

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2010-235

September 7, 2012

MAINE PUBLIC UTILITIES COMMISSION  
Long-Term Contracting for Offshore Wind  
Energy and Tidal Projects

COMMENTS OF THE  
INDUSTRIAL ENERGY  
CONSUMER GROUP

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The Industrial Energy Consumer Group (“IECG”) submits the following comments in response to the Commission’s Request for Comments (On Non-Confidential Term Sheet) in this docket, dated August 29, 2012. The Commission’s Amended Protective Order No. 4 in this matter provides that the submission of comments on any term sheet shall be considered Designated Confidential Information.

## **I. Summary**

The Commission has requested public comments on the proposal submitted to it by Statoil North America, Inc. (“Statoil”) for a long-term contract for its proposed deep-water offshore wind energy pilot project. In addition to the policy considerations that the Commission will no doubt be considering in its deliberations; there are specific legal constraints on the Commission’s authority to approve any contract as seemingly described by the redacted non-confidential Term Sheet (“Term Sheet”). These include both federal requirements regarding the setting of electric rates, as well as the specific requirements of state law regarding long-term contracts for deep-water offshore wind energy projects.

Further, IECG urges both caution and strategic thinking about Maine’s role in deep water offshore wind. IECG applauds the work of the University of Maine and others in examining the feasibility of offshore wind. However, it bears noting that the task force which examined many issues was populated by advocates and supporters, with no effort to consider consumer effects. The legislation developed by the task force became unacceptable and was rescued only in part. The legislation was enacted two years ago, as well, and much has changed since then in the energy world. IECG believes these factors place some responsibility on the Commission to act strategically and prudently.

In particular, IECG urges the Commission to evaluate where this project may lead. And at what cost. For example, Great Britain has confronted massive technological and financial obstacles in its own offshore wind project. Great Britain’s societal commitment here has been surpassed in scale only by its military efforts in the two world wars. Great Britain’s wind towers attach to the sea floor, rather than float, as would Statoil’s, making Statoil’s challenges far

greater. Yet even Great Britain is unsure it can fund and construct what it plans. Maine cannot make a similar effort. This is not to counsel defeatism; it is to ask for careful determination of how Maine will benefit in relation to the cost. Maine should act strategically within the developments of other nations, states and industries. For example, will the over-market subsidies by Maine consumers give Maine a share of intellectual property rights developed in the Maine project? The money Maine provides is similar to an equity investment.

IECG urges, as IECG has consistently done in its twenty-seven year history, that the Commission and the State of Maine continue to search for ways to cut the cost of energy for Maine people and businesses. The proposed price of 29¢/KwH greatly exceeds any price ever paid for power in Maine. A compelling need must be found to justify this cost to Maine consumers.

Unfortunately, IECG believes that the Term Sheet does not demonstrate compliance with federal law on electric rates and must be modified substantially in order to come into compliance with federal requirements. The IECG also notes that the Term Sheet also does not appear to comply with important requirements of applicable state law. Particularly, the requirement that the proponent invest in manufacturing in Maine related to deep water offshore wind. Accordingly, the citizens and consumers of Maine would pay more and receive less than Maine law requires.

## **II. Background**

### **A. The Ocean Energy Act**

In 2010, the Legislature enacted An Act To Implement the Recommendations of the Governor's Ocean Energy Task Force (the "Act"), pursuant to which the Commission was directed to "conduct a competitive solicitation for proposals for long-term contracts to supply installed capacity and associated renewable energy and renewable energy credits from one or more deep-water offshore wind energy pilot projects or tidal energy demonstration projects." P.L. 2009, ch. 615, §A-6. "[E]xcept as otherwise provided by this section," the solicitation shall be conducted in accordance with 35-A M.R.S. §3210-C. *Id.*

Section 3210-C grants the Commission the authority to require T&D utilities to enter into long term contracts for the purchase of capacity, energy and renewable energy credits. With respect to renewable energy credits, as amended in 2012, Section 3210-C(3)(C) provides in relevant part:

The price paid by the investor-owned transmission and distribution utility for the renewable energy credits must be lower than the price received for those renewable energy credits at the time they are sold by the investor-owned transmission and distribution utility.

