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December 10, 2020

Mark D. Marini, Secretary
Department of Public Utilities
One South Station, 5th Floor
Boston, MA 02110

Re: Petition for Approval of Long-Term Contracts for Procurement of Offshore Wind Energy Pursuant to Section 83C, D.P.U. 20-16/17/18

Dear Secretary Marini:

On behalf of NSTAR Electric Company d/b/a Eversource Energy, Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, and Fitchburg Gas and Electric Light Company d/b/a Until (together, the "Distribution Companies") enclosed is the Distribution Companies' joint response to the Motion for Reconsideration submitted by the Office of the Attorney General in the above captioned proceeding.

Please contact me with any questions you may have. Thank you for your attention to this matter.

Sincerely,



Matthew S. Stern, Esq.

Enclosures

cc: Mary Alice Davey, Esq., Hearing Officer
D.P.U. 20-16/17/18 Service Lists

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Petition of NSTAR Electric Company, d/b/a)
Eversource Energy for Approval of Proposed)
Long Term Contracts for Offshore Wind Energy) D.P.U. 20-16
Generation Pursuant to Section 83C of An)
Act Relative to Green Communities, St. 2008,)
c. 169, as amended by St. 2016, c. 188, § 12)

Petition of Massachusetts Electric Company and)
Nantucket Electric Company, each d/b/a)
National Grid for Approval of Proposed Long Term)
Contracts for Offshore Wind Energy Generation) D.P.U. 20-17
Pursuant to Section 83C of An Act Relative to)
Green Communities, St. 2008, c. 169,)
as amended by St. 2016, c. 188, § 12)

Petition of Fitchburg Gas and Electric Light)
Company d/b/a Unitil for Approval of Proposed)
Long Term Contracts for Offshore Wind Energy) D.P.U. 20-18
Generation Pursuant to Section 83C of An)
Act Relative to Green Communities, St. 2008,)
c. 169, as amended by St. 2016, c. 188, § 12)

JOINT RESPONSE OF THE ELECTRIC DISTRIBUTION COMPANIES TO THE ATTORNEY GENERAL’S MOTION FOR RECONSIDERATION

NSTAR Electric Company d/b/a Eversource Energy, Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid, and Fitchburg Gas and Electric Light Company d/b/a Unitil (collectively, the “Distribution Companies” or the “EDCs,” and individually “Distribution Company”) hereby respond to the Motion for Reconsideration submitted by the Office of the Attorney General (the “Attorney General” or “AGO”) to the Department of Public

Utilities (the “Department”) on November 25, 2020, in the above-referenced proceedings (the “AGO Motion”).

I. INTRODUCTION

This proceeding involves the Department’s review and approval of long-term power purchase agreements with Mayflower Wind Energy LLC for each Distribution Company’s *pro rata* share of an aggregate 804 MW Offshore Wind Energy Generation project and associated Environmental Attributes (the “PPAs”). The PPAs were executed by the Distribution Companies and approved by the Department in accordance with Section 83C of the Green Communities Act, St. 2008, c. 169, as amended by St. 2016, c. 188 §12 (“Section 83C”) and the Department’s corresponding regulations at 220 C.M.R. 23.00. Pursuant to Section 83C(d) and 220 C.M.R. 23.07, the Distribution Companies requested annual remuneration of 2.75 percent of the annual contract payments consistent with the plain terms of Section 83C to compensate the Distribution Companies for accepting the financial obligation of the long-term contract. The Department’s final decision in the proceeding, issued on November 5, 2020 (the “Order”), approved the PPAs and found that the Distribution Companies’ request for annual remuneration of 2.75 percent of the annual payments under the PPAs is reasonable and in the public interest. NSTAR Electric Company d/b/a Eversource Energy et al., D.P.U. 20-16; D.P.U. 20-17; D.P.U. 20-18, at 91 (2020).

In the AGO Motion, the Attorney General seeks reconsideration of the Order with respect to the Department’s determination to set the contract remuneration rate for the PPAs at 2.75 percent. The Attorney General argues that the Department should reconsider the decision made in its Order regarding remuneration on the basis that the Department did not provide an adequate statement of reasons or make subsidiary findings to support its decision to set the remuneration rate for the PPAs at 2.75 percent versus a lesser amount, as argued by the AGO during the

proceeding (AGO Motion at 5-7). The Attorney General relies on a recent decision of the Commonwealth of Massachusetts Court of Appeals regarding the Department’s reasoning for the authorized return on common equity (“ROE”) set for NSTAR Electric Company in NSTAR Electric Company and Western Massachusetts Electric Company each d/b/a Eversource Energy, D.P.U. 17-05 (2017), as support for the Department’s obligation to provide subsidiary findings and statement of reasons for its decisions (AGO Motion at 6-7). See, Attorney General v. Department of Public Utilities, 2019-P-1383, 98 Mass.App.Ct. 1117 (Mass. App. Ct. Nov. 4, 2020) (slip opinion) (hereinafter, “Appeals Court Decision”).

According to the Attorney General, due to the timing of the issuance of the Appeals Court Decision, the Department did not have the “benefit” of the most recent guidance of the Appeals Court Decision and, therefore, the Department’s “failure to comply” with the Appeals Court directives may have been a “mistake” (*id.* at 7). Further, the Attorney General claims that the Department failed to provide adequate information to allow its decision-making process to be understood or undergo meaningful judicial review (*id.* at 12-13). Neither of these claims is credible.

For the reasons discussed below, the Department should reject the Attorney General’s request for reconsideration because the AGO Motion is unfounded. There is no mistake or error in the Department’s Order in relation to its interpretation of statutory law, its choice or application of the standard of review, its statement of reasons explaining that application, or with respect to subsidiary findings. There are no parallels between the Department’s findings in D.P.U. 17-05 and the findings, reasoning and elucidation of subsidiary findings in the Department’s Order. As a result, the AGO’s reliance on the Appeals Court Decision is thoroughly misplaced.

II. STANDARD OF REVIEW

The Department's Procedural Rule, 220 CMR 1.11(10), authorizes a party to file a motion for reconsideration within 20 days of service of a final Department Order. The Department's policy on reconsideration is well-settled: "[r]econsideration of previously decided issues is granted when extraordinary circumstances dictate that [the Department] take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation." NSTAR Electric Company et al., D.P.U. 18-76-A; D.P.U. 18-77-A; D.P.U. 18-78-A at 4 (2019); citing Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987). Rather than simply rearguing issues considered and decided, a motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. Id.; see also Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983).

Reconsideration may also be appropriate upon a showing that the Department's disposition of an issue was the product of mistake or inadvertence. Consolidated Arbitrations, Phase 4-M at 5 (1999) (emphasis added), citing Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983). Lastly, reconsideration is appropriate where parties have not been "given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. Petition of CTC Communications Corp., D.T.E. 98-18-A at 2, 9 (1998).

With regard to clarification, the Department has consistently held that "[c]larification of previously issued orders may be granted when an order is silent as to the disposition of a specific

issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning.” Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). “Clarification does not involve reexamining the record for the purpose of substantively modifying a decision.” Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

III. DISCUSSION

A. There Is No Basis for Reconsideration.

The Attorney General argues that the Department should reconsider its Order because the Department has allegedly failed to provide a statement of reasons or requisite subsidiary findings supporting its decision to approve remuneration at 2.75 percent as opposed to some other lower figure (AGO Motion at 5-6). However, the Attorney General makes no effort to identify any “extraordinary circumstances” that warrant the Department taking a “fresh look at the record,” which – in fact – is what the AGO is seeking. NSTAR Electric Company et al., D.P.U. 18-76-A; D.P.U. 18-77-A; D.P.U. 18-78-A at 4 (2019). Instead, the Attorney General attempts to shoehorn its motion into the standard for reconsideration by claiming that the Department’s *explanation* of its decision (but not the decision itself) is the result of mistake or inadvertence.

Specifically, the Attorney General argues that the Appeals Court Decision issued on November 4, 2020, one day prior to the Department’s Order in this matter, provides specific direction as to the type of subsidiary findings the Department should have included in the Order to support its conclusion that remuneration of 2.75 percent is reasonable and in the public interest. The Attorney General claims that the Department’s “failure to comply” with the directives in the Appeals Court Decision in reaching its remuneration decision here may have been a mistake due

to timing (AGO Motion at 7). The Attorney General asserts that the Department should reconsider the remuneration issue with the benefit of the Appeals Court Decision and “provide the requisite subsidiary findings and a statement of reasons clearly connecting the Department’s analysis and findings to the specific remuneration percentage awarded” (*id.* at 7).

The Attorney General’s strained attempt to identify a “mistake” in the Department’s Order is evident in the Attorney General’s own description of the Appeals Court Decision. As acknowledged by the Attorney General, “the Appeals Court reiterated the Department’s long-standing obligation to make subsidiary findings” and “does not change the Department’s obligations under G.L. c. 30A, § 11(8)” (AGO Motion at 6-7). The Appeals Court Decision took issue with the Department’s explanation as to the selection of ROE in D.P.U. 17-05, stating that the Department did not provide reasoning as to “whether or how market conditions impacted its ROE decision, how it factored the parties’ financial models into its ROE decision, or how it applied its agency expertise to the evidence to arrive at the ROE it ultimately selected.” Appeals Court Decision at *3.

Thus, the fatal flaw in the Attorney General’s argument is that the Appeals Court Decision does not establish a new, generally applicable standard or issue any new directive to the Department as to the manner in which it approaches its decision-making process. Rather, the Appeals Court Decision puts forth a narrow, case-specific critique of the Department’s perceived lack of justification for one particular decision, viz., its ROE decision in D.P.U. 17-05, as evaluated against longstanding principles of administrative law. The Appeals Court Decision did not overturn the Department’s decision or call into question the Department’s broad discretion to set an ROE. The Appeals Court Decision also did not modify, clarify or in any way call into question the integrity of the Department’s decision. To the contrary, the Appeals Court Decision is

exceedingly narrow, finding that the Department's decision in that case simply a factual statement as to the basis for its decision to set the ROE at the point that it did. Outside of directing the Department to fill in the blank on the factual basis for its ROE selection in that particular case, the Appeals Court Decision creates no new obligation, nor makes any statement clarifying some new principle of law that the Department would have to consider in any or all decisions coming after the issuance of that decision. Accordingly, there is no "mistake" that the Department made in its Order that must be corrected, nor any "benefit" to the Department of reconsidering the remuneration percentage through the lens of the Appeals Court Decision.

B. The Department's Order Is a Robust Statement of Reasons with Adequate Requisite Findings.

In addition to the lack of any basis for reconsideration, the Attorney General's critique of the Department's Order is wholly unfounded by *any* standard. The justification for the 2.75 percent remuneration rate put forth in the Department's Order is sound, i.e., the justification is explained in a robust statement of reasons and is supported by ample subsidiary findings regarding law and relevant facts. In particular, the Attorney General's request for reconsideration is fundamentally off-base given that the statutory provision allowing remuneration is precise and does not afford the Department as much latitude as the Department has in authorizing ROE within a base-rate proceeding under G.L. c. 164, § 94. As a result, within the context of the Department's approval of long-term renewable power contracts undertaken in furtherance of the Commonwealth's renewable energy procurement process, the nature and scope of the Department's inquiry differs substantially from that associated with setting ROEs. Here, the Department's decision on remuneration appropriately and adequately rests on findings of law and relevant facts specifically described by the statutory regime itself.

The Attorney General claims the Department has “mistakenly failed” to provide subsidiary findings explaining what qualitative factors it relied upon in setting the remuneration rate (AGO Motion at 7-9). The Attorney General argues that “the Department fails to set forth the manner in which its reasoning was connected to the ultimate decision to grant a remuneration of 2.75 percent as opposed to any other remuneration percentage” (*id.* at 9). More specifically, the Attorney General criticizes the Order for: (1) rejecting the Distribution Companies’ proposed “benchmarks” without addressing whether a lower remuneration rate is appropriate to account for cost recovery of PPA obligations; (2) dismissing the Distribution Companies’ response to Record Request DPU-1, regarding a non-linear decline in financial obligations over time; (3) not discussing the Attorney General’s alternative proposal for remuneration in a range of 1.375 and 1.891 percent; (4) relying on the Department’s previous decisions under Section 83C and 83D of the Green Communities Act; and (5) not considering remuneration decisions in other jurisdictions (*id.* at 9-11). The Attorney General’s criticisms, while presented in the guise of procedural faults, are a direct function of the AGO’s dissatisfaction with the substance of the Department’s decision to allow remuneration. However, dissatisfaction with the outcome of a proceeding does not comprise the “extraordinary circumstances” necessary to trigger reconsideration, nor do the criticisms withstand scrutiny when measured against the Department’s obligations under G.L. c. 30A.

Under that standard, agency decisions must be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision. G.L. c. 30A, § 11 (8). The requirement of subsidiary findings exists so that any reviewing court may exercise its appellate function to determine whether the findings of the agency are supported by the evidence and whether, given these findings, the agency correctly applied the law to the facts so found. Save the Bay, Inc. v. Dep’t of Pub. Utilities, 366 Mass. 667, 687 (1975); Town of

Hamilton v. Dep't of Pub. Utilities, 346 Mass. 130, 137 (1963). An agency need not make detailed findings of all evidence presented to it, as long as its findings are sufficiently specific to allow review of its decision. Town of Hingham v. Dep't of Telecommunications & Energy, 433 Mass. 198, 207 (2001).

