STATE OF MAINE
PUBLIC UTILITIES COMMISSION

MAINE PUBLIC UTILITIES COMMISSION **RE: Long-Term Contracting for Offshore Wind Energy & Tidal Energy Projects** **Docket No. 2010-00235**	**COMMENTS OF THE OFFICE OF THE PUBLIC ADVOCATE** **February 21, 2018**

INTRODUCTION

The Office of the Public Advocate (the "Office") files these comments in response to the Maine Public Utilities Commission's (the "Commission") Order, dated January 24, 2018 (the "2018 Order"), seeking comment on whether the Commission should reopen its February 13, 2014 and February 19, 2014 Orders (the "2014 Orders") in this docket that approved a Term Sheet for the Maine Aqua Ventus offshore wind demonstration project. For the reasons given below, this Office urges the Commission not to reopen the 2014 Orders. Not only does this Office see no changed circumstances of material consequence that would justify reopening; we believe that law and policy weigh against reopening a 4-year-old decision, even if some circumstances have changed. To paraphrase the Chief Executive in his recent State of the State address, businesses need the state and its agencies to be consistent more than compliant. Projects seeking to invest in Maine can comply with tough regulations as long as governmental policies and decisions are consistent, and "we don't change them every 3 months."

The Public Advocate notes that its suggestions regarding the Term Sheet have been addressed in the proposed power purchase agreement, and that it has no further

suggestions for that document. Finally, the Public Advocate notes that the proposed power purchase agreement is consistent with the approved Term Sheet as well as the Commission's 2014 Orders and the directives of the Ocean Energy Act ("OEA"). P.L. 2009 ch. 615. The first state action related to this project occurred in 2007 and the decision in this docket on the project's Term Sheet was made in February 2014; the Commission should stay the course and allow this decade-long initiative to move ahead towards commercialization.

PROCEDURAL HISTORY

The MAV project and the long-term contracting process whose conclusion is now before the Commission had their genesis in An Act to Implement Recommendations of the Governor's Task Force on Wind Power Development, which established the first state goal for offshore wind. P.L. 2007 ch. 661 §A-6. This was followed by the Ocean Energy Task Force established by Governor Baldacci by Executive Order dated November 7, 2008, and charged with recommending a strategy for moving forward as expeditiously as practicable with the development of the vast, indigenous, renewable ocean energy resources of the Gulf of Maine. The OEA was the key piece of legislation that resulted from the Task Force's recommendations. The current Public Advocate served on the Ocean Energy Task Force, was the sponsor of the OEA and chaired the Utilities and Energy Committee in the 124th Maine Legislature, which enacted the OEA.

As noted in the Task Force's December 2009 final report, renewable ocean energy has enormous promise to address state and regional energy needs, including energy independence and security; limiting exposure to the volatile costs and supplies of fossil fuels; attaining our greenhouse gas reduction goals; and stimulating economic

opportunity for our citizens. Maine has significant offshore wind energy resources, which can play a role in addressing transportation and home heating needs. Our universities, research institutions and businesses can provide needed research capabilities, workforce, and industrial infrastructure to support this development.

The Task Force concluded that making the transition to off-shore energy (wind, tidal, and wave) when the time is right can provide Maine long-term price stability, domestic political control over its energy future, development of a new industry cluster, and jobs for Maine people. Increasing access to an energy resource with a fuel cost of zero for electricity, heat, and transport would provide Maine people with insurance against increases in oil and gas prices. The Task Force found that despite the hurdles that development of Maine's ocean energy resources will encounter along the way to commercialization, the potential benefits dictated concerted action now to ensure that Maine is positioned to capture the tremendous promise these resources can provide.

The Task Force also recommended that Maine act immediately to support the electrification of heating and transportation, the sectors responsible for the bulk of Maine families' energy budget, for consuming the vast majority of petroleum products, and for producing a significant share of greenhouse gas emissions in Maine.[1] In 2009, the Task Force predicted that commercialization of deep water offshore wind power was at least five to ten years down the road; noting that "If we wait until a catastrophe is upon us, we'll be starting from scratch and delay now will be our undoing."[2] The Task Force specifically noted the opportunity for Maine to leverage state and federal funding in pursuing ocean energy in general and offshore wind and the University-led effort that

[1] Final Report of the Ocean Energy Task Force, December 2009, pages vi, x.
[2] Id., page vi.

became MAV.[3] The Task Force knew in 2009 that we needed to begin the process now, to clear obstacles and cut lead time for future deployments. Now, in 2019, ten years later, Maine sits on the cusp of commercializing its significant offshore wind resources.

