id. at 21-22 (emphasis added). This interpretation must be rejected, as it impermissibly would read the language regarding the central purpose of Section 83 – i.e., to facilitate the financing of renewable energy generation – right out of the statute. The General Court's intent must be ascertained from the language of the statute by giving effect to each word. Fordyce v. Town of Hanover, 457 Mass. 248, 257-258 (2010); In re Liquidation of American Mutual Liberty Liability Ins. Co., 440 Mass. 796, 800-801 (2004).[6] Section 83's requirement that eligible renewable energy projects have a first operation date on or after 2008, and the requirement that Section 83 contracts "facilitate the financing" of projects, can and must be read in harmony. Fordyce, 457 Mass. at 258. In other words, contrary to Transcanada's assertions, both criteria must be met.

[6] APNS admits to this basic principle of statutory construction, as it must. See APNS Br. at 42 ("It is a well-established rule of statutory construction that a statute must be interpreted in such a way as to not render any of its language superfluous."(citing Trace Construction, Inc. v. Dana Barros Sports Complex, LLC, 459 Mass. 346 (2011)).

APNS, for its part, similarly seeks to set aside the central purpose of Section 83. Specifically, APNS argues that National Grid failed to consider "whether the 3.5 percent of its load that would be served by PPA-1 could be met by a combination of Class 1 renewable resources that are already operational and those that are as far along in permitting as Cape Wind". APNS Br. at 49. This interpretation of Section 83, like Transcanada's, impermissibly ignores that the central purpose of the program is to "facilitate the financing" of renewable energy projects. In other words, the statute is intended to get projects up and running, not for facilities that have already been financed and commenced operation without the benefit of a long-term contract.

It is demonstrably true, as borne out by observed dynamics on the ground in New England, that new electric generation projects virtually always require purchased-power agreements to obtain financing. A:19L2369. Long-term PPAs enable capital investment in new renewable energy projects because they provide critical assurance to lenders that predictable revenues will be generated from the sale of power and other products, such as RECs. A. 3499. The

scale of the Cape Wind project (and its clean energy potential) is substantial, particularly as compared to any other renewable projects in New England, and as the first offshore wind farm in North America, it would represent a new type of renewable resource for the United States and the Commonwealth. As such, Cape Wind would be especially difficult to finance without a long-term PPA, and a PPA will help "facilitate its financing". A. 2370. Giving meaning and effect to the explicitly stated purpose of Section 83 is thus particularly critical in this case.

Further, although the Department's Section 83 implementing regulations were stripped of certain geographic limitations in the face of dormant commerce clause litigation brought by Transcanada, A. 4530-4531, it is worth noting – and remains relevant – that the statutory language clearly contemplates offshore renewable energy (in both state and federal waters) as being eligible for the long-term contracts program. St. 2008, c. 169 § 83 (requiring distribution companies to enter long-term contracts "to facilitate the financing of renewable energy generation within the jurisdictional boundaries of the commonwealth, <u>including state waters, or in adjacent</u>

federal waters.")(emphasis added). The Legislature clearly intended to include offshore renewable energy generation, not just land-based generation, in the program, and explicitly authorized the long-term contracts program to establish new opportunities for facilitating the financing of this type of resource.

II. Based on Substantial Evidence of Record, the Department Reasonably and Properly Concluded that PPA-1 Meets the "Cost-effectiveness" Requirement of Section 83.

A. Section 83 Requires Eligible Long-term Renewable Energy Contracts to be "Cost-effective," Not "Least Cost".

Section 83 calls upon electric distribution companies to enter into "cost-effective" long-term contracts to facilitate the financing of renewable energy generation, and the Department's regulations require that the renewable energy generating source "be cost effective to Massachusetts ratepayers over the term of the contract." St. 2008, c. 169, § 83; 220 C.M.R. § 17.05(1)(c)(3). The term "cost effective" is not defined in Section 83 or elsewhere in the Green Communities Act, and the plain language of the statute provides little guidance beyond a requirement that the Department "take into consideration

both the potential costs and benefits" of the long-term contracts. Id. What is evident from the plain language of the statute, however, is that the standard is one of "cost-effectiveness," not "least cost," contrary to arguments that APNS (APNS Br. at 44-45) and other Appellants endeavor to advance.