P.L. 2011, c. 273, §1 (AMD); P.L. 2011, c. 273, §3 (AFF); P.L. 2011, c. 413, §2 (AMD).

The only rational manner in which to harmonize the Act with the recent amendment to Section 3210-C(3)(C), is to find that any premium that a T&D utility is required to pay must be for either energy or capacity.

The Act further provides further specific direction to the Commission allowing the Commission to approve a long-term contract only if it determines that the potential supplier:

1...

...B. Has the technical and financial capacity to develop, construct, operate ***and, to the extent consistent with applicable federal law, decommission and remove the project*** in the manner provided by Title 38, section 480HH, subsection 3, paragraph G;

***C. Has quantified the tangible economic benefits of the project to the State, including those regarding goods and services to be purchased and use of local suppliers, contractors and other professionals, during the proposed term of the contract...***

***E. Has demonstrated a commitment to invest in manufacturing facilities in the State that are related to deep-water offshore wind energy*** or tidal energy, as applicable, including, but not limited to, component, turbine, blade, foundation or maintenance facilities; and

***F. Has taken advantage of all federal support for the project, including subsidies, tax incentives and grants, and incorporated those resources into its bid price.***

2. To mitigate any impacts of a long-term contract entered into under this section on electric rates, the commission shall:

***A. Require the supplier, as part of the long-term contract, to take advantage of future federal support that may become available to the project over the contract term*** to mitigate impacts of the contract on electric rates;

***B. Use the following funds to the full extent that such funds are available to mitigate impacts of the long-term contract on electric rates over the contract term:***

***...(4) Any other sources of revenue or funds accessible to the commission to mitigate impacts on ratepayers;...***

The commission may not approve any long-term contract under this section that would result in an increase in electric rates in any customer class that is greater than the amount of the assessment charged under Title 35-A, section 10110, subsection 4 at the time that the contract is entered. P.L. 2009, ch. 615, §A-6 [emphasis added to original throughout]

**B. The Statoil Term Sheet**

On August 15, 2012, Statoil filed a proposed term sheet containing the “essential elements” of a long-term contract for energy and capacity from the Statoil Hywind Maine Project (“the Project”). The redacted Term Sheet has been provided to the Service List in this docket along with the Commission’s request for comments.

The Term Sheet provides among other things, that:

“Energy and Capacity are the sole Contract Products to be purchased under the Contract. RECS or other market products associated with the environmental attributes of the Project are not included in the Contract and the rights to such attributes are retained by Statoil. *Term Sheet*, page 2.

The Term Sheet proposes two pricing options for energy. Option 1 sets the contract price at \$290/MWh, changing after the first year by 1% plus or minus the rate of load growth change for distribution voltage customers of the contracting transmission & distribution utilities (Central Maine Power, Bangor Hydro, and Maine Public Service, collectively referred to as “T&D Utilities”). Option 2 sets the contract price at \$320/MWh, changing after the first year by the rate of annual load growth change for the distribution voltage customers of the T&D Utilities. *See Term Sheet*, page 3.

The Term Sheet provides that the contract price for capacity shall be the “market value per kW-month at the prevailing clearing price in the FCM (or successor market) received by the T&D Utilities and passed through to Statoil...” *Term Sheet*, page 3.