The Task Force's key recommendation was that Maine promote and support financing and development of renewable ocean energy projects and related businesses in Maine by amending state law to direct the Public Utilities Commission to issue a Request for Proposals for renewable ocean energy development projects and to direct transmission and distribution utilities to enter into long term contracts with renewable ocean energy projects for capacity, energy, and renewable energy credits, even if at an above market price, when the rate impact is determined to be reasonable given the benefits of these projects.[4]

The Task Force understood that legislation – enacted by the Legislature, reviewed by the Governor – should play a key role in defining what is reasonable in light of goals to advance development of the State's renewable ocean energy resources, and suggested that the existing system benefit charge level at that time was a good benchmark for determining whether an ocean energy contract's rate impacts were reasonable. But the Task Force noted that this entails a balancing exercise:

> On the one hand, Maine's electric rates are among the highest in the country, which undermines its competitive position and standard of living. At the same time, some rate impact may be necessary to promote development of Maine's offshore wind and tidal power industry, to reduce our fossil fuel dependence and greenhouse gas emissions, and to increase energy in-dependence by taking advantage of one of our greatest untapped natural resources. On balance, the Task Force believes that the rate impact should be no greater than the current system benefit charge, which

[3] Id., pages 19 (DOE grant to the University-led consortium) and 23 (initial state bond proposal).
[4] Id., page viii.

> is approximately $0.0015 per kilowatt hour, and adds less than one dollar to the average residential monthly utility bill.[5]

When the Legislature enacted the OEA in 2010, it adopted virtually all of the Task Force's findings and recommendations. The preamble, finding sections, policies and activities prescribed by the Legislature in the OEA all point to the overarching issue of overreliance on oil to heat our homes and fuel our vehicles and fossil fuels to run our electric power plants. The OEA also includes the Task Force's additional finding that "climate change, caused primarily by the burning of fossil fuels, may in fact pose an even greater threat to the environment, economy, social fabric and human health."[6]

Through the OEA, the Legislature established a series of Maine policies implementing the Task Force's recommendations. The Legislature revised Maine's statutory offshore wind power goal to a transformational level – 5,000 megawatt of offshore wind by 2030 – a power source that would enable Maine to electrify in every sense, including heat for our homes and fuel for our cars.[7]

Finally, the Legislature directed the Commission to issue a Request for Proposals for renewable ocean energy development projects – and to order our transmission and distribution utilities to enter into long term contracts with renewable ocean energy projects for capacity, energy, and renewable energy credits. Just as recommended by the Task Force, contracting under the Ocean Energy Act can even be at an above market

[5] Id., page 39.
[6] Id., page iii.
[7] P.L.2009 ch. 615 §A-4.

price, within the bounds of the reasonable rate impact that the Legislature specified in the statute -- $0.00145 per kilowatt-hour.[8]

In remarks on the Senate floor prior to unanimous enactment of the OEA, bill sponsor and Energy and Utilities chair Barry Hobbins noted that the original legislation had been amended to "address all of the concerns with the different stakeholder groups [including the Maine Lobsterman Association and the Maine Municipal Association]."[9] The then-chair and now current Public Advocate also in discussing the statutory goal of 5,000 megawatts by 2030 said that: "over time, it's been shown through extensive research that this new energy can provide for heat and transportation in abundance, which would reduce the state's reliance on imported fossil fuels."[10]

The Legislature set the stage for the MAV project in 2009 when it enacted an $11 MM offshore wind research bond that was subsequently approved by voters, The Legislature acted again in 2013, when it passed the Omnibus Energy Act (P.L. 2013 ch. 369) and An Act to Provide for Economic Development with Offshore Wind Power (P.L. 2013 ch. 378) and specifically directed the Commission to conduct a second offshore energy solicitation and also specifically removed any doubt about whether the MAV project would qualify to be considered under the OEA. The current Public Advocate, along with House Minority Leader Kenneth Fredette and former Senator John Cleveland, was one of the three primary co-sponsors of the Omnibus Energy Act, and these three together brokered the critical amendment that became part of P.L. 2013 ch. 378, which not only specified the second solicitation, but directed the Commission to "make every

[8] Id., §A-6.
[9] Remarks of Senator Hobbins, Legislative Record – Senate, Monday April 5, 2010, page S-1745.
[10] Id.

effort to finalize a contract under this section."[11] It should be noted that this language arose in the context of conducting the second solicitation directed by this Public Law.