A review of the use of the term "cost-effectiveness" in other sections of the Green Communities Act is illuminating. As an initial matter, the Green Communities Act reinforces that "cost-effective" does not mean "less expensive than supply." Tellingly, in provisions governing the procurement of energy efficiency and demand resources, the Act explicitly refers to the procurement of resources that are "cost effective or less expensive than supply" – obviously distinguishing between those two distinct standards. St. 2008, c. 169 § 11; Mass. G.L. c. 25, §§ 21(a), 21(b)(1)-(2), 21(d)(2) (emphasis added). Indeed, Section 83 clearly contemplates the prospect of long-term PPAs with above-market costs for power and RECs, as reflected in the following language regarding mechanisms for the reconciliation of energy and RECs that have been procured under a long-term PPA:

> If the distribution company sells the purchased energy into the wholesale spot market and auctions the RECs as described in the fifth paragraph, the distribution company shall net the cost of payments made to projects under the long-term contracts against the proceeds obtained from the sale of energy and RECs, and the difference shall be credited **or charged** to all distribution customers through a uniform fully reconciling annual factor in distribution rates, subject to review and approval of the department of public utilities.

St. 2008, c. 169, § 83 (emphases added). Obviously, there would be no need to reference the prospect of "charging" any differences to distribution customers, as Section 83 does, unless the program allowed for the potential of above-market costs.

In general, the flexible and open-ended language of Section 83 with respect to cost-effectiveness stands in contrast to the explicit definitions of that term used in other provisions of the Green Communities Act, specifically in the energy efficiency context. For example, the Act directs that efficiency programs, including low-income energy efficiency programs "shall be screened only through cost-effectiveness testing which compares the value of program benefits to program costs to ensure that a program is designed to obtain energy savings and system benefits with value greater than the costs of the program." St.

2008, c. 169 § 11 (amending G.L. c. 25) and § 19(c) (amending G.L. c. 25, § 21(b)(3))(emphasis added). No such language is included in Section 83, leaving the Department with broader discretion to interpret and apply the cost-effectiveness test under that statute.

Section 83 does include guidance regarding how cost-effectiveness should be applied in evaluating long-term renewable energy PPAs, by directing that each PPA be viewed over its entire term, rather than on any shorter term basis. The statute thus emphasizes the use of a long-term lens, and allows for an affirmative finding of cost-effectiveness even if a PPA otherwise might not be cost-effective for one (or more) years of its ten to fifteen year term.

B. The Department Appropriately Rejected APNS' "Bright Line" Test as Inconsistent with Section 83's "Cost-effectiveness" Standard. APNS' Re-Framed "ACP Option," Argued on Appeal, Similarly Should Be Rejected on the Basis That it is Inconsistent with Section 83's Cost-effectiveness Standard.

In the underlying proceeding, APNS sought, unsuccessfully, to persuade the Department to apply a so-called "Bright Line" test to determine whether Cape Wind PPA-1 is cost-effective. A. 7846; APNS Br. at 10. The

"Bright Line" test proffered by APNS would have capped the contract price for eligible renewable energy projects at the market price for energy plus the "Alternative Compliance Payment" ("ACP") value established by DOER's regulations – a tool intended to address circumstances of scarcity in the market for eligible renewable energy supply, i.e., when there is not enough eligible renewable energy available for electric suppliers to purchase in order to meet their Massachusetts RPS requirements. Id. The Department appropriately rejected that argument on the basis that it lacks any basis in Section 83. A. 7855. On Appeal, APNS has re-cast its ACP argument – now asserting that the Department must look to the ACP value as a limit on REC prices (APNS Br. at 41) – an argument similarly untethered from the actual language of Section 83.

APNS bases its argument in support of the ACP as a supposed REC price "cap" on language in Section 83 that authorizes DOER to assess whether the long-term contracting requirements of Section 83 "reasonably support the renewable energy goals of the commonwealth" and "whether the [ACP] rate … should be adjusted accordingly." St. 2008, c. 169, § 83. APNS' argument further is premised on the assumption that "[t]he only reasonable interpretation of

the [foregoing] provision that gives it meaning is that the language authorizes DOER to adjust the level of the ACP upward in the event DOER determines the current level of the ACP is too low to support the Commonwealth's renewable energy goals." APNS Br. at 43 (emphasis added). But APNS ignores that Section 83 equally reaffirms DOER's authority to adjust the ACP value downward (e.g., in the event the long-term contracting program is successful in bridging the gap between supply and demand for new renewable energy supply), and does not in any way tie the analysis or adjustment of ACP value to the cost-effectiveness requirement under the statute.[7]

