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Re: Promoting Equitable Economic Opportunities in Offshore Wind Development

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The Massachusetts offshore wind industry is poised to boom, delivering considerable economic and economic benefits to the Commonwealth. Consistent with the state’s policy to mitigate climate change, and as specified in legislation enacted in 2016 and 2018, Massachusetts utilities—closely supervised by state agencies—have already procured 1,600 megawatts (“MW”) of offshore wind (“OSW”) capacity. Although the first 1,600 MW will not come online for a few more years, the Department of Energy Resources (“DOER”) is already drafting criteria for the next round of Requests for Proposals (“RFPs”), pursuant to which utility companies will contract for another 1,600 MW of OSW capacity. When all is said and done, Massachusetts will have created a massive new industry to support a cleaner economy for decades to come.

Ensuring this economic opportunity is available for all, regardless of race, ethnicity, gender, or economic status will promote both economic and environmental justice while Massachusetts transitions to a clean energy economy. For the reasons described below, DOER can—and should—include provisions in the RFP to create opportunities for minority and other disadvantaged communities in the forthcoming offshore wind RFP.

I. EOEEA can include provisions in an RFP for offshore wind to prioritize economic justice.

DOER, the distribution companies, and the independent evaluator are currently drafting the RFP for the next procurement of 1,600 MW in OSW. Based on public statements DOER has made to date, the aim of this RFP is to solicit bids in time for the utilities to conclude a contract with a generator(s) in 2022. The Department of Public Utilities (“DPU”) will review both the solicitation and the bids received in response, with opportunities for public comment at both steps.

The forthcoming solicitation process can and should explicitly foreground racial, economic, and environmental justice. Although the Supreme Court has interpreted the Equal Protection Clause to limit the ability of state and local governments to give preferences to minority-owned businesses, it has only done so in cases where state and local governments imposed strict,

ELM

February 4, 2021

Page 2

mandatory quotas for minority involvement. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Massachusetts and other states and localities, on the other hand, have designed programs in many instances that successfully *encourage*, rather than mandate, equitable opportunities. Indeed, under existing Massachusetts law, state agencies and private actors are already incentivized to consider economic opportunities for minorities and disadvantaged businesses when formulating and evaluating energy generation proposals.

First, the 2016 Act to Promote Energy Diversity requires that DPU evaluate the effects of potential OSW long-term contracts on employment and economic opportunities. Chapter 188, of the Acts of 2016, § 83C(d)(xi) (Generation proposals must “create and foster employment and economic development in the commonwealth.”). DPU’s regulations mirror this legislation. 220 C.M.R. § 23.05(1)(a)8. DOER and DPU should implement this provision with a focus on those who need employment and economic development opportunities most, namely disadvantaged and underserved communities.

Second, the Commonwealth’s stated commitment to environmental justice also compels a focus on promoting equity in the economic opportunities created by the OSW industry. Executive Order 552, issued by former Governor Patrick in 2014, implements the state’s environmental justice policy for executive agencies. Relying in turn on constitutional and statutory commitments to guaranteeing a clean environment for all, EO 552 requires state agencies—including EOEEA—to take environmental justice into account when making decisions. In particular, it requires state agencies to “identif[y]...economic development opportunities, environmental benefits, and other discretionary funding programs that do, or appropriately should, consider the needs of an Environmental Justice Population in the award process.”¹ Similarly, the Commonwealth’s updated 2017 Environmental Justice Policy states that “environmental justice shall be an integral consideration...in the implementation of all [Energy and Environmental Affairs] programs, including...energy efficiency and renewable energy generation,” and established as a priority “[f]acilitating local residents’ connection with governmental, labor union, community college or other training opportunities in environmental fields”.² The OSW procurement process is one of the most significant programs in EOEEA’s portfolio—to comply with its own commitments to environmental justice, EOEEA must ensure equitable opportunities in the OSW industry.

Third, the state’s Supplier Diversity program, which applies to a wide range of state procurements, demonstrates the state’s commitment to equitable opportunities in major public and quasi-public contracts. The Supplier Diversity Office (“SDO”)³ implements the state’s disadvantaged-business programs, as required by Executive Orders 565 and 523, and as sanctioned by the Legislature for state- and state-assisted construction contracts by M.G.L. c. 7C

¹<https://www.mass.gov/files/documents/2017/11/29/Executive%20Order%20on%20Environmental%20Justice%20links%20to%20PDF%20file.pdf>.

² https://www.mass.gov/files/documents/2017/11/29/2017-environmental-justice-policy_0.pdf at 4-5.

³See <https://www.sdo.osd.state.ma.us/>.

ELM

February 4, 2021

Page 3

§ 6. The SDO certifies MBEs and WBEs, and other DBEs, for disadvantaged-business enterprises, a supplier diversity program, a small business purchasing program, and an affirmative marketing/construction reform program. For contracts to which the state is a party, the SDO sets participation targets for MBEs and WBEs. DOER and DPU should apply supplier diversity principles to the OSW procurement.

One recent, successful model of an RFP that promoted minority-business inclusion was the Massachusetts Port Authority's RFP for the new convention center hotel in the Seaport District of Boston. Boston's minority communities had largely not benefited from the extensive redevelopment of the Seaport, so Massport leadership committed to prioritizing diversity and inclusion in the solicitation process. The key to this effort was structuring the RFP so that a "comprehensive diversity and inclusion program" counted for 25% in the evaluation of the total proposal, weighted equally to three other factors. This structure encouraged bidders to propose substantial and innovative diversity and inclusion initiatives, without necessarily requiring bidders to do so. Massport received several impressive and innovative responses to the RFP from development teams that included minority partners and investors. Similar conditions in the forthcoming RFP for OSW would have meaningful effects. As described above, OSW developers responding to the RFP would be encouraged to include bold targets for workforce training and employment, and they would source capital from minority investors during the bidding process. Further, this model allows for some flexibility in how DOER assesses economic justice proposals: it could assign this category a particular weight as in the Massport model, or perhaps deem it a "bonus" in a point-based award system.

For an example of a less "formula-based" consideration of economic justice in a competitive process, DOER and DPU can also learn from the success of the Massachusetts Gaming Commission in promoting economic justice in the state's nascent gaming industry. The Massachusetts Expanded Gaming Act, c. 194 of the Acts of 2011 (largely codified at M.G.L. c. 23K), included numerous provisions requiring applicants seeking to build one of the first three gaming establishments in the Commonwealth to demonstrate how their proposals would utilize MBEs and WBEs as contractors and subcontractors, and minorities, women, and veterans in construction. The Gaming Commission was required to take economic justice issues into account in selecting between applicants, and tracked applicants' and licensee's progress in meeting the commitments in their applications on a quarterly basis. M.G.L. c. 23K, §§ 15(15)-(16), 18(16)-(17), 21(a)(21)-(24). The legislation has helped the Gaming Commission focus applicants' plans on these issues, and broaden the reach of economic activity generated by gaming in Massachusetts. Although the Gaming Commission's actions were explicitly mandated by statute, as discussed above, DOER can utilize other legislative authority to implement a similar model for the new OSW industry as the Commission has for a new gaming industry. In both cases, the entry of a new industry to the Commonwealth which requires construction, manufacturing, and ongoing maintenance and operation provides opportunities up and down the supply chain to increase diversity in employment and contracting.

In sum, the key state agencies and private actors can and should support more equitable economic opportunities in the next round of OSW procurements. The state's Environmental Justice policy requires DOER and the Attorney General to advocate for more employment and business opportunities for minorities and other disadvantaged groups, and DPU must take these issues into account in evaluating RFPs and proposed long-term contracts. Utilities and generators can take a page from Massport's playbook and prioritize supplier diversity in, respectively, their issuance of and response to the next RFP.

II. Other states provide models for factoring equity into the OSW solicitation process.

Neighboring Atlantic coast states are also moving rapidly to develop their offshore wind resources and prioritizing equity while doing so.

New Jersey factors equity into its OSW procurement process. As in Massachusetts, New Jersey's statute and regulations do not expressly address minority business participation in the OSW industry.⁴ Nonetheless, New Jersey's criteria for evaluating responses to its OSW RFPs include both an evaluation of workforce development and environmental justice. Among other specific criteria, OSW-developer applications in New Jersey must address:⁵

- “incremental investments in infrastructure, supply chain, workforce development..., and the associated economic benefits for the State”;
- “the Applicant’s plan to include diversity and inclusion initiatives as part of the training programs and hiring practices”; and
- “Planned in-State spending that will support environmental justice communities by providing jobs, grants, training programs, or environmental benefit projects..., along with an explanation of the nexus between the spending and the Application.”

Note that New Jersey's mandate, like the Massport and Gaming Commission models, encourages bidders to think of creative ways to increase minority and disadvantaged business participation in offshore wind, without quotas or set-asides that may be more difficult to implement legally. Instead, this model relies on the marketplace itself to generate methods for increased participation, with an express focus on job creation throughout the OSW supply chain.

Maryland has adopted a similar approach to promoting minority participation in its OSW industry, but by both statute and regulation. In the summer of 2020, the Maryland legislature revised its statute authorizing OSW to codify certain rules promoting minority participation, including:

⁴ See 43 N.J. Stat. Ann. § 3-87.1; 14 N.J. Admin. Code § 8-6.1-.7.

⁵ New Jersey Board of Public Utilities, New Jersey Offshore Wind Solicitation #2, Solicitation Guidance Document at 18–19 (Sept. 10, 2020), available at <http://njoffshorewind.com/solicitation-documents/Final-Solicitation-Guidance-Documents-with-attachments.pdf>.

- Requiring “[t]o the extent practicable...applicants for a proposed offshore wind project [to] comply with [Maryland’s] Minority Business Enterprise Program”;
- Directing the state MBE promotion office to develop a plan, in consultation with the Attorney General and the industry applicant, a plan to ensure that each phase of the OSW project meets minority participation goals.⁶

In addition, the Maryland Public Service Commission issued regulations promoting participation by both minority labor and capital. OSW developers seeking private investment must “solicit and interview and reasonable number of minority investors,” Md. Code Regs. 20.61.06.02K(3)(a), and offer a “plan demonstrating engagement of small and minority businesses.” Md. Code Regs. 20.61.06.03B(1)(a)(xiv)–(xv).

The recently adopted Virginia Clean Economy Act (“VCEA”) incorporates similar provisions to advance racial, economic, and environmental justice.⁷ The VCEA, which commits the state to procure up to 5,200 MW of OSW, includes several provisions to aid “historically economically disadvantaged communities,” which the act defines as “(i) a community in which a majority of the population are people of color or (ii) a low-income geographic area.” Va. Code Ann. § 56-576. The VCEA requires utilities that construct OSW facilities to submit a plan to Virginia’s utilities commission and its diversity and workforce development agencies that describes how the utility will “giv[e] priority to the hiring, apprenticeship, and training of veterans..., local workers, and workers from historically economically disadvantaged communities.” *Id.* § 56-585.1:11.D. Further, the VCEA requires that 50% of the revenue generated from any compensatory payments from utilities for failing to meet the act’s Renewable Portfolio Standard will be allocated “to job training programs in historically economically disadvantaged communities.” *Id.* § 56-585.5.D.5.

Massachusetts’ inclusion of similar provisions targeted at expanding the benefits of OSW would thus not only further the Commonwealth’s existing expressed commitment to economic justice in procurement and energy policies, but would put it on par with its neighbors.

III. The RFP for the next 1,600 MW of offshore wind should explicitly take into account economic opportunities for minority and disadvantaged workers and businesses.

As discussed above, Massachusetts should prioritize racial and economic justice in the procurement process for offshore wind. Moreover, the Commonwealth’s commitments to environmental justice and supplier diversity compel the consideration of these factors.

Drawing on Massachusetts’ own experience using procurement to promote equitable economic development in the Seaport and similar efforts by other states regarding offshore wind, the next RFP for Massachusetts offshore wind should include direction to respondents:

⁶ Maryland Pub. Util. Code § 7-704.1, as amended by [SB 442](#) (effective July 1, 2020).

⁷ <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB851>. See also <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856056-en.html>.

- 1) that proposals will be evaluated, in significant part, based on their plans for creating opportunities for minority and disadvantaged workers, businesses and investors. Among other features, this component of proposals should address:
 - a. The respondent's plan for workforce development, focused on minority and disadvantaged workers;
 - b. The respondent's plan to solicit business from minority and disadvantaged contractors; and
 - c. The respondent's plan to solicit investment from minority and disadvantaged investors;
- 2) to cooperate with the state Supplier Diversity Office and other state agencies focused on minority and disadvantaged business creation and development; and
- 3) to explain how their proposal will ameliorate environmental harm and create economic opportunities in environmental justice communities.