

No. 12-1561

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BEYOND NUCLEAR, NEW HAMPSHIRE SIERRA
CLUB, SEACOAST ANTI-POLLUTION LEAGUE
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondent

And

NEXTERA ENERGY SEABROOK, LLC,
MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,
TAUNTON MUNICIPAL LIGHTING PLANT, AND
HUDSON LIGHT & POWER DEPARTMENT
Intervenors.

On a Petition for Review of a Final Decision of the
United States Nuclear Regulatory Commission

BRIEF OF INTERVENORS MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC COMPANY, TAUNTON MUNICIPAL LIGHTING PLANT, AND
HUDSON LIGHT & POWER DEPARTMENT

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JURISDICTIONAL STATEMENT

The Massachusetts Municipal Wholesale Electric Company (“MMWEC”), the Taunton Municipal Lighting Plant (“TMLP”) and the Hudson Light & Power Department (“HLPD”) adopt by reference the Jurisdictional Statement set forth in the Brief of Intervenor NextEra Energy Seabrook, LLC (“NextEra”).

STATEMENT OF THE ISSUE

MMWEC, TMLP and HLPD adopt by reference the Statement of the Issue set forth in the Brief of Intervenor NextEra.

STATEMENT OF THE CASE

MMWEC, TMLP and HLPD adopt by reference the Statement of the Case set forth in the Brief of Intervenor NextEra.

STATEMENT OF THE FACTS

MMWEC, TMLP and HLPD adopt by reference the Statement of the Facts set forth in the Brief of Intervenor NextEra.

SUMMARY OF ARGUMENT

The Nuclear Regulatory Commission (the “Commission” or “NRC”) did not abuse its discretion and was neither arbitrary nor capricious in denying the admissibility of the contention proposed by Beyond Nuclear, the Seacoast Anti-Pollution League and the New Hampshire Sierra Club (collectively, the “Petitioners”). The Commission reasonably determined that the Petitioners failed to demonstrate a genuine dispute that offshore wind should have been considered as a reasonable alternative to baseload nuclear power.

The Commission’s decision is supported by the fact that offshore wind power would not allow MMWEC’s participants, as well as TMLP and HLPD, all of which are public entities, to fulfill their legal obligations to serve their customers at reasonable rates. Participants in MMWEC’s Seabrook projects, along with TMLP and HLPD, are municipal light department that have an obligation to serve their customers. In order to meet their service obligations, they need reliable, long-term resources – including nuclear baseload generators.

A nuclear baseload facility, such as Seabrook Station (“Seabrook”), with a capacity factor in excess of 90%, is an important part of the diversified electric supply portfolios that municipal light departments maintain in order to meet their obligations to serve. Likewise, having a reliable nuclear baseload resource in their

electricity supply portfolios helps the municipal light departments maintain reasonable and predictable rates for their customers.

The offshore wind generation that Beyond Nuclear proposes as a reasonable alternative to baseload nuclear energy cannot assure the municipal light departments that they will meet their obligation to serve. Wind energy is intermittent and would not be a reasonable alternative to a baseload resource because the capacity factor would be too low compared to the capacity factor of a baseload nuclear generator.

Additionally, the cost to develop a system of interconnected offshore wind farms would be prohibitive to municipal light departments, especially in light of the fact that the technology for such offshore wind energy does not exist today. Municipal light departments, such as MMWEC's participants, as well as HLPD and TMLP, could not sustain such costs and meet their obligations of providing reliable service to their customers at reasonable rates.

The Commission's decision is further supported by present day facts regarding offshore wind development and technology, which show that it takes a significant amount of time just to reach the point where one offshore wind facility could be constructed in New England. A case in point is the development of the offshore wind facility by Cape Wind Associates, LLC ("Cape Wind"). To date, the Cape Wind facility has taken nearly eleven years after the initial permit

applications were filed; yet no turbines have been constructed. The Cape Wind experience validates that the Commission acted reasonably in determining that offshore wind would not be a reasonable alternative and that the Petitioners failed to demonstrate a genuine dispute exists on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi) (2012).

STANDARD OF REVIEW

MMWEC, TMLP and HLPD adopt by reference the Standard of Review set forth in the Brief of Intervenor NextEra. In addition, agency actions and decisions are reviewed with substantial deference. *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 290 (1st Cir. 1995). An agency action or decision is set aside *only* if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.* at 290, *citing* 5 U.S.C. §706(2)(A). “The scope of this review is narrow; a court should not substitute its judgment for that of the agency. . .” *Id.* at 290.

“This deference is especially marked in technical or scientific matters within the agency’s area of expertise.” *Id.* at 290. “Mixed questions of law and fact, at least to the extent that they are fact-dominated, fall under this rubric.” *Adams v. U.S. E.P.A.*, 38 F.3d 43 (1st Cir. 1994).

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN REVERSING THE ADMISSION OF PETITIONERS' CONTENTION.

The Commission reasonably based its decision to dismiss the Petitioners' offshore wind contention on the current and near-future state of offshore wind technology. The Petitioners assert that because NextEra applied for license renewal twenty years in advance of expiration, the Commission abused its discretion by considering current and near-term offshore wind technology in dismissing their contention. Brief of Petitioners at 44-46, *Beyond Nuclear et al v. U.S. Nuclear Regulatory Comm'n*, No. 12-1561 (1st Cir. August 16, 2012) ("Pet. Br. at ___").

A contention must provide "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi) (2012). "Contentions must be based on . . . information available at the time the petition is to be filed." 10 C.F.R. § 2.309 (f)(2) (2012).

In the proceedings before the Commission, the Petitioners failed to raise a genuine issue of material fact based on currently available information as to the present or near term feasibility of offshore wind turbines. Further, the Petitioners have failed to raise a genuine issue of material fact as to the availability of offshore wind turbines by 2030 as a Seabrook replacement. Thus, the Commission acted reasonably and within its discretion in dismissing the Petitioners' contention.

II. THE COMMISSION DID NOT ABUSE ITS DISCRETION AND ACTED REASONABLY IN ITS DECISION BECAUSE PETITIONERS' CONTENTION DOES NOT TAKE INTO ACCOUNT THE OBLIGATION TO SERVE IMPOSED ON MMWEC'S PARTICIPANTS, TMLP, AND HLPD.

The reasonableness of the Commission's decision is supported by the fact that the offshore wind technology presented in the Petitioners' contention would wholly fail to enable MMWEC's participants, TMLP, and HLPD to fulfill their obligations to serve their customers at reasonable rates.

MMWEC, TMLP and HLPD are public entities.

MMWEC was created by a Special Act of the Massachusetts Legislature to plan, finance, and acquire power supply resources on behalf of Massachusetts cities and towns that have their own light departments. 1975 Mass. Acts ch. 775, § 5(p) (Reported at Mass. Gen. Laws ch. 164, Appendix §§ 1-1 et. seq., West Ed.). TMLP and HLPD are Massachusetts municipal light departments operating pursuant to Massachusetts General Laws, Chapter 164, §§34 – 69A.

A. MMWEC'S PARTICIPANTS, TMLP, AND HLPD PROVIDE ELECTRICITY TO THEIR CUSTOMERS, IN PART, THROUGH OWNERSHIP IN SEABROOK.

i. MMWEC

MMWEC is a body politic and corporate and political subdivision of the Commonwealth of Massachusetts. 1975 Mass. Acts ch. 775, § 2. MMWEC is a

public instrumentality and the exercise of its powers is deemed an essential public function. *Id.*

MMWEC is a voluntary membership organization, whose members are comprised of Massachusetts cities and towns that have municipal light departments. *Id.* § 3; *Mass. Mun. Wholesale Elec. Co. v. Town of Danvers*, 411 Mass. 39, 41, 577 N.E.2d 283, 286 (1991). MMWEC also enters into contracts with non-member municipal light departments. All such entities contracting with MMWEC are referred to as “Participants.” *Town of Danvers*, 411 Mass. at 41, 577 N.E.2d at 286. Essentially, MMWEC is a vehicle through which its members and Participants, which typically are small, can pool their resources to obtain the economic benefits of purchasing electricity in bulk. *Id.* at 40-41, 577 N.E.2d at 285-286.

Among other things, MMWEC is authorized to contract to sell to Massachusetts cities and towns having municipal light departments all or a portion of the capacity and output of one or more specific energy facilities. 1975 Mass. Acts ch. 775, § 6(a). Such contracts may be for the life of the energy facility and may provide for the payment of unconditional obligations imposed without regard to whether an energy facility is completed or operating and notwithstanding the suspension or interruption of output. *Ibid.*

Massachusetts cities and towns having municipal light departments are authorized to enter into such contracts. *Ibid.* Such contracts are not considered debt of the city or town. 1975 Mass. Acts ch. 775, § 6(b).