This legislative effort was supported by the Governor who issued a press release on June 27, 2013 saying in part:

> '[t]he hard-working citizens who fund the University every year would be pleased to see that their ratepayer dollars are going to a project that will benefit Mainers, rather than subsidizing a foreign oil company,' the Governor said. 'Our own university has made significant progress in offshore wind technology recently and we have already invested millions into this research.'[12]

After conducting that solicitation, and selecting the MAV project for negotiation of a Term Sheet negotiated between the PUC, CMP, MAV and this Office (along with input from the Governor's Energy Office which sent a letter of support for approval of the Term Sheet to the Commission), the Commission deliberated and approved the Term Sheet in the 2014 Orders. In the four years since the approval of the Term Sheet, the MAV project has, among other things:

- been selected as an alternate by the DOE under the DOE's offshore technology demonstration program;
- been subsequently up-selected as a primary project by DOE;
- negotiated a community benefits agreement with Monhegan Plantation;
- been the intended beneficiary of a voter-approved intermodal transportation bond to create project infrastructure at Mack Point;
- been publicly supported by Senators Susan Collins and Angus King and all four legislative leaders;
- successfully negotiated a binding $40 million contract for further DOE support;
- expended millions of dollars and thousands of man-hours in project design, engineering, interconnection, public outreach and financing efforts; and
- converted the Term Sheet into a power purchase agreement after discussions with the Commission, CMP and this Office.

[11] P.L. 2013 ch. 378 §6.
[12] Office of Maine Governor Paul LePage, *Amendment Allows University of Maine to Compete for Offshore Wind Project*, June 27, 2013

THERE ARE NO CHANGED CIRCUMSTANCES THAT JUSTIFY RECONSIDERATION OF THE 2014 TERM SHEET

In its 2018 order, the Commission cites a series of facts and asks if one or more of these facts should serve as a basis for reconsideration. These facts include:

- whether the OEA's preamble related to volatility of fossil fuels and/or its mention of Maine's renewable portfolio standard could serve as a basis for reconsideration of the 2014 Orders;

- whether the technological advancements of the offshore wind industry in recent years are likely to reduce the benefit as originally proposed by the MAV technology;

- whether the increased interest in and development of offshore wind projects by other states would reduce the potential economic benefits proposed by the project for a second potential project beyond the current MAV project ("MAV II");

- Whether changes since 2014 to the project ownership structure, interconnection location, and Monhegan local benefits should serve as a basis for reconsideration as potentially changing the Commission's finding with regard to its 2014 Orders.[13]

The straightforward answer to all these questions is **No**. Even if the Commission's questions were not asked after four years of reliance on the 2014 Orders by MAV, various Maine state agencies, the DOE, and numerous Maine individuals and businesses; none of the cited circumstances, either singly or collectively, rise to the level of significance that should be required when deciding whether to reconsider a prior Commission decision, especially one that is four years old. This Office considers the Commission's discretion under Section 1321 to be broad and powerful. This power alone requires that its use be circumscribed by necessity and not by insignificant circumstances.

While this Office assumes that MAV will provide detailed answers to the Commission's questions, such detailed answers do not mean that reconsideration is

[13] 2018 Order, pages 3-6.

justified. With regard to the preamble questions, the Commission is picking and choosing its targets carefully. The preamble in question is lengthy and the sheer weight of findings and objectives stated fall heavily on the intent of the Legislature to proceed with the OEA's solicitation, even if one of more facts change slightly. The issues of fossil fuel volatility and Maine's overreliance on such remain as vibrant and as concerning for Maine ratepayers and citizens as they did in 2010. The current Administration continues to expend efforts to reduce this reliance. Even in the unlikely event that such prices are expected to remain low in the future, the bulk of the Legislature's concerns had to do with conversion away from fossil fuels, reducing the State's overreliance on such, and the improvements to our society from broad development of renewable energy. With regard to the RPS question, Maine already had generation in excess of the portfolio requirements in 2010. The RPS was merely cited as a secondary reason for promoting renewable generation.

With regard to the question concerning technological advancements, the Office, while deferring to the engineers and scientists involved; will note that the question seems to proceed from a flawed premise. The development of larger and larger wind turbines will not reduce the benefit of the proposed MAV technology. That technology is the patented innovation of the modular concrete floating hulls. It appears that the need for placement of larger and larger turbines will result in potential demand for the MAV technology that is greater than may have been contemplated in 2014, especially as such turbines are more likely to be placed in greater depths than can be served by fixed bottom technology. Resting upon such a flawed premise, this question should not serve as a basis for reconsideration.

