

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

NEW ENGLAND POWER GENERATORS  
ASSOCIATION and GENON ENERGY,  
INC.,

*Appellants,*

FOOTPRINT POWER SALEM HARBOR  
DEVELOPMENT L.P. and MASSACHUSETTS  
MUNICIPAL WHOLESALE ELECTRIC  
COMPANY,

*Appellants-  
Intervenors,*

v.

MASSACHUSETTS DEPARTMENT OF  
ENVIRONMENTAL PROTECTION and  
EXECUTIVE OFFICE OF ENERGY AND  
ENVIRONMENTAL AFFAIRS,

*Appellees.*

SJC 12477

**BRIEF OF APPELLANT-INTERVENOR  
MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY**

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**STATEMENT OF THE ISSUES**

In accordance with Mass. R.A.P. 16(j), Appellant-Intervenor, the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), adopts the "Issues Presented" in the brief of the Appellants, New England Generators Association and GenOn Energy, Inc. (collectively, "NEPGA")<sup>1</sup>.

**STATEMENT OF THE CASE**

In accordance with Mass. R.A.P. 16(j), MMWEC adopts NEPGA's Statement of the Case, Section I - Nature of the Case.

MMWEC was granted intervenor status by the Superior Court. (Record Appendix, at p. \_\_, hereinafter "A. \_\_"). MMWEC joins in the claims raised by NEPGA in its complaint for judicial review pursuant to G.L. c. 30A, § 7, and G.L. c. 231A, §§ 1-2. A. \_\_ The complaint for judicial review seeks a declaration that the regulations promulgated by the Agencies in 310 Code Mass. Regs. § 7.74 ("the 7.74 Rules") are invalid and should be voided.

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<sup>1</sup>Pursuant to the Reservation and Report entered with the Court on February 9, 2018, MMWEC has been designated as an Appellant-Intervenor and NEPGA as the Appellants in the case.

The 7.74 Rules are unlawful and should be declared invalid because they exceed the Agencies' authority under the Global Warming Solutions Act ("GWSA") and are inconsistent with the purpose and the terms of the GWSA. The 7.74 Rules also are arbitrary and capricious.

**STATEMENT OF FACTS - MMWEC**

**A. MMWEC and Its Municipal Members**

MMWEC is fundamentally different from the Appellants, which are private, for-profit entities. MMWEC is a public corporation and a political subdivision of the Commonwealth. St. 1975, c.775, § 2. It was created by the Legislature in 1975 to provide power supply services to the cities and towns in Massachusetts that operate their own electric systems. *Mass. Mun. Wholesale Elec. Co. v. Town of Danvers*, 411 Mass. 39, 41 (1991).

MMWEC is a voluntary membership organization. St. 1975, c.775, § 3; *Canner v. Town of Groton*, 402 Mass. 804, 805 (1988). Pursuant to MMWEC's enabling act, any Massachusetts city or town having a municipal light department may become a member of MMWEC. St. 1975, c.775, § 3. When cities and towns authorize membership in MMWEC, they authorize their respective municipal light



departments ("MLDs") to enter into contracts with MMWEC. *Canner, id.*, at 807-808.

Among the powers given to MMWEC under its enabling act is the authority to own and operate electric power facilities and to sell to its member MLDs (among other entities) the electric power generated by its facilities. St. 1975, c. 775, § 5.

When MMWEC sells such power, it passes all costs of the power on to the purchasing MLDs. That is because the Legislature established MMWEC as a non-profit entity. A. 2012. MMWEC has no retained earnings, no equity, and no shareholders. All of MMWEC's funds are held in trust for the benefit of someone else. St. 1975, c.775, §§ 2, 13. MMWEC is a vehicle through which MLDs, which typically are small and non-contiguous, can aggregate their resources to obtain economic benefits, particularly the ability to obtain lower cost electricity for their municipal customers. *Danvers*, 411 Mass. at 41; *Hull Municipal Lighting Plant v. MMWEC*, 399 Mass. 640, 641 (1987); A. 2912.

In establishing MMWEC, the Legislature specifically designated the exercise of MMWEC's powers as an essential public function, St. 1975, c. 775, § 2, and this Court has held that MMWEC does, in fact, exercise

its powers for the benefit of the public. See *Hull*, 399 Mass. at 648.

**B. Stony Brook Energy Center and MMWEC's Power Sales Agreements**

In furtherance of its public function, MMWEC financed, constructed and operates the Stony Brook Energy Center in Ludlow, Massachusetts ("Stony Brook"). St. 1975, c.775, § 5; A. 2912. Stony Brook is comprised of two fossil-fired generating facilities, which together generate power that MMWEC sells to 25 municipal members, acting through their respective MLDs. A. 2416, 2423.

The contracts between MMWEC and the MLDs providing for the sale and purchase of Stony Brook power require the MLDs to pay all of MMWEC's costs associated with construction and operation of Stony Brook, whether or not Stony Brook is operating or its operation is curtailed. These contractual provisions are authorized by MMWEC's enabling act, St. 1975, c. 775, §§ 5(t)(ii), 6(a)(ii), and are part of the MMWEC structure established by the Legislature, under which MMWEC's revenues derived from the contracts provide security for the financings MMWEC undertakes to build or procure ownership interests in its generating facilities.

*Danvers*, 411 Mass. at 41-42. MMWEC's revenues derived from the contracts provide security because the MLDs are required to set charges to their municipal customers at levels adequate to meet their payment obligations to MMWEC under the contracts. St. 1975, c. 775, § 6(c). While MLDs are departments of the cities or towns in which they operate, *Municipal Light Commission of Taunton v. State Emp. Group Ins. Commission*, 344 Mass. 533, 536 (1962), these payment obligations are considered expenses of the MLDs and not a debt of those cities or towns. St. 1975, c. 775, § 6(b).<sup>2</sup>

Accordingly, even if Stony Brook is not operating or its output is curtailed, so that the MLDs are receiving no power or less power than they contracted for, MMWEC's costs associated with Stony Brook nonetheless flow through to the MLDs, and in turn to the MLDs' municipal customers. A. 2416, 2423; see *Danvers*, 411 Mass. at 42. Unlike a private, for-profit corporation, MMWEC cannot use profits or retained

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<sup>2</sup> As departments of those cities and towns, MLDs are non-profit, with no stockholders, and they must set rates for the electricity they sell to their municipal customers according to a statutory formula. G.L. c. 164, § 58. Consequently, they differ from electric companies, which are organized as profit-making corporations owned by private shareholders. G.L. c. 164, §§ 3-8D, 23-24, 33.

earnings to absorb such costs because it has no profits or retained earnings.

**C. The Global Warming Solutions Act**

In accordance with Mass. R.A.P. 16(j), MMWEC adopts Section II.B of NEPGA's brief.

**D. *Kain v. Department of Environmental Protection and Executive Order 569***

In accordance with Mass. R.A.P. 16(j), MMWEC adopts Section II.C of NEPGA's brief.

**E. The 7.74 Rules**

In accordance with Mass. R.A.P. 16(j), MMWEC adopts Section II.D and Section II.E of NEPGA's brief.

**F. ISO-NE and the Regional Electric Market**

In New England, the day-to-day operation of the regional electric grid is overseen and administered by ISO-New England, Inc. ("ISO-NE"). A. 2370.<sup>3</sup> Very generally stated, operation of the regional electric grid entails ISO-NE selecting, after bidding by ISO-NE generators, and dispatching, certain generating facilities in New England to operate and produce power at levels sufficient to meet the New England demand for power. A. 1158-59, 1204, 1217-18. Under ISO-NE's "economic

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<sup>3</sup> In addition to Massachusetts, the New England region includes Connecticut, Maine, New Hampshire, Rhode Island and Vermont.

dispatch" system, the lowest-cost plants are dispatched first. A. 2951.

Because energy resources are shared across state lines, the demand for electricity in Massachusetts may in fact be met by electricity generated outside the state. A. 2323, 2376. In 2014, approximately 44% of the electricity used in Massachusetts was imported from power plants located in other states and in Canada. A. 1590.

In response to the Agencies' formulation of the 7.74 Rules, ISO-NE undertook an analysis of the Rules' impact on regional electricity generation, emissions, and wholesale electricity costs. A. 2368. The ISO-NE analysis showed that the net impact of the 7.74 Rules will be to increase, not decrease, CO<sub>2</sub> emissions. A. 2368, 2379. This result will occur because the 7.74 Rules seek to meet emission reduction goals by placing restrictions (*i.e.* emissions caps) on electricity generation in Massachusetts. When in-state generation is restricted, the demand for electricity will need to be met by shifting the ISO-NE dispatch process to generating facilities in other New England states. A. 2378. When this occurs, low-cost Massachusetts facilities, which are generally the most efficient and

lowest-emitting, will run less, and more costly, less efficient, and higher-emitting plants in neighboring states will run more. A. 2913-14.

The ISO-NE analysis also showed that the 7.74 Rules will result in an increase in the wholesale cost of electricity. A. 2368. The greater the restrictions on emissions imposed by the Rules, the greater the increase in costs. A. 2372.

#### ARGUMENT

**A. The 7.74 Rules Are Unlawful Because, In Promulgating Them, The Agencies Exceeded Their Statutory Authority.**

**1. The Agencies exceeded their statutory authority by improperly melding together G.L. c. 21N, §§ 3(c) and 3(d) to formulate a regulation imposing declining aggregate emissions limits on the electric sector.**

Sections 3(c) and 3(d) of G.L. c. 21N provide:

(c) Emissions levels and limits associated with the electric sector shall be established by the executive office and the department, in consultation with the department of energy resources, based on consumption and purchases of electricity from the regional electric grid, taking into account the regional greenhouse gas initiative and the renewable portfolio standard.

(d) The department shall promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions.

The Agencies assert that the 7.74 Rules were promulgated pursuant to the authority granted to them in these sections. 310 Code Mass. Regs. § 7.74; A. 3347, 3190. According to the Agencies, these sections together give them "the authority to craft annually declining GHG limits for all sources and categories of sources in the Commonwealth, *including the electric sector.*" A. 3190 (emphasis added.)

As support for their view, the Agencies point out that § 3(c) "does not prohibit [the Agencies] from adopting the in-state, annually declining mass-based GHG limits contemplated by Section 3(d) on the electric sector." A. 3191-3192. The Agencies then reason that "since the plain language of [§ 3(c)] does not preclude imposition of a Section 3(d) limit on the electric sector, [the Agencies] can reasonably interpret the statute to harmonize the language in Sections 3(c) and 3(d), and adopt regulations in accordance with the procedural and substantive requirements of the two statutory sections." A. 3193.

