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November 22, 2017

Debra A. Howland
Executive Director and Secretary
State of New Hampshire
Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

RE: Docket No. 17-153
Request for Rulemaking with Respect to Purchases of
Electric Energy and Capacity Produced from Qualified Facilities

Memo of Law¹

Dear Executive Director Howland:

Please find enclosed an original and 7 copies of a Memo of Law regarding Order No. 26,071 in the above-captioned proceeding.

Order No. 26,071 did not discuss the issues of law involved in this proceeding. My opinion is that this Order is unlawful on the grounds that the PURPA avoided cost rates set out in Section 33 (page 24) of the Eversource/PSNH Tariff are inconsistent with the holdings in *Allco Renewable Energy Ltd. v. Massachusetts Electric Co. et al.*, *Windham Solar LLC & Allco Fin. Ltd.*, as well as 18 C.F.R. § 292.304(d).

It appears that the Massachusetts Department of Public Utilities is in accord with this position:

On September 23, 2016, the United States District Court for the District of Massachusetts (“District Court”) issued a Memorandum and Order in *Allco Renewable Energy Ltd. v. Massachusetts Electric Co. et al.*, 1:15-cv-13515, 2016 U.S. Dist. LEXIS 130617 (D. Mass. September 23, 2016) (“District Court

¹ This is not a Motion for Rehearing.

Order”). **The District Court found that the Department’s regulations are inconsistent with the FERC regulations and that the Department’s regulations are therefore invalid.** District Court Order at 23. The District Court found that the Department has the statutory authority to revisit its implementation of FERC’s rules, either through a new rulemaking, a case-by-case adjudication, or other reasonable method. District Court Order at 23, citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). Accordingly, by this Order, and pursuant to G.L. c. 30A, § 2 and 220 C.M.R. § 2.00 et seq., the Department institutes this rulemaking for the purpose of updating its regulations at 220 C.M.R. § 8.03(1) to comply with the District Court Order and 18 C.F.R. § 292.304(d).

ORDER INSTITUTING RULEMAKING, D.P.U. 17-54, March 21, 20179 (*Emphasis added*).

Moreover, it appears that Eversource has expressed some support for the position that the existing rates for QF’s are unlawful. In its October 19, 2017 letter submitted to the Commission in this proceeding Eversource noted the following:

Also, as noted above, there has been recent activity relative to the requirements of PURPA for New England’s utilities and utility commissions, specifically in *Alco Renewable Energy Ltd. v. Massachusetts Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. Sept. 23, 2016) and FERC’s decision in *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 (Nov. 22, 2016). These decisions addressed whether a QF is entitled to an LEO [legally enforceable obligation] containing a forecast of avoided cost. In its decision, FERC stated that “... state regulatory authorities cannot preclude a QF - even an intermittent QF - from obtaining a legally enforceable obligation with a forecasted avoided cost rate” *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶61134 at P. 6 (Nov.22, 2016).

Thank you for considering these comments. I have served a copy of this Memo on each person identified on the commission’s service list for this docket.

Sincerely,

/s/James T. Rodier