MMWEC owns 11.6% of Seabrook. Applicant's Environmental Report ("ER") at 7-3, Appendix p. 2 ("App. ___"). MMWEC sells all of the output it receives from its ownership share in Seabrook to its Participants. *Town of Danvers*, 411 Mass. at 40-41, 577 N.E.2d at 285-286. The output of MMWEC's Seabrook ownership is sold to Participants through such contracts, which are known as power sales agreements. *Id.* at 41, 577 N.E.2d at 286.

MMWEC's charges each Participant are considered as expenses of the municipal light department and constitute special obligations of the city or town payable from the municipal light departments' revenues. 1975 Mass. Acts ch. 775, § 6(b). A city or town is obligated to fix, review and collect charges for electric power through its municipal light department at least sufficient to provide revenues adequate to meet its obligations under the power sales agreement. *Id.* § 6(c).

ii. TMLP and HLPD

TMLP and HLPD are municipal light departments operating pursuant to Massachusetts General Laws, Chapter 164, §§34 – 69A. TMLP and HLPD each own 0.1% of Seabrook. ER at 7-3, App. 2. TMLP and HLPD use their entitlements to electricity from Seabrook directly for their customers.

III. MMWEC’S PARTICIPANTS, AS WELL AS TMLP AND HLPD, ARE OBLIGATED TO SERVE THEIR CUSTOMERS.

MMWEC’s Participants, as well as TMLP and HLPD, are all municipal light departments. Mass. Gen. Laws ch. 164, §§34-69A. Each municipal light department is subject to the direction and control of a city council, board of selectmen, or municipal light board, the members of which are elected by the city or town residents that the light department serves. Mass. Gen. Laws ch. 164, §§55, 56.

A municipal light department is statutorily obligated to provide electricity to the inhabitants of the city or town in which it is located. Mass. Gen. Laws ch. 164, §§34 and 47A. Absent a city or town vote, no other electricity provider may sell electricity within the service territory of a municipal light department. Mass. Gen. Laws ch. 164, §47A. Additionally, municipal light departments are obligated to provide such service at reasonable rates. *Bd. of Assessors of Holyoke v. State Tax Comm’n*, 355 Mass. 223, 235, 244 N.E.2d 287, 295 (1969).

A. OFFSHORE WIND POWER SHOWS NO PROMISE OF REACHING THE CAPACITY FACTOR OF A NUCLEAR BASELOAD RESOURCE.

Seabrook is a baseload nuclear reactor. ER at 7-3, App. 2. Baseload power is the least expensive and is utilized when user demand is minimal. *Pa. Elec. Co. v. Pa. Public Utility Comm’n*, 166 Pa. Commw. 413, 437, 648 A.2d 63, 77 (Pa. Commw. Ct. 1994).

Baseload facilities operate on a near-continuous basis and have very high capacity factors¹. *Env'tl. Law and Policy Center v. U. S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 679 (7th Cir. 2006); *Pa. Elec. Co.*, 166 Pa. Commw. 413 at 437, 648 A.2d at 77. Intermediate facilities operate less frequently and are used to meet demands that vary throughout the day. *Pa. Elec. Co.*, 166 Pa. Commw. at, 437, 648 A.2d at 77. Peaking facilities operate only when needed to meet the highest demand for electricity and are the most expensive to operate. *Id.*

Municipal light departments maintain a mix of these resources in their supply portfolios. *See id.* (“Utilities operate baseload plants for long intervals ... intermediate power is only used to meet demands that vary throughout the day ... [p]eaking power is provided only a few hours per day during times of highest demand.”).

Since municipal light departments are obligated to serve their customers, municipal light departments must meet the demands of their customers that are continuous (baseload), vary throughout the day (intermediate) and highest each day (peaking).

¹ A “capacity factor” is “the ratio of the electrical energy produced by (1) a generating unit for the period of time considered; to (2) the electrical energy that could have been produced at continuous, full power operation during the same period.” *Alliance to Protect Nantucket Sound, Inc. v. Dep’t of Public Utilities*, 461 Mass. 166, 180, n.25, 959 N.E.2d 413, 433, n. 25, (2011), *citing*, D.P.U. 10-54 at 9, n. 11.