In short, the Agencies position is that they can use Section 3(d) to regulate the electric sector.

However, this position violates long-standing and consistently applied rules of statutory construction.

Foremost among these is the rule that the language of a statute is "the principal source of insight" into the intent of the Legislature. *Mary Bishop v. Tes Realty Trust*, 459 Mass. 9, 12 (2011).

Looking at the language of Sections 3(c) and 3(d), the first obvious point is that the Legislature enacted two separate and distinct sections, with separate and distinct language. Section 3(c) states that emissions limits for the electricity sector shall be "based on consumption and purchases of electricity from the regional electric grid, taking into account the [RGGI] and the renewable portfolio standard." G.L. c. 21N, § 3(c). Section 3(d), on the other hand, requires "annual declining emissions limits for sources or categories of sources that emit greenhouse gases," without defining how those limits are to be calculated. G.L. c. 21N, § 3(d). Significantly, there is no mention of the electric sector in § 3(d).

Had the Legislature not wanted emissions for the electric sector to be calculated on the basis of the factors specified in § 3(c), it simply could have omitted mention of those factors. However, since the Legislature did enunciate those factors, they must be given effect. *Monell v. Boston Pads, LLC*, 471 Mass. 566, 576 (2015);



see *Commonwealth v. Angiulo*, 415 Mass. 502, 525 (1993) (it is to be presumed that the Legislature did not intend "to enact a barren and ineffective provision").

Conversely, had the Legislature wanted the regulations providing for annual declining emissions limits to include the electric sector, it could have done so by expressly referencing the electric sector in § 3(d). *Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 232 (2012). It did not. That fact cannot be ignored. *Mass. Insurers Insolvency Fund v. Smith*, 458 Mass. 561, 567 (2010). This Court has long held that where the Legislature has employed a term in one part of a statute, but not in another, the term cannot be implied where it is excluded. *Souza* 462 Mass. at 232; see *L.L. v. Commonwealth*, 470 Mass. 169, 177 (2014) (Legislature's inclusion of particular language in one part of a state and not in another indicates an affirmative choice not to include that language).

The Agencies have ignored these basic principles of law. Instead, the Agencies have melded §§ 3(c) and 3(d) together in an improper attempt to craft a regulation that imposes the requirements of § 3(d) on a sector of the economy covered by § 3(c).

This conclusion is amply supported by the decision of this Court in *Kain v. Department of Environmental Protection*, 474 Mass. 278, 297(2016). In that decision, the Court held that RGGI regulations promulgated by the Department did not satisfy the requirements of § 3(d). *Id.* at 296. As support for its decision, the Court pointed to the fact that § 3(c) "specifically carves out a separate process by which emissions levels and limits associated with the electric sector are established," thereby demonstrating "the Legislature's intent that regulations related to the electric sector be treated differently from regulations promulgated under § 3(d)." *Id.* at 297.<sup>4</sup>

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<sup>4</sup> This different treatment makes sense when viewed in light of the fact that just one month before enacting the GWSA, the Legislature enacted the Green Communities Act. St. 2008, c. 169. That act approves Massachusetts' participation in the Regional Greenhouse Gas Initiative ("RGGI"), St. 2008, c. 169, § 7, the entire purpose of which is to ensure that GHG emissions be achieved in a cost-effective manner on a regional level. G.L. c. 21A, §§ 21, 22. See *Chardin v. Police Commissioner of Boston*, 465 Mass. 314, 327 (2013)(it is presumed that the Legislature is aware of existing statutes when it enacts a new one). While that alone makes plain the Legislature's understanding that the electricity market is a regional market, and that accordingly, the electric sector is different from other economic sectors and sources that result in GHG emissions, the Legislature itself acknowledged such understanding. The same year that it enacted the GWSA and the Green Communities Act, it enacted companion legislation concerning "Oceans," "Clean Energy Biofuels," and "Green Jobs." As pointed

The failure of the 7.74 Rules to provide for the separate approach for the electric sector dictated by the plain and unambiguous language of §§ 3(c) and 3(d) clearly contravenes the Legislature's intent. In melding together §§ 3(c) and 3(d), the Agencies have improperly exceeded the authority given them by the Legislature, and the 7.74 Rules accordingly are unlawful.

While this Court accords deference to administrative agencies' interpretation of statutes, an erroneous interpretation of a statute is not accorded such deference. *Moot v. Department of Environmental Protection*, 448 Mass. 340, 351-353 (2007); see *Herrick v. Essex Regional Retirement Board*, 77 Mass. App. Ct. 645, 647-648 (2010) ("Deference is not abdication. It

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out by the Court in *Kain*, 474 Mass. at 282, the Report of the Senate Committee on Global Warming and Climate Change stated that each of these acts "addresses a separate but related piece of the clean energy economy." *Id.* The Legislature's understanding of the regional nature of the electric sector is also reflected in the GWSA's definition of "statewide greenhouse gas emissions," which is defined in part to mean "[t]he total annual emissions of greenhouse gases in the commonwealth, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in the commonwealth, ...whether the electricity is generated in the commonwealth or imported." G.L. c. 21N, § 1. (emphasis added.)

does not permit a 'detectable error of law.'" (citations omitted.)

**2. The Agencies exceeded their statutory authority by ignoring the requirements of G.L. c. 21N, § 3(c).**

In improperly melding together G.L. c. 21N, §§ 3(c) and 3(d) to impose the requirements of § 3 (d) on the electric sector, the Agencies ignored the requirements of § 3(c). That section requires electric sector emissions levels to be "based on consumption and purchases of electricity from the regional electric grid, taking into account the regional greenhouse gas initiative and the renewable portfolio standard." G.L. c. 21N, § 3(c).

The 7.74 Rules do not meet these requirements. Rather than taking the regional electric grid into account, the 7.74 Rules seek to meet emission goals by imposing mass-based emission reductions on electric generating facilities located in Massachusetts. 310 Code Mass. Regs. § 7.74(5)(a), (b); A. 3348-3349. As shown by the ISO-NE analysis, the effect of such emissions reductions will be to shift generation from low-emitting facilities in Massachusetts to high-emitting facilities located outside the state. A. 2378. That shift will result in an increase in statewide GHGs, *id.*, and

therefore violate the purpose of the GWSA to reduce GHG emissions. The shift also will violate the requirements of § 3(c) that the regulations governing the electric sector be consistent with RGGI, the purpose of which is to ensure that GHG emissions be achieved in a cost-effective manner on a regional level. G.L. c. 21A, §§ 21, 22.

In ignoring the requirements of § 3(c) in promulgating the 7.74 Rules, the Agencies have again contravened the Legislature's intent, and exceeded the authority given to them by the Legislature. Accordingly, the 7.74 Rules are unlawful. *Moot*, 448 Mass. at 351-353.

**3. The Agencies' usurpation of authority under G.L. c. 21N, §§ 3(c) and 3(d) cannot be justified by their view that the 7.74 Rules will help achieve the goals of the statute.**

Administrative agencies cannot exercise powers not given to them even if they believe that such powers would be helpful to effectuate the purpose of the statute under which they are acting. *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581, 595 (2008). While the Agencies believe that imposing the § 3(d) requirements on the electric sector is appropriate because it will further the goal of the GWSA to decrease

GHG emissions in the Commonwealth, 310 Code Mass. Regs. § 7.74(1); A. 3347, it is the role of the Legislature to determine how those reductions are to be achieved. The Agencies cannot usurp that role. Rather, they must promulgate regulations as the Legislature directed in §§ 3(c) and 3(d). *Moot*, 448 Mass. at 347, 350 (agency cannot exceed statutory authority even for a "laudable agency reason"); see *Providence and Worcester Railroad Co. v. Energy Facilities Siting Board*, 453 Mass. 135, 144 (2009) (agency's belief that it would be desirable to have a particular power did not justify the agency in claiming power the Legislature did not grant); *Herrick*, 77 Mass. App. Ct. at 648 (policy preference of an administrative agency cannot alter the language of a statute and bestow upon the agency a power that the statute does not).

**B. The 7.74 Rules Are Arbitrary and Capricious.**

Regulations promulgated by administrative agencies are not upheld if they are illegal, arbitrary or capricious. *Beth Israel Hosp. Ass'n. v. Rate Setting Comm'n*, 24 Mass. App. Ct. 495, 505 (1987). A regulation is declared void "if its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Salisbury Nursing &*

*Rehabilitation Center, Inc. v. Division of Administrative Law Appeals*, 448 Mass. 365, 372 (2007) (citations omitted).

Even if for purposes of argument, Section 3(d) of c. 21N may be read to authorize the 7.74 Rules, the 7.74 Rules are arbitrary and capricious and thus cannot stand.

**1. Implementation of the 7.74 Rules will result in the opposite of the GWSA's mandate.**

The GWSA mandates the reduction of greenhouse gas emissions to the limits set forth in G.L. c. 21N. St. 2008, c. 298, §§ 1-3, 6.

However, the evidence is clear that implementation of the 7.74 Rules actually will increase, not decrease statewide GHG emissions. A. 2368, 2379. ISO-NE, the entity that operates the New England electric grid, concluded from its analysis that restrictions on generation by low-emitting Massachusetts generating facilities will shift the ISO-NE dispatch process to high-emitting non-Massachusetts generating facilities. A. 2378. The tighter the restrictions, the greater the shift, and the greater the increase in emissions. A. 2372, 2913.

In other words, because the 7.74 Rules seek to meet emission reduction goals by limiting in-state

electricity generation, the demand for electricity must be met by generating facilities in other New England states. When this occurs, low-cost Massachusetts facilities, which are generally the most efficient and lowest-emitting, will run less, and more costly, less efficient, and higher-emitting plants in neighboring states will run more. A. 2914. Because G.L. c. 21N defines "Statewide greenhouses gas emissions" to include emissions from out-of-state generation of electricity consumed in Massachusetts, G.L. c. 21N, § 1, emissions totals attributable to Massachusetts under the 7.74 Rules actually will increase. A. 2372. Consequently, the 7.74 Rules will impede achievement of the goals set forth in the GWSA, rather than further them.