Further, an agency decision is supported by substantial evidence so long as the record contains such evidence as a reasonable mind might accept as adequate to support a conclusion. NextEra Energy Resources LLC v. Dep't of Pub. Utilities, 485 Mass. 595, 603 (2020). Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them. Id., citing G.L. c. 30A, § 11 (5). A reviewing court gives great deference to the Department's expertise and experience in areas where the Legislature has delegated decision-making authority to the agency. Town of Hingham, 433 Mass. at 201. More specifically, the Department has broad authority to determine ratemaking matters in the public interest. Massachusetts Inst. of Tech. v. Dep't of Pub. Utilities, 425 Mass. 856, 868 (1997).

Measured against this standard, the Department's Order includes a robust statement of reasons and adequate subsidiary findings on issues of law and fact to facilitate judicial review and provide transparency about the basis for the Department's decision on the remuneration rate.

1. The Department's Determinations of Law are Clear and Appropriate.

As a threshold matter, Section 83C of the Green Communities Act mandates the Department to adopt regulations relating to the solicitation of offshore wind that include the provision of remuneration of up to 2.75 percent of annual contract payments, stating as follows:

The department of public utilities shall promulgate regulations consistent with this section. The regulations shall: [...] (3) provide for an annual remuneration for the contracting distribution company up to 2.75 per cent of the annual payments under the contract to compensate the company for accepting the financial obligation of the long-term contract, such provision to be acted upon by the department of public utilities at the time of contract approval ...

St. 2008, c. 169, § 83C(d).

The plain language of Section 83C states that the Department shall provide for an annual remuneration for the contracting distribution companies up to 2.75 percent of the annual payments under the contract to compensate the company for accepting the financial obligation of the long-term contract. There is no latitude for the Department in this provision except for the term “up to.” Section 83C does not specify any criteria the Department must use to determine a remuneration rate “up to” 2.75 percent.

Therefore, the matter is delegated to the Department’s discretion and the Department’s determination of the applicable standard is afforded substantial deference. NextEra, 485 Mass. at 604; citing New England Power Generators Ass’n, Inc. v. Dep’t of Env’tl. Protection, 480 Mass. 398 (2018); see also Alliance to Protect Nantucket Sound, Inc. v. Dep’t of Public Utilities, 461 Mass. 168, 171 (2011) (Reviewing court will “give deference to the department’s expertise and experience in areas where the Legislature has delegated to it decision-making authority, pursuant to G.L. c. 30A, § 14.”); Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 448 Mass. 45, 50 n. 6, (2006) (“The substantial deference owed to an agency’s interpretation of a statute it is charged to enforce includes approving an interpretation of statutory language that may be read in two ways.”); Nautical Tours, Inc. v. Dep’t of Public Utilities, 469 Mass. 1007, 1009 (2014 (“the department is entitled to deference in interpreting a general law that it is charged with implementing and enforcing”). Moreover, a reviewing court “must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions

cannot by any reasonable construction be interpreted in harmony with the legislative mandate.” NextEra, 485 Mass. at 603-604 (internal quotations omitted).

The Department’s Order adequately explained its conclusions of law as to the applicable standard it applied to its review of the Distribution Companies’ request for an annual remuneration of 2.75 percent. The Department appropriately determined that, as a matter of law under the regulatory framework of Section 83C, the Distribution Companies “have the burden to support their remuneration request with evidence, and the Department has the discretion to determine an appropriate level of remuneration.” Order at 84. As it has similarly found in previous decisions made pursuant to Section 83C and 83D, the Department determined that its remuneration analysis: (1) does not require an electric distribution company to show incremental risk from a long-term contract in order to support a particular remuneration; and (2) does not link remuneration to any specific quantitative analysis. Id. Further, the Department has determined that “because Section 83C does not require the Companies to demonstrate a quantified level of risk from the PPAs to qualify for remuneration, qualitative evidence alone is acceptable when sufficient, reliable quantitative evidence is unavailable.” Id. Given the statutory construct, the Department is well within its authority to set this standard.

The Department’s analysis found that the PPAs are a “financial obligation” under the unambiguous and plain meaning of Section 83C(d)(3). Order at 87. This legal conclusion is supported by the Department’s findings that the PPAs obligate the Distribution Companies to take and pay for all energy and RECs delivered at a fixed price over a 20-year term regardless of customer demand. Id. The Department further concluded that the financial obligation of the PPAs may impact the Distribution Companies’ ability to attract investors. Id. citing, Tr. at 116-119, 124-126. The Department also found, as a matter of law, the regulatory framework of Section 83C

establishes remuneration as a means to compensate Companies for accepting the financial obligations of long-term renewable energy contracts. Id. at 89. Thus, the Department's legal conclusions provide a clear basis for approving remuneration in accordance with Section 83C.