[7] As we pointed out in the underlying proceeding, APNS' ACP argument also reflects a fundamental misapprehension of the genesis and purpose of ACP. APNS relies on the erroneous proposition that ACP was created specifically in order to place a cap on REC prices. Tellingly, the original RPS statute enacted in connection with the Restructuring Act in the late 1990's included no mention of ACP. St. 1997, c. 164, § 50; 225 CMR § 14.00 et seq. Rather, DOER created ACP as a mechanism for load serving entities to comply with the RPS mandate when there is an insufficient supply available of RPS-eligible renewable energy. 225 CMR § 14.08. Pursuant to DOER regulations, ACP revenues have been used, in turn, to invest in the development of new renewable energy generation and bridge the gap between supply and demand for RPS-eligible renewable energy generation. 225 CMR § 14.08(3)(b). The Massachusetts General Court first adopted statutory language embracing the administratively-created ACP in 2008 as part of the Green Communities Act. St. 2008, c. 169, § 83; 225 CMR § 14.00 et seq.

APNS even goes so far as to suggest that National Grid should have flouted the law rather than sign a long-term PPA with Cape Wind that does not comport with APNS' so-called "ACP Rule," viz.:

> Massachusetts ratepayers would be better off economically if National Grid ignored its obligations and simply paid market prices for energy in addition to the ACP on its RPS shortfall. That means that PPA-1 is not cost-effective to ratepayers.

APNS Br. at 14 (emphasis added). APNS underscored the emphasis it places on this fundamentally flawed argument by repeating it:

> [R]atepayers would be better off economically if National Grid ignored its portfolio obligations under the RPS and paid market prices for energy in addition to the ACP on its RPS shortfall.

Id. at 44 (emphasis added). These arguments stand in flat contradiction of the basic requirements and policy objectives of the Massachusetts RPS, G.L. c. 25A, § 11F, and the Commonwealth's long-term contracting statute, § 83, they ignore the basic fact that ACP does not deliver the benefits of actual renewable energy, A. 7855, and manifest APNS' ultimate objective of preventing the Cape Wind project from advancing irrespective of what the law requires.

Likewise, there is no support in the record for APNS' new argument that the "opportunity costs" of PPA-1 somehow render it not cost-effective. See, e.g., APNS Br. at 36-37. APNS' "opportunity cost" argument regarding the supposed lost potential for renewable energy (Id. at 39) is neither grounded in the plain language of Section 83 nor substantiated by evidence of record.

C. The Department Acted Reasonably, Based on Substantial Evidence of Record, in Determining that PPA-1 is Cost-effective

In light of the Department's extensive cost-effectiveness analysis based on substantial evidence of record, and in light of the deference that must be afforded to the Department with respect to its factual determinations,[8] it is perhaps not surprising that Appellants' challenges with respect to the approval of PPA-1 under Section 83 turn almost exclusively on issues of law, as discussed above, rather than fact. Yet Appellants make cursory arguments with respect to the Department's

[8] See, e.g., Cobble v. Comm'r of Dep't of Soc. Serv., 430 Mass. 385, 390 (1999) (In reviewing an agency decision, the Court "should defer to the agency on questions of fact and reasonable inferences drawn from the record."); see also, Daniels v. Board of Registration in Med., 418 Mass. 380, 385-86 (1994); Flint v. Comm'r of Pub. Welfare, 412 Mass. 416, 420 (1992); Arthurs v. Board Of Registration in Med., 383 Mass. 299, 304 (1981).

determinations based on the evidence of record, particularly by suggesting that the Department erred in finding that PPA-1 "will provide benefits to National Grid's ratepayers that far exceed those that could be provided by other potential § 83 contracts," and that "[t]he critical unique attributes of the Cape Wind facility relate to its size, its capacity factor, its location on the regional transmission system, and its stage of development." APNS Br. at 47 (citing A. 8014).