Since baseload resources operate on a continuous basis they have a high capacity factor. Seabrook has a capacity factor in the range of 90% - 97%. ER, §7.2.1.5, App. 4. Therefore, Seabrook meets baseload demand of customers. Moreover, baseload resources are the least expensive to operate. *Pa. Elec. Co.*, 166 Pa. Commw. at, 437, 648 A.2d at 77.

As demonstrated by the exhibits submitted to the Atomic Safety and Licensing Board and to the Commission by the Petitioners, wind energy is intermittent and a system of interconnected offshore wind farms would not be reliable like a baseload resource. The Petitioners' exhibits show that the capacity factors for wind power are far too low to be considered a baseload resource.

As opposed to the 90% - 97% capacity factor of a baseload nuclear facility, those exhibits show that the capacity factors for wind power have been in the range of 24.1% to 40%, with most falling between 30% and 35%.² Petitioners' Ex. 4, Cristina L. Archer and Mark Z. Jacobson, *Supplying Baseload Power and Reducing Transmission Requirements by Interconnecting Wind Farms*, 46 Journal of Applied Meteorology and Climatology, 1701, 1716, App. 39; Petitioners' Ex. 9, EnerNex Corp., "Eastern Wind Integration and Transmission Study" (Jan. 2010)

² In addition, NextEra's Environmental Report explains that the average annual capacity factors for wind power systems are in the range of 20% to 40%, with the average capacity factor for the region at 22.1%. ER, 7-12, App. 4.

at 54 and 217, App. 46; Petitioners' Ex. 19, U.S. Dept. of Energy, "20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electricity Supply" (July 2008), at 26 and 221, App. 122-123.

Even the projections for future wind power are assigned capacity factors in the 34% to 55% range. Petitioners' Ex. 19, U.S. Dept. of Energy, "20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electricity Supply" (July 2008), at 183, App. 123; Petitioners' Ex. 21, National Renewable Energy Laboratory, "Large Scale Offshore Wind Power in the United States: Assessment of Opportunities and Barriers" (Sept. 2010) at 35, n. 7, 59 and 117. App. 151.

In addition, the supporting information submitted by the Petitioners acknowledges that wind power is intermittent and that the capacity factor for wind generation can vary greatly by geographic region. Petitioners' Ex. 9, EnerNex Corp., "Eastern Wind Integration and Transmission Study" (Jan. 2010) at 217, App. 46. In stark contrast to a nuclear baseload unit, which is the "workhorse" of a bulk power system, wind power "is taken whenever it is available." Petitioners' Ex. 19, EnerNex Corp., "Eastern Wind Integration and Transmission Study" (Jan. 2010) at 89, App. 12.

Simply put, the Petitioners are proposing that a resource, which is at best a peaking resource, should be considered as a reasonable alternative to a baseload

resource. With such vast disparity between these two types of resources, one clearly cannot be considered a reasonable alternative to the other. Stated plainly, offshore wind power would not fulfill the obligation to serve.

B. THE COSTS OF OFFSHORE WIND POWER WOULD PREVENT THE MUNICIPAL LIGHT DEPARTMENTS FROM FULFILLING THEIR OBLIGATION TO SERVE AT REASONABLE RATES.

Another factor demonstrating that offshore wind power is not a reasonable alternative to baseload nuclear energy is the cost. The information submitted by the Petitioners clearly states that the technology for offshore wind energy does not exist today. Petitioners' Ex. 14, "Final Report of the Maine Ocean Energy Task Force to Governor John E. Baldacci" (Dec. 2009) at iv and 27, App. 74 and 83. Yet even assuming such technology existed, the costs associated with offshore wind facilities would be exorbitant, especially when compared to an existing baseload nuclear facility. *See* Petitioners' Ex. 15, "Creating Offshore Wind Industry in the United States: A Strategic Network Plan for the United States Department of Energy, Fiscal Years 2011-15" ("Predecisional Draft") (Sept. 2, 2010) at 6, App. 97.

