

## Will Slow But Steady Win the Race? Cape Wind Clears One More Hurdle

December 28, 2011 by [Seth Jaffe](#)

The Massachusetts [Supreme Judicial Court today affirmed](#) the decision by the Department of Public Utilities to approve the power purchase agreement, or PPA, between Cape Wind and National Grid. (Full disclosure: Foley Hoag represented the Department of Energy Resources in support of the contract before the DPU.) The decision doesn't mean that Cape Wind will now get built. Given the (one hopes) temporary problems with the federal loan guarantee program and Cape Wind's failure thus far to sell the rest of the power from the project, the SJC decision is more of a necessary than sufficient condition to construction.

On the merits, the decision is pretty much a standard nuts-and-bolts review concerning whether there was substantial evidence to support DPU's decision. The SJC made frequent reference to the deference given both to DPU's application of its expertise and to its interpretation of statutes it is charged with implementing.

Going forward, the most significant aspect of the decision is probably the SJC's finding that, in the absence of a statutory definition of the term "cost-effective," the DPU was within its authority in considering

*"All costs and benefits associated with [the PPA], including the non-price benefits that are difficult to quantify, and including costs and benefits of complying with existing and reasonably anticipated future federal and state environmental requirements."*

Similarly, the SJC agreed with the DPU that analysis regarding whether the contract is in the public interest need not be limited to whether lower-priced alternatives exist. The SJC found that there was substantial evidence in the record supporting the DPU's conclusion that Cape Wind would provide "significant and special advantages by virtue of its location near an area that uses high levels of electricity and the advanced state of the permitting process for the facility."

In short, the decision not only affirms the DPU's decision here, but makes clear that, so long as an appropriate record is compiled, DPU is going to have significant discretion with respect to similar projects going forward.

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