Accordingly, given the substantial deference accorded to the Department's implementation of Section 83C, the Department's thought process and evidentiary basis as to the acceptance of the 2.75 percent remuneration rate is clear and appropriate. Therefore, the Department's decision is fully consistent with the Department's obligations under G.L. c. 30A, § 11 (8).

2. The Department's Decision is Supported by Law and Evidence.

A fundamental question in this case is the level of remuneration that should be allowed as compensation to the Distribution Companies for accepting the financial obligations associated with the long-term contracts. The law explicitly authorizes the Department to set remuneration at 2.75 percent. The law further allows the Department to establish a remuneration rate below 2.75 percent, in its discretion, and does not put any constraints on the Department as to the method by which it will determine whether the appropriate remuneration rate should be less than 2.75 percent.

The analytical inquiry that the Department has made over the past three cases in authorizing the 2.75 percent remuneration rate revolves around the consideration of whether setting a rate that is less than 2.75 percent will undermine the faith and confidence of credit analysts and equity investors, signaling a retreat from the Commonwealth's support of renewable long-term contracting by electric distribution companies that would otherwise have no relation whatsoever to the said contract. The Department has said that it is making decisions in support of the Commonwealth's long-term procurement effort and that it does not want to risk damage to the EDC's credit quality or equity value because that will ultimately come at a cost to customers and defeat the Commonwealth's important policy objectives. Order at 88. Therefore, the Department

has stated that it will approve the 2.75 percent *explicitly* set by statute unless and until market experience indicates that a different value is appropriate. Id.

Based on the record in this case, the Department found that “the market for large-scale offshore wind projects in North America has not materially matured in the past year and information about the impacts of offshore wind procurement on the financial condition of the purchasing utilities remains scarce.” Order at 86. The Department also noted that past contracts approved under Section 83C and 83D have not reached commercial operation, or even begun construction yet and, therefore, the Distribution Companies have not yet incurred any payment obligations. Id. Thus, the Department found that it is “persuaded that the lack of actual market experience with large new clean energy generation resources makes it a challenge to quantify the effects of the PPAs’ financial burdens and how those burdens and the level of risk to the Companies may change over time.” Id. The Department further acknowledged the fact that the market for large-scale offshore wind projects in North America has not developed further since the Department last reviewed a Section 83C long-term contract. Id. Moreover, the Department recognized that, even with actual market experience, an adequate quantitative analysis may not be possible until there is a clear loss of financial flexibility seen by investors or rating agencies. Id.

Having concluded that reliable quantitative evidence is unavailable at this time, the Department properly and justifiably relied on its own expertise combined with qualitative evidence to conclude that remuneration of 2.75 percent is appropriate and in the public interest. Order at 87. The Department found that the PPAs, which are similar in size and nature to those in the prior Section 83C case, “are a ‘financial obligation’ under the unambiguous and plain meaning of Section 83C(d)(3).” Id. The Department also explained that it is “persuaded that as the Companies’ larger long-term PPAs pursuant to Sections 83C and 83D reach commercial operation,

and as more are added, the level of uncertainty, risk or the loss of financial flexibility perceived by investors and rating entities may become more apparent.” Id. The Department also found that the Distribution Companies’ strong credit ratings directly support offshore wind generation development directed by Section 83C. Id. at 88.

In support of the above conclusion, the Department reiterated its consistent, prior remuneration decisions as well as record evidence, such as the Standard & Poor’s March 25, 2020 credit report of Unitil. Order at 87-88, citing Exh. Att. AG 1-2(d) (Unitil). Unitil’s March 25, 2020 Standard & Poor’s report identifies the long-term contract with Vineyard Wind LLC and stressed that the Department’s approval of remuneration at 2.75 percent “limit[s] its financial implications” and “compensate[s] the distribution companies for accepting any financial obligation of the long-term contract” (Exh. Att. AG 1-2(d) (Unitil) at 2). S&P further noted that remuneration “is in addition to a make-whole rider” (id.). The Department reasonably relied on the report as evidence that investors and rating agencies have taken notice of the long-term contracts and may be concerned with additional uncertainty, risk or the loss of financial flexibility resulting from additional larger long-term PPAs. Order at 87.

Based in part on this evidence, the Department explained its reasoning for approving remuneration at 2.75 percent as follows:

It is clear, and the Department has recognized that market, business, and regulatory conditions will evolve over time as the market for clean energy generation resources matures and determined that if equity investors and credit rating agencies express concerns in the future, that reaction could result in increased costs or changes in credit rating that would ultimately be passed on to ratepayers. Remuneration, plus ratemaking mechanisms for recovery of contract costs, are intended to ensure that the Companies can maintain strong credit ratings along with the financial obligations related to long-term renewable energy contracts. Importantly, the Department has found that the Companies’ strong credit ratings directly support project financing of offshore wind energy generation resources. Here, the Department finds again that decisions about remuneration provide the financial markets with important signals about the Department’s commitment to

support clean energy contracting over the long term. This commitment to clean energy is being made through use of the Companies' balance sheets and through cost recovery from ratepayers. **Accordingly, setting remuneration at 2.75 percent will help mitigate potential negative consequences, while advancing the development of clean energy generation for the benefit of ratepayers, consistent with Section 83C and the Commonwealth's clean energy goals.**

The Companies' request for remuneration at 2.75 percent is also supported by previous Department orders regarding remuneration for long-term clean energy contracts pursuant to Sections 83C and 83D. Consistent with our decisions in those proceedings, the Department maintains that the GCA outlines a clear policy commitment by the Commonwealth to the development of clean energy generation resources. The regulatory framework embedded throughout the GCA (i.e., Section 83A, Section 83C, and Section 83D) establishes remuneration as a means to compensate the electric distribution companies for accepting the financial obligations of long-term renewable energy contracts, **and regulatory consistency is critically important to rating agencies' assessment of the Companies' credit rating.**

Order at 88-89 (internal citations omitted) (emphasis added).

The Attorney General's Motion omits reference to this statement of reasons, or at least materially discounts the statement, claiming that the Department "failed in its Order to clearly set forth the factors upon which it actually relied in determining that 2.75 percent is reasonable and appropriate..." (AGO Motion at 12). To the contrary, it is patently apparent from the Department's decision that its adoption of the statutory rate of 2.75 percent was, among other considerations, based on record evidence indicating that retreat from the 2.75 percent remuneration rate awarded in the previous Section 83 decisions could be perceived as a negative by equity and credit-rating analysts given the Department's prior supportive stance. Thus, any rate less than 2.75 percent (without a strong basis for that lower amount) would be: (1) inadequate to mitigate potential negative consequences of the long-term contracting requirements under Section 83C; and (2) inconsistent with the regulatory framework of the Green Communities Act and the Department's past decisions.

The Attorney General has not successfully rebutted this argument over three cases because the record in each of the proceedings, including the instant proceeding, shows that the credit rating agencies place substantial weight on regulatory environment in rendering their ratings guidance. This reasoning defeats the Attorney General’s accusation that the Department failed to support its “decision to grant a remuneration of 2.75 percent as opposed to any other remuneration percentage.” The Attorney General may not agree with the premise, but the record evidence supports this explanation of the Department that its decision is made to avoid the perception of a worsening of the regulatory environment in Massachusetts. The Department’s discussion and subsidiary findings provide an adequate explanation of its decision to support judicial review, consistent with the Department’s obligation under G.L. c. 30A, § 11 (8). See Costello v. Dep’t of Pub. Utilities, 391 Mass. 527, 535–36, 462 N.E.2d 301, 308 (1984) (“While we can conduct a meaningful review of a decision of less than ideal clarity if the agency’s path may reasonably be discerned, we will not “supply a reasoned basis for the agency’s action that the agency itself has not given.”).

3. The Order Discusses the Record Evidence Upon Which the Decision Rests.

The Attorney General’s motion raises additional critiques of the Department’s Order, arguing that it failed to adequately address evidence in favor of a remuneration rate below 2.75 percent. Specifically, the Attorney General takes issue with the Order for: (1) rejecting the Distribution Companies’ proposed “benchmarks” without addressing whether a lower remuneration rate is appropriate to account for cost recovery of PPA obligations; (2) dismissing the Distribution Companies’ response to Record Request DPU-1 regarding a non-linear decline in financial obligations over time; (3) not discussing the Attorney General’s alternative proposal for remuneration in a range of 1.375 and 1.891 percent; (4) relying on the Department’s previous

decisions under Section 83C and 83D of the Green Communities Act; and (5) not considering remuneration decisions in other jurisdictions (AGO Motion at 9-11). However, each of the Attorney General's critiques of the Department's Order are flawed and unconvincing.