In the first place, offshore wind facilities have higher capital costs than land-based facilities, "largely because of turbine upgrades required for operation at sea and increased costs related to turbine foundations, balance-of-plant infrastructure,

interconnection, and installation.” *Id.* Also, there are one-time costs associated with the “development of the infrastructure to support the offshore industry.” *Id.*

Moreover, in order potentially to reduce the cost of offshore wind energy – which is currently higher than “comparable technologies” - significant technical and infrastructure challenges would have to be overcome. *Id.* As the Department of Energy states in Petitioners’ exhibit 15:

The implications for adding large amounts of offshore wind generation to the power system need to be better understood in order to ensure reliable integration and evaluate the need for additional grid infrastructure such as an offshore transmission backbone. Finally, with current technology, cost-effective installation of offshore wind turbines requires specialized turbine installation vessels, purpose-built portside infrastructure for installation, operations, and maintenance, and robust undersea electricity transmission lines and grid interconnections. These vessels and this infrastructure do not currently exist in the U.S., and legislation such as the Jones Act limits the ability of foreign-flagged vessels of this kind to operate in U.S. waters. *Id.* at 7-8, App. 98.

Likewise, the uncertainty of the permitting process substantially increases the costs associated with offshore wind development. *Id.* at 8, App. 98. As more fully discussed *infra*, such costs include the extensive delays resulting from challenges to siting, permitting, and installation, often including litigation.

All of this substantiates the fact that the development of offshore wind would be cost prohibitive to municipal light departments. Municipal light departments could not sustain such costs and meet their obligation of providing reliable service to their customers at reasonable rates.

IV. THE NUCLEAR REGULATORY COMMISSION PROPERLY CONSIDERED THAT A REALISTIC TIME FRAME FROM SITING TO CONSTRUCTION FOR THE DEVELOPMENT OF AN OFFSHORE WIND FACILITY IS OVER A DECADE.

The Commission acted reasonably when it dismissed the Petitioners' contention because the evidence submitted by the Petitioners demonstrates that an offshore wind facility would not be a reasonable alternative to Seabrook. The Petitioners contend that the Commission abused its discretion by looking at the viability of a wind facility as baseload power currently and in the near-term, rather than its prospective viability at the time of Seabrook's license expiration in 2030.

"Petitioners supported their petitioner[sic] with considerable evidence suggesting that offshore wind will be rapidly deployed in New England within the decade." Pet. Br. at 39.

In assessing the "rapid deployment" of offshore wind off the coast of New England, the slow progress of the only large-scale offshore wind facility in New England has demonstrated that the relevant technology for a prospective offshore wind facility to be developed by 2030 is the technology currently available. Even assuming that offshore wind could be a reliable source of baseload power, as demonstrated by Cape Wind, discussed *infra*, an offshore wind facility intended to replace Seabrook would have to be under development currently.

Because no large-scale wind facility is under development at present for the purpose of replacing Seabrook, no genuine dispute of material fact exists as to

whether wind energy is a viable alternative to nuclear power as is required by 10 C.F.R. §2.309(f)(1)(vi) (2012). *See* Petitioners’ Exhibit 15 at 7, App. 98 (describing significant technical and infrastructure challenges to be overcome for wind power deployment).

A. THE CAPE WIND FACILITY DEMONSTRATES THE EXTRAORDINARY AMOUNT OF TIME AND OPPOSITION A LARGE-SCALE WIND FACILITY FACES FROM LICENSING TO CONSTRUCTION.

Cape Wind’s offshore wind facility is a proposed large-scale wind energy facility of 130 wind turbine generators to be located on Horseshoe Shoal in Nantucket Sound, off the coast of Massachusetts. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 457 Mass. 663, 666, 932 N.E.2d 787, 791 (2010).

i. OVER THREE YEARS: THE TIME IT TOOK TO RESOLVE THE LITIGATION MERELY FOR THE DATATOWER TO TEST THE SITE FOR THE PROSPECTIVE WIND FACILITY.

Cape Wind began the rapid deployment of its wind facility on November 20, 2001 when it applied for a navigability permit from the U.S. Army Corps of Engineers (“Corps”) to construct an offshore data tower. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t. of the Army*, 398 F.3d 105, 107 (1st Cir. 2005). The data tower was for the purpose of gathering data to determine whether Horseshoe Shoals was a feasible location for a wind facility. *Id* at 107.