Appellants' arguments in this respect transparently are an extension of the faulty premise that the Department is somehow obliged to approve Section 83 contracts only for the "lowest cost" resources. See APNS Br. at 47-50. Moreover, Appellants have not, and indeed cannot, demonstrate that the Department acted unreasonably, or based on insufficient evidence, in concluding that PPA-1 is cost-effective in light of the particular benefits of the Cape Wind project – such as electric market price suppression effects, hedge value, relatively high capacity factor, reliability benefits in a key area of electric demand, ability to deliver very large quantities of renewable power, benefits for moderating (or meeting) peak load, potential for bridging the gap between supply and

demand for RPS-eligible renewable electricity, and role in ensuring that the Commonwealth's statutory GHG-reduction mandates are met. A. 7999-8002.

Indeed, Intervenor-Appellees CLF et al. believe that the Department's decision understates the extent to which Cape Wind is needed for Massachusetts and the New England region to meet existing renewable energy mandates, as demonstrated by substantial evidence of record. See, e.g., A. 1464-65; 2069. The Department was obliged to, and to a certain extent did, take into account the substantial benefits of Cape Wind for achieving the objectives of important state laws that are intended to promote clean renewable energy and reduce greenhouse gas emissions – particularly the Massachusetts RPS, which goes hand-in-hand with Section 83.

The Green Communities Act amended the RPS in 2008 to set ambitious targets for the procurement of new renewable energy, currently at 6% of load and escalating by an increment of 1% of load per year. G.L. c. 25A, § 11F. By 2013, when Cape Wind is projected to become operational, National Grid, like all other load serving entities in Massachusetts, will be required to meet 8% of its load with new renewable energy generation. That requirement will

grow annually such that by 2028 – the anticipated final year of Cape Wind PPA-1's initial 15-year term – National Grid and each other load serving entity must meet at least 23% of load with new renewable energy generation – of which Cape Wind will supply a relatively small (3.5%) but meaningful fraction. Moreover, adjacent New England states and New York have similarly ambitious renewable energy targets that are expected to produce robust demand for new renewable energy generating sources throughout the region. See, e.g., A: 4:1471-1473.[9]

Substantial evidence of record set forth in the underlying proceeding demonstrates that Cape Wind is needed for Massachusetts (and the region) to meet these existing renewable energy mandates. See, e.g., A. 1464-65, 2069. In particular, Drs. Tierney and Stoddard laid out detailed analyses of the projected "gap" between supply and demand for renewable energy, and the Department appropriately recognized in its Final Order that it is difficult if not impossible to imagine that the targets will be met without Cape Wind. Id.; see also A. 7949, 7959-60 (noting that

[9] Dr. Tierney estimates that demand for renewable energy in New England will grow from about 6,000 gigawatt hours (GWh) in 2010 to approximately 24,000 to 29,000 GWh in 2025. A. 4:1509.

Cape Wind is expected to provide fully 14.4% of the total GHG emissions reductions required from the entire electric sector by 2020, and 4.2% of the Commonwealth's aggregate GHG reduction requirements across all sectors by 2020).

Moreover, the Department reached its cost-effectiveness determination without fully crediting the substantial evidence of record, introduced by CLF et al. and other parties, regarding benefits such as (1) the beneficial market price suppression effects the Cape Wind project would have as it bids its power into the market and displaces some of the most costly electric generating resources; A. 2087; A. 132; A. 2349-50; A. 7918-19 (declining to take into account unrebutted evidence of record introduced by CLF et al. regarding price suppression in the capacity market, the REC market, and with respect to natural gas prices) and (2) avoided environmental compliance costs, particularly with respect to GHG emissions. A.7918-19.

III. The Department's Approval of PPA-1 Pursuant to Section 83 Did Not Contravene the Commerce Clause of the U.S. Constitution.

Although Appellants raise several challenges to the Department's approval of PPA-1 that ostensibly are based on

alleged contraventions of the Commerce Clause of the United States Constitution, see e.g., Transcanada Br. at 4-18 and APNS Br. at 16-28, these arguments represent little more than a re-framing of Appellants' misplaced arguments about a supposed "least-cost" standard that, in Appellants' view, should have favored cheaper renewable energy available throughout the region. As discussed below, Appellants' Commerce Clause arguments are misplaced given that the Department and National Grid were not affected by any geographic restrictions in connection with advancing the "individual negotiation" and approval of Cape Wind PPA-1, Cape Wind itself is not located "in-state" in any event, and the Department did not violate any rule of "reasoned consistency" by approving PPA-1 while rejecting contracts proposed by NSTAR arising out of a geographically constrained solicitation.