First, the Attorney General is correct that the Department dismissed the Distribution Companies' proposed benchmarks as helpful only to understand the magnitude of the financial obligation. However, the Department's statement that one rationale supporting the Companies' proposal *is not accepted* does not have the effect of rejecting the Companies' other rationales, or of invalidating other parts of the Department's decision to set the remuneration rate at 2.75 percent. To the contrary, the Department's decision to explain what evidence it found inapplicable to its decision is emblematic of the Department's overall compliance with its obligations under G.L. c. 30A, § 11 (8) to support its determination with adequate explanation.

Second, the Attorney General's complaint that the Department improperly "dismissed" record evidence on non-linear declines in financial obligations over time is not accurate (AGO Motion at 10). The Department did not "dismiss" the non-linear declines but, rather, reviewed both the Distribution Companies' analysis and the Attorney General's contrary approach and declined to rely on either analysis due to the timing of the submission and the lack of opportunity, by all parties, to fully assess and examine the accuracy of such analyses. Order at 90-91. Again, despite the Attorney General's assertions to the contrary, the weight given to the response to this record request does not in any way discredit the Department's ultimate conclusion, but rather supports it. The Department's determination to resist making a decision based on concepts presented late in the preceding preventing full investigation and review is a responsible exercise of reasoned decision-making. This determination and the reason for it were also fully and clearly articulated in the Department's Order.

Third, the Attorney General's complaint that the AGO's expert witness testimony on a "low" and a "high" remuneration percentage is not discussed in the analysis and findings section of the Order is similarly inconsequential (AGO Motion at 10). The Department is not required to discuss every position taken by every party in a case and it is clear that it considered the AGO's remuneration percentage range since those arguments were cited in the "Positions of the Parties" section of the Order. Order at 67-68; Town of Hingham, 433 Mass. at 207 (agency "need not make detailed findings of all evidence presented to it, as long as its findings are sufficiently specific to allow us to review its decision."); Trustees of Clark Univ. v. Department of Pub. Utils., 372 Mass. 331, 334-335 (1977) ("An intervener's case should not be ignored. It is not, however, the focus of attention.") (citation omitted).

When presented with contested issues of fact – such as the disparate expert testimony offered by the Distribution Companies and the Attorney General – it is up to the Department to weigh that evidence using its applicable expertise. See Costello v. Dep't of Pub. Utilities, 391 Mass. 527, 533, (1984) ("We will not substitute our judgment for that of the department on disputed questions of fact."). In this case, the Attorney General put forth, in the final pages of Mr. Musco's July 10, 2020 surrebuttal testimony, an "opinion that a reasonable remuneration range would be between 1.375% and 1.891%" (Exh. AG-VM-2, at 13). When the Attorney General put forth this "reasonable remuneration range," the Attorney General assumed a burden of production to produce evidence sufficient to avoid an adverse finding. Fitchburg Gas and Electric Light Company, D.T.E. 99-118, at 7 (2001), citing A. Cella, Administrative Law and Practice, Massachusetts Practice Series, Vol. 38, § 277.

By her own admission, the Attorney General failed to meet that burden. The Attorney General readily admitted that "Mr. Musco's proposal is not based on record evidence" (AGO In.

Br. at 23). Moreover, when asked to justify his low and high range, the Attorney General's witness, Mr. Musco, could not identify empirical or methodological basis in support of those values, admitting that "I really don't have any basis for speculating as to what the legislature was thinking" when it lowered remuneration from 4 percent to 2.75 percent, although he cited that reduction as the basis for the particular math used in his proposed rate (Tr. 1, at 169, 177).

Given that the Attorney General's witness was unable to provide a shred of support for the alleged "reasonable remuneration range" under cross examination, and that the Attorney General admitted that the values put forth by the AGO's witness were *not* based on record evidence, it should not be surprising that the Department did not devote analysis in its Order to addressing the Attorney General's recommendation. The Department's apparent decision to give the Attorney General's "evidence" zero weight is perfectly reasonable given the circumstances.

Fourth, the Attorney General attempts to bolster its argument by highlighting that the Department has relied only on its own previous Sections 83C and 83D decisions (AGO Motion at 11). However, the Department references this precedent not as a legal principle, but rather for the fact that the record evidence shows that the regulatory environment and regulatory stability are factors in the equity and credit-ratings processes and the stability of the remuneration rate has been demonstrated to the market place through the signals contained in the Department's sequential decision. Although the Department has stated that it will determine each remuneration request on the case-specific record of each long-term contract proceeding, the act of changing that precedent could have the very impact that remuneration attempts to protect against, which is undermining the integrity of the regulatory construct supporting the long-term contracting effort. As a result, reference to the prior decisions *is a necessity* in explaining the Department's thought processes in making decisions to carry out the mandates of Sections 83C and 83D. Accordingly, the

Department's consideration of its own precedent on remuneration percentages and market factors, which are directly and inextricably relevant, further support the quality of the Department's decision-making. See, D.P.U. 18-76/77/78 at 73 (2019).