The same is true for the question related to interest in other states. This Office assumes that the Commission is referring to the 1,600 MW of offshore wind being currently sought in Massachusetts, a recently issued Connecticut RFP for up to 250 MW; the New Jersey governor's decision to seek 3,500 MW and the thousands of more megawatts of offshore wind being sought by New York (both City and State), Maryland, Virginia, North Carolina and South Carolina. There may be even more opportunity, as there are suggestions for offshore wind being the solution for islands in the Caribbean. This development will only spur interest in finding solutions for floating offshore wind, as the "easy sites are gobbled up rapidly. In fact, this is the impetus in Europe now. A conservative estimate for the development of offshore wind might be 10,000 to 15,000 MW in the next decade or two. If only 10% of this development utilized the MAV technology, that would represent 1,000-1,500 MW of installed capacity. Even assuming 10 MW turbines, that would mean 100-150 floating hulls. If these are manufactured in Maine and floated to their final sites, it could represent as much or more economic benefit to Maine than the hypothetical MAV II of 83 turbines and 498 MW. The fact that this technology is American "developed, designed and built" and the fact that it can be towed by Jones Act-compliant vessels, in fact gives MAV a greater opportunity than was anticipated in 2014. Simply because the expected benefits could be greater than hoped for in 2014, does not constitute a basis for reconsideration.

Finally, the questions on "project specific circumstances" also cannot serve as a basis for reconsideration. The Commission has had ongoing discussions with MAV for nearly a year before the 2018 Order. It was aware of the substitution of Naval Energies for Emera, and the ongoing efforts related to onshore interconnection location and the

Monhegan community benefits agreement. If anything, Naval Energies strengthens the MAV team, and greatly broadens the potential geographic scope for application of the MAV technology.[14] As for the interconnection siting issues, the Commission specifically found in 2014 that such are not within the Commission's authority pursuant to the OEA[15]. As noted then, other state and federal agencies will address any potential impacts from related activities. Finally, the Commission also decided in 2014 that it had no objections to the community benefit provisions contained within the Term Sheet "or to additional community benefits."[16] This Commission has never intervened in local community benefit agreements, especially where such was unanimously endorsed by a popular vote, and should not do so now.

LAW AND PUBLIC POLICY DO NOT SUPPORT REOPENING A FOUR-YEAR-OLD DECISION

The Commission is apparently relying on its authority under 35-A M.R.S. §1321 in requesting comment as to whether it should reconsider the 2014 Orders. While the plain language the statute gives the Commission broad discretion in reconsidering any order, that discretion is not unlimited. The Commission cannot and should not reconsider rules without appropriate justification for doing so. Were any party moving to seek reconsideration, the burden of providing an adequate showing for such action would fall on that party, and in the case of the Commission seeking to do so on its own, the burden falls on the Commission exactly as it would on any other moving party. This burden would be to first show that the conditions upon which the 2014 Orders were based have changed significantly. Note that this requirement is not met by the fact that <u>any</u> condition

[14] https://www.naval-energies.com/en/who-we-are/presentation/
[15] 2014 Orders, Part Two, page 16.
[16] Id.

existing in 2014 has changed; but rather that a significant number of the significant conditions upon which the 2014 orders were based have changed in a way that would have affected the decision of the Commission in 2014. As discussed above, this situation does not exist here.

In addition, reconsideration under §1321 is very different when the Commission is acting in its quasi-judicial role such as when approving rates, charges or schedules of regulated utilities or competitive energy providers (which by the way is the enumerated list of orders in §1321) versus when it is acting, as it is here, as the counterparty to a contract. When the Commission is directly involved in the negotiation of terms sheets, contracts, and contract amendments, it cannot pretend that it is not a party in interest to the underlying transaction. The Commission's own rules at Ch. 316 hold all parties to a standard of commercial reasonableness. Here where the Commission is the real party in interest, it should be held to that same standard. It is also noteworthy that the Term Sheet and the 2014 Orders did not provide that the Term Sheet was to be nonbinding. It is customary and commercially reasonable practice to include in term sheets any conditions excusing one or both parties from continuing to execution of a definitive agreement. This lack of a "nonbinding clause" is especially noteworthy now since the long-term contracting statute of §3210-C was amended in 2017, three years after the MAV Term Sheet was approved, to specify that term sheets are nonbinding, preliminary documents. In the absence of that statute, the absence of such a clause in the Term Sheet, the length of time that has elapsed and the reliance of MAV and many other private companies, and

federal and state agencies and officials, the Commission should ensure that it is acting in a commercially reasonable and fair manner before unilaterally acting in this instance.

In addition, the history of Maine's support for offshore wind energy and general, and the University of Maine-led effort that has resulted in the MAV project, should be respected by the Commission. Much of this has been discussed above. Numerous public expressions of support have been made by many federal and state officials, including letters in support sent to both the Commission and the DOE from the Governor's Energy office and legislative leadership. The Chief Executive has expressed his desire that Maine state government not change its mind "every three months." This concern is even more acute after four years have passed since the initial decision. In his recent State of the State, the Chief Executive also stated that the State should not let state-funded patents "lie on the shelf" collecting dust. That is precisely what the MAV project is about; commercialization of project-related University of Maine patents. Finally, the Commission should not reconsider its approval of the Term Sheet after four years have elapsed and the only significant change which may be identified by some, is the make-up of the Commission. Such action has a chilling effect for investment in the state and in confidence about the State's commitments to private parties. Only the Legislature may cancel state contracts without cause. Whether or not there is already a contract in place for MAV is a question perhaps for another day, but it is clear from the discussion above that no substantive cause for reconsideration of the Term Sheet exists. The Legislature has not changed its mind about ocean energy and this project. The Commission should do the same.

THE PROPOSED POWER PURCHASE AGREEMENT INCORPORATES THE OPA'S SUGGESTIONS AND IS CONSISTENT WITH THE TERM SHEET, THE 2014 ORDERS, AND APPLICABLE LAW

At various times since 2012, this Office has filed comments in this docket, sometimes in support of certain projects, sometimes requesting Term Sheet changes that might reduce risks to Maine ratepayers. One consistent theme has been that the decision on the mechanism for a long-term contract was made by the Legislature in the OEA. Upon review of the proposed MAV power purchase agreement, this Office has determined that it does indeed meet the objectives of the OEA; and as seen below, the proposed contract directly addresses our previously expressed concerns.

This Office had previously expressed concern over the description of the Available Ratepayer Fund (ARF) mechanism contained in the Term Sheet. However, these concerns have been addressed within the proposed MAV contract by use of frequent monitoring of the ARF balance and provision for additional financial security, if needed to reduce ratepayer risk, potentially several times annually. This frequency of monitoring and adjustment, if necessary, resolves our concerns. This Office had also previously expressed concerns about the provision of the Term Sheet suggesting that MAV might provide free electricity to the Monhegan District. Our concern was that such might establish a Commission precedent with unintended consequences. We have now had an opportunity to review the final Monhegan Plantation agreement, and note that it does not contain such a provision. We also understand that the agreement was adopted by a unanimous vote of the residents of the Plantation attending a public meeting on whether to adopt the agreement. Our concerns are resolved by the final agreement.

We have also reviewed the power purchase agreement regarding its consistency with the Term Sheet, the 2014 Orders, and the Act. As noted above, when enacting the OEA, the Legislature made its primary purpose the promotion of ocean energy technology demonstration projects, which would provide both project-specific economic benefits, as well as future economic benefits from potential larger-scale development which would not be subsidized by Maine ratepayers. Whether the technology is guaranteed to provide such future benefits is not relevant to the charge of the OEA. This Office has determined that the proposed MAV power purchase agreement meets the objectives of the OEA; is consistent with the Term Sheet and the 2014 Orders, and more specifically notes that the contract resolves all concerns previously expressed by this Office with regard to the Term Sheet.

CONCLUSION

Maine has come a long way in the steadfast pursuit of our opportunities in ocean energy. For diverse reasons – including but not limited to the price and volatility of fossil fuels, and environmental and economic considerations – for over a decade Maine policy has unwaveringly supported offshore wind development within the statutory bounds created by the Legislature. The Commission has played a significant role in this process to date, from keeping the Legislature informed as it established policy, to implementing that policy through the offshore wind solicitation and contracting process. The process is nearly complete. To change course at this very late stage would jeopardize or lose many of the benefits that Maine has pursued for years, to the great harm of the using and

consuming public. The Public Advocate urges the Commission to, paraphrasing the Legislature, make every effort to finalize a contract for MAV.

Respectfully submitted,

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