This conclusion is not refuted by a modelling analysis performed by Synapse Energy Economics, Sustainable Energy Advantage, and Eastern Research Group. The modelling analysis, which is included in Appendix A to the Agencies Response to Comment, A. 3195, shows that CO<sub>2</sub> emissions will be reduced based on the 7.74 Rules *working in conjunction with* the Clean Energy Standard ("CES") regulations promulgated by the Agencies.<sup>5</sup> A.

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<sup>5</sup> The CES Regulations are intended to increase the amount of clean energy purchased from the regional electric



3199-3200. The obvious flaw in the modelling analysis is that it does not model, project or predict the emissions impacts of 7.74 Rules alone. Further, the Agencies have not presented any modelling that demonstrates that the 7.74 Rules will achieve the goal of reducing GHG emissions in Massachusetts.

Because the 7.74 Rules will achieve the exact opposite of what the Legislature intended in promulgating the GWSA, the Rules "cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Salisbury Nursing and Rehabilitation Center*, 448 Mass. at 372. Accordingly, the 7.74 Rules are arbitrary and capricious. *Massachusetts Hospital Assoc., Inc. v. Department of Medical Security*, 412 Mass. 340, 346 (1992) (regulations invalid where contrary to language of statute and its underlying purpose).

**2. Implementation of the 7.74 Rules will result in an increase in electricity costs and the effect will be particularly acute for MMWEC, its municipal members and their customers.**

The ISO-NE analysis also showed that implementation of the 7.74 Rules will result in an increase in

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grid for consumption in Massachusetts. 310 Code Mass. Regs. § 7.75(1); A. 3358.

electricity costs. A. 2368. That effect again flows, in part, from the shift of electric generation from Massachusetts to other New England states. *Id.*; A. 2913.

The Massachusetts fleet of electric generating units is comprised of several highly efficient gas-fired facilities. A. 2913. Caps on emissions from these facilities will require the facility operators to curtail the amount of time they operate so as to avoid reaching their caps. *Id.* The ensuing energy shortfall will cause a shift of generation from efficient, low-cost facilities to less-efficient, more costly facilities outside of Massachusetts, thereby increasing wholesale electricity costs. *Id.*

These costs will increase further if Massachusetts generating facilities do meet their emissions caps, and the facility operators are required to purchase emission allowances, or more drastically, are required to cease operation altogether because emission allowances are unavailable for purchase. A. 2913-2914. As the ISO-NE noted, the more restrictive the emission caps, the greater these effects, and the greater the increase in costs. A. 2368; *see also* A. 2913.

Also, an increase in costs in the short term may occur due to the operation of the forward capacity

market in New England. Very generally stated, each year, operators of electric generating facilities in New England commit to provide a certain amount of capacity for a three-year period in the future. If the facility operators are unable to meet their capacity commitments during the relevant period, they are subject to financial penalties from ISO-NE. A. 2913, 2953.

As of February 2017, the operators of Massachusetts electric generating facilities have provided capacity commitments for the years running through May 31, 2021. In a scenario where the operators are required to curtail electricity generation to avoid exceeding their emissions limits, they will suffer not only a loss of electric market revenues, but also could face the imposition of substantial penalties due to their inability to meet their capacity commitments. *Id.*

All these factors will increase wholesale electricity costs in New England. While the ISO-NE analysis shows that the increase in costs will be modest, A. 2368, even modest increases cannot be tolerated where, in contravention of the statutory purpose, the operation of the 7.74 Rules will lead to an increase in GHG emissions in Massachusetts.

The consequences of a Stony Brook curtailment are particularly acute for MMWEC and the MLDS contractually bound to pay all costs of Stony Brook. A. 2012. When Stony Brook provides a capacity commitment to the ISO-NE, but then exceeds its 7.74 Rules emissions limit, MMWEC will be forced either to cease generating from Stony Brook, in which case it will incur financial penalties from the ISO-NE, or continue to run and incur financial penalties under the 7.74 Rules. In either scenario, the MLDS will pay the cost. A. 2913, 2953; 310 Code Mass. Regs. § 7.74.

Further, the impact of an increase in wholesale electricity costs will be exceptionally onerous for MMWEC and its 25-member MLDS. MMWEC has no profits, no retained earnings, and no shareholders. St. 1975, c. 775, §§ 2, 13. Under the structure established by the Legislature, MMWEC's costs associated with Stony Brook flow through to the MLDS purchasing Stony Brook power from MMWEC, whether or not Stony Brook's output is curtailed, or incurs penalties, or it is operating at all. *Danvers*, 411 Mass. at 41-42. In a scenario where emissions caps on Stony Brook would require MMWEC to curtail Stony Brook's output, or even to cease operating, and MMWEC's costs associated with Stony Brook

are increased, MMWEC's increased costs nevertheless flow through to the MLDs. *Id.* Unlike a private, for-profit corporation, MMWEC cannot use profits or retained earnings to absorb the increased costs and cushion their impact on the MLDs, because it has no profits or retained earnings. Similarly, because the MLDs are public, non-profit entities that must set rates for their municipal customers according to a statutory formula, *Municipal Light Commission of Taunton*, 344 Mass. at 536; G.L. c. 164, § 58, the increased costs passed on by MMWEC to the MLDs are in turn passed on to their municipal customers.

To pass judicial muster, agency regulations must reflect a sensible interpretation of the statute under which they were promulgated. *Moot*, 448 Mass. at 346. Regulations that defeat the purpose of that statute and at the same time impose increased costs on Massachusetts consumers are not sensible. Consequently, the 7.74 Rules are arbitrary and capricious and therefore invalid.

### **3. The 7.74 Rules Exceed the GWSA's Sunset Provision.**

The GWSA requires that the regulations promulgated pursuant to G.L. c. 21N, § 3(d) expire on December 31, 2020. St. 2008, c. 298, § 16. Yet, the 7.74 Rules seek

to regulate emissions limits on the electric sector for time periods up to the year 2050. A. 3316.

Therefore, even if § 3(d) may be read to authorize the 7.74 Rules, the Rules contravene the plainly stated expiration date (or sunset provision) mandated by the GWSA. Thus, the Rules are arbitrary and capricious and accordingly invalid.

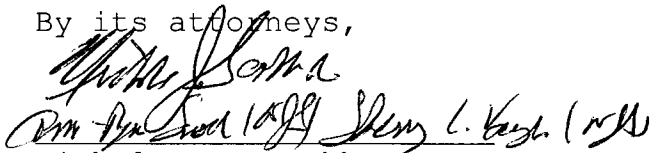
**CONCLUSION**

For the above reasons, this Court should declare that: (1) the 7.74 Rules are unlawful because they are in excess of the Agencies' authority under G.L. c. 21N, §§ 3(c) and 3(d) and are arbitrary and capricious and therefore void, and (2) operators of electricity generating facilities are under no obligation to comply with the 7.74 Rules beginning on January 1, 2018, remand the matter to the Agencies to promulgate rules in conformance with the GWSA and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

**MASSACHUSETTS MUNICIPAL  
WHOLESALE ELECTRIC COMPANY**

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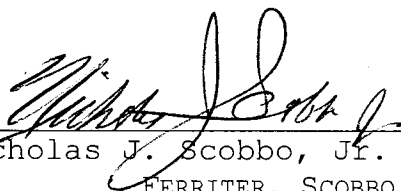
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Dated: February 27, 2018

**Rule 16(k) Certificate of Compliance**

I hereby certify that the above brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including but not limited to: Mass. R.A.P. 16(a)(6), Mass. R.A.P. 16(e); Mass. R.A.P. 16(f); Mass. R.A.P. 16(h); Mass. R.A.P. 18; and Mass. R.A.P. 20.



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Date: February 27, 2018



COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

NEW ENGLAND POWER GENERATORS  
ASSOCIATION and GENON ENERGY,  
INC.,

*Appellants,*

FOOTPRINT POWER SALEM HARBOR  
DEVELOPMENT L.P. and MASSACHUSETTS  
MUNICIPAL WHOLESALE ELECTRIC  
COMPANY,

*Appellants-  
Intervenors,*

v.

MASSACHUSETTS DEPARTMENT OF  
ENVIRONMENTAL PROTECTION and  
EXECUTIVE OFFICE OF ENERGY AND  
ENVIRONMENTAL AFFAIRS,

*Appellees.*

SJC 12477

**ADDENDUM TO BRIEF OF APPELLANT-INTERVENOR  
MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY**

In accordance with Mass. R.A.P. 16(j), MMWEC adopts  
NEPGA's Addendum and, in addition, includes:

St. 1975, c. 775 (reported at Appendix to G.L. c. 164)

G.L. c. 164, §§ 3-8D

G.L. c. 164, §§ 23-24

G.L. c. 164, § 33

G.L. c. 164, § 58

§ 3. Corporations governed by chapter, MA ST 164 § 3

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 3

§ 3. Corporations governed by chapter

Currentness

This chapter shall apply to gas and electric companies organized or chartered under any general or special laws applicable thereto, and to the respective officers and stockholders of such corporations.

Notes of Decisions (2)

M.G.L.A. 164 § 3, MA ST 164 § 3

Current through Chapter 175 of the 2017 1st Annual Session

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§ 4. Application of chapter 156B; MA ST 164 § 4

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 4

§ 4. Application of chapter 156B

Currentness

The following sections of chapter one hundred and fifty-six B shall apply to corporations subject to this chapter:

(a) Sections seven, nine, nine A, ten, fourteen, sixteen, seventeen, twenty, twenty-six, twenty-nine through forty, forty-two through fifty-nine, sixty-one, sixty-two, sixty-five through sixty-nine, seventy-seven, ninety-nine through one hundred and thirteen and one hundred and fifteen.

(b) Section twenty-seven, except that paragraphs (b) and (c) thereof shall apply only to certificates issued after October first, nineteen hundred and seventy-three.

(c) Sections sixty-three and sixty-four shall apply also to statements, reports, articles of organization, articles of amendment and articles of consolidation or merger required to be filed pursuant to this chapter or chapter one hundred and fifty-six B.

**Credits**

Amended by St.1938, c. 44; St.1967, c. 58; St.1973, c. 502, § 1; St.1973, c. 860, § 2.