The Term Sheet further provides that “Statoil will use commercially reasonable efforts to pursue and acquire...grant and subsidy opportunities applicable to the Project” and that:

The Project will retain such grants in their entirety up to \$35 million to ensure that Statoil's minimum investment criteria are met. For any grants received by Statoil in excess of this amount, the Contract Price-Energy will be reduced for the applicable Contract Year to reflect a credit for the net grant proceeds realized unless Statoil proposes, and the Commission agrees to, an increase in the Project scope which increases the costs of the Project (including, without limitations, use of larger turbines, more extensive test programs or other relevant activities) to the benefit of future offshore wind developments. This credit obligation will not apply to grants that are paid to or utilized by research laboratories or universities or to any new funding that is obtained that requires repayment, such as a loan. In the event the current federal Investment Tax Credit is materially adversely modified with respect to the Project or has not been extended to cover the

full expected construction period of the Project, and if notwithstanding such event Statoil proceeds to construct the Project, Statoil shall be entitled to retain any additional grant proceeds in excess of \$35 million to the extent necessary to offset the loss of the economic benefits to Statoil associated with the Investment Tax Credit. *Term Sheet*, pages 3-4.

With regard to non-pricing terms, the Term Sheet contains several statements of Statoil's "Ambitions" as well as a series of Project commitments that include:

- (i) Commercially reasonable efforts to spend in Maine and/or allocate to Maine suppliers at least 40% of capital expenditures and operating and maintenance expenditures;
- (ii) Direct or indirect employment of 150 persons full time during the Project's peak construction period;
- (iii) Locate an Operations Center for the Project in Maine;
- (iv) Current employment of 20-25 persons employed by local firms in the "Pre-FID" Phase of the Project, as well as commercially reasonable efforts to allocate front end engineering and design studies to Maine based companies;
- (v) Application of an extended supplier development process with the goal of maximizing local suppliers and contractors during construction and operation of the Project; and
- (vi) Continuation of an existing Collaboration Program with the University of Maine for which "Statoil foresees the involvement of Maine based manufacturing industries as contributors." *Term Sheet*, page 6.

### **III. Federal law provides constraints on the Commission's authority to impose a rate in excess of avoided cost**

States are preempted from establishing wholesale rates for generating energy and capacity except pursuant to their limited authority under PURPA – an authority limited to establishing rates that are not in excess of avoided costs. The question of whether a state can order a utility to enter into long term contracts for energy and capacity at prices that exceed prevailing wholesale market prices was addressed recently by the Federal Energy Regulatory Commission ("FERC") in *Re California Public Utilities Commission, et al.*, 132 FERC ¶ 61,047 (July 15, 2010) (FERC Declaratory Order), 133 FERC ¶ 61,059 (October 21, 2010) (FERC Clarification Order), and 134 FERC ¶ 61,044 (January 20, 2011) (FERC Rehearing Order). In these decisions, FERC determined that states were preempted from establishing wholesale rates for generating energy and capacity except pursuant to their authority under PURPA. However, this authority is limited. In particular, "a state still cannot impose a ratemaking regime inconsistent with the requirements of PURPA and this Commission's regulations—i.e., a state cannot impose rates in excess of avoided cost." 132 FERC ¶ 61,047 at P 66. (citing *Connecticut Light and Power Co.*, 70 FERC ¶

61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995), *appeal dismissed*, *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (1997).

The rates proposed in this matter are clearly in excess of any reasonable calculation of avoided cost. The proof of this is that the market clearing price in ISO-NE is presently (2012) (Maine zone) 3.25¢/kWh. The MCP is set by gas units much of the time. Gas markets further show the price will not reach double digits for the foreseeable future. In fact, it appears that the rates are proposed to be paid solely for energy, as capacity is to be a pass-through charge under the Term Sheet, and Statoil will retain any renewable energy certificates or other environmental attribute products. Since rates are proposed to be paid solely for the energy of the units, the Commission is prohibited under federal law from imposing such rates.

#### **IV. The Term Sheet must comply with applicable state law**

There are several elements, required under the Act, which are apparently either incomplete or incorrectly stated in the Term Sheet. There are also required elements which appear to be wholly missing from the Term Sheet. Since the IECG has not had (and in fact may never have) the opportunity to review the unredacted version of the Term Sheet, it must assume that the version it has been allowed to see fails to correctly reflect full compliance with the Act.