A. The Department Appropriately Set Aside the Geographic Limitations in Section 83 and Its Implementing Regulations

As discussed above, Section 83 at once focused the long-term renewable energy contracts program on a geographically constrained area and explicitly gave the Department the authority, through a severability clause, to

set aside any challenged provision of Section 83 while continuing to implement its requirements. The severability clause reads as follows:

> If any provision of this section is subject to a judicial challenge, the [Department] may suspend the applicability of the challenged provision…, and shall issue such orders and take such other actions as are necessary to ensure that the provisions that are not challenged are implemented expeditiously to achieve the public purposes of this provision.

St. 2008, c. 169, § 83, ¶ 10.

When Transcanada lodged a federal court challenge against geographic restrictions in Section 83 and its implementing regulations, the Department appropriately exercised its authority to swiftly modify its rules to jettison geographic restrictions that were subject to challenge based on the Commerce Clause of the U.S. Constitution. See Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (invalidating an in-state purchasing requirement to be contrary to the Commerce Clause); Opinion of the Justices, 330 Mass. 713, 726 (1953)(finding severability to be an appropriate remedy when a portion of a law is found to be unconstitutional); A. 4540 (D.P.U. 10-58-A).

In short, Section 83 explicitly allows the Department to set aside challenged sections of the law, and that is

exactly what the Department did here with respect to Section 83's geographic restrictions, in keeping with federal and state law. The Department also took swift action to suspend the competitive RFP for long-term contracts, and directed the utilities to revise their solicitation method by issuing a new RFP without the geographic constraints that had characterized the Initial RFP. A. 4564. Finally, the Department determined that National Grid's individual negotiation solicitation with Cape Wind did not necessitate a re-commencement of the solicitation process (because it was not characterized by geographic limitations such as those that were challenged in connection with the Initial RFP), and instead directed National Grid to demonstrate whether and how it complied with D.P.U. 10-58-A and the accompanying emergency regulations.[10]

B. The Solicitation of the Cape Wind PPA was not Affected by Any Geographic Restrictions or Otherwise "Tainted" by Alleged Violation of the Commerce Clause.

[10] It is noteworthy that no party challenged the Department's approval of the timetable and method for National Grid's solicitation of a long-term PPA with Cape Wind, as set forth in D.P.U. 09-138.

Notwithstanding the Department's swift action to strip any challenged geographic restrictions from its regulations implementing Section 83, and the lack of any geographic restriction on National Grid's solicitation of a long-term PPA with Cape Wind by individual negotiation, Appellants still assert that the process leading to Cape Wind PPA-1 was somehow "tainted" by violation of the Commerce Clause. See e.g. Transcanada Br. at 11. But this argument fails for several reasons, including (1) Cape Wind is located in federal waters and, as such, is not an in-state resource that could be the subject of state-based protectionism in the first place; (2) the geographic limitation in Section 83 had no bearing on National Grid's solicitation or negotiation of a long-term PPA with Cape Wind, and there is substantial evidence of record that National Grid complied with the Department's decision in D.P.U. 10-58-A and the associated emergency regulations;[11] and (3) Appellants' argument, if adopted, would lead to the absurd result that the only acceptable individual negotiations would be with resources outside of the geographic boundaries of Massachusetts, with no opportunity for in-state projects.

[11] Indeed, National Grid explicitly asked the Department to suspend Section 83's geographic restriction as part of its petition in support of Cape Wind PPA-1. See A. 8097.

With respect to National Grid's compliance with D.P.U. 10-58-A, the Department extensively analyzed whether National Grid's solicitation and negotiation of a PPA with Cape Wind was somehow characterized by an inappropriate geographic constraint, and concluded that the utility would have pursued a long-term PPA with Cape Wind even if Section 83 never had contained any geographic restriction. See e.g., A. 8097-98. Where, as here, an agency's decision is supported by substantial evidence and associated findings, the Agency's determination should be afforded considerable deference. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 696-698 (2010); Massachusetts Inst. of Tech. v. Dept. of Pub. Utils., 425 Mass. 856, 867-68 (1997). Appellants have supplied no compelling reason to upend the Department's well-reasoned conclusion that National Grid satisfied the requirements of D.P.U. 10-58-A.