The Corps issued a permit for the data tower on August 19, 2002 and construction was scheduled to begin on October 11, 2002. *Ten Taxpayer Citizens Group v. Cape Wind Assocs.*, 373 F.3d 183, 186 (1st Cir. 2004). The beginning of construction was delayed when Ten Taxpayer Citizens Group successfully obtained a restraining order in Barnstable Superior Court. *Id.* at 186. Ten Taxpayer Citizens Group filed a law suit alleging that Cape Wind should be prevented from building its data tower until it obtains a license in compliance with Massachusetts' fishery regulations. *Ten Taxpayer Citizen Group v. Cape Wind Assocs., LLC*, 278 F. Supp. 2d 98, 100 (D. Mass. 2003). The District Court dismissed Ten Taxpayer's claim, finding that the data tower was more than three miles offshore and thus did not have to comply with Massachusetts' fishery regulations. *Id.* at 101.

While the *Ten Taxpayer* litigation was ongoing, the Alliance to Protect Nantucket Sound ("Alliance") challenged the Corps' granting of the permit, alleging that the Corps did not have jurisdiction to issue a permit for the data tower, violated the Administrative Procedure Act and violated the National Environmental Policy Act ("NEPA") in issuing the permit. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't. of the Army*, 288 F. Supp. 2d 64, 67 (D. Mass. 2003). The District Court granted the Corps' motion for summary judgment on September 18, 2003. *Id.* at 82.

On June 28, 2004, the First Circuit Court of Appeals upheld the District Court's dismissal of Ten Taxpayer's complaint. *Ten Taxpayer*, 373 F.3d at 197. The litigation that had been delaying the rapid deployment of the data tower for the prospective wind facility ended on February 16, 2005, more than three years after the initial permit applications were filed, when the First Circuit upheld the District Court's granting of summary judgment. *Alliance*, 398 F.3d at 116.

ii. FIVE YEARS: THE TIME THAT PASSED FROM WHEN CAPE WIND APPLIED FOR THE NECESSARY LICENSES FOR ITS TRANSMISSION LINES UNTIL THE LITIGATION SURROUNDING THE LICENSES WAS RESOLVED.

On May 11, 2005, the Massachusetts Energy Facilities Siting Board ("EFSB") approved an application to build Cape Wind's transmission lines. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 448 Mass. 45, 49, 858 N.E.2d 294, 298 (2006). This approval came almost three years after the application was filed on September 17, 2002. *Id.* at 48, 858 N.E.2d at 297. Upon being challenged by the Alliance, the Massachusetts Supreme Judicial Court upheld the EFSB's decision to grant a permit for the transmission lines for the wind facility on December 18, 2006. *Id.* at 56, 858 N.E.2d at 302.

In October, 2007, the Cape Cod Commission denied Cape Wind's proposed development of regional impact which was required for approval of the transmission lines. *Alliance*, 457 Mass. at 666, 932 N.E.2d at 791. After being

denied the Cape Cod Commission's needed approval, Cape Wind sought a certificate of environmental impact and public interest from the EFSB in November of 2007, pursuant to Mass. Gen. Laws ch. 164, §69K, which would serve as a composite of the individual permits that would otherwise be required for the construction and operation of the transmission lines. *Id.*

After extensive discovery and two days of hearings, the EFSB granted Cape Wind the composite certificate on May 21, 2009, seven and one half years after the initial permit applications had been filed. *Id.* at 671, 932 N.E.2d at 795. The Alliance filed multiple appeals of the EFSB's decision in several county courts, which were ultimately consolidated before the Supreme Judicial Court. *Id.* at 672, 932 N.E.2d at 795-6. On August 31, 2010, the Supreme Judicial Court affirmed the decision of the EFSB. *Id.* at 701, 932 N.E.2d at 815.

iii. OVER TWO YEARS: THE TIME REQUIRED FOR A CONTESTED FEDERAL AVIATION ADMINISTRATION DETERMINATION THAT THE WIND TURBINES POSED NO HAZARD.

After nine years of litigation, in 2010 Cape Wind had permits from the Commonwealth of Massachusetts to build transmission lines to connect the proposed wind towers to the power grid, but the saga of the turbines themselves continued. The proposed wind turbines are 440 feet tall and thus require the approval of the Federal Aviation Administration ("FAA") before construction can

begin. *Town of Barnstable, Mass. v. Fed. Aviation Admin.*, 659 F.3d 28, 30 (D.C. Cir. 2011).