Lastly, the Attorney General alleges the Department failed to discuss neighboring states' decisions related to remuneration in connection with long-term energy contracts, calling this evidence of "black box" decision-making (AGO Motion at 11). To the contrary, the Department discussed the Attorney General's example of Rhode Island and Connecticut and determined that "comparisons of how the financial markets perceive those contracts may be instructive for determining the appropriate level of remuneration in future proceedings" and noted that the reaction of the financial markets to the suspension of previously approved rates for CL&P may be informative in future proceedings. Order at n. 51. It is apparent that the Department has reviewed and considered neighboring state decisions, which are based on entirely different statutory framework and are not controlling authority in any event.¹ The Department also indicated that neighboring state decisions may be relevant in the future to the extent those decisions affect the financial markets.

Lastly, it is unclear why the AGO would view the Appeals Court Order of having direct applicability to the Department's decision in this proceeding. Fundamentally, Section 83 procurements, including the associated remuneration, are undertaken in accordance with the detailed mandates incorporated into specific Massachusetts statutes for the express purpose of governing those same procurements. In terms of remuneration, the statute makes it clear that: (1) remuneration must accompany the long-term contract as compensation for accepting the long-term

¹ Commonwealth Elec. Co. v. Department of Public Utilities, 397 Mass. 361, n. 3 (1986)(stating, "[t]hough perhaps persuasive authority by analogy, decisions of a foreign administrative agency do not control Massachusetts law").

financial obligation; and (2) a remuneration rate of 2.75 percent is authorized by law. Thus, the Department's obligation is to present a statement of reasons as to how the Company's proposal on remuneration meets the parameters of the statute with the requisite subsidiary findings of fact on that same point. The Attorney General's Motion suggests that the Department has somehow failed to articulate a statement of reasons and subsidiary findings of fact in relation to a decision that the Department *did not see fit to make*, which is to approve the AGO's unsubstantiated proposals for a rate less than 2.75 percent.

Accordingly, the Order provides a proper and sufficiently robust statement justifying the Department's conclusions and setting out subsidiary findings, all of which are supported by substantial record evidence. Order at 83-91. The fact that the Department chose not to adopt the Attorney General's position is not grounds for reconsideration.

C. The Department Made Sufficient Subsidiary Findings to Enable Judicial Review.

The Attorney General asserts the Department failed to provide any connection between the Department's reasoning and the remuneration percentage granted, which the AGO alleges hinders its ability to determine whether the Department's determination is reasonable or should be appealed (AGO Motion at 13-14). Additionally, the Attorney General asserts the Department's "opaque decision-making" prevents other interested parties from appealing the decision and the financial markets from understanding the Department's decision-making process (*id.* at 13). Lastly, the Attorney General claims the Order leaves investors to "speculate" on how the Department set the remuneration percentage (*id.* at 14-15).

All of these claims are baseless. The Department's findings must enable a reviewing court to determine whether the Department's decision was based upon an error of law, unsupported by substantial evidence, or otherwise not in accordance with law. Town of Hamilton, 346 Mass. at

137. As demonstrated above, throughout the Department's Order, it made subsidiary findings in support of its overall conclusion that the 2.75 percent remuneration level is "reasonable and in the public interest." For example, the Department stated the factors that it considered in making the decision and explained why it rejected the Distribution Companies' and Attorney General's non-linear financial obligation analyses and the Distribution Companies' benchmarks. Order at 89-91. Citing specific record evidence, the Department also made subsidiary findings regarding the relationship between the level of remuneration granted by the Department; how such decisions affect the Distribution Companies' credit ratings; the regulatory framework of the Green Communities Act; and the overall financial obligation of the PPAs. *Id.* at 86-89. Therefore, there are ample subsidiary findings of fact to support the Department's determination of 2.75 percent and any judicial review that may occur. If the Attorney General is unclear as to whether there is a point of appeal, it is because the Department has not made any error that would lead to that conclusion.

IV. CONCLUSION

The Attorney General has failed to raise any valid issue for reconsideration and the Department should not reconsider its decision. As demonstrated above, the Department provided a robust statement of reasons and adequate subsidiary findings of fact to support the approved remuneration percentage. Therefore, the Attorney General's Motion for Reconsideration should be denied.

**NSTAR ELECTRIC COMPANY d/b/a
EVERSOURCE ENERGY**

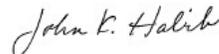
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