C. Contrary to APNS' Assertions, the Department Acted With "Reasoned Consistency" in Approving the Cape Wind PPA

APNS similarly cannot demonstrate that the Department somehow violated the principle of "reasoned consistency" when it approved National Grid's long-term PPA with Cape

Wind after rejecting long-term contracts proposed by NSTAR in D.P.U. 10-71, 10-72, and 10-73. While it is true that administrative agencies are expected to act with "reasoned consistency" in their decision-making processes, Massachusetts Automobile Rating and Accident Prevention Bureau v. Comm'n of Ins., 401 Mass. 282, 287 (1987) (citing Boston Gas Co. v. Department of Pub. Utils., 367 Mass 92, 103 (1975)), this does not mean the Department somehow was constrained to reject PPA-1 when it rejected NSTAR's contracts on grounds not relevant to National Grid's solicitation of Cape Wind PPA-1.[12] Importantly, unlike PPA-1 – which satisfied the statutory prerequisite of having an approved method and timetable for its solicitation – the long-term contracts that were rejected in D.P.U. 10-71, 10-72, and 10-73 failed to meet the basic prerequisite that they be based on an approved method of solicitation because the Department effectively had rescinded the original approval and had directed the utilities to re-issue their

[12] Even if the Department had an "established pattern of conduct" in applying Section 83, which in light of the newness of the law it did not, the Department still could deviate from that pattern where justified. The principle does not act as the sort of regulatory or adjudicatory straight jacket that the Alliance suggests. Monsanto Co. v. Dep't of Pub. Util., 402 Mass. 564, 569 (1988); Alliance Br. at 28-29.

competitive RFP without the challenged geographic restrictions.

Importantly, Section 83 provides that a "timetable and method for solicitation and execution of [long term renewable energy contracts] shall be proposed by the distribution company in consultation with the department of energy resources and shall be subject to review and approval by the department of public utilities." St. 2008, c. 169 § 83 (emphasis added). As reflected in the Department's Final Order approving Cape Wind PPA-1, the Department had dismissed NSTAR's contracts without prejudice because they did not comply with the Department's directives in D.P.U. 10-58, which required a re-initiation of the solicitation process pursuant to revised standards. A. 8074 (citing NSTAR Electric Company, D.P.U. 10-71, 10-72, 10-73, Orders of Dismissal Without Prejudice); A. 4487.

The distinction between the Department-approved solicitation methods for NSTAR and National Grid's PPAs is an essential factual distinction. When the Department ordered the removal of provisions and subsequent amendments to the corresponding regulations in D.P.U. 10-58, the Department effectively rejected the Initial RFP as an approved solicitation method. Therefore, NSTAR's

solicitation method failed to comply with the Department's modified solicitation method, serving as grounds to dismiss NSTAR's proposed contracts.

Conversely, the Department's order in D.P.U. 10-58 had no effect on the Department's approval of National Grid's solicitation method that gave rise to Cape Wind PPA-1, and instead called upon National Grid to explain how its solicitation process was compliant with the directive of D.P.U. 10-58 to set aside the challenged geographic restrictions. As the Department noted in its Final Order in the proceeding below, "[b]ecause Section 83 allows for solicitation methods that are significantly different from one another, it logically follows that there will also be differences in the showing a petitioner must make to demonstrate regulatory compliance . . . the solicitation method chosen will influence the type of showing that will be applicable." A. 8094.

Accordingly, the Alliance's argument that the Department failed to act with "reasoned consistency" is meritless. In both rejecting NSTAR's long-term contracts and approving National Grid's, the Department consistently required that the distribution companies comply with the statutory prerequisite that a long-term contract must be

entered pursuant to a method and timetable for solicitation approved by the Department.[13]

Appellants' arguments ignore that PPA-1 appropriately resulted from an approved method and timetable of solicitation by individual negotiation whereas the NSTAR PPAs were the product of a solicitation process that was obviated by the Department in the wake of a challenge to the sort of geographic restriction that characterized the RFP that gave rise to those PPAs. See APNS Br. at 28-29. Indeed, the Department's rejection of the first round of PPAs proposed by NSTAR serves to underscore the Department's compliance with the Commerce Clause.