M.G.L.A. 164 § 4, MA ST 164 § 4

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§ 4A. State secretary; examination of documents; approval;..., MA ST 164 § 4A

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 4A

§ 4A. State secretary; examination of documents; approval; instances of corporate omission

Currentness

The state secretary shall examine each document submitted to him under the provisions of this chapter. If he finds that the provisions of law relative thereto have been complied with, he shall endorse his approval thereon, and upon payment of the fee provided in section thirty-three such document shall be deemed to be filed with the state secretary. The state secretary shall keep a record, conveniently indexed, of each such document, of his endorsement of approval, if given, of the date of submission, and of the date on which such document is filed, and shall keep such documents on file in his office in a manner convenient for public inspection. He shall cause a photographic or other copy to be made of articles of organization and amendments thereof so filed showing his approval endorsed thereon, and shall deliver the same to the corporation.

The state secretary shall report to the attorney general instances of neglect or omission on the part of corporations to comply with the provisions of law so that the attorney general may enforce the penalties therefor.

**Credits**

Added by St.1973, c. 860, § 2A.

M.G.L.A. 164 § 4A, MA ST 164 § 4A

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§ 5. Organization of corporation; certification by state secretary, MA ST 164 § 5

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 5

§ 5. Organization of corporation; certification by state secretary

Currentness

The organization of a corporation to be formed under this chapter shall be effected in accordance with the requirements of section twelve of chapter one hundred and fifty-six B and section six. A certified statement of the fact of incorporation by the state secretary shall be conclusive evidence of incorporation. Nothing contained in this chapter shall authorize the organization of a combined gas and electric company, unless the department, after notice and a public hearing, shall certify to the state secretary that it deems the public convenience will be promoted thereby.

**Credits**

Amended by St.1973, c. 860, § 3.

Notes of Decisions (4)

M.G.L.A. 164 § 5, MA ST 164 § 5

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§ 5A. Name; restrictions; injunctive relief, MA ST 164 § 5A

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 5A

§ 5A. Name; restrictions; injunctive relief

Currentness

The name of a corporation subject to this chapter shall contain the words "gas company" or "electric company", as the case may be. Such corporation shall not assume the name or trade name of another corporation established under the laws of the commonwealth, or of a corporation wherever established, firm, association or person carrying on business in the commonwealth, at the time of incorporation or change of name of the corporation assuming any such name or within three years prior thereto, or assume a name which is under reservation under the laws of the commonwealth for another or proposed corporation wherever established, or assume a name so similar to the foregoing as to be likely to be mistaken for it, except with the written consent of the said corporation, firm or association or of such person previously filed with the state secretary. The supreme judicial or superior court shall have jurisdiction in equity, upon the application of any person interested or affected, to enjoin such corporation from doing business under a name assumed in violation of any provision of this section, although articles of organization or articles of amendment may have been approved and filed. Paragraphs (b), (c) and (d) of section eleven of chapter one hundred and fifty-six B shall apply to corporations subject to this chapter.

**Credits**

Added by St.1973, c. 860, § 4.

M.G.L.A. 164 § 5A, MA ST 164 § 5A

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 6

§ 6. Articles of organization; contents

Currentness

(a) The articles of organization shall state:

(1) that the incorporators (stating their names, including their given names, and post office addresses) associate themselves with the intention of forming a gas or electric company, or a combined gas and electric company, as the case may be;

(2) the name of the corporation;

(3) the purposes for which the corporation is formed;

(4) the amount of its capital stock, which shall not be less than one thousand dollars; the number of shares into which the capital stock is to be divided; and if more than one class of stock is authorized, a description of each class with the preferences, voting powers, qualifications, special or relative rights or privileges as to each class thereof and any series then established; provided, however, that the aggregate amount of preferred stock shall not exceed the aggregate amount of common stock and all cash premiums paid to the corporation and applied to the purposes of the corporation;

(5) the par value of the shares, which may be one hundred dollars, fifty dollars, twenty-five dollars, twenty dollars, ten dollars, five dollars, one dollar or such other amount as the department shall authorize.

(6) in case of a corporation organized for the purposes set forth in section nine A, the statement described in said section.

(b) The articles of organization, in addition may state:

(1) any restrictions imposed upon the transfer of shares of stock of any class;

§ 6. Articles of organization; contents, MA ST 164 § 6

(1 ½ ) a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director notwithstanding any provision of law imposing such liability; provided, however, that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section sixty-one or sixty-two of chapter one hundred and fifty-six B, or (iv) for any transaction from which the director derived an improper personal benefit; and

(2) any other lawful provisions for the conduct and regulation of the business and affairs of the corporation for its voluntary dissolution or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders.

No provision adopted pursuant to clause (1 ½ ) shall eliminate or limit the liability of a director for any act or omission occurring prior to the date upon which such provision becomes effective.

(c) The form on which articles of organization are filed shall also contain the following information which shall not for any purpose be treated as a permanent part of said articles:

(1) the post office address of the initial principal office of the corporation in the commonwealth;

(2) the name, residence and post office address of each of the initial directors and the president, treasurer and clerk of the corporation;

(3) the fiscal year of the corporation initially adopted;

(4) the date initially fixed in the by-laws for the annual meeting of stockholders of the corporation;

(5) the name and business address of the resident agent, if any, of the corporation.

**Credits**

Amended by St.1947, c. 48; St.1964, c. 331; St.1973, c. 860, § 5; St.1985, c. 658; St.1986, c. 644, §§ 3, 4.

**Notes of Decisions (1)**



**§ 6. Articles of organization; contents, MA ST 164 § 6**

**M.G.L.A. 164 § 6, MA ST 164 § 6**

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§ 8. Amendment of articles of organization; changes in capital..., MA ST 164 § 8

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 8

§ 8. Amendment of articles of organization; changes in capital stock or corporate name

Currentness

A corporation subject to this chapter may authorize, at a meeting duly called for the purpose, an amendment of its articles of organization by vote of the majority of each class of stock outstanding and entitled to vote thereon, effecting any one or more of the following:

(a) a change of the par value of the shares of its capital stock in accordance with clause (5) of paragraph (a) of section six, provided the aggregate par value of the outstanding shares shall not be increased by any such change, and provided further that such change shall not be effective unless the department shall approve the same on an application of the corporation filed within thirty days after the passage of the vote authorizing such change;

(b) an increase of its capital stock of any class then authorized, or a reduction of any such class of stock; and

(c) change of its corporate name.

**Credits**

Amended by St.1973, c. 860, § 7; St.1977, c. 258, § 1.

M.G.L.A. 164 § 8, MA ST 164 § 8

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Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 8A

§ 8A. Amendment of articles of organization; change in business authorized or any other change

Currentness

A corporation subject to this chapter may authorize, at a meeting duly called for the purpose, an amendment of its articles of organization, by vote of two-thirds of each class of stock outstanding and entitled to vote thereon, effecting any one or more of the following changes:

(a) an alteration of, addition to or change of the business for which it was incorporated, but it shall not engage in any business not authorized by this chapter; provided, however, that a gas company shall not be authorized to engage in the business of an electric company and an electric company shall not be authorized to engage in the business of a gas company unless, in either case, the department, after notice and public hearing, shall certify to the state secretary that the department deems the public convenience will be promoted thereby;

(b) any other amendment to its articles of organization; provided, only, that any provision added to or changes made in the articles of organization by such amendment could have been included in and any provision deleted thereby could have been omitted from original articles of organization filed at the time of such meeting. If any such amendment would adversely affect the rights of any class of stock, the vote of two-thirds of such class, voting separately, shall also be necessary to authorize such amendment. For this purpose any series of a class which is adversely affected in a manner different from other series of the same class shall, together with any other series of the same class adversely affected in the same manner, be treated as a separate class.

**Credits**

Added by St.1973, c. 860, § 8.

Notes of Decisions (1)

M.G.L.A. 164 § 8A, MA ST 164 § 8A

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§ 8A. Amendment of articles of organization; change in business..., MA ST 164 § 8A

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 8B

§ 8B. Articles of amendment; submission to state secretary; effective date; filing

Currentness

Within sixty days after any meeting at which any amendment of the articles of organization has been adopted or within thirty days after any necessary approval by the department, whichever is later, articles of amendment, signed under the penalties of perjury by the president or any vice president and by the clerk or an assistant clerk, setting forth such amendment and the due adoption thereof, shall be submitted to the state secretary. The amendment shall become effective when the articles of amendment are filed in accordance with section six of chapter one hundred and fifty-six B, unless said articles specify, in accordance with the vote adopting the amendment, a later effective date not more than thirty days after such filing, in which event the amendment shall become effective on such later date. A signed copy of any amendment which relates to an increase or reduction of capital stock shall also be filed in the office of the department.

**Credits**

Added by St.1973, c. 860, § 8.

M.G.L.A. 164 § 8B, MA ST 164 § 8B

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Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 8C

§ 8C. Restatement of articles of organization; adoption; submission to state secretary; filing; effective date

Currentness

Every corporation may authorize, at a meeting duly called for the purpose, by vote of a majority of each class of stock outstanding and entitled to vote thereon, a restatement of its articles of organization. The restated articles of organization may effect further amendments of the articles of organization; provided, however, that every such further amendment is lawfully adopted in accordance with the provisions of, and is authorized by, section eight or eight A. If the restated articles of organization only restate and do not amend the articles of organization, such restated articles may be authorized and adopted by the directors without a vote of the stockholders. Within sixty days after any meeting at which restated articles of organization have been adopted, or within thirty days after any necessary approval by the department, whichever is later, such restated articles, signed under the penalties of perjury by the president or any vice president and by the clerk and any assistant clerk, shall be submitted to the state secretary. Such restated articles of organization shall set forth all matter that would be required or permitted to be set forth in original articles of organization filed at the time of such meeting, other than the names and addresses of the incorporators, and shall indicate in a manner prescribed by the state secretary each amendment effected by such restated articles of organization.

The restated articles of organization shall become effective when filed in accordance with section six of chapter one hundred and fifty-six B, unless the restated articles or the vote adopting the restated articles specify a later effective date not more than thirty days after such filing, in which event the restated articles of organization shall become effective on such later date. From and after the effective date thereof the restated articles of organization shall be deemed for all purposes to have superseded the original articles of organization, or other charter documents, and amendments, and shall constitute the articles of organization of the corporation.

**Credits**

Added by St.1973, c. 860, § 8. Amended by St.1988, c. 323.

M.G.L.A. 164 § 8C, MA ST 164 § 8C

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§ 8D. Confirmation of organization or subsequent proceedings;..., MA ST 164 § 8D

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 8D

§ 8D. Confirmation of organization or subsequent proceedings; certificate; submission to state secretary; effective date

Currentness

If doubts arise as to the legality of the organization of any corporation created by special charter for a purpose mentioned in this chapter, which is in the exercise of its franchise, or as to the regularity or sufficiency of the proceedings of any such corporation, whether created by special charter or formed under the general laws, in consequence of failure subsequent to the organization to comply with the directions or requirements of any statute, the stockholders, at a special meeting called for the purpose in the manner provided in section thirty-four of chapter one hundred and fifty-six B, may by vote confirm such defective proceedings and all subsequent proceedings of the corporation dependent thereon. The clerk or an assistant clerk shall thereupon under the penalties of perjury make a certificate setting forth the particular matters especially causing a doubt, and a copy of the call of the meeting and of the vote of the stockholders, and the date of holding the meeting, which he shall submit to the state secretary. The certificate shall become effective when filed in accordance with section six of chapter one hundred and fifty-six B and thereupon such proceedings shall be taken to be legal and valid as fully as if the requirements of the statutes had been satisfied.

**Credits**

Added by St.1973, c. 860, § 8.

M.G.L.A. 164 § 8D, MA ST 164 § 8D

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§ 23. Voting by stockholders; proxy, MA ST 164 § 23

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 23

§ 23. Voting by stockholders; proxy

Currentness

Stockholders may vote in person or by proxy. No proxy dated more than six months before the meeting named therein shall be valid and no proxy shall be valid after the final adjournment of such meeting. A proxy with respect to stock held in the name of two or more persons shall be valid if executed by any one of them unless at or prior to exercise of the proxy the corporation receives a specific written notice to the contrary from any one of them. A proxy purporting to be executed by or on behalf of a stockholder shall be deemed valid unless challenged at or prior to its exercise and the burden of proving invalidity shall rest on the challenger. If not otherwise determined by the articles of organization or by-laws of the corporation, each stockholder shall be entitled to one vote for each share owned by him.

Credits

Added by St.1973, c. 860, § 13.

M.G.L.A. 164 § 23, MA ST 164 § 23

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§ 24. Voting by stockholders; articles of organization or by-laws..., MA ST 164 § 24

Massachusetts General Laws Annotated

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Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 24

§ 24. Voting by stockholders; articles of organization or by-laws controlling

Currentness

(a) Whenever, with respect to any action to be taken by the stockholders of a corporation subject to this chapter, the articles of organization or by-laws require the vote or concurrence of the holders of all of the shares, or of any class or series thereof, or a greater proportion thereof than required by this chapter with respect to such action, the provisions of the articles of organization or by-laws shall control.

(b) Whenever, with respect to any action to be taken by the stockholders of such corporation as to which a vote of each class of stock outstanding and entitled to vote thereon is required by this chapter, the articles of organization or by-laws provide that two or more classes of stock shall vote as a single class, the provisions of the articles of organization or by-laws shall control, provided, however, that no such provision shall deprive any class or series of stock whose rights would be adversely affected by such action of any right to a separate vote which such class or series may have under section eight A or section eight C.

**Credits**

Added by St.1973, c. 860, § 14.

M.G.L.A. 164 § 24, MA ST 164 § 24

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§ 33. Fees for filing certificates, articles and copies of votes, MA ST 164 § 33

Massachusetts General Laws Annotated

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Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 33

§ 33. Fees for filing certificates, articles and copies of votes

Currentness

The fees for filing the following certificates, documents and copies of votes required to be filed by corporations subject to this chapter with the state secretary shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven:

- (a) Articles of organization required by section five.
- (b) Articles of amendment providing for an increase of the total amount of authorized capital stock.
- (c) Any other articles of amendment.
- (d) Restated articles of organization in accordance with section eight C; provided, however, that in the event such restated articles of organization incorporate any amendment to the original articles of organization as theretofore amended, there shall be added to the filing fee the amount of the filing fee that would be required under paragraphs (b) and (c) of this section if such amendment had been incorporated in articles of amendment filed in accordance with section eight B.
- (e) Articles of consolidation or merger in accordance with section one hundred and two A.
- (f) Articles of dissolution pursuant to section one hundred of chapter one hundred and fifty-six B.
- (g) Certificates or copies of votes required by section eight D. For each other filing with the state secretary required by law, but no fee shall be required for filing the certificate of change of principal office of the corporation required by section fourteen of chapter one hundred and fifty-six B, the certificate of change of date of annual meeting or change of fiscal year required by section thirty-eight of chapter one hundred and fifty-six B or the certification of change of officers required by section fifty-three of chapter one hundred and fifty-six B.

§ 33. Fees for filing certificates, articles and copies of votes, MA ST 164 § 33

**Credits**

Amended by St.1932, c. 180, § 32; St.1953, c. 283; St.1973, c. 860, § 19; St.1980, c. 572, § 350.

Notes of Decisions (1)

M.G.L.A. 164 § 33, MA ST 164 § 33

Current through Chapter 175 of the 2017 1st Annual Session

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§ 58. Schedule of prices for gas and electricity, MA ST 164 § 58

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

M.G.L.A. 164 § 58

§ 58. Schedule of prices for gas and electricity

Currentness

There shall be fixed schedules of prices for gas and electricity, which shall not be changed oftener than once in three months. Any change shall take effect on the first day of a month, and shall first be advertised in a newspaper, if any, published in the municipality. No price in said schedules shall, without the written consent of the department, be fixed at less than production cost as it may be defined from time to time by order of the department. Such schedules of prices shall be fixed to yield not more than eight per cent per annum on the cost of the plant, as it may be determined from time to time by order of the department, after the payment of all operating expenses, interest on the outstanding debt, the requirements of the serial debt or sinking fund established to meet said debt, and also depreciation of the plant reckoned as provided in section fifty-seven, and losses; but any losses exceeding three per cent of the investment in the plant may be charged in succeeding years at not more than three per cent per annum. The gas and electricity used by the municipality for any purpose except street lighting shall be charged for in accordance with the prices in the fixed schedules. The gas and electricity used by the municipality for street lighting shall be charged for at a cost to be determined as follows: the sum of all operating expenses, interest on the outstanding debt, the requirements of the serial debt or sinking fund established to meet said debt, and also depreciation of the plant reckoned as provided in section fifty-seven, and losses, shall be the dividend; the kilowatt hours sold including those supplied for street lighting shall be the divisor, and the resulting quotient multiplied by the kilowatt hours supplied for street lighting shall be the cost to be charged to the municipality for street lighting. In lieu of the method of determining charges for electricity used by the municipality for street lighting, as set forth in the preceding sentence, electricity so used may be charged for at a cost in accordance with a street lighting schedule filed with and approved by the department.

**Credits**

Amended by St.1964, c. 401.

Notes of Decisions (10)

M.G.L.A. 164 § 58, MA ST 164 § 58

Current through Chapter 175 of the 2017 1st Annual Session

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## APPENDIX TO CHAPTER 164

### MASSACHUSETTS WHOLESALE ELECTRIC COMPANY

#### Section

- 1-1. Definitions.
- 1-2. Corporate Status.
- 1-3. Municipal membership in corporation.
- 1-4. Board of directors, appointment; election; term; vote; removal; vacancies; expenses and compensation; officers.
- 1-5. Rights and powers of corporation.
- 1-6. Contracts to sell energy; computing borrowing capacities of cities or towns; fees and charges.
- 1-7. Eminent Domain.
- 1-8. Tax exemptions.
- 1-9. Bonds; terms and conditions; signature; interim receipts.
- 1-10. Bond security; trust agreement or resolution; fees and charges; disposition of proceeds.
- 1-11. Refunding bonds.
- 1-12. Debt of commonwealth, cities or towns.
- 1-13. Trust funds.
- 1-14. Enforcement of bondholders' rights.
- 1-15. Legal investment in bonds.
- 1-16. Bonds; investment securities.
- 1-17. Amount of bonds; approval; hearing.
- 1-18. Bonds issued without obtaining consent.
- 1-19. Law applicable.
- 1-20. Annual Report.
- 1-21. Termination or dissolution; vesting of assets.
- 1-22. Priority of act.
- 1-23. Liberal construction.
- 1-24. Severability.
- 1-25. Termination.

St. 1975, c. 775, §§ 1 to 25, enacted the provisions set out as §§ 1-1 to 1-25 of this appendix.

#### **§ 1-1. Definitions**

The following words as used in this act shall, unless the context otherwise requires, have the following meanings:

"Alternative energy facilities", shall include but not be limited to facilities powered in whole or in part by the sun, wind, water, biomass, refuse, alcohol, wood or any renewable non-depletable fuel, and cogeneration.

"Bonds" or "bond", bonds, notes and other evidence of indebtedness of the corporation issued under the provisions of this act.

"Corporation", the Massachusetts Municipal Wholesale Electric Company, heretofore organized under chapter one hundred and sixty-four of the General Laws.

"Department", the department of public utilities.

"Energy", electricity, electric power, electric capacity, electric energy, natural gas, liquefied natural gas, liquefied petroleum air gas, propane air, synthetic natural gas, oil, steam, coal, water, wind, solar, battery, or any by-products, derivatives, services, ancillary products or ancillary services derived therefrom, including, but not limited to, reactive power or voltage control, loss compensation, scheduling and dispatch, load following, system protection services and energy imbalance services, emissions allowances or the transmission, transportation, storage, purchase, sale, exchange or interchange of energy capacity, either electric or other, distribution, disposal, decommissioning thereof, or the transmission, transportation, storage, disposal, decommissioning or distribution of any by-products thereof.

"Energy facility", an electric power facility, or a system or facility, or an interest in or right to the use of services derived from the facility or system or a part of thereof, including an energy conservation system, system for the production of renewable energy or alternative energy facility for the manufacture, generation, transmission, distribution, transformation, transportation, storage, purchase, sale, exchange or interchange or conservation of energy or any by-products or ancillary products thereof or services derived therefrom by any means, including, but not limited to, vehicles, personal or real property and a facility for processing refuse or other materials into fuel with or without other by-products, or facilities and property for the acquisition, extraction, conversion, transportation, storage, reprocessing or disposal of fuel and other materials of any kind for any of these purposes, as necessary to carry out the purposes of this act.

"Energy conservation systems", any projects, systems, programs and measures to promote or implement energy conservation, and as authorized in clause (p 1/2) of section five.

"Majority vote", majority vote as defined in section one of chapter forty-four of the General Laws.

"Municipal light board", the municipal light board or commission, municipal gas and electric commission or similar body of a city or town having a municipal electric department established under chapter one hundred and sixty-four of the General Laws or a special act; the mayor or city manager, as the case may be, of such a city having no such body; or the selectmen of such a town having no such body. Such a city or town may exercise any of its power or authority contained in this act through its municipal light board.

St.1975, c. 775, § 1. Amended by St.1988, c. 129, §§ 1, 2; St.2008, c. 535, § 1, eff. April 16, 2009.

### **§ 1-2. Corporate status**

The corporation is hereby made a body politic and corporate and a political subdivision of the commonwealth. Said corporation is constituted a public instrumentality and the exercise of the powers conferred by this act shall be deemed and held to be the performance of an essential public function.

St.1975, c. 775, § 2.

### **§ 1-3. Municipal membership of corporation**

(a) Each city or town which is entitled to nominate a director of the corporation immediately prior to the effective date of this act and which is authorized to become a member of the corporation by majority vote of such city or town shall be a member of the corporation. Any other city or town having a municipal electric department, established under the provisions of chapter one hundred and sixty-four of the General Laws or a special act, and which is authorized to become a member by majority vote of such city or town may become a member by applying for admission to the corporation and agreeing to comply with such reasonable terms and conditions of membership as the by-laws may fix from time to time. Membership may be terminated pursuant to such reasonable terms and conditions as the by-laws may fix from time to time, provided that liabilities under contracts in force at the time of such termination shall not be affected except as provided in such contracts.

(b) The member cities and towns, voting at a meeting or by written instrument, shall have the power to adopt, amend or repeal the by-laws and to elect directors of the corporation. Each member city or town shall from time to time designate, by a writing filed with the corporation, its manager of municipal lighting or a member of its municipal light board to vote and execute such written instruments on its behalf. Each member city or town shall have one equal vote, except that the election of the directors of the corporation shall be carried out according to the procedure set forth in clause (a) of section four. A majority of the votes shall be necessary for action by the member cities and towns.

(c) The general expenses of the corporation which are not provided from other sources may be provided by the member cities and towns as may be agreed upon with the corporation.

St.1975, c. 775, § 3.

### **§ 1-4. Board of directors, appointment; election; term; vote; removal; vacancies; expenses and compensation; officers**

(a) Except as otherwise provided in this act, the powers of the corporation shall be exercised by a board of nine directors. The governor shall appoint two directors who shall serve at the pleasure of said governor. The member cities and towns shall elect seven directors from among their respective managers of municipal lighting and

members of their municipal light boards. Four of the elected seven directors shall be elected by the member cities and towns each of whom shall have a vote which shall be given weight in the same proportion which its annual kilowatt hour sales, as most recently reported to the department under chapter 164 of the General Laws or as otherwise determined or estimated in accordance with the by-laws, bears to the total of such sales by all member cities and towns. Three of the elected seven directors shall be elected by the member cities and towns each of whom shall have one equal vote. Of the directors elected at the annual meeting in 1999, two of the four directors elected by weighted vote shall serve for a term of three years and two shall serve for a term of two years. One of the directors elected by equal vote shall serve for a term of three years, one shall serve for a term of two years, and one shall serve for a term of one year. Thereafter, all seven elected directors shall be elected as their respective terms expire in the manner prescribed in this section and each shall serve for a term of three years and until their successors are chosen and qualified. An elected director may be removed at any time by the member cities and towns with or without cause or for cause by the board. The member cities and towns shall elect a successor to fill any vacancy among the elected directors for the respective unexpired term. No vacancy in the membership of the board shall impair the right of a quorum to exercise the powers of the board. A majority of the full membership of the board shall constitute a quorum and a majority of such quorum shall be necessary for any action by the board. The directors shall not be entitled to compensation for their services as such but shall be reimbursed for actual expenses necessarily incurred in the performance of their duties.

(a 1/2 ) Notwithstanding the provisions of subsection (a), one representative each from the towns of Ludlow, Hampden and Wilbraham shall be entitled to serve as an additional member of the board of directors, to attend the meetings of said board, and to vote on any matters before the board that affect the town represented by said member; provided, that each such additional member shall be elected by a vote of, and serve at the pleasure of, the board of selectmen of the applicable town.

(b) The board shall annually choose a chairman, a secretary and a treasurer, and such other officers as the board may determine. Two or more offices may be held by the same person, and except in the case of the chairman, an officer need not be a director. Each officer shall serve until his successor is chosen and qualified unless sooner removed by the board, with or without cause. In the event of a vacancy in any office, the board shall fill the vacancy for the unexpired term. If a director serves as secretary or treasurer or both, he may be compensated by the corporation for his services as such, otherwise a director shall not be compensated by the corporation for his services as an officer, but he shall be reimbursed for his actual expenses necessarily incurred in the performance of his duties.

(c) A director or officer of the corporation who is also an officer or employee of the commonwealth or of a member city or town or other public body shall not thereby be precluded from voting or acting on behalf of the corporation on a matter involving the commonwealth or the city or town or other public body.

St.1975, c. 775, § 4. Amended by St.1997, c. 43, § 148; St.1998, c. 194, § 249.

## **§ 1-5. Rights and powers of corporation**



The corporation shall have all the rights and powers necessary or convenient to carry out and effectuate the purposes and provisions of this act, including, but without limiting the generality of the foregoing, the rights and powers:

(a) to adopt by-laws for the regulation of the affairs and the conduct of its business, and to prescribe rules, regulations and policies in connection with the performance of its functions and duties;

(b) to adopt an official seal and alter the same at pleasure;

(c) to maintain an office at such place or places as it may determine;

(d) to adopt a fiscal year and alter the same at pleasure;

(e) to sue and be sued;

(f) to receive, administer and comply with the conditions and requirements respecting any gift, grant, donation or appropriation of any property or money;

(g) to acquire by purchase, lease, gift, or otherwise, or to obtain options for the acquisition of, any property, real or personal, improved or unimproved, tangible or intangible, including an interest in land less than the fee thereof;

(h) to sell, lease, mortgage, exchange, transfer or otherwise dispose of, or to grant options for any such purposes with respect to any real or personal property or interest therein, upon the term and conditions as the corporation shall determine, with or without consideration and notwithstanding whether the real or personal property shall be needed by or useful to the corporation;

(i) to pledge or assign any money, fees, charges or other revenue of the agency, or any real or personal property and any proceeds derived by the corporation from the sale of energy or property or any insurance or condemnation awards;

(j) to employ personnel who shall serve at the pleasure of the directors, provided, however, that the corporation may bind itself by contract to employ a general manager for a period not exceeding five years;

(k) to borrow money and issue its bonds as provided in this act and to provide a pooled loan program on behalf of and for the benefit of its members, to make loans to its members and to enter into leases on behalf of its members, both as lessee or lessor;

(l) to purchase energy, including, but not limited to, all or a portion of the capacity and output of energy facilities and steam, whether or not produced by an energy facility;

(m) to sell energy and other products of energy facilities to member and non-member cities and towns having municipal electric departments established under chapter one hundred and sixty-four of the General Laws or a special act and to other utilities, public and private, within and without the commonwealth; such cities and towns are hereby authorized to purchase energy sold by the corporation, provided, however, that nothing in this act shall be construed to authorize resale of energy so purchased except as otherwise authorized by law;

(n) to contract for the use of transmission and distribution facilities owned by others for the delivery to purchasers of electric power and energy sold by the corporation, any such owner is hereby authorized to enter into such contracts with the corporation;

(o) to contract with respect to the purchase, sale, delivery, exchange, interchange, wheeling, pooling, transmission or use of electric power and energy and to otherwise participate in intrastate, interstate and international arrangements with respect thereto, including a New England power pool as defined by section one of chapter one hundred and sixty-four A of the General Laws;

(p) jointly or separately to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of, own, lease, sell, dispose of or otherwise participate in energy facilities or portions thereof or research and development relating thereto within or without the commonwealth and to enter into and perform contracts with respect thereto if the corporation acquires or owns an interest as a tenant in common with others in any energy facilities within the commonwealth, the surrender or waiver by any such owner of such property of its right to partition such property for a period not exceeding the period for which the property is used or useful for electric utility purposes shall not be invalid and unenforceable by reason of length of such period, or as unduly restricting the alienation of such property;

(p 1/2 ) in addition to and not in derogation of any other authority previously granted under this act, jointly or separately to plan, finance, operate, use, share costs of, sponsor, publicize or otherwise participate in projects, systems, programs or measures to promote or implement energy conservation and load management including but not limited to energy-conserving or load reducing modifications of the maintenance and operating procedures of a building or facility or in the installation therein; energy-conserving modifications to windows and doors; caulking and weatherstripping; insulation; automatic energy control systems; load management systems; hot water systems; equipment required to operate variable steam, hydraulic and ventilating systems; plant and distribution system modifications, including replacement of burners, furnaces or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; replacement or modifications of lighting fixtures; energy recovery and recycling systems; and cogeneration systems or portions thereof; or research and development relating thereto within or without the commonwealth and to enter into and perform contracts with respect thereto if the corporation acquires or owns an interest as a tenant in common with others in any energy conservation system within the commonwealth the surrender or waiver by any such owner of such property of its right to partition such property for a period not exceeding the period for which the property is used or useful for electric utility purposes shall not be invalid and unenforceable by reason of length of such period, or as unduly restricting the alienation of such property;

(q) to apply to the appropriate agencies of the commonwealth, other states, the United States, and to any other proper agency for such permits, licenses, certificates or approvals as may be necessary, and to construct, maintain and operate energy facilities in accordance with such licenses, permits, certificates or approvals;

(r) to apply and contract for and to expend assistance from the United States or other sources, whether in form of a grant or loan or otherwise;

(s) to make and execute all contracts and agreements and other instruments necessary or convenient in the exercise of the powers and functions of the corporation under this act;

(t) to enter into contracts determined by the corporation to be necessary or for the prudent management of its assets, funds, debts or fuels, including, without limitation, interest rate swaps, option contracts, future contracts, forward purchase contracts, hedging contracts, leases or other risk management instruments;

(u) to exercise and perform all or a part of its powers and functions through wholly-owned or partly-owned corporations or other entities; and

(v) to do all things necessary, convenient or desirable to carry out the purposes of this act or the powers expressly granted or necessarily implied in this act.

Contracts entered into by the corporation pursuant to this section (i) may be for the life of a facility or other term or for an indefinite period, (ii) may provide for the payment of unconditional obligations imposed without regard to whether a facility is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a facility and (iii) may contain provisions for prepayment, non-unanimous amendment, arbitration, delegation and other matters deemed necessary or desirable to carry out their purposes.

St.1975, c. 775, § 5. Amended by St.1988, c. 129, § 3; St.2008, c. 535, §§ 2 to 9, eff. April 16, 2009.

**§ 1-6. Contracts to sell energy; computing borrowing capacities of cities or towns; fees and charges**

(a) The corporation and member and non-member cities and town having municipal electric departments established under chapter 164 of the General Laws or by a special act and other utilities, public or private, may enter into energy contracts including, but not limited to, contracts providing for the sale or purchase of energy or energy facilities, borrowing by members under a pooled loan program, planning, engineering, design, acquiring sites or options for sites and expenses preliminary or incidental to such facilities. Any such contract may: (i) be for the life of a facility or other term or for an indefinite period; (ii) provide for the payment of unconditional obligations imposed without regard to whether a facility is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a facility; and (iii) contain provisions for prepayment, non-unanimous amendment, arbitration, delegation and other matters considered necessary or desirable to carry out its purposes. Any such contract may also provide, in the event of default by any party to the contract in the performance of its obligations under the contract, for other parties to assume the obligations and succeed to the rights and interests of the defaulting party, pro rata or otherwise as may be agreed upon in the contract.

(b) Neither the obligations of the corporation nor the obligations of any member or non-member cities and towns under any energy contracts hereunder shall be included in computing the borrowing capacities of the cities and towns. The obligations of cities and towns with municipal electric departments established under chapter 164 of the General Laws or by a special act shall be treated as expenses of operating their electric plants

and shall constitute special obligations of the cities and towns, payable solely from the revenues and other moneys derived by the cities and towns from their electric departments or systems. The liability of those cities and towns from other funds shall be limited to obligations undertaken by them to pay for the energy used by them.

(c) A city or town shall be obligated to fix, revise and collect fees and charges for energy and other services, facilities and commodities furnished or supplied through its electric department or systems at least sufficient to provide revenues adequate to meet its obligations under any contracts with the corporation and to pay any and all other amounts payable from or constituting a charge and lien upon the revenues, including amounts sufficient to pay the principal of and interest on all bonds issued by the city or town for energy-related purposes.

St.1975, c. 775, § 6. Amended by St.2008, c. 535, §§ 10, 11, eff. April 16, 2009; St.2012, c. 209, § 31, eff. Nov. 1, 2012.

### **§ 1-7. Eminent domain**

Subject to those provisions of chapter one hundred and sixty-four of the General Laws which are made applicable by section nineteen hereof, the corporation may acquire real property, or any interest therein, by eminent domain in accordance with the provisions of chapter seventy-nine or chapter eighty A; provided, however, that (i) no property already appropriated to public use shall be so taken except to the extent and for the purposes permitted by said provisions of said chapter one hundred and sixty-four and (ii) no facility for the generation, transmission or distribution of electric power and energy owned by any person shall be so taken except for the purpose of acquiring property or rights therein to permit the crossing of existing transmission or distribution facilities. Any taking under chapter seventy-nine of the General Laws shall be governed by the provisions of said chapter which are applicable to public corporations or authorities. Before a taking is made or injury inflicted by the corporation for which damages may be recovered under chapters seventy-nine or eighty A of the General Laws, the corporation shall file with the department of public utilities security to the satisfaction of the department for the payment of all damages and costs which may be awarded for the property taken or injured; and if, upon petition of the owner and notice to the corporation, any security taken appears to the department to have become insufficient, the department shall require the corporation to give further security to the satisfaction of the department.

St.1975, c. 775, § 7.

### **§ 1-8. Tax exemptions**

(a) The corporation shall not be required to pay any taxes upon its income, existence or franchise, and the bonds issued by the corporation, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be exempt from taxation within the commonwealth.

(b) Real and personal property, situated within the commonwealth and owned by the corporation shall be exempt from property taxation, provided, however, that the corporation shall, in lieu of property taxes, pay to any governmental body authorized to levy local property taxes the amount which would be assessable as local property taxes

on the real and tangible personal property if such property were the property of a corporation defined as an "electric company" in section one of chapter one hundred and sixty-four of the General Laws. Such payments shall be due, and bear interest if unpaid, as in the case of taxes on the property of such an "electric company". For purposes of such payments in lieu of taxes, the assessors of the taxing authority shall make a valuation and assessment of the property and determine the tax that would be assessable if such property were owned by a corporation as defined as an "electric company". Payments in lieu of taxes made hereunder shall be treated in the same manner as taxes for purposes of all procedural and substantive provisions of law, including appeals, now and hereinafter in effect applicable to assessment and taxation of real and personal property, collection and abatement of such taxes and the raising of public revenues.

St.1975, c. 775, § 8.

**§ 1-9. Bonds; terms and conditions; signature; interim receipts**

(a) The corporation may, subject to the approval of the department under this act, borrow money by the issue of its bonds for any of its corporate purposes. Bonds may be issued hereunder as mortgage bonds, as general obligations of the corporation or as special obligations payable solely from particular funds. Without limiting the generality of the foregoing, these bonds may be issued for project costs, prepayment of fuel, transmission or transportation of fuel, or for the corporation's share of project costs of energy facilities or long-term purchases of rights to use energy facilities which may include interest before and during the carrying out of any project and for a reasonable period after that time, prepayments under contracts for the purchase of energy or services related thereto, stranded investment costs, early termination costs of any energy project, decommissioning costs, reserves for debt service or other capital or current expenses that may be required by a trust agreement or resolution securing bonds, and all other expenses incidental to the determination of the feasibility of any project or to the carrying out of the project or to the placing of the project in operation.

(b) The bonds of each issue shall be dated, shall bear interest at such rate or rates, shall mature at such time or times, as may be determined by the corporation, and may be made redeemable before maturity at the option of the corporation at such price or prices and under such terms and conditions as may be fixed by the corporation prior to the issue of the bonds. The corporation shall determine the form of the bonds, including interest coupons to be attached thereto, and the manner of execution of the bonds, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the commonwealth.

(c) In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until after such delivery. The corporation may also provide for authentication of bonds by a trustee or fiscal agent.

(d) The bonds may be issued in coupon or in registered form, or both, as the corporation may determine and provision may be made for the registration of any coupon bonds as

to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The corporation may sell its bonds in such manner, either at public or private sale, and for such price, as it may determine will best effect the purposes of this act.

(e) The corporation may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The corporation may also provide for the replacement of any bonds which shall have become mutilated or shall have been destroyed or lost.

St.1975, c. 775, § 9. Amended by St.2008, c. 535, § 12, eff. April 16, 2009.

**§ 1-10. Bond security; trust agreement or resolution; fees and charges; disposition of proceeds**

(a) In the discretion of the corporation, but subject to the terms of the department's approval, any bonds issued under this act may be secured by a resolution of the board or by a trust agreement between the corporation and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the commonwealth. This trust agreement shall be in a form and executed in a manner that may be determined by the corporation. The trust agreement or resolution may pledge or assign, in whole or in part, the revenues and other moneys held or to be received by the corporation, including the revenues from any facilities existing when the pledge or assignment is made, and any contract or other rights to receive the same, whether then existing or later coming into existence and whether then held or later acquired by the corporation, and the proceeds thereof. Such trust agreement or resolution may contain such provisions for protecting and enforcing the rights, security and remedies of the bondholders as may be reasonable and proper and not in violation of law, including, without limiting the generality of the foregoing, provisions defining defaults and providing for remedies in the event thereof which may include (i) the acceleration of maturities and covenants setting forth duties of, and limitations on, the corporation in relation to the acquisition, construction, improvement, enlargement, alteration, equipping, furnishing, maintenance, use, operation, repair, insurance and disposition of property, the custody, safeguarding, investment and application of moneys, the issue of additional bonds, the fixing, revision and collection of fees and charges, the use of any surplus bond proceeds, the establishment of reserves, and the making and amending of contracts and (ii) provision for the trustee under such a trust agreement to take possession and control of the business and properties of the corporation, to operate and maintain the same, to make any necessary repairs, renewals and replacements in respect thereof, and to fix, revise and collect fees and charges.

(b) The corporation is authorized to fix, revise and collect fees and charges for energy and other services, facilities and commodities furnished or supplied by it. Such fees and charges shall not be subject to supervision or regulation by any commission, board, bureau or agency of the commonwealth or any municipality or other political subdivision of the commonwealth, but such fees and charges shall be subject to the terms of any applicable contracts. For as long as any bonds of the corporation are outstanding and unpaid, such fees and charges shall be so fixed so as to provide revenues at least sufficient to pay all costs and expenses in connection with the operation and

maintenance of energy facilities and all necessary repairs, replacements and renewals thereof, to pay when due the principal of, premium if any, and interest on all bonds of the corporation, to create and maintain reserves as may be required by any trust agreement or resolution securing bonds, and to pay any and all amounts which the corporation may be obligated to pay by law or contract.

(c) It shall be lawful for any bank or trust company to act as a depository or trustee of the proceeds of bonds or of revenues or other moneys under any such trust agreement or resolution and to furnish such indemnifying bonds or to pledge such securities as may be required by the corporation. Any such trust agreement or resolution may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the corporation may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as current operating expenses. The pledge by any such trust agreement or resolution shall be valid and binding and shall be deemed continuously perfected for the purposes of the Uniform Commercial Code<sup>1</sup> from the time when the pledge is made; the revenues, moneys, rights and proceeds so pledged and then held or thereafter acquired or received by the corporation shall immediately be subject to the lien of such pledge without any physical delivery or segregation thereof or further act; and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the corporation, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the corporation, and no filing need be made under the Uniform Commercial Code.

St.1975, c. 775, § 10. Amended by St.2008, c. 535, §§ 13 to 15, eff. April 16, 2009.

### **§ 1-11. Refunding bonds**

The corporation may issue refunding bonds for the purpose of paying any of its bonds at maturity or upon acceleration or redemption, subject to the approval of the department under this act. The refunding bonds may be issued at such time prior to the maturity or redemption of the refunded bonds as the corporation deems to be in the public interest. The refunding bonds may be issued in sufficient amounts to pay or provide the principal of the bonds being refunded, together with any redemption premium thereon, any interest accrued or to accrue to the date of payment of such bonds, the expenses of issue of the refunding bonds, the expenses of redeeming the bonds being refunded, and such reserves for debt service or other capital or current expenses from the proceeds of such refunding bonds as may be required by a trust agreement or resolution securing bonds. The issue of refunding bonds, the maturities and other details thereof, the security therefor, the rights of the holders thereof, and the rights, duties and obligations of the corporation in respect of the same shall be governed by the provisions of this act relating to the issue of bonds other than refunding bonds insofar as the same may be applicable.

St.1975, c. 775, § 11.

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<sup>1</sup> Chapter 106, §1-101 et seq.



**§ 1-12. Debt of commonwealth, cities or towns**

Bonds issued under the provisions of this act shall not be deemed to be a debt of the commonwealth or of any city or town or a pledge of the faith and credit of the commonwealth or of any city or town. All bonds shall contain on the face thereof that neither the commonwealth nor any city or town shall be obligated to pay the same and that neither the faith and credit nor the taxing power of the commonwealth or of any city or town is pledged to the payment of the principal of or interest on the bonds. Every bond shall also recite whether it is a general obligation of the corporation or a special obligation thereof payable solely from particular funds pledged to its payment.

St.1975, c. 775, § 12.

**§ 1-13. Trust funds**

All moneys received pursuant to the provisions of this act, whether as proceeds from the sale of bonds or notes or as revenues or otherwise, shall be deemed to be trust funds to be held and applied solely as provided in this act.

St.1975, c. 775, § 13.

**§ 1-14. Enforcement of bondholders' rights**

Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under a trust agreement or resolution securing the same, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may bring suit upon the bonds or coupons and may, either at law or in equity, by suit, action, mandamus, or other proceedings which may include appointment of a receiver to take possession and control of the business and properties of the corporation, to operate and maintain the same, to make any necessary repairs, renewals and replacements in respect thereof, and to fix, revise and collect fees and charges, protect and enforce any and all rights under the laws of the commonwealth or granted hereunder or under such trust agreement or resolution, and may enforce and compel the performance of all duties required by this act or by such trust agreement or resolution to be performed by the corporation or by any officer thereof.

St.1975, c. 775, § 14.

**§ 1-15. Legal investment in bonds**

Bonds issued under the provisions of this act are hereby made securities in which all public officers and public bodies of the commonwealth and its political subdivisions, all insurance companies, trust companies in their commercial departments, savings banks, co-operative banks, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the commonwealth for any



purpose for which the deposit of bonds or obligations of the commonwealth is now or may hereafter be authorized by law.

St.1975, c. 775, § 15.

**§ 1-16. Bonds; investment securities**

Notwithstanding any of the provisions of this act or any recitals in any bonds issued under this act, all such bonds shall be deemed to be investment securities under the Uniform Commercial Code.<sup>2</sup>

St.1975, c. 775, § 16.

**§ 1-17. Amount of bonds; approval; hearing**

The corporation shall issue only such amount of bonds as the department may from time to time vote is reasonably necessary for the proposed purpose of such issue, and such approval shall be subject to such reasonable terms and conditions as the department may determine to be in the public interest; provided, however, that where such bonds are payable at periods of not more than one year after the date of issue, approval of such issuance by the department shall not be required. The department shall render a decision upon an application for such issue, after notice and hearing, within thirty days after the final hearing thereon. The decision shall be in writing, shall assign the reasons therefor, shall, if approving such issue, specify the principal amount of bonds which are approved to be issued and shall, within seven days after it has been rendered, be filed in the office of the department.

St.1975, c. 775, § 17. Amended by St.1981, c. 105.

**§ 1-18. Bonds issued without obtaining consent**

Bonds may be issued under this act without obtaining the consent of any department, division, commission, board, bureau or agency of the state, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required therefor by this act, and the validity of and security for any bonds issued by the corporation shall not be affected by the existence or non-existence of any such consent or other proceedings, conditions or things.

St.1975, c. 775, § 18.

**§ 1-19. Law applicable**

(a) Section eleven A 1/2 of chapter thirty A and section twenty-three C of chapter thirty-nine of the General Laws, relating to meetings of public boards, and section ten of chapter sixty-six relating to the availability of public records as defined in clause twenty-sixth of section seven of chapter four of the General Laws shall apply to the corporation,

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<sup>2</sup> Chapter 106, §1-101 et seq.

provided, however, that the corporation shall not be obligated to disclose trade secrets or commercial or financial information if the corporation determines that such disclosure would adversely affect its ability to conduct business in relation to other suppliers of electric power and energy.

(b) Sections sixty-one and sixty-two of chapter thirty of the General Laws relating to the environmental impact of works, projects or activities conducted by authorities of the commonwealth shall apply to the corporation.

(c) Sections sixty-nine G to sixty-nine R, inclusive, seventy-one to seventy-five, inclusive, seventy-nine, one hundred and twenty-five A and one hundred and twenty-seven of chapter one hundred and sixty-four and sections twenty-one to twenty-two N, inclusive, and twenty-five to forty-one, inclusive, of chapter one hundred and sixty-six of the General Laws shall apply to the corporation, to the extent the provisions of the same are apt, in the same manner and to the same extent as if it were a corporation defined as an "electric company" in section one of chapter one hundred and sixty-four of the General Laws. Sections fifty-six D and ninety-four A of said chapter one hundred and sixty-four shall not apply to contracts for the purchase of energy or capacity and output of one or more specific energy facilities entered into with the corporation by a city or town having a municipal electric department established under said chapter one hundred and sixty-four or a special act or by an "electric company" as defined in section one of said chapter one hundred and sixty-four. Except as otherwise expressly provided in this act, the provisions of said chapter one hundred and sixty-four shall not apply to the corporation.

(d) The corporation may take such action as it deems appropriate to enable its employees to come within the provisions and obtain the benefits of the federal social security act. If the employees of the corporation shall come within the provisions of said social security act, their employment shall be included in the term "employment" as used in sections one to seven, inclusive, of chapter one hundred and fifty-one A of the General Laws.

(e) The corporation shall have the authority to bargain collectively with labor organizations representing employees of the corporation and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances, and the submission of grievances and disputes to arbitration. Chapters one hundred and fifty A, one hundred and fifty B and one hundred and fifty C of the General Laws shall apply to the corporation, to the extent the provisions of the same are apt, in the same manner and to the same extent as a private corporation. The employees of the corporation shall be exempt from the operation of chapter thirty-one of the General Laws.

(f) Wherever the corporation has primary responsibility for the construction or operation of any energy facility within the commonwealth, no contract for construction, reconstruction, alteration, remodeling, repair or demolition of the facility or equipment, supplies or materials for the facility, except in cases of special emergency involving the health, safety or welfare of the people or their property, shall be awarded unless proposals for the same have been invited by advertisement in a newspaper published in the city of Boston, such publication to be at least one week before the time specified for the opening of said proposals. Such advertisement shall state the time and place for opening the proposals in answer to said advertisement, and shall reserve to the corporation the right to reject any and all such proposals. All such proposals shall be

opened in public. No bid or contract shall be split or divided for the purpose of evading these requirements.

Sections twenty-six to twenty-nine, inclusive, and sections forty-four A to forty-four L, inclusive, of chapter one hundred and forty-nine and sections thirty-nine F to thirty-nine M, inclusive, of chapter thirty of the General Laws shall not apply to the corporation.

(g) Legislative consent is hereby given to the application to the corporation of the laws of other states with respect to taxation, payments in lieu of taxes, and the assessment thereof and to the application of regulatory and other laws of other states and of the United States in relation to the acquisition, ownership and operation by the corporation of energy facilities situated without the commonwealth pursuant to the authority granted in this act.

St.1975, c. 775, § 19. Amended by St.1979, c. 115; St.2008, c. 535, §§ 16 to 19, eff. April 16, 2009.

### **§ 1-20. Annual report**

The corporation shall submit an annual report in writing concerning its operation to the member cities and towns, the department, the governor and the general court within ninety days following the close of its fiscal year.

St.1975, c. 775, § 20.

### **§ 1-21. Termination or dissolution; vesting of assets**

Upon termination or dissolution of the corporation, the title to all funds and other properties owned by it which remain after payment or the making of provision for payment of all bonds and other obligations of the corporation shall vest in the member cities and towns as provided in this act and the by-laws of the corporation.

St.1975, c. 775, § 21.

### **§ 1-22. Priority of act**

The provisions of this act shall be deemed to provide an additional, alternative and complete method for the doing of the things authorized hereby and shall be deemed and construed to be supplemental and additional to, and not in derogation of, powers conferred upon the corporation, member and non-member cities and towns and others by law, provided, however, that insofar as the provisions of this act are inconsistent with the provisions of any general or special law, administrative order or regulation or any limitation imposed by a corporate or municipal charter, the provisions of this act shall be controlling.

St.1975, c. 775, § 22.

### **§ 1-23. Liberal construction**

This act, being necessary for the welfare of the commonwealth and its inhabitants, shall be liberally construed to effect the purposes hereof.

St.1975, c. 775, § 23.

**§ 1-24. Severability**

The provisions of this act are severable, and if any provision hereof shall be held invalid in any circumstances, such invalidity shall not affect any other provisions or circumstances. This act shall be construed in all respects so as to meet all constitutional requirements. In carrying out the purposes and provisions of this act, all steps shall be taken which are necessary to meet constitutional requirements whether or not such steps are required by statute.

St.1975, c. 775, § 24.

**§ 1-25. Termination**

The Massachusetts Municipal Wholesale Electric Company shall continue its existence as organized under the provisions of chapter one hundred and sixty-four of the General Laws until the board of nine directors are elected and appointed as provided in section four (a) of this act, and thereupon, upon acceptance of this act by the trustees of the Massachusetts Municipal Wholesale Electric Company Trust and by vote of the then board of directors of the corporation elected in accordance with the provisions of chapter one hundred and sixty-four of the General Laws, the trust shall terminate and all shares of capital stock in the corporation shall be deemed to have been redeemed and cancelled, and no shares shall thereafter be issued or reissued by the corporation.

St.1975, c. 775, § 25.

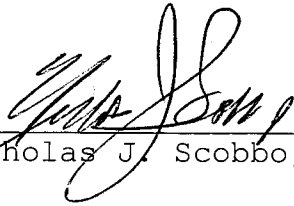
### Certificate of Service

Pursuant to Mass. R.A.P. 13(d), the undersigned hereby certifies, under the penalties of perjury, that on February 27, 2018, I have made service of this Brief upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by hand delivery to:

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