The FAA initiated an extensive aeronautical study to determine whether Cape Wind would obstruct the navigable airspace or disrupt air navigation facilities and equipment. *Id.* The FAA issued 130 Determinations of No Hazard, one for each turbine. *Id.* The Town of Barnstable and the Alliance successfully challenged the Determinations of No Hazard, resulting in the DC Circuit vacating and remanding the FAA's determinations on October 28, 2011, one month before the ten year anniversary of the initial filing. *Id.* at 36.

iv. OVER ONE AND A HALF YEARS: THE TIME THAT PASSED FROM THE TIME THE POWER PURCHASE AGREEMENTS WERE FILED UNTIL LITIGATION COULD BE RESOLVED ALLOWING THE DEPARTMENT OF PUBLIC UTILITIES TO APPROVE THE AGREEMENTS.

The next stage in the rapid deployment of Cape Wind was the approval of a Power Purchase Agreement (“PPA”) between National Grid and Cape Wind by the Massachusetts Department of Public Utilities (“DPU”). On December 3, 2009, National Grid applied to the DPU for approval to negotiate with Cape Wind for long term PPAs. *Alliance to Protect Nantucket Sound, Inc. v. Dep’t of Public Utilities*, 461 Mass. 166, 170, 959 N.E.2d 413, 419 (2011). The DPU consented to the negotiations on December 29, 2009 and the parties agreed to two PPAs on May 7, 2010, filing them with the DPU for approval on May 10, 2010. *Id.* at 170-171,

959 N.E.2d at 419-20. The DPU denied one PPA and approved the second PPA on November 22, 2010. *Id.* at 171, 959 N.E.2d at 420. The Alliance appealed the approval decision before the Supreme Judicial Court, which affirmed the decision of the DPU on December 28, 2011. *Id.* at 189, 959 N.E.2d . at 432.

That same day, December 28, 2011, the Massachusetts Supreme Judicial Court, issued another decision affirming the DPU's decision not to allow a motion filed by the Alliance to reopen the administrative record in the proceeding for approval of the PPAs. *Alliance to Protect Nantucket Sound, Inc. v. Dep't of Public Utilities*, 461 Mass. 190, 959 N.E.2d 408 (2011).

v. ALMOST ELEVEN YEARS LATER, LITIGATION IS STILL PENDING AND NO CONSTRUCTION HAS BEGUN.

As of September 17, 2012, nearly eleven years after the initial applications were filed, no turbines have been rapidly deployed. There are still several lawsuits pending which could further delay the development of Cape Wind.

Several environmental groups and the Alliance have filed pending lawsuits, which allege that the wind facility will harm federally protected birds and whales in violation of NEPA, the Endangered Species Act, and the Migratory Bird Treaty Act. These lawsuits have been filed in the District Court for the District of Columbia and are docketed as: *Public Employees for Envtl. Responsibility et al v. Bromwich et al.* 1:10-cv-01079-RMU, 1:11-cv-01238-RMU (D. D.C.).

At the very minimum, Cape Wind's development time frame has already taken eleven years. If a large-scale offshore wind facility were to be available to replace Seabrook as a source of baseload power by 2030, that facility would have to be under development now in order to be a realistically available and reliable source of baseload power that MMWEC's Participants, TMLP and HLPD could rely on to fulfill their obligation to serve.

Because such an offshore wind facility would have to be under development currently, and no such facility is under development, no material facts are in dispute as to the availability of a wind facility as a reasonable alternative to Seabrook. The Commission acted reasonably in looking at the current state of wind turbine technology in its decision to dismiss Petitioners' contention and committed no abuse of discretion.

V. CONCLUSION

As demonstrated by the foregoing, the Commission acted reasonably and did not abuse its discretion when it dismissed the Petitioners' contention. The Commission properly applied the contention admissibility standards in reaching its decision that the Petitioners' contention failed to raise a genuine dispute regarding whether offshore wind farms are at present, or would become in the near future, a reasonable alternative to baseload power.

For the reasons stated herein, the Commission's decision should be affirmed and the petition for review should be denied.

Respectfully submitted,

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Dated: September 19, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with applicable type-volume limitations. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 4876 words, as computed by Microsoft Word 2010. The brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in proportionally spaced font using Microsoft Word 2010 in 14-point Times New Roman Type.

Dated: September 19, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2012, the foregoing Brief of Intervenors, Massachusetts Municipal Wholesale Electric Company, Taunton Municipal Lighting Plant, and Hudson Power & Light Department was served via the First Circuit's Case Management/Electronic Case Files system on the following counsel of record, all of whom are CM/ECF filers.

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