First, the Act clearly requires the Commission to determine that the potential supplier has the technical and financial capacity to decommission and remove the Project in accordance with state law. The Term Sheet is silent on decommissioning and removal. While we assume that Statoil has provided the Commission with confidential financial information, the mere assertion of Statoil's (or any other potential suppliers') net worth or financial position is not enough to satisfy this requirement. Many of IECG's members have been required to accept and maintain decommissioning plan requirements from the State of Maine. An explanation of the decommissioning methods and removal plans and an explanation of how financial assurance will be provided is required.

The Act also requires quantification of the tangible economic benefits to the State. The Term Sheet fails to do so. It does provide an estimate of direct and indirect employment numbers during peak construction, but it does not provide any further quantification of tangible economic benefit. The IECG appreciates that it may be difficult to do so at the Term Sheet stage of the Project, but that does not excuse the failure to do so. This element of the Act does not seem to rise to the level of business confidential information, and is a key component in considering whether to enter into any such contract.

The Act further requires that the potential supplier has "demonstrated a commitment to invest in manufacturing facilities in the State." P.L. 2009, ch. 615,

§A-6 subsection 1.E. The Term Sheet fails to do so. Commitments to using a specific percentage of local suppliers or contractors (stated to be 40% but actually only a level of 30% is enforceable by the Commission, meaning that more than twice as many out of state suppliers or contractors can be chosen without penalty; see *Term Sheet*, page 8) is not enough. Neither is a commitment to continue funding a research and development program through the University of Maine.

The Commission must also ensure that any potential supplier “[h]as taken advantage of all federal support...and incorporated those resources into its bid price” and used “any other sources of revenue or funds accessible to the commission to mitigate impacts on ratepayers...” P.L. 2009, ch. 615, §A-6 subsections 1.F and 2.B(4). Again, while the IECG is limited to the redacted version of the Term Sheet, it does not appear that the current Term Sheet meets these requirements. Statoil’s proposal to retain \$35 million in benefits does not seem to meet the Act’s clear requirements, nor is it apparent that the retention of such funds and/or Statoil’s receipt and retention of the federal Investment Tax Credit applicable to the Project have been factored into the cost of the contract, which contains an energy price significantly higher than the current market clearing price. In order to comply with the Act and to fully mitigate any effect on Maine ratepayers, the Commission should secure, for the benefit of ratepayers, the economic benefit of any state or federally subsidized loan programs. Finally, while the IECG does not object to Statoil’s proposed backstop against an adverse change in the Investment Tax Credit, any contract should be clear that subsidies, grants, or government-provided financial benefits of any type that become available in the future and are in excess of those available at the time of the contract, shall be wholly applied to reducing ratepayer impacts.

## **V. Conclusion**

The IECG believes that the Term Sheet violates federal law on electric rates and must be modified substantially in order to come into compliance with federal requirements. The rates proposed in this matter are clearly in excess of any reasonable calculation of avoided cost. To the extent the excess is proposed to be paid in exchange for the energy of the units, the Commission is prohibited under federal law from imposing such rates. Without further direction from the Legislature, therefore, contracts for prices in the range proposed cannot be approved by the Commission.

The IECG also notes that the Term Sheet also does not appear to comply with all requirements of the Act; and must be modified to do so before any Commission approval. Serious deficiencies appear to exist with regard to decommissioning and removal; quantification of tangible economic benefit; commitment to investment in Maine manufacturing facilities; and offsetting impacts to Maine ratepayers. The Act was a product of long and arduous negotiations that resulted in a careful balancing of the policy of encouraging

deep-water offshore wind energy projects with concern with Maine ratepayers and the cost of energy for Maine people and businesses. The IECG respectfully requests that the Commission honor that important legislative compromise by disapproving of the current Term Sheet.

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