Moreover, the remedy sought by APNS and its fellow appellants -- to re-open the process to out-of-state competition (APNS Br. at 28) -- would have no effect in the context of solicitation by individual negotiation such as

[13] Even though it did, in fact, operate with reasoned consistency as between its decisions in D.P.U. 10-54 and D.P.U. 10-71, 10-72 and 10-73, the Department nonetheless carefully and adequately explained its reasons for imposing the same compliance requirements on differing solicitation methods. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 448 Mass. 45, 56 (2006) (finding that the Energy Facilities Siting Board's careful and adequate explanation of its reasons for its decision was "an eminently reasonable and practical approach," satisfying the agency's obligation to act with "reasoned consistency.").

occurred here. Section 83 still allows individual negotiations with projects, in any location, that – once financed and put into operation – can deliver RPS-eligible power to Massachusetts customers and otherwise meet the criteria of Section 83, irrespective of whether the facility is located in-state, in waters adjacent to the Commonwealth, or anywhere else in the region.

CONCLUSION

Wherefore, for the foregoing reasons, CLF et al. request that this Court affirm the Department's decision in D.P.U. 10-54.

Respectfully Submitted,

CONSERVATION LAW FOUNDATION and UNION OF CONCERNED SCIENTISTS

By their attorney,

_____

Susan M. Reid, BBO# 647807
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 350-0990

NATURAL RESOURCES DEFENSE COUNCIL,

By its attorneys (appearing *pro hac vice*),

_____

Katherine Kennedy, Esq.
Brandi Colander, Esq.
Natural Resources Defense Council
40 West 20th ST, 11th Floor
New York, NY 10011
Tel: (212) 727-4637

CLEAN POWER NOW, INC.

By its attorney,

_____

Matthew F. Pawa, BBO #652933
Pawa Law Group, P.C.
1280 Centre Street, Suite 230
Newton Centre, MA 02459
Tel: (617) 641-9550

Dated: July 29, 2011

CERTIFICATE OF COMPLIANCE PURSUANT TO R.A.P. 16(K)

I, Susan M. Reid, counsel for Intervenor-Respondents Conservation Law Foundation and Union of Concerned Scientists, and on behalf of Intervenor-Respondents Natural Resources Defense Council and Clean Power Now, hereby certify that the Brief for the Amicus Curiae Conservation Law Foundation complies with the Rules of Court that relate to the filing of briefs, including but not limited to the Rules noted in R.A.P. 16(k)

CONSERVATION LAW FOUNDATION

By its attorneys,

_____

Susan M. Reid (BBO# 647807)
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
(617) 850-1740

Dated: July 29, 2011

CERTIFICATE OF SERVICE

I, Susan M. Reid, on behalf of Conservation Law Foundation, Union of Concerned Scientists, Natural Resources Defense Council and Clean Power Now, hereby certify that on this date I served a true copy of the foregoing Brief of Intervenor-Respondents Conservation Law Foundation, Clean Power Now, Natural Resources Defense Council and Union of Concerned Scientists upon counsel of record to the parties on the service lists in the above-captioned proceedings.

_____

Susan M. Reid, Esq., BBO# 647807
Conservation Law Foundation
62 Summer Street
Boston, Massachusetts 02110
Tel: (617) 850-1740

Dated: July 29, 2011

Service List

Kenneth W. Salinger, Esq. (Department of Public Utilities)
Annapurna Balakrishna, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

David Rosenzweig, Esq. (Cape Wind and National Grid)
Erika Hafner, Esq.
Keegan Werlin LLP
265 Franklin Street
Boston, MA 02110

Robert R. Ruddock, Esq. (Associated Industries of Massachusetts)
Daniel Cahill, Esq.
Smith & Ruddock
50 Congress St, Suite 500
Boston, MA 02109

Robert A. Rio, Esq. (Associated Industries of Massachusetts)
Associated Industries of Massachusetts
222 Berkeley St
PO Box 763
Boston, MA 02117

Glenn S. Benson, Esq. (Alliance to Protect Nantucket Sound)
Carol A. Smoots, Esq.
Perkins Coie LLP
604 Fourteenth St, NW, Suite 800
Washington, DC 20005

Evan T. Lawson, Esq. (Alliance to Protect Nantucket Sound)
Michele Hunton, Esq.
Lawson & Weitzen
88 Black Falcon Ave, Suite 345
Boston, MA 02210

Richard A. Kanoff, Esq. (New England Power Generators Assc.)
Murtha Cullina, LLP
99 High St, 20th Floor
Boston, MA 02110

Robert M. Buchanan, Esq. (TransCanada Power)
Choate, Hall & Stewart LLP
2 International Place
Boston, MA 02110