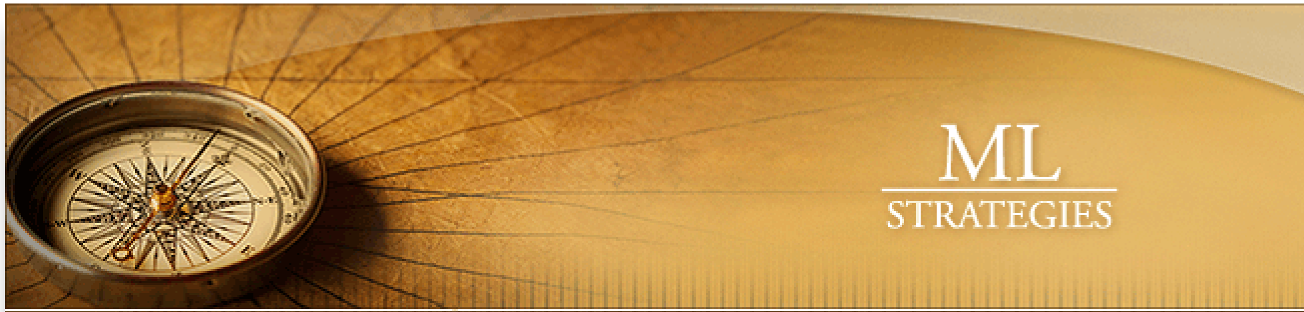

ML Strategies Alert

AUGUST 3, 2012

New Massachusetts Law Boosts Wind and Solar Energy

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On August 3, 2012, Massachusetts Governor Patrick signed new energy legislation that, among other things, expands the incentives and opportunities for developing wind, solar, hydro and other forms of renewable power generation to serve the state's electricity consumers. This law, Senate Bill 2395, *An Act relative to competitively priced electricity in the Commonwealth* (the "Act"), also includes provisions that aim to manage some of the drivers of energy cost increases.

In regard to renewable energy, the Act:

- more than doubles the amount of power supply that electric distribution companies must purchase from renewable generators under long term contracts,
- increases the opportunities for owners of distributed renewable energy facilities to sell their excess power at favorable rates, and
- increases the size of hydroelectric projects eligible for financial incentives under the state's Renewable Portfolio Standard (RPS).

ML Strategies and Mintz Levin have been actively engaged with the Legislature and the Patrick Administration in the development of the Act. We welcome the opportunity to advise interested companies on the details and implications of the Act as well as on the development of regulations to implement it. In this alert, we summarize the provisions in the Act that will significantly expand the opportunities and incentives for renewable energy development.

More Long-Term Contracts for Renewable Power

The Act increases the overall percentage of electricity supply that electric distribution companies may purchase from renewable generating facilities under long-term contracts to 7%. The Green Communities Act (GCA) of 2008 previously required distribution companies to obtain up to 3% of their total annual supply from long-term contracts for renewable energy with terms of 10 to 15 years. The Act adds a new long-term contracting provision, Section 83A, to the GCA, that requires distribution companies to solicit proposals from renewable energy developers for long-term contracts with terms of 10 to 20 years for up to 4% of their annual load.[1] By December 2016, electric distribution companies must conduct two rounds of joint solicitations for the new 10 to 20 year contracts. Achieving the overall 7% will require renewable energy developers to construct hundreds of megawatts of new renewable generation facilities. Wind farms are likely to be the form of generation that delivers the power to meet this additional demand for renewable generation, which RPS rules allow be built in any of the New England states, New York or nearby Canadian provinces.

In another important modification of the GCA, the new Section 83A added by the Act requires distribution companies to develop the new round of contracts only though a competitive bidding process. By contrast, the existing Section 83 of the GCA allows distribution companies to develop contracts through individual negotiations

with renewable energy developers. This provision, for example, allowed for the individual negotiations that led to the development of the power purchase agreements for the Cape Wind project.

The new legislation also contains a provision that requires each distribution company to enter into long-term power purchase contracts with "newly developed, small, emerging or diverse renewable energy distributed generation facilities" located in its service territory. Of the additional 4% of electricity supply that must be procured from renewable generating facilities under Section 83A, 10% of that amount (0.4% of total supply) must be purchased from these small generators. To qualify, such generators must have a maximum capacity no greater than 6 megawatts and not be net metering facilities. Also, a technology that has installations in the Commonwealth totaling more than 30 megawatts of capacity as of April 2012 will not qualify. That will preclude solar facilities from obtaining long-term contracts under this provision.

Net Metering Opportunities Expanded

Massachusetts "net metering" policy allows retail electricity customers who own solar and other types of distributed power generating equipment to be paid retail rates by their electric distribution utility for electricity they produce in excess of what they consume. Currently, distribution companies must allow up to 3% of their historic peak energy consumption to be provided by qualifying net metering installations, with 1% reserved for privately owned and 2% for publicly owned equipment. The new legislation raises the cap on privately and publicly owned net metering installations to 3% each, or 6% total, doubling the amount of consumer generation that will qualify for the retail pricing incentive.

Other changes are made to the net metering program by the Act. It adds anaerobic digestion, facilities that turn organic material into biogas for combustion, to the list of generating technologies eligible to qualify for net metering payments. It allows small, privately owned net metering facilities (up to 25 kilowatts) to qualify for the retail rate payments but excludes power produced by these facilities from that which counts toward the 3% limitation on privately owned facilities. To expedite the development of net metering installations, the Act requires the department of public utilities to standardize the process used by distribution utilities to interconnect these generation facilities to their electricity grids by November of 2013.

Larger Hydro Facilities Qualify for Financial Incentives

The new legislation alters current law to increase the size of hydroelectric projects that can qualify as renewable energy generating sources for financial incentives under the state's RPS. The Act increases the maximum allowable size of Class I hydroelectric power generation facilities eligible for the RPS Class I financial incentives from 25 to 30 megawatts, and increases the maximum size for hydroelectric power generation facilities eligible for Class II RPS financial incentives from 5 to 7.5 megawatts.

Property Tax Reform Is Not Included in the Act

The Act does *not* include a proposed revision to the tax code that would have standardized and clarified the application of local property tax law to renewable energy facilities. Current law, enacted in 1978, provides some renewable energy systems with an exemption from local property taxation. However, the emergence of commercial scale solar installations, many of which are involved in net metering, has created significant uncertainty as to the extent of that exemption.

Both the House and Senate versions of the Act included provisions that would have clarified that an exemption from local taxation would be available to projects that sold at least 50% of their energy output to the host municipality, produced no more than 125% of the annual energy used by the host building, or made a payment in lieu of taxes of 5 or 6% of the gross proceeds from the project's energy sales. The legislation that emerged from the conference committee between the House and Senate, however, did not include any of these provisions. This leaves developers and owners of renewable energy projects with continued uncertainty over the extent of the current exemption. That uncertainty will have to be resolved through individual negotiations and/or litigation between each solar developer and the potential host city or town.

Other Provisions Included In the Act

The Act includes other important provisions not related to renewable energy. For example, it:

- Directs the Department of Public Utilities to revise rates charged by utilities to more

accurately reflect the costs incurred to distribute electricity to each class of commercial, industrial and residential customers;

- Creates a three-year voluntary accelerated rebate pilot program under which the five biggest commercial or industrial electric and gas consumers in each utility territory may receive full rebates for the cost of qualified energy efficiency measures; and
- Addresses the up-coming retirement of the coal-fired power plant on the waterfront in Salem, Mass., by directing the Department of Public Utilities to investigate whether additional generating capacity will be needed in the greater Boston region to insure system reliability and, if the Department finds that additional capacity will be needed, directs the distribution companies that serve the region to solicit and enter into long-term contracts that will provide the needed generating capacity.

ML Strategies and Mintz Levin will continue to engage in the implementation of this new law, including the development of the regulations required to be promulgated under the Act. We welcome opportunities to advise interested companies on its legal and business ramifications.

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Endnotes

[1] Under the new Section 83A added by the Act, electric distribution companies will be provided with an incentive payment of 2.75% of the value of the 10-to-20 year contracts developed to fulfill the additional 4% requirement, down from the 4% of contract value incentive provided for such contracts under existing Section 83 the GCA.

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