# STATE OF CONNECTICUT

**DEPARTMENT OF PUBLIC UTILITY CONTROL**

**TEN FRANKLIN SQUARE**

**NEW BRITAIN, CT 06051**

**DOCKET NO. 05-07-14PH02 DPUC INVESTIGATION OF MEASURES TO REDUCE FEDERALLY MANDATED CONGESTION CHARGES (LONG TERM MEASURES)**

May 3, 2007

By the following Commissioners:

Donald W. Downes

John W. Betkoski, III

Anne C. George

## DECISION

# DECISION

## I. INTRODUCTION AND SUMMARY

Pursuant to General Statutes of Connecticut (Conn. Gen. Stat.) §§ 16-243m(c) and (g), the Department reviews and approves the recommendations of its consultants to select certain bidders for capacity contracts in response to the request for proposals (RFP) for new capacity conducted in this proceeding. The Department selects a seven hundred and eighty seven megawatt portfolio of projects consisting of one new highly efficient combined cycle gas-fired base load plant, two peaking plants located in the constrained Southwest Connecticut region, and one state-wide energy efficiency program. The Department also describes the next steps in the approval process for capacity contracts with selected bidders.

## II. BACKGROUND OF THE PROCEEDING

Pursuant to Conn. Gen. Stat. § 16-243m, also known as Public Act 05-01, An Act Concerning Energy Independence (EIA or Act), the Department opened the instant uncontested proceeding on its own motion. The purpose of this docket is to implement a competitive procurement process to solicit new capacity resources in order to reduce Federally Mandated Congestion Charges (FMCCs) for Connecticut ratepayers over the long term. On September 13, 2006, the Department issued the First Interim Decision approving the RFP for incremental or new capacity. On November 16, 2006, the Department issued the Second Interim Decision approving the capacity contracts, Master Agreements, that the electric distribution companies will use to contract for new capacity selected in this proceeding. On April 23, 2007, the Department issued a Draft Decision approving its consultant's recommendations. Participants filed written exceptions to the Draft Decision on April 26, 2007. Oral arguments were held at the Department on April 30, 2007.

### A. DESCRIPTION OF THE ENERGY INDEPENDENCE ACT (EIA)

The Connecticut legislature mandated that the Department issue a RFP to procure new or incremental capacity to reduce the impact of FMCCs on Connecticut ratepayers through the EIA. As defined in the Act, eligible capacity includes generation, demand response, and energy efficiency, thus this procurement process is similar to the Integrated Resource Planning processes undertaken under the previous era of electricity sector regulation.

According to subsection 12(c) of the Act, the RFP must identify "measures that would reduce FMCCs for the period commencing on May 1, 2006, and ending on December 31, 2010" and may include but shall not be limited to "(1) customer-side distributed resources, (2) grid-side distributed resources, [and] (3) new generation facilities, including expanded or repowered generation". Subsection 12(c) of the EIA further specifies that the RFP shall "encourage responses from a variety of resource types and encourage diversity in the fuel mix used in generation."

Under subsection 12(g), the Department must give preference to proposals that result in the greatest aggregate reduction of FMCCs, make efficient use of existing sites and supply infrastructure, and serve the long term interest of ratepayers.

Finally, Section 12(i) of the EIA lays out the criteria by which the Department should judge the project proposals and approve contracts. The Department can approve a contract if it determines that it will: (1) result in the lowest reasonable cost of such products and services; (2) increase reliability; and (3) minimize FMCCs to the state over the life of the contract.

### B. Participants

The Department designated the persons identified on the Service List, Attachment 1, as participants in the proceeding.

## III. SELECTION PROCESS AND SELECTED BIDDERS

The Department has reviewed a report entitled "Recommendations on Selection of Projects in the 2006 Connecticut RFP Process" dated May 3, 2007 (Attachment 2, LEI Report) prepared by London Economics International LLC. The Department incorporates the LEI Report's findings, analysis, conclusions and recommendations into this decision by reference. The attached Report is an updated version of the original Report dated April 20, 2007. The updates are made in response to issues raised in written exceptions. The updates expand on the description of the modeling approach and analysis conducted by LEI and reconcile conclusions in the RFP selection with the needs assessment.

Based on the content of the Report, the Department makes the following determinations. The Department finds that the RFP process was conducted in a fair and impartial manner, was commercially reasonable and was competitive. The Department also finds that the RFP process conformed to the principles and standards approved by the Department in Docket No. 05-07-20, Development of Process and Standards for Competitive Solicitation of Long-Term Projects to Reduce Federally Mandated Congestion Charges. The Department further finds that the selected projects meet the criteria of Conn. Gen. Stat. §§ 16-243m(c), (g) and (i).

The winning projects portfolio, consisting of four individual projects, provides the largest net benefit to Connecticut ratepayers as compared to other individual projects and portfolios of projects. The winning portfolio constitutes a total maximum capacity of 787 MW and consists of one 620 MW new highly efficient combined cycle gas-fired base load plant in Middletown offered by Kleen Energy Systems LLC (Project 409), one small, 66 MW, peaking plant located in the constrained Southwest Connecticut (Stamford) region offered by Waterside Power LLC (Project 851), one 96 MW new and highly efficient peaking unit also located in Southwest Connecticut (Waterbury) offered by Waterbury Generation LLC (Project 993), and one 5 MW energy efficiency program offered by Ameresco (Project 358). This portfolio is projected to create net economic benefits for Connecticut ratepayers totaling $509 million on a weighted average basis[1] because of its impact on wholesale costs of power, namely Locational Marginal Prices in the energy market, capacity clearing prices in the capacity market, and auction clearing prices in the Locational Forward Reserve Market.

The Department believes that the portfolio selected will provide much needed resources to supplement Connecticut's aging generation fleet. Included in the portfolio is a new efficient 620 MW base load generation plant which will help drive down energy prices, reduce emissions and add capacity to meet our growing demands. The addition of two peaking plants will help improve reliability and provide a foundation for fast start generation capacity which has been identified in the needs analysis. Although no demand response units have been selected through this solicitation, the Department believes that demand response and conservation are important components of the state's resource mix. The Department will continue to aggressively pursue demand response and conservation though other venues such as the distributed generation grant program, Energy Independence Act short-term measures and the conservation and load management program.

The DPUC directs that The Connecticut Light and Power Company (CL&P) serve as the counterparty to two contracts – with Kleen Energy and with Waterside Power. The DPUC directs that The United Illuminating Company (UI, together with CL&P, Companies) serve as the counterparty to two contracts – with Waterbury Generation and with Ameresco. The anticipated share of costs based on LEI's weighted average of all nine scenarios analyzed is 89% for CLP and 11% for UI.

| Bid ID # | Bidder | Location | EDC Counterparty | Weighted Cost ($MM) | EDC share of costs |
|---|---|---|---|---|---|
| 409 | Kleen | Middletown | CL&P | $ 304.52 | 89% |
| 851 | Waterside | Stamford | CL&P | $ 3.78 | |
| 993 | Waterbury | Ansonia | UI | $ 35.42 | 11% |
| 358 | Ameresco | CT State | UI | $ 2.29 | |
| TOTAL | | | | $ 346.02 | |

As all Connecticut customers will benefit from the capacity contracts regardless of what service territory a project is located in, all customers are responsible for paying the costs of all of the capacity contracts. In order to achieve the targeted 80-20 cost sharing ratio (which represents each Company's peak load share), it will be necessary to establish a cost sharing agreement between CL&P and UI similar to the one used for the Project 100 renewable energy contracts in Docket No. 03-07-17RE03. Therefore, the Department directs that CL&P and UI file on or before May 7, 2007 a modified version of the cost sharing agreement already approved by the Department in Docket No. 03-07-17RE03, for use in this proceeding.

[1] The range in net benefits is from $-66 to $1,679 million and is based on the results of nine different market scenarios, with differing supply-demand conditions, environmental regulations, and fuel prices.

## IV. ACCOUNTING ISSUES

In Written Comments filed on June 2, 2006 and at other times in this proceeding and in a related proceeding, DPUC Investigation Into the Financial Impact of Long-Term Contracts on Electric Distribution Companies, Docket No. 05-07-18, UI and CL&P indicated concern that the long-term capacity contracts could have negative impacts resulting from accounting treatments that: (1) require consolidation under FIN 46; (2) require treatment as a derivative; and (3) require that the CfD be recorded as a capital lease.

CL&P filed responses to Department interrogatories focused on accounting issues. Based on its preliminary review, CL&P has concluded that, if the Contract for Differences (CfD) is used to contract for capacity, the contract would not require consolidation under FIN 46(R) or treatment as a capital lease. CL&P Response to Department Interrogatory EL-8. CL&P concluded that it is a derivate, but its response does not clearly indicate if CL&P believes that accounting treatment as a derivative will cause costs that is seeks to recover and whether any actions can be taken now to mitigate against any such costs. Id. UI responded similarly. UI Response to Department Interrogatory EL-9. Both Companies said that they needed to review the financial information of selected bidders before they could make a final determination regarding accounting treatment of the contracts.

As described more fully below in Section V, the Department will provide CL&P and UI an opportunity to review the financial bid information of selected bidders for the purpose of identifying any negative accounting treatments that will cause costs for them. CL&P and UI will be given an opportunity in Docket 07-04-24, DPUC Review of Energy Independence Act Capacity Contracts, to identify any claimed negative accounting treatments and propose remedies. The Department can consider the proposed remedies or, without granting any remedy, approve the capacity contract and the electric distribution company can seek rate relief through a full rate proceeding pursuant to Conn. Gen. Stat. §§ 16-243m(l) and 16-19.

## V. COST RECOVERY PROCESS ISSUES

CL&P has raised concerns about its ability to recover certain costs associated with negative credit rating and accounting treatment caused by being a counterparty to capacity contracts. CL&P appealed the Department's decision in Docket No. 05-07-18, DPUC Investigation Into the Financial Impact of Long-Term Contracts on Electric Distribution Companies addressing these issues. See Docket No. HHB-CV-06-4009637-S – The Connecticut Light and Power Company v. Connecticut Department of Public Utility Control, et al.

On April 16, 2007, CL&P filed a motion seeking that the Department make certain rulings regarding the process the electric distribution companies must follow to make cost recovery claims for costs resulting from being counterparties to capacity contracts required by Conn. Gen. Stat. §§ 16-243m(c), (g) and (i). CL&P represents that these rulings would mitigate against its accounting and balance sheet concerns. On April 16, 2007, the Department issued a ruling that it would address CL&P's motion in this decision and directed that any docket participants file comments by April 19, 2007.

In its motion, CL&P asks that the Department rule that:

1. Contracts for Differences (CfDs) are long-term capacity contracts within the meaning of Conn. Gen. Stat. § 16-243m(i) and will be used by the Department in the current capacity procurement (Requested Ruling 1);

2. entering into the capacity contracts is prudent and efficient management (Requested Ruling 2);

3. all of electric distribution companies' costs that are found to be prudently incurred by the Department and that are directly related to entering into, performing under and enforcing capacity contracts shall be recovered through non-bypassable federally-mandated congestion charge (NBFMCC) (Requested Rulings 2 and 3);

4. capacity contracts shall become effective upon approval by the Department in its final decision in the proceeding reviewing contracts required by Section 16-243m(i) (Requested Ruling 4);

5. electric distribution companies can seek to recover all prudently incurred costs directly caused by the capacity contracts even if the contracts are later invalidated unless the contracts were invalidated as a result of the electric distribution company's improper performance or failure to perform (Requested Rulings 2 and 5);

6. Section 16-243(l) authorizes the electric distribution companies to file for a full rate case, under Section 16-19, to recover on a going forward basis any costs associated with negative credit ratings resulting from capacity contracts (Requested Ruling 6);

7. the electric distribution companies can have time to review selected bidders' financial information to assess whether there is any negative accounting treatment that will result from capacity contracts and whether measures can be taken to mitigate against any such costs (Requested Ruling 7);

8. Section 16-243(l) authorizes the electric distribution companies to file for a full rate case, under Section 16-19, to recover on a going forward basis any costs associated with negative accounting treatment resulting from capacity contracts and, to the extent that the law prevents the filing of a rate case, the electric distribution company can file a notice of intent to seek the costs in a future rate case (Requested Rulings 8 and 9).

On April 19, 2007, the Office of Consumer Counsel (OCC) filed objections to CL&P's requested rulings. The OCC claims that 1) it would be ultra vires for the Department to make the requested rulings as it would bind the Department in the future to these rulings and 2) committing to use of specific regulatory procedures may impinge on the procedural rights of the OCC and other parties. The OCC incorporated by reference arguments made in a petition for reconsideration addressing the same issues in Docket No. 05-07-18.

Conn. Gen. Stat. §§ 16-243m(c), (g) and (i) require the CL&P and UI enter into long-term capacity contracts. On the issue of cost recovery, subsection (i) expressly provides that the costs of these contracts shall be recovered through federally mandated congestion charges (FMCCs). In addition to this express provision in Section 16-243m(i) regarding the Companies' entitlement to recover contract-related costs, it is a fundamental principle of constitutional law that it could result in an unconstitutional taking to require the Companies to spend money on these contracts and to incur costs performing services related to these contracts without, at the same time, allowing for appropriate cost recovery. Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

CL&P filed written exceptions seeking clarification of several rulings made in the Draft Decision and providing suggested language to clarify the Department's intent. The Department adopts the requested language. The OCC filed written exceptions reiterating its objections described above. The Department rejects those objections for the reasons discussed below.

The Department makes the following rulings regarding the process for electric distribution companies to recover their costs associated with being counterparties to capacity contracts required by Conn. Gen. Stat. §§ 16-243m(c), (g) and (i). As a general matter, the rulings proposed by the CL&P do not guarantee any future cost recovery, but rather, clarify the process by which the Companies can seek recovery subject to a prudency review by the Department of the evidence regarding any claimed costs. Moreover, the proposed rulings are consistent with the express language of Section 16-243m, which provides that the costs of these contracts shall be recovered through FMCCs. The Department addresses below each of CL&P's requested rulings. These rulings will also apply to the electric distribution companies entering into, performing under and enforcing any cost sharing agreement, described more fully above in Section III, entered into between UI and CL&P.

With respect to the OCC's objections, the Department rules as follows. First, it is not ultra vires for the Department to perform its function of interpreting and applying the statutes that govern this proceeding. Section 16-243m addresses the issue of cost recovery by indicating that capacity contract costs shall be recovered through the FMCC. CL&P has requested rulings from the Department regarding the specific process by which it can seek to recover capacity contract costs. The Department's current Commissioners, and any future Commissioners, are and will continue to be bound by Section 16-243m until such statute is repealed or changed. To suggest that the Department cannot interpret the statutes relating to this proceeding and make rulings on relevant issues raised by parties to this proceeding based on its interpretation of relevant statutes is wholly without merit.

Second, the Department is not impinging on the procedural rights of the OCC and other parties. CL&P seeks a ruling regarding the process that it must follow to recover costs it may incur as a result of being a counterparty to capacity contracts. The Department is interpreting, applying and making rulings on the issues raised based on relevant statutes.

Third, the OCC incorporated by reference arguments it made in a petition for reconsideration addressing the same issues in Docket No. 05-07-18. CL&P also made a request for the same rulings it seeks here in Docket No. 03-07-17RE03, DPUC Review of Long-Term Renewable Energy Contracts – Round 1 Results and Contract, Accounting and Allocation Issues. The OCC raised all of the same objections in its petition for reconsideration in Docket No. 05-07-18 as objections to CL&P's request for cost recovery process rulings in Docket No. 03-07-17RE03. The Department, in a letter order dated April 9, 2007 in Docket No. 03-07-17RE03, adopted CL&P's proposed rulings and rejected all of the OCC's objections. The Department affirms its rejection of OCC's objections in this proceeding as well and makes the rulings requested by CL&P subject to some modifications described below.

CL&P requests that the Department rule that Contracts for Differences (CfDs) are long-term capacity contracts within the meaning of Conn. Gen. Stat. § 16-243m(i) and will be used by the Department in the current capacity procurement (Requested Ruling 1). The Department previously made this ruling in its September 13, 2006 Interim Decision in this proceeding at Section IV.B.1 and, for the same reasons stated therein, the Department affirms that ruling again in this decision.

CL&P requests that the Department rule that entering into the capacity contracts is prudent and efficient management for cost recovery purposes. As the Companies are required by statute and Department decisions implementing the same, to enter into capacity contracts and the cost sharing agreement, the Department finds that the Companies are acting prudently in obeying these legal directives. The Department does not see how it could legally rule otherwise.

CL&P requests that the Department rule that all of the electric distribution companies' costs that the Department finds (1) were directly related to entering into, performing under and enforcing capacity contracts and (2) were prudently incurred shall be recovered through a NBFMCC and Section 16-19b. The Department believes that this criteria and process for cost recovery is required by Sections 16-243m(i) and 16-19b(e) and (h). As such, only the contract price, administrative, and other direct costs can be collected through a NBFMCC and Section 16-19b. In its written exceptions, UI claims that any claimed negative credit rating and accounting treatment costs should be collected through the NBFMCC. The Department will withhold ruling on this issue until such time such costs are actually claimed. The Department views costs associated with negative credit rating and accounting treatment as being indirect costs distinguishable from direct costs, such as administrative and contract price costs. As described more fully below, the electric distribution companies must file a full rate case pursuant to Sections 16-19 and 16-243m(l) to recover these indirect costs, i.e. any negative credit rating and accounting treatment costs.

The OCC and others will have the right to review and contest UI's and CL&P's claimed costs. Section 16-19b(d) provides that the "Department of Public Utility Control shall adjust the retail rate charged by each electric distribution company for electric transmission services periodically to recover all transmission ***costs prudently incurred*** by each electric distribution company." [emphasis added].

Section 16-19b(h) requires that

> [t]he department shall ***hold a public hearing*** thereon whenever the department deems it necessary, but ***no less frequently than once every six months***, and undertake such other proceeding thereon to determine whether charges or credits made under such clauses reflect the actual prices paid for purchased gas or energy and the actual transmission costs and are computed in accordance with the applicable clause. ***If the department finds that such charges or credits do not reflect the actual prices paid for purchased gas or energy, and the actual transmission costs or are not computed in accordance with the applicable clause, it shall recompute such charges or credits and shall direct the company to take such action as may be required to insure that such charges or credits properly reflect the actual prices paid*** for purchased gas or energy and the actual transmission costs and are computed in accordance with the applicable clause for the applicable period. [emphasis added].

There are at least two opportunities, one in a contested case under Section 16-19b(h) and one in an administrative setting under Section 16-19b(e), for the Department, the OCC and others to examine and comment on the Companies' requested cost recovery related to the capacity contracts. The first opportunity arises in an administrative proceeding when the Companies seek to pass through the costs in the NBFMCC. At that time, the persons can comment on the Companies' submissions. The second opportunity arises at least twice a year, when persons, in the contested case conducted pursuant to Section 16-19b(h), can challenge any of the electric distribution companies' claimed capacity contract-related administrative costs that they believe are imprudent or not caused by the capacity contracts. If persons are correct that certain costs are not properly recoverable, the Department has the authority to require rate adjustments to address any over recovery.

CL&P asks that the Department rule that capacity contracts shall become effective upon approval by the Department in its final decision in the proceeding reviewing contracts required by Section 16-243m(i). In its written exceptions, UI requested that capacity contracts be considered effective (1) if no appeal is taken, forty six days after the Department Decision approving the contract or (2) if any appeal is taken regarding the contract, the date the on which all appeal issues are finally resolved. The Department will make CL&P's requested ruling as the express language of Section 16-243m(i) states that capacity contracts are effective upon Department approval. Also, this concept is reflected in Section 5.1(b) of the Master Agreements approved by the Department. Section 5.1(b) states that contracts will be effective upon approval in the docket required by Section 16-243m(i) which has now been opened and is identified as Docket No. 07-04-24, <u>DPUC Review of Energy Independence Act</u>

Capacity Contracts. UI did not file written exceptions to either the September 13 or November 16, 2006 Decisions objecting to the Master Agreement's provision regarding the effective date. UI should be indifferent to when Master Agreements become effective because, as described below, it will be able to recover all of its prudently incurred capacity contract costs even if the capacity contract is later invalidated on appeal. Delaying the effective date until resolution of appeals would unnecessarily delay the construction and operation of capacity projects and result in loss of benefits to consumers and increased costs for procuring the capacity if the RFP's November 2007 deadline for project approval is not met.[2]

CL&P requests that the Department rule that electric distribution companies can seek to recover all prudently incurred costs directly caused by the capacity contracts even if the contracts are later invalidated unless the contracts were invalidated as a result of the electric distribution company's improper performance or failure to perform. The Department believes that this request is consistent with basic ratemaking and cost recovery principles and the constitutional law regarding takings. If the electric distribution companies are prudently performing as counterparties under the capacity contracts as ordered by statute and the Department, and the contracts are later invalidated through no fault of their own, they are entitled to recover prudently incurred costs.

CL&P requests that the Department rule that Section 16-243(l) authorizes the electric distribution companies to file for a full rate case, under Section 16-19, to recover on a going forward basis any costs associated with negative credit ratings resulting from capacity contracts. The Department believes that the plain language of this provision and Section 16-243m(i), permitting capacity contract cost recovery through FMCC, provide clear legislative intent that the electric distribution companies could recover prudently incurred capacity contract costs on a going forward basis without any risk that electric distribution companies could be locked out from seeking to recover these costs or that these costs would somehow become unrecoverable. Unlike direct costs (such as administrative and contract price costs) that are directly related to entering into, performing under, and enforcing capacity contracts, which can be collected through a NBFMCC and Section 16-19b, for costs due to negative credit ratings, the electric distribution companies must file a full rate case under Section 16-19 and 16-243m(l), in which all of its costs and revenues can be examined and contested.

CL&P requests that the Department rule that the electric distribution companies can have time to review selected bidders financial information to assess whether there is any negative accounting treatment that will result from capacity contracts and whether measures can be taken to mitigate against any such costs.

The Department makes the requested ruling with modifications. Provided that CL&P and UI have provided signed nondisclosure agreements, the RFP Coordinator

[2] Under the terms of the RFP, if projects do not receive final approval by November 2007, they can withdraw their bids or have their bid price adjusted using a utility price index. The Department assumes conservatively that any adjustment to the bid price based on the utility price index will result in a price increase as the cost of labor and commodities necessary to construct and operate the projects is not likely to become cheaper going forward.

will provide CL&P and UI with the financial bid information for winning bidders on May 4, 2007. In Docket No. 07-04-24, DPUC Review of Energy Independence Act Capacity Contracts, the Department will provide CL&P and UI until July 3, 2007, sixty days from May 4, 2007, to review the financial bid information of selected bidders for the purpose of identifying any negative accounting treatments that will cause costs for them as well as any proposed remedies for mitigating against any such costs. CL&P can request additional financial information from selected bidders and the Department will resolve any disputes pertaining to such requests. On July 3, 2007, CL&P and UI shall file a report with the Department in Docket No. 07-04-24 providing the results of their financial accounting review. If CL&P or UI claims there are costs due to accounting treatment, they shall promptly make a filing with the Department that 1) identifies the specific aspect or aspects of the Capacity Contract or counterparty structure that causes or contributes to the impact, together with citations to the applicable GAAP or FASB pronouncements, 2) provides a fair and reasonable estimate of the financial impact on CL&P of the GAAP treatment showing a material adverse impact 3) provides support reflecting CL&P's consultation with its outside auditor or consultant that the GAAP treatment is required for a fair presentation of its financial statements[3], and 4) identifies any proposed remedy. The Department will not make it mandatory, as requested by CL&P, to have a 30-day negotiation process between, the electric distribution company, the bidder and a Department prosecutorial unit. Rather, if CL&P or UI proves that negative accounting treatment of any of the capacity contracts will cause them costs, the Department can consider and adopt proposed remedies, or, without approving any remedies, approve the capacity contract and the electric distribution company can then seek rate relief through a full rate proceeding pursuant to Conn. Gen. Stat. §§ 16-243m(l) and 16-19. In order to bring timely closure to this proceeding, the Department is not inclined to give any more time for review beyond sixty days, given that the electric distribution companies can file a rate case at any time to seek cost recovery if they believe that negative accounting treatment of a capacity contract is causing increased costs.

CL&P requests that the Department rule that Section 16-243(l) authorizes the electric distribution companies to file for a full rate case, under Section 16-19, to recover on a going forward basis any costs associated with negative accounting treatment resulting from capacity contracts and, to the extent that the law prevents the filing of a rate case, the electric distribution company can file a notice of intent to seek the costs in a future rate case. The Department believes that the plain language of Section 16-243m(l) provides clear legislative intent that the electric distribution companies could recover these types of capacity contract costs on a going forward basis. The Department believes that it would be illegal, in contravention of Conn. Gen. Stat. § 16-243m(i) and may be in violation of the Takings Clauses of the United States and Connecticut Constitutions to bar the electric distribution companies from seeking cost recovery for capacity contract costs as a result of following mandates of the statute and Department decisions. Unlike costs that are directly related to entering into, performing under, and enforcing capacity contracts, which can be collected through a NBFMCC and Section 16-19b, for costs associated with negative accounting treatment of capacity

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3 If CL&P seeks rate recovery for costs associated with GAAP treatment of a Capacity Contract, CL&P will then provide support, e.g., a report, letter, etc, prepared by its outside auditor or consultant to the DPUC that the GAAP treatment is required for a fair presentation of its financial statements.

contracts, the electric distribution companies must file a full rate case, in which all of its costs and revenues can be examined and contested, under Sections 16-9 and 16-243(l). In its written exceptions, CL&P requested clarification that the electric distribution companies can seek recovery for any accounting related-costs occurring during the term for the capacity contracts. The Department finds that, at any time during the term of the capacity contracts, the electric distribution companies can seek to recover any accounting-related costs that they can prove were caused by capacity contracts.

The Department believes that it is consistent with the cost recovery language of Sections 16-243m(i) and (l) to permit CL&P or UI, if they are legally barred from filing a rate case during the time they are incurring costs related to negative accounting treatment of capacity contracts, to defer those costs they seek to recover. If either company seeks such treatment, it must file written notice at the time it wishes for cost recovery to begin with the Department and the OCC. Any such requested deferral would be subject to Department review of the appropriateness of the deferral, including whether or not the company was overearning at the time of the deferral, and a prudency review of the costs. Office of Consumer Counsel v. Department of Public Utility Control et al, 279 Conn. 584 (2006).

The Department has not addressed all of the issues raised in the written exceptions. Most of the issues related to the consultant's bid evaluation method and are addressed in the attached revised Report and the nonpublic Report containing confidential bid information which was provided to the OCC. A tabular summary of how those issues were addressed is attached as Attachment 5.

## VI. DESCRIPTION OF NEXT STEPS

In his written exceptions, the Attorney General requested that the Department suspend the completion of the procurement process until the end of the legislative session, June 6, 2007, to see, what, if any, energy bills see the General Assembly passes so the Department can assess whether the projects selected in this proceeding are appropriate in light of any new legislative mandates. On May 1, 2007, the AG and OCC filed a motion making the same request. For the reasons set forth in the Department's ruling on that motion, which are incorporated by reference into this decision, the Department rejects the request.

The following is a description of upcoming events in this and Docket No. 07-04-24, DPUC Review of Energy Independence Act Capacity Contracts. On or before May 4, 2007, CL&P and UI shall provide Kleen Energy, Waterside Power, Waterbury Generation, Ameresco, the Department and the RFP Coordinator with the signed nondisclosure agreements for each person it wishes to have access to the confidential financial bid information. The Companies should use the protective order and nondisclosure agreement approved by the Department on November 27, 2006. Consistent with the Code of Conduct outlined in the RFP and Master Agreements, CL&P and UI must limit access to the protected information to only those persons performing the financial accounting review. Upon receipt of the nondisclosure agreement, the RFP Coordinator will send CL&P and UI an electronic version of the selected bidders financial information on CD-ROM. CL&P and UI shall only use the financial bid information for the limited purpose of analyzing it to identify if there any actual financial accounting issues that raise cost recovery issues so that CL&P and UI may file a rate case seeking recovery for any claimed costs.[4] UI and CL&P shall have sixty days to review this information. In Docket No. 07-04-24, DPUC Review of Energy Independence Act Capacity Contracts, UI and CL&P shall report to the Department if there are any negative accounting treatments that will cause costs and propose remedies, including any agreements with bidders, for resolving any negative accounting issues. If the Department agrees that there is a problem, the Department will then consider whether it will address it through adopting a proposed remedy or through a rate case filing by UI or CL&P.

In Docket No. 07-04-24, DPUC Review of Energy Independence Act Capacity Contracts, on or before May 18, 2007, CL&P shall file signed executed Master Agreements with Kleen Energy and Waterside Power and UI shall file signed executed contracts with Waterbury Generation and Ameresco.[5]

In its written exceptions, UI claims that it is not required to file executed Master Agreements, but only a draft contract because Section 16-243m(i) states that the electric distribution companies shall have thirty days to negotiate a draft contract with each selected project. UI's analysis is incorrect for several reasons. First, the Department already has finalized standard contracts, i.e. the Master Agreement, so that there is no need to negotiate a draft contract. The first sentence of Section 16-243m(i) regarding the negotiation of a draft contract is, therefore, inapplicable to the circumstances of this proceeding. Additionally, the Department does not interpret Section 16-243m(i) as bestowing any substantive or procedural right on UI or CL&P to negotiate contract terms and conditions. The Department believes that Section 16-243m(e), which provides that the capacity contracts shall contain such provisions as the Department directs, is controlling. To that end, the Department conducted an extensive stakeholder process over the course of a year to develop the standard Master Agreements. The Department received input from numerous and diverse stakeholders, including UI, in the form of testimony at hearings and thousands of pages of written comments. The Department believes that the terms and conditions of the Master Agreements ultimately approved by it are commercially reasonable and fairly balance the interest of consumers, the buyers (UI and CL&P) and the capacity suppliers.

Second, from a process standpoint, it would be unfair to change the contract terms and conditions or to allow UI to file unexecuted contracts in the Section 12(i)

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[4] In its written exceptions, UI indicated that it intends to use the financial bid data to assess whether the selected projects meet the criteria of Section 16-243m(i). The OCC has all of the financial bid data for all bidders and is, therefore, better equipped to perform that function in Section 16-243m(i) proceeding, Docket No. 07-4-24. The Department will provide CL&P and UI a limited set of confidential financial bid data needed to evaluate financial accounting issues. The Companies will be provided with information supplied by bidders on Appendices G and I of their bid submissions describing the bidders' financial capabilities and proposed project financing structures. The Companies can request additional information from the Department and selected bidders, but must justify how the additional information relates to the financial accounting review.

[5] In its written exceptions, CL&P asked about who should prepare the execution copy of each capacity contract. CL&P and UI, in consultation with the selected bidders and, if needed the RFP Coordinator, shall prepare the execution copies.

proceeding. Winning bidders bid into this process under the belief, based on language in the Department's September 13, 2006 and November 16, 2006 decisions in this proceeding, that the Master Agreements were final and that they would be required to sign those Master Agreements if selected. UI never raised an objection to this ruling after either decision on the basis that it had a right to negotiate different terms and conditions. Furthermore, the Next Steps sections of both of those decisions clearly described that UI and CL&P would be required to file executed contracts to be reviewed in the proceeding required by Section 16-243m(i). UI also never objected to this ruling after either decision. If UI had objected to either of these rulings in a timely manner back in September or November 2006, the Department would have been in a position to grant the requested relief as bidders could have incorporated this change into their Financial Bids, which were submitted to the Department on December 13, 2006. However, the Department declines to grant that requested relief now because doing so would constitute material changes that could negatively impact the timing and cost of financing, constructing and operating the selected projects.

Third, after conducting an extensive stakeholder process to develop the Master Agreements' terms and conditions, the Department will not now permit UI or CL&P to unilaterally (or bilaterally with the consent of a winning bidder) delete, add to or change the terms and conditions of the Master Agreement. The Department wanted all projects to sign contracts with identical terms so that it could evaluate them on an equal basis. The Department evaluated and selected projects based on the assumption that they agreed to the terms and conditions of the Master Agreements. Altering any of the terms and conditions of the Master Agreements post project selection would be unfair because projects may have been evaluated differently if they each had different contract terms and conditions at the time of evaluation and selection.

Finally, under Section 16-243m(e), the Department, not UI, has the ultimate authority to determine the terms and conditions of the capacity contracts. There are only very limited circumstances under which the Department will entertain proposals to revise the Master Agreements. If a provision is proven to be illegal, the Department will examine alternative language. Also, if UI or CL&P can prove that a provision will work an unintended unforeseen economic hardship on UI or CL&P, that was only detectable upon review of the selected bidders confidential financial bid data, and for which UI or CL&P cannot be made whole through the cost recovery processes set forth in this decision, the Department will examine alternative language. Section 12.6 of the Master Agreements and page 6 of the November 16, 2006 Decision provide for other circumstances justifying changes to the terms and conditions. Absent any of these justifications, the Department will not entertain any proposed revisions at this time and UI and CL&P are directed to file executed contracts with the Department on May 18, 2007 in Docket No. 07-04-24.

The schedule for Docket No. 07-04-24 is attached as Attachment 3. The Department will conduct this one proceeding to review all of the selected projects and the executed contracts and will issue a Decision approving or rejecting the contracts.

As discussed more fully above, pursuant to Section 16-243m(i), each contract will become effective upon approval by the Department.

The scope of review in the contested case proceeding will be limited to assessing whether there is substantial evidence to support the Department's preliminary finding in this proceeding that the projects selected meet the three criteria listed in Section 12(i) of the EIA, notably whether the project(s): (1) result in the lowest reasonable cost of such products and services; (2) increase reliability; and (3) minimize FMCCs to the state over the life of the contract. The scope of the proceeding will not include presentation of evidence about whether the Department or its consultants could have reached different conclusions using different methods for evaluating bids.

CL&P and UI shall use the Letter of Credit (LOC) template attached to this Draft Decision (Attachment 4, the same template the Department used for the RFP process) as a basis for the LOC to be signed by winning bidders electing to use an LOC to fulfill their Completion and Performance Security requirements. CL&P and UI may make amendments to the template if needed though such amendments should be commercially reasonable and acceptable to the Department and selected bidders. CL&P and UI shall submit the final LOC template to be used by the winning bidders for approval to the DPUC on or before May 7, 2007. Winning bidders should file comments on the draft LOCs on or before May 10, 2007.

Winning bidders will have until May 18, 2007, the date upon which the executed Master Agreements are submitted to the Department, to post their increased project security deposits (from $10/kW to $25/kW for generation from $2/kW to $5/kW for DR) with their respective electric distribution company). Upon notification that the electric distribution company has received the increased security deposit, the Department will return the original security deposit posted on December 13, 2006 to the bidder. For bidders that submitted an LOC, the Department will send the bidder the LOC within 2 days of notification by the electric distribution company that the increased security deposit has been received.

For those bidders that submitted a wire transfer of cash as their project security deposit, within 2 days of notification by the electric distribution company that the full Completion and Performance Security has been received, the Department will direct the Connecticut State Treasurer to issue a check for the original project security deposit, plus accrued interest, and to send that check to the bidder. We have been informed that it takes the Treasurer approximately seven business days to cut the check from the date of notification.

Bidders whose projects were not selected will have their project security deposit refunded to them. Bidders who posted a Letter of Credit will receive that LOC via express mail, sent out by April 24, 2007. Bidders who posted cash will receive a check from the Connecticut state Treasurer. Bidders who submitted bids using a wire transfer need to complete the vendor form that was distributed by the RFP Coordinator and submit that form to the DPUC as per the RFP Coordinator's instructions. It takes the State Treasurer about seven business days to process and send the check from the date that the Department issues the request for repayment of the project security deposit.

## VI. CONCLUSION AND ORDERS

### A. CONCLUSION

Based on the content of the Report, the Department makes the following determinations. The Department finds that the RFP process was conducted in a fair and impartial manner, was commercially reasonable and was competitive. The Department also finds that the RFP process conformed to the principles and standards approved by the Department in Docket No. 05-07-20, Development of Process and Standards for Competitive Solicitation of Long-Term Projects to Reduce Federally Mandated Congestion Charges. The Department further finds that the selected projects meet the criteria of Conn. Gen. Stat. §§ 16-243m(c), (g) and (i). The winning projects portfolio, consisting of four individual projects constituting 787 MW, provides the largest net benefit to Connecticut ratepayers as compared to other individual projects and portfolios of projects.

### B. ORDERS

1. In this proceeding, if they have not already done so, CL&P and UI shall submit nondisclosure agreements to selected bidders, the RFP Coordinator and the Department on or before May 7, 2007.

2. In this proceeding, if they have not already done so, CL&P and UI shall submit the final LOC template to be used by the winning bidders for approval to the DPUC on or before May 7, 2007.

3. In this proceeding, winning bidders should file any comments they have on the LOC template on or before May 10, 2007.

4. In this proceeding, if they have not already done so, CL&P and UI shall file on or before May 10, 2007 a modified version of the cost sharing agreement already approved by the Department in Docket No. 03-07-17RE03, for use for in this proceeding.

5. In Docket No. 07-04-24, CL&P and UI shall file executed Master Agreements with their respective counterparties on or before May 18, 2007.

6. In Docket No. 07-04-24, CL&P and UI shall file their report or reports on financial accounting issues on or before July 3, 2007

**DOCKET NO. 05-07-14PH02 DPUC INVESTIGATION OF MEASURES TO REDUCE FEDERALLY MANDATED CONGESTION CHARGES (LONG TERM MEASURES)**

This Decision is adopted by the following Commissioners:

Donald W. Downes

John W. Betkoski, III

Anne C. George

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

May 4, 2007

Date

## Table of Contents of Attachments to Interim Decision

# STATE OF CONNECTICUT

**DEPARTMENT OF PUBLIC UTILITY CONTROL**
**TEN FRANKLIN SQUARE**
**NEW BRITAIN, CT 06051**

**DOCKET NO. 07-04-24 DPUC REVIEW OF ENERGY INDEPENDENCE ACT CAPACITY CONTRACTS**

August 22, 2007

By the following Commissioners:

Donald W. Downes
Anthony J. Palermino
John W. Betkoski, III

## DECISION

# DECISION

## I. INTRODUCTION

### A. Summary

Pursuant to General Statutes of Connecticut § 16-243m, the Department approves capacity contracts with Kleen Energy Systems, LLC for a six hundred twenty megawatt new highly efficient combined cycle gas-fired base load plant in Middletown, with Waterside Power, LLC for a sixty six megawatt peaking plant located in the constrained Southwest Connecticut region, with Waterbury Generation LLC for a ninety six megawatt new highly efficient peaking unit also located in Southwest Connecticut and with Ameresco for a five megawatt statewide energy efficiency program. The Department finds that this portfolio of capacity contracts will increase reliability and will minimize federally mandated congestion charges to the state over the life of the contracts at the lowest reasonable cost for the products and services procured under the contracts.

### B. Background of the Proceeding

In June 2005, the Connecticut Legislature passed Public Act 05-01, an Act concerning Energy Independence (EIA).[1] Among the requirements of the EIA was that the Department launch a procurement process to acquire new capacity. The objective of the procurement process was to decrease total costs of electricity for Connecticut electricity ratepayers over the next 15 years and to improve the reliability of the electricity system in Connecticut. Conn. Gen. Stat. § 16-243m.

In July 2005, the Department initiated Docket No. 05-07-14PH02, Department Investigation of Measures to Reduce Federally Mandated Congestion Charges (Long Term Measures) with the objective of designing and running the procurement process authorized under the EIA. As permitted by Conn. Gen. Stat. § 16-243m(d), the Department retained the services of London Economics International LLC (LEI) to assist it in its efforts to design and implement the procurement process required by the Act. LEI's role included all aspects of the process, ranging from conducting a Needs Assessment, design of the Request for Proposals (RFP) and the Master Agreements, serving as the RFP coordinator, to analyzing the Financial Bid submissions. LEI July 5, 2007 Report, p. 4.

The process to determine what range of capacity was needed and how that capacity should be solicited and contracted for was a long and consultative one. Subsequent to LEI's retention in February 2006, the Department hosted Technical Meetings to discuss the Connecticut Energy Advisory Board's (CEAB) April 2006 "Report on Connecticut's Long-term Electric Capacity Requirement," providing stakeholders with an opportunity to discuss the CEAB's report's assumptions and conclusions. Stakeholders were invited to submit written comments and provide feedback during the Technical Meetings to assist the Department and LEI in its assessment of investment needs and in designing

[1] The EIA has been codified in General Statutes of Connecticut (Conn. Gen. Stat.) § 16-243m.

the RFP process. Department Interim Decision, Docket No. 05-07-14PH02 (September 13, 2006).

On June 5, 2006, the Department issued LEI's Investment Needs Assessment, entitled "Report on the Electricity Sector Needs of Connecticut, 2007-2021" (Needs Assessment). The Needs Assessment addressed the question of investment needs from a market-based perspective, identifying the quantity of additional capacity needed to balance the supply and procurement targets in the Independent System Operator of New England's (ISO-NE) Forward Capacity Market (FCM), Locational Forward Reserve Market (LFRM), and the Day-Ahead Energy Market (Energy).

Similarly, the Department also held several Technical Meetings to discuss the RFP and the draft contracts with stakeholders and stakeholders had several opportunities to provide comments on both sets of documents.[2] The Department extensively revised the Master Agreements and the RFP in response to stakeholder feedback. The EIA specifically required that a variety of resources participate in the procurement process (Section 16-243m (c)) therefore, the RFP was structured as an all-source RFP, where different types of demand-side and supply-side resources compete against each other, similarly to how they participate in and compete against each other in wholesale markets.

After soliciting stakeholder input, the Department issued the final Needs Assessment along with the final RFP on September 15, 2006. Registrations for the RFP were due on September 29, 2006. Qualification submissions were due on November 13, 2006, and Financial Bid submissions were due on December 13, 2006. LEI July 5, 2007 Report, p. 13.

From December 13, 2006 through May 2007, LEI analyzed the Financial Bids, conducting a sophisticated and detailed bid evaluation of each individual conforming bid, and a variety of different portfolios (i.e., combinations of conforming bids). The EIA described how the Department and LEI should select the best capacity projects for the state: projects selected should increase reliability, minimize Federally Mandated Congestion Costs (FMCCs), and should be procured at the lowest reasonable cost possible. The objective of this procurement process was not to resolve all supply deficiencies in Connecticut for the foreseeable future or to displace or replace wholesale electricity markets. Rather, this procurement process was meant to encourage the development of new or incremental capacity sooner than might otherwise occur, focusing on capacity that minimizes costs by reducing FMCCs, improves reliability, and therefore achieves the greatest net benefits for Connecticut ratepayers over time, while maximizing other state policy objectives. LEI July 5, 2007 Report, p. 14.

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2 Technical Meetings were held on July 13-14, 2006 and October 10, 2006. Numerous sets of written comments constituting thousands of pages were submitted on August 3, 2006, August 31, 2006, October 6, 2006, October 16, 2006, and November 7, 2006. During the RFP process, there was also significant stakeholder interaction. The Department established a Q&A page on the RFP website to ensure that all stakeholders had timely access to the same information and to provide a forum for quickly and effectively disseminating information.

After several months of extensive analysis by LEI and consultations with Department staff, LEI recommended to the Department that it select four projects as winning bidders through a report issued by LEI on May 3, 2007 entitled "Recommendations on Selection of Projects in the 2006 Connecticut RFP Report" (May Report). In its May Report, LEI concluded that the winning portfolio (Portfolio 89) met the requirements of the EIA and created net economic benefits totaling more than half a billion dollars on a weighted average basis over the life of the contracts. May Report, p. 42. On July 5, 2007 in this proceeding, LEI filed a slightly revised version of its report reflecting some minor revisions to the original document (LEI July 5, 2007 Report).

The Department carefully and extensively analyzed LEI's recommendations. The winning portfolio selected in the May 3, 2007 Decision in Docket No. 05-07-14PH02 constitutes a total maximum capacity of 787 MW and consists of one 620 MW new highly efficient combined cycle gas-fired plant in Middletown offered by Kleen Energy Systems LLC (Project 409) (Kleen), one small, 66 MW, peaking plant located in Stamford in the constrained Southwest Connecticut (SWCT) region offered by Waterside Power LLC (Project 851) (Waterside), one 96 MW new and highly efficient peaking unit also located in Southwest Connecticut (Waterbury) offered by Waterbury Generation LLC (Project 993) (Watermen), and one 5 MW energy efficiency program offered by Ameresco (Project 358). The Department has taken administrative notice of the entire record in 05-07-14PH02. Tr. 7/10/07, p. 859.

On May 18, 2007, The Connecticut Light and Power Company (CL&P) filed executed public and non-public versions of the Master Agreements with Kleen and Waterside for review in this proceeding. On May 24 and June 15, 2007, The United Illuminating Company (UI) filed executed public and non-public versions[3] of the Master Agreements with Watermen and Ameresco, respectively.

In this contested case proceeding held pursuant to Conn. Gen. Stat. § 16-243m(i), the Department reviewed evidence regarding the selected projects and Master Agreements, and decides, based on the preponderance of evidence, whether the proposed contracts meet the statutory criteria and whether to approve, reject, or modify proposed capacity contracts with the projects selected in Docket No. 05-07-14PH02. The Department may only approve contracts of fifteen years or less in duration that contain terms that mitigate the long-term risk assumed by ratepayers, and only if the contracts (1) result in the lowest reasonable cost of such products and services, (2) increase reliability, and (3) minimize federally mandated congestion charges (FMCCS) to the state over the life of the contract. Conn. Gen. Stat. § 16-243m(i).

## C. Conduct of The Proceeding

The Department designated the following as parties to this proceeding: The Connecticut Light and Power Company, P.O. Box 270, Hartford, Connecticut 06141-0270; The United Illuminating Company, 157 Church Street, P.O. Box 1564, New Haven, CT 06506-0901; and the Office of Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051. The Department recognized the following as

[3] The non-public versions contain protected confidential technical and financial bid information of the projects.

intervenors in this proceeding: Environment Northeast, 15 High Street, Chester, CT 06412; Waterside Power, LLC, 105 Chestnut Street, Suite 37, Needham, MA 02492; Department of Environmental Protection, 79 Elm Street, Hartford, CT 06106; Legislative Research, Legislative Research Office Building, Room 5300, Hartford, CT 06106-1591; Connecticut Clean Energy Fund, 200 Corporate Place, 3rd Floor, Rocky Hill, CT 06067; NRG Energy, Inc., 211 Carnegie Center, Princeton, NJ 08540; Ameresco CT, LLC, 111 Speen Street, Suite 410, Framingham, MA 01701; Kleen Energy Systems, LLC, c/o Frederic Lee Klein, Esquire, Pullman and Comley, LLC, 90 State House Square, Hartford, CT 06103; and Waterbury Generation, LLC, c/o David Bogan, Esquire, Robinson & Cole, LLP, Financial Centre, 695 East Main Street, P.O. Box 10305, Stamford, CT 06904-2305. The Department recognized the Office of Attorney General, 10 Franklin Square, New Britain, CT 06051 as an Interested Person.

Pursuant to a Nondisclosure Agreement approved in Docket No. 05-07-14PH02, the Office of Consumer Counsel (OCC) has access to all of the confidential bid information reviewed by the Department and its consultants. In that docket, the Department also approved the OCC's request to retain expert consultants to help it analyze the bid information and participate in that and this proceeding.

Pursuant to Notices of Technical Meetings dated May 17 and June 1, 2007, the Department held a technical meeting on May 30 and June 13, 2007 for the purpose of further explaining LEI's responses to OCC's interrogatories submitted in Docket No. 05-07-14PH02 and in the current docket in the offices of the Department, Ten Franklin Square, New Britain, CT 06051. LEI answered one hundred sixteen interrogatories.[4]

Pursuant to a Notice of Hearing dated June 1, 2007, a hearing was held on July 9 and 10, 2007 in the offices of the Department, Ten Franklin Square, New Britain, Connecticut 06051. A late-filed exhibit hearing was held on July 23, 2007 in the offices of the Department, Ten Franklin Square, New Britain, CT 06051. Thirty three late-filed exhibits were submitted: LEI provided twenty three, OCC five, Kleen three, and NRG Energy, Inc. (NRG) two.

Briefs were filed on July 31, 2007 by UI, CL&P, Waterside, Kleen, NRG, OCC, and The Attorney General's Office (AG). WaterGen filed a brief on August 1, 2007.

Written Exceptions were filed on August 15, 2007 by the OCC, CL&P, UI, Waterside Power, Waterbury Generation, Kleen Energy, the Attorney General, and NRG Energy. Oral Arguments were held in the offices of the Department, Ten Franklin Square, New Britain, CT 06051 on August 17, 2007. Oral arguments were offered by the OCC, the Attorney General, UI, CL&P, NRG, Waterside, and Kleen.

## II. DEPARTMENT FINDINGS AND ANALYSIS

The Department may only approve contracts of fifteen years or less in duration which will mitigate the long-term risk assumed by ratepayers only if the contracts (1) result in the lowest reasonable cost of such products and services, (2) increase

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[4] LEI adopted its responses to interrogatories as part of its testimony. Tr. 7/10/07, pp. 595-596.

reliability, and (3) minimize FMCCs to the state over the life of the contract. Conn. Gen. Stat. § 16-243m(i). The Department addresses each of these statutory elements below. The Department also addresses issues relating to the competitiveness of the procurement process, other benefits resulting from the selected projects, accounting and financial reporting treatment for these contracts by the electric distribution companies, and NRG Energy, Inc.'s (NRG) claim that LEI's analysis failed to comport with the evaluation rules set forth in the Department's RFP. NRG Brief, p. 1.

## A. RFP Process, Bid Evaluation Assumptions and Methodologies, and Project Selection

Before discussing whether the proposed Master Agreements with the four projects satisfy the criteria of Section 16-243m(i), the Department will address issues regarding the bid evaluation assumptions and methodologies raised by the OCC and NRG. While the scope of the instant docket was limited to addressing whether or not the criteria of Section 16-243m(i) were met and was not intended to cover the assumptions and methodologies underlying the bid evaluation process (established in Docket 05-07-14Ph02), the Department took OCC and NRG's critiques seriously and did analyze each of them, as we discuss below.

The bid evaluation process was designed to analyze all aspects of the bids, including the proposed project(s)' economic benefits, their technical characteristics and anticipated project execution risk, their interconnection risk, their risk of not qualifying for ISO-NE's new capacity market, how the proposed projects performed vis-à-vis other state policy priorities, and what the implications were for market power concerns in the wholesale energy market should one or more projects be selected as a winning bidder. LEI July 5, 2007 Report, p.5. The Financial Bids were assessed to ensure that they were conforming and each bidder's qualifications were carefully analyzed to ensure that bidders were capable of delivering the products and services promised in their bid in a timely fashion. Id. p. 5. The economic analysis had several steps. First, bids were compared against one another to determine which bids would make it to the short list; shortlisted bids were analyzed in more detail individually and then in combination. For purposes of the short-list analysis, the Financial Bids were classified by their technology category (baseload generation plants, peaking generation plants, demand response projects and energy efficiency projects) and evaluated in order to eliminate projects, whose bids were extremely uneconomic as compared to other similar projects. Id. p. 5. The short-listing considered both economic and technical traits of projects. Id. p. 16 LEI then analyzed each of the remaining individual projects, calculating each project's ability to decrease costs to Connecticut ratepayers in the energy, capacity, and reserves markets and the resulting net benefits for Connecticut ratepayers. Id. p. 5. This interim phase of the Bid Evaluation was not implying that peakers were competing against peakers only and not against other proposed projects. Rather, this stage of analysis allowed LEI to establish relative merits of projects and allowed for a tractable portfolio evaluation process. Top performing projects were then combined into more than 30 portfolios to assess if combinations of projects resulted in greater net benefits for Connecticut ratepayers, and, if so, which combination of projects resulted in the largest net benefits to Connecticut ratepayers. Id. p. 5. Other analyses, such as an assessment of each project's and portfolio's ability to improve reliability in the state and each project's and portfolio's performance on a set of state policy priorities, were also incorporated in the final bid evaluation results. Id. p. 5. More detailed explanations of the bid evaluation assumptions and methodology can be found in Section 4 of London Economics' July 5, 2007 Report, *Recommendations on the Selection of Projects in the 2006 Connecticut RFP Process,* which is available in this docket on the Department's website.[5]

Given the mandate in the EIA, it was important that the Bid Evaluation process be based on accurate representations of the ISO New England wholesale markets. This would ensure that the evaluation was reasonable and that the measured net benefits were genuine. The OCC's expert stated that based on their "review of LEI's work products and responses to OCC discovery, London Economics' market-price models appear to accurately and comprehensively simulate market rules and operating procedures in each product market, and to reasonably simulate pricing interactions among these product markets." Pre-filed Testimony dated June 29, 2007, p. 11 (OCC PT).[6]

The OCC had three major criticisms of LEI's modeling. OCC PT, p. 15. Specifically, the OCC claims that (1) LEI failed to address identified resource needs, (2) implausibly assumed that the addition of capacity from request-for-proposals (RFP) projects would not affect the quantity or timing of other supply additions and retirements, and (3) relied on unrealistic baseline scenarios and scenario weightings for modeling project impacts. OCC PT, pp. 10-15. Based on the Needs Assessment issued in September 2006, OCC believed that LEI should have focused the evaluation of the RFP bids on "determining whether the critical 650 MW of forward reserves could be developed economically, quantifying the effect of project proposals on energy prices in Connecticut, and determining whether various combinations of resources...would eliminate the need for the Connecticut RMR contracts that will be in effect until June 2010." OCC PT p.11. OCC's second concern was that LEI did not adjust its baseline assumptions to remove generic capacity when project capacity was added, which "grossly overstates the benefit of RFP projects in reducing market energy and capacity prices." OCC PT p. 14. This is an important argument for OCC as OCC's expert stated that if an RFP project displaced an equal amount of generic new capacity, or led to the retirement of an equal amount of existing capacity, the price reductions that LEI forecasts in the forward capacity market would essentially vanish. OCC PT p. 58. Finally, OCC stated that the results of LEI's analysis were driven by high weightings given to highly unlikely scenarios.

The OCC also states that LEI made several other errors in its modeling: LEI miscalculated net contract costs in certain years, by failing to subtract the market value of the contract capacity from the contract payments; LEI's adjustment for price forecast error understates the benefits of small and peaking projects and results in illusory differences between portfolios; the computation of existing generators' fixed costs—used to estimate generators' bids in the forward capacity market and for evaluating the economics of retirement decisions—appears flawed; LEI's modeling of LFRM prices appears arbitrary; LEI's approach to screening energy-efficiency projects does not comply with the requirements of the Act. OCC PT, pp. 16-17. However, OCC's expert

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[5] This report was adopted by LEI as part of its testimony in this proceeding. Tr. pp. 472-473 and 474-475.

[6] The Pre-filed Testimony was adopted as testimony by the OCC's consultants. Tr. 7/10/07, p. 925.

stated that he did not conduct any additional energy, capacity, or LFRM modeling of the Financial Bids beyond that which LEI provided. Tr. 7/10/07 pp. 936-941.

The OCC submitted Late Filed Exhibits (LFE) 27, 28, and 29 in response to the Department's request for information regarding their analysis. The Department finds that OCC's LFEs do not adequately explain their underlying assumptions or conclusions.

In the OCC's brief submitted on July 31, 2007 (OCC Brief), the OCC reiterated many of these points. In conclusion, OCC stated that there was insufficient evidence in the record to justify the award of contracts for three of the four projects in Portfolio 89, due mainly to the fact that LEI has not provided sufficient evidence to demonstrate that Portfolio can be procured at the least cost possible. OCC Brief, pp. 7-16. The OCC also stated that the RFP process was not truly competitive because of the small number of bids for baseload resources. OCC Brief, pp. 17-21. The OCC also points out several additional modeling errors by LEI in their analysis, including that LEI's analysis was skewed by low cost assumptions for combined cycle units (OCC Brief, pp. 26-28); LEI's FCM modeling contains the flaw of assuming that generic combined cycle units are added solely in Massachusetts (OCC Brief, p. 32); LEI's LFRM modeling contains serious errors (OCC Brief, pp. 32-34); LEI's retirement scenario wrongly concludes that the Newington unit will retire (OCC Brief, pp. 34-36); and LEI's effort to correct its errors was inadequate (OCC Brief, pp. 36-37). OCC submitted Written Exceptions on August 15, 2007 in which it took exception to the Draft Decision in its entirety, redirecting the Department's attention to the positions stated in its Brief. OCC Written Exceptions (OCC WE), p. 1). In OCC's Oral Arguments, they focused mainly on their concern about LEI's assumptions regarding generic new entry as well as the scenario weightings.

NRG also had several critiques of LEI's analysis. First, like the OCC, they stated that the LEI analysis relied on the unrealistic assumption that capacity additions resulting from the RFP would not change the development of new capacity, thereby "double-counting new capacity and its impact on market prices." Pre-filed Testimony Dated July 3, 2007[7], p 4 (NRG PT). Second, again like the OCC, they were critical that LEI counted benefits from scenarios that they believe are unlikely to occur. NRG PT, p. 5. Third, NRG claimed that LEI did not incorporate important environmental rules and regulations into its analysis. Id. Finally, NRG stated that LEI did not correctly account for benefits that would come from the repowering of existing facilities and instead penalized them in the bid evaluation process. Id. NRG listed additional critiques in its Brief, stating that LEI's generic capacity assumption for peakers is inconsistent with its own economic analysis (NRG Brief, p. 9); the additional analysis performed by LEI does not prove that Portfolio 89 should be selected (NRG Brief, pp. 10-12); LEI should have evaluated the NRG project and Kleen as a separate portfolio (NRG Brief, pp. 1718); LEI has not provided sufficient evidence to demonstrate that Portfolio 89 meets the statutory criteria (NRG Brief, pp. 18-19); and the NRG project is superior to the Kleen project (NRG Brief, pp. 24-28). NRG's expert analyzed LEI's results and assumptions but did not produce any new, independent analysis for the record to substantiate the last assertion. NRG submitted Written Exceptions on August 15, 2007, which continued to focus on the criticisms listed above. In its Oral Arguments on August 17, 2007, NRG

[7] The Pre-filed Testimony was adopted as testimony by NRG's consultant. Tr. 07/10/07, p. 968. NRG also submitted testimony on July 23, 2007 (LFE 23).

focused its comments mainly on LEI's analysis of the repowered capacity as well as its concerns regarding LEI's assumptions for generic new capacity.

Other stakeholders largely affirmed LEI's analysis, methodology, and results. WaterGen stated that: LEI fully demonstrated that its assumptions and methodology were reasonable and that Portfolio 89 provided the benefits to Connecticut ratepayers specified in the Act. LEI demonstrated, for example, that its results were robust in that Portfolio 89 still provides significant ratepayer benefits even substituting key OCC and NRG assumptions. WaterGen Brief, p. 10. Kleen Energy stated that: LEI has performed a detailed and comprehensive analysis of over twenty project proposals and has selected a portfolio of four projects that are reasonably projected to provide Connecticut's consumers with $522 million in net benefits. Kleen Brief, p. 15.

Although the previous Decision limited the scope of this instant docket,[8] the Department listened to and considered the arguments made by all parties. Although many of the criticisms by OCC and NRG described above could be classified as 'different methods', the Department nevertheless carefully and thoroughly considered the analysis and critiques of OCC and NRG. The Department finds for the reasons set forth in other sections of this decision that the bid evaluation assumptions and methods, the bids selected and the proposed Master Agreements satisfy the criteria of Conn. Gen. Stat. § 16-243m(i). Additionally, as discussed more fully below, the Department finds that 1) the OCC's and NRG's claims that LEI should have used different assumptions and methods to reach different conclusions are outside the scope of this proceeding, and 2) after consideration of all of the evidence in the record, including evidence presented by the OCC and NRG concerning what assumptions and methods they believe that LEI should have used, the Department find that the bid evaluation assumptions and methods, the bids selected, and the proposed Master Agreements satisfy the criteria of Conn. Gen. Stat. § 16-243m(i).

In Docket No. 05-07-14PH02, the docket in which the RFP was conducted and the projects were selected, the OCC and NRG were heavily engaged in a lengthy and extensive stakeholder process and had every opportunity to influence the assumptions and methodologies ultimately employed by LEI in evaluating and selecting bids. All stakeholders including OCC and NRG had the time, place, and opportunity in Docket No. 05-07-14PH02 to engage on these issues and to provide constructive input to the Department. In order to finalize and conduct the evaluation and selection criteria for the RFP process required by Sections 16-243m(c) and (g), the issues of what assumptions and methods were to be used by LEI to select projects in Docket No. 05-07-14PH02

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[8] In the Final Decision issued on May 3, 2007 in Docket 05-07-14 PH02, the Department stated that the assessment of the Department's decision regarding the RFP bids would focus only on whether the selection process met the 12 (i) criteria: "The scope of review in the contested case proceeding will be limited to assessing whether there is . . . evidence to support the Department's preliminary finding in this proceeding that the projects selected meet the three criteria listed in Section 16-243m(i) of the EIA, notably whether the project(s): (1) result in the lowest reasonable cost of such products and services; (2) increase reliability; and (3) minimize FMCCs to the state over the life of the contract. The scope of the proceeding will not include presentation of evidence about whether the Department or its consultants could have reached different conclusions using different methods for evaluating bids." Department Decision May 3, 2007, p. 13.

necessarily had to be resolved in that proceeding in order to finalize the development and implementation of the RFP.

The Department limited the scope in this proceeding in an attempt to prevent revisiting issues about assumptions and evaluation methodologies that were previously discussed, decided, and then relied on in Docket No. 05-07-14PH02. WaterGen correctly states in it brief, the Department did not want to have a "battle of experts" in this contested case proceeding regarding issues that had long ago been decided on in the past uncontested case proceeding which required the Department to select projects which would ultimately be considered for capacity contracts in this proceeding. WaterGen Brief pp. 9-10. Even though the Department indicated that it was going to limit the scope of this contested case proceeding, the record in this proceeding clearly shows that the Department allowed both the OCC and NRG broad latitude to present extensive evidence regarding what different assumptions and evaluation methods they believe should have been used by LEI and how, in their opinion, LEI should have reached different conclusions. If the Department believed that either the OCC or NRG presented sufficient evidence that the assumptions and methods LEI used to evaluate and select projects were flawed and resulted in the selection of projects not meeting the criteria of Section 16-243m(i), the Department would rely on that evidence and take appropriate action, including but not limited to rejecting or modifying some or all of the proposed Master Agreements, reevaluating projects to determine if different ones should be chosen, etc. The Department's only objective is to implement Section 16-243m(i) in a manner consistent with achieving the benefits that the legislature intended to achieve when it enacted it. Upon a review of all of the record evidence, the Department finds that the assumptions and methods LEI used are reasonable and designed to achieve the objectives of Section 16-243m(i) and that OCC and NRG have not presented evidence that leads the Department to find that LEI did anything in its analysis was unreasonable or contrary to the purposes of Section 16-243m(i).

Moreover, as described below, after further analysis incorporating the OCC's major criticisms[9] (reduction of generic entry and employment of OCC's preferred weightings) (Tr. 07/09/07 p. 528, 550-554). and testing NRG's portfolio addition,[10] none of these criticisms affect the final results of LEI's analysis or their recommendations as the Department lays out in the subsections below. As described more fully in Section II.B. of this decision, the Department finds that the projects selected by LEI meet the selection criteria of Section 16-243m(i) and the Department approves the Master Agreements for all four projects.

### 1. Assumptions regarding proxy capacity

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9 Tr. 8/15/07, pp. 1198 and 1204.

10 While LEI misunderstood exactly what NRG had wanted in its Late Filed Exhibit requests on July 9-10, 2007, the tests run by LEI did have value as it showed that adding NRG to Portfolio 89 no longer minimized FMCCs. It was not possible given the Docket schedule to have LEI rerun all the projects and portfolios with the changes suggested by OCC and NRG given the huge amount of compueter time that the bid evaluation modeling requires. It was also not necessary to re-run all the analysis as LEI demonstrated through its LFEs that OCC's suggested changes would not completely eliminate capacity benefits, as their expert asserts. It was not necessary to re-reun all of the analysis against a revised baseline without Montville 6, as requested by NRG, given that the Department does not believe that Montville 6 would be retired.

The OCC's and NRG's concerns about LEI's proxy capacity assumptions ignore two essential facts. First, LEI's assumptions about proxy capacity were used in order to compare the projects against one another on an "apples-to-apples" basis. Changing the baseline assumptions to reduce the amount of capacity in line with the RFP project or portfolio that was being analyzed would make it impossible to compare the projects' or portfolios' bid evaluation results against one another. Tr. 07/09/07 pp. 524-525. Second, the proxy capacity assumptions varied in each of the nine scenarios analyzed in the baseline, thereby allowing LEI to consider how the project or portfolio performed under a range of different supply conditions. In effect, some of the scenarios did not contain any proxy capacity until 2014. LEI explained during the hearings why its approach of using a fixed baseline assumption was the most appropriate methodology. Tr. 07/09/07 p 525. The OCC, in its Pre-Filed Testimony, asserts that removal of the proxy capacity in response to the projects would result in zero capacity benefits from the selected projects. OCC PT, p. 58. Conceptually, NRG makes a similar argument. In order to complement the record, LEI ran numerical tests that evaluated the hypothesis asserted by OCC and NRG regarding the selected portfolio's benefits. Tr. 07/09/07 p. 549.

Although LEI does not view this as the optimal approach, LEI tested the impact of reducing proxy capacity by the amount of RFP capacity. Tr. 07/09/07 p. 549. Portfolio 89 still results in substantial positive net benefits - $268 million on a weighted average basis - and is the best portfolio among all the top portfolios analyzed using the revised approach. Tr. 07/09/07 pp. 559 In other words, the selected projects continue to achieve the FMCC minimization and least cost criteria required by the EIA. This numerical test demonstrated that LEI's use of fixed proxy capacity in the baseline did not negate the conclusions reached by LEI regarding (a) substantial capacity benefits, and (2) positive net benefits and finally, (c) the optimal nature of the selected four projects to minimize FMCCs. Tr. 07/09/07 pp. 549-559.

OCC asserts that LEI's inclusion of 700 MW of proxy peaking capacity was unreasonable and biased the analysis against peakers. (OCC Brief, p. 19) In contrast to OCC's position with respect to the proxy combined cycle capacity assumption (discussed above), OCC suggests that such proxy peaking capacity should not have been included in either the baseline or the case with projects.

OCC's criticism ignores the fact that LEI received only 628 MW of conforming peaking capacity in this RFP. Connecticut's shortfall is projected to exceed that amount, as discussed in the RFP and Needs Assessment. (RFP, p. 14; Needs Assessment, p. 12) Therefore, the LFRM price would remain at the $14/ kW-month cap in every year under the baseline (as OCC admits in its Brief). (OCC Brief, p. 28). Moreover, because the conforming peaking projects in this RFP would not be sufficient to overcome the supply shortfall, LFRM prices will stay at the $14/kW-month cap after the RFP projects come online (even under the best situation where all the conforming peaking projects are included). This would only reduce the economic benefits that would be projected for peaking projects, because the price would not change, while the total procurement amount would rise, and therefore total costs to load would increase. This dynamic is not a function of any modeling assumptions, but rather a direct outcome of the market rules.

Leaving aside the projected economics, the Department notes that there is a reasonable likelihood that some peaking capacity – outside this RFP – will materialize in Connecticut. For example, as evidenced in LFE 14, there are over 1,600 MW of gas turbines and combustion turbine projects in Connecticut awaiting interconnection in ISO-NE's interconnection queue as of June 8, 2007, with start dates ahead of the first Capability Period in 2010 in the Forward Capacity Market.[11] Although the interconnection queue is not a definitive measure of new capacity, as project sponsors may still decide to not go forward with their development projects, it is a useful yardstick – and one that requires commitment in excess of that required for the Show of Interest/Qualification process for the FCM. Further, other Department programs, such as the grant program for distributed generation and emergency generation, are bringing online capacity which approximates in many ways conventional peaking generation. Both peaking generation and demand-side resources can qualify to participate in the FCM. In addition, some demand-side resources also have the capability of participating in LFRM.

Nevertheless, as part of its analysis, LEI analyzed an all-peaking portfolio, consisting of the 628 MW of conforming peaker bids. However that portfolio performed poorly, with projected weighted average net benefits of negative $20 million (LEI July 5, 2007 Report, p. 57). A detailed review of the Economic Analysis shows concretely the negative benefits created due to insufficient supply in the LFRM. Across the nine scenarios modeled by LEI, there were some scenarios where proxy peaking capacity was added only in 2014 (scenario 5, 8, 9), rather than in 2010 (scenario 2). Therefore, once the RFP projects were included, the measured benefits for the initial years are based on a situation without any proxy peaking capacity. In Scenarios 5, 8, and 9, the portfolio of all conforming peakers created between $20 million and $27 million in negative benefits from the LFRM in each year until generic peakers were introduced, because their total capacity was not great enough to reduce the LFRM price from the $14/ kW-month cap. (LFE 1 – OCC Omnibus Request – Bid Evaluation Models)

In response to concerns raised by OCC in its Pre-filed Testimony, LEI presented in the hearings, the results of another modeling test. The test considered whether a reduction of generic peaking capacity would change the expected economic benefits of peaking projects bid in this RFP under Scenario 2. In this test, LEI reduced the amount of generic peaking capacity that entered the market after the introduction of an all peaker portfolio (LEI left the generic peakers in the baseline according to the original schedule). The result of this test was that the net benefits (under Scenario 2) increased by $7 million, but were still substantially negative at negative $275 million (Tr. 07/09/07, p. 591). Given the modeling dynamics observed in the year-by-year results in certain scenarios, it is logical to conclude that if LEI had removed the 700 MW of proxy peaking capacity from the baseline as well, as suggested by OCC, the results would have only worsened for peaking projects because of the supply shortfalls in the LFRM and the

[11] Note that this figure is inclusive of the projects in the RFP.

incremental negative benefits (e.g., increased costs to ratepayers) that it would have created, further discounting the value of the all-peaking portfolio.[12]

Based on the foregoing evidence, the Department concludes that LEI's assumptions regarding the generic 700 MW peakers were reasonable and did not artificially bias against peaking projects.

### 2. Scenario assumptions used in bid evaluation

As summarized above, both NRG and OCC state that certain scenarios relied upon in the bid evaluation analysis, notably Scenarios 5, 6, 8 and 9, were unrealistic. They cite to the relatively higher level of system interruptions and low reserve margins in making this conclusion. OCC PT p. 22; NRG PT pp. 18-19. The objective of using nine different scenarios was to reflect the various different outcomes that could occur depending on supply-demand conditions, environmental regulations, and fuel prices. Tr. 07/09/07 pp. 525-526. The scenarios were designed to create a wide range of possible outcomes, given the 15 year modeling horizon, including adverse conditions where supply interruptions occur and more moderate system conditions, with relatively lower market prices. The Department would not meet its fiduciary duties to protect ratepayers if it did not consider the spectrum of possible future market outcomes, including both attractive and unattractive market outcomes. Therefore, the weighting of the scenarios was done with two objectives in mind: 1) the relative likelihood of the scenarios, and 2) the policy priorities of the Department, notably insuring against high and volatile prices for end consumers. LEI July 5, 2007 Report, p. 26. The critiques of the OCC and NRG focus on the first objective, stating that the weighting assumptions were unrealistic and ignore the second. The Department's second objective was very important as its overarching priority is to avoid the worst case scenarios that would have the most detrimental impact on Connecticut ratepayers. Such worst case scenarios are often difficult to anticipate and are not expected to happen, as seen, for example, with real world events, like the tripling of gas prices and the overnight bankruptcy of Enron. In its Oral Arguments, OCC stated that they did not ignore the second element, but found that there are sufficient safeguards – like ISO-NE's stop gap measures - to stop such situations from happening. Tr. 8/17/07, pp. 1201-1202. Yet, OCC also implies that market dynamics are often dysfunctional. (Tr. 07/10/07, pp. 797-798). Sometimes, market situations arise that cannot be planned for; in that case, prudent planning by the utilities, or the ISO-NE or the Legislature, can not avert an unwanted outcome. It is precisely such situations that the Department wants to insure against. And the insurance cannot be too expensive, as OCC claims,, if the Economic Analysis shows that it will more than 'pay for itself' in terms of benefits to ratepayers.

While the Department continues to support the concept of using nine highly differentiated scenarios, LEI once again tested the implications of revising the weightings of the scenarios as suggested by the OCC. Based on the OCC's recommended revised weightings (ignoring Scenarios 5, 6, 7, and 8 and allocating

[12] While criticizing the assumptions made by LEI, OCC acknowledges this market paradigm in its Brief, noting that "new peakers would need to be at least the 650 MW or so needed to meet the LFRM requirements, and perhaps hundreds of megawatts greater to overcome the potential for abuse of market power as to LFRM" (OCC Brief, p., 29).

16.7% to Scenario 1, 66.7% to Scenario 2, 5.6% to Scenario 3, and 11.1% to Scenario 4), Portfolio 89 is still expected to produce significant net benefits for ratepayers, approximately $304 million on a weighted basis before accounting for Other Factors (note that in the interest of fully testing the OCC's primary criticisms, LEI also layered the alternate weighting on top of the revised assumptions regarding proxy capacity). Tr. 07/09/07, pp.527-528.

### 3. Procuring needed supply

OCC states that LEI should have focused on identifying how to procure 650 MW of forward reserves, and assessing how that procurement would affect energy prices in Connecticut and the existence of Reliability Must Run (RMR) contracts. OCC PT, p.12. The Department believes that these statements are based on a mis-interpretation of the Needs Assessment, the RFP, and the purpose of the statute. First the EIA does not state anywhere that this is the methodology that the Department should have followed. Conn. Gen. Stat. §243m. The structure of the RFP was designed to explicitly meet the requirements of the EIA, which stated that the RFP aim to reduce all FMCCs[13], which by definition includes energy, capacity, and locational forward reserves. LEI July 5, 2007 Report, p. 12. Second, the Needs Assessment cautions that the economic results may diverge from the identified MW requirements in the Needs Assessment given the ratepayers' obligations from various ISO-NE product markets and the actual bids received in response to the RFP. Both the Needs Assessment and the RFP indicated that identified resource needs were never intended to be a strict procurement target for this RFP. RFP, p. 15; Investment Needs Assessment, p. 88. The Department re-stated these important considerations in its September 13, 2006 Interim Decision in Docket 05-07-14Ph02. Third, in contrast to the opinions put forth by the OCC and NRG, the selected projects are correlated with the resource needs identified in the Needs Assessment and reduce overall costs to ratepayers, consistent with the ultimate policy objectives of the state law. Tr. 07/09/07 pp. 522-524; NRG Brief p. 9. Fourth, assessing how the projects procured in this RFP process could reduce Reliability Must Run (RMR) agreements does not appear logical. RMRs are set expire with the start of the first FCM Commitment Period and, prior to that date (2010), various stakeholders in Docket 05-07-14PH02 stated that it would be unlikely that any RMRs would be removed. Tr. 07/09/07 p. 540. Thus, unless explicitly qualified in a bidder's proposal, the projects offered in this RFP would not be able to eliminate RMRs in the short term. Tr. 07/09/07 p. 540.

### 4. Assumptions about repowerings

The benefits of the NRG project were analyzed based on the incremental capacity increase that would result from its proposed repowering. The Department recognizes that NRG feels that its project has not been treated fairly. At the same time, the

[13] Conn. Gen. Stat. § 16-1(41) "Federally mandated congestion charges" means any cost approved by the Federal Energy Regulatory Commission as part of New England Standard Market Design including, but not limited to, locational marginal pricing, locational installed capacity payments, any cost approved by the Department of Public Utility Control to reduce federally mandated congestion charges in accordance with section 7-233y, this section, sections 16-19ss, 16-32f, 16-50i, 16-50k, 16-50x, 16-243i to 16-243q, inclusive, 16-244c, 16-244e, 16-245m, 16-245n, and 16-245z, and section 21 of public act 05-1 of the June special session** and reliability must run contracts.

Department, and many stakeholders, including NRG, acknowledges that there was an overwhelming amount of information provided over the course of the public record in Docket 05-07-14Ph02, and that the issues of benefit analysis, new entry, repowerings and retirements are complex and highly interrelated.

In interpreting the rules of RFP, the Department noted on several occasions that potential bidders must offer incremental capacity to the Department, because it was important that the Department add to, rather than simply replace, existing capacity. Department Interim Decision September 13, 2006, p. 11. The modeling approach taken by LEI in the Bid Evaluation reflects this fundamental objective of the RFP, given the known facts about retirements and modeled economics of all existing supply. Given a thorough review of the record, the Department finds that the NRG project[14] was evaluated fairly and consistent with the rules of the RFP for proposed repowering projects.

First, other repowering bids faced similar treatment if bidders had not passed one of two tests for retirement, i.e. formal declaration that the unit is retiring or economic evaluation of the unit demonstrated that it would face losses for three consecutive years. No other bidders complained about LEI's analysis or methodology on this topic.

Second, LEI had explicitly stated in the RFP (as well as on numerous occasions in different Technical Meetings) how it would be incorporating its retirement assumptions into the modeling (RFP, p. 49; Pre-Bid Conference Tr. Pp. 2616-2618; July 13, 2006 Technical Meeting Tr. p. 1962). Indeed, during the design stage of the RFP and Needs Assessment, NRG provided recommendations in its written comments to LEI on the Needs Assessment that using a fixed retirement age of 55 years was not advisable (NRG Written Exceptions, June 12, 2006, p. 5). Once LEI integrated its economic retirement rule into the next iteration of the Needs Assessment, NRG did not offer further critique on this point, implying its tacit approval of the economic retirement approach. Based on information that NRG submitted in this RFP process, the details of the proposed project, and the fact the NRG had not otherwise made any official announcement to the Department or to ISO-NE that the facility was going to be retired, LEI's treatment of the existing Montville unit is reasonable and justified. Tr. 07/10/07 pp. 906-907; 922-923; Kleen July 31, 2007 Brief, pp. 5-6.

Third, NRG had ample opportunity to clarify the issue of how such a facility would be evaluated in confidential Q&A to the RFP coordinator (hundreds of such clarifying questions were submitted between September 15, 2006 and December 13, 2006) and at the pre-bid conference on October 10, 2006. RFP website, RFP Documents page and Q&A page. NRG did not submit any questions to clarify their understanding of how such a project would be evaluated.

The requirements of the RFP process required that LEI treat all bidders on an equal footing. Incorporating a retirement of the existing Montville unit in the baselines, despite the fact that there was no rational economic basis to do so – would be tantamount to biasing the results.

[14] The NRG project referred to throughout this decision is Project 146 also known as the Montville 6 repowering.

The Department recognizes that NRG did not obtain all the information it was seeking in the Late Filed Exhibits due to a misunderstanding by LEI. However, during the Late-Filed Exhibit hearing, NRG did not request that the Department direct LEI to redo these analyses. Tr. 7/23/07 pp. 1125-28; 1137-38; 1146-1147. In its brief, NRG now makes such a request. Given the timing in this docket and that the Department does not believe that the assumptions which NRG asks LEI to build into the modeling needed to produce these LFEs are valid, the Department finds that requiring LEI to run additional analyses at this point in time is not feasible and will not produce relevant evidence. (See Section 8 for more discussion about this.)

### 5. Competitiveness of the RFP process

OCC stated in its July 31, 2007 Brief that "the RFP process was not truly competitive because of the small number of bids for baseload resources...Given that there were only two conforming baseload bids, there is no basis for believing that the lowest reasonable cost means for achieving this resource would be achieved through the approval of either bid." OCC Brief, p. 17.

The Department finds that the objective of the RFP design and the bid evaluation design was to compare generation and demand side assets as well as peaking and baseload units against one another. LEI July 5, 2007 Report, p. 5. Thus, the number of bids for any given technology is irrelevant as all the bids will be analyzed against one another. Moreover, the Needs Assessment identified a need for both peaking and baseload resources. Needs Assessment, pp. 10-12. The Department received more than twenty Financial Bids on December 13, 2006, upon which date bidders needed to submit significant financial deposits to demonstrate their commitment to the project and the RFP process. Based on this, the Department finds the RFP was competitive. The Department finds that the OCC has not provided any evidence that the RFP process was not competitive. Analysis of bid prices against projected market prices for purposes of establishing competitiveness, as suggested by OCC and AG (OCC Brief, p. 8; AG Brief, p. 6), is not relevant for a number of reasons. First, it is important to understand that the RFP was specifically designed to create a market-wide impact rather than to simply hedge the costs of contracted capacity. Therefore, there was no a priori expectation or RFP constraint that bid prices would need to be at or below projected market prices. Furthermore, because the Master Agreements require obligations of suppliers in excess of those in the wholesale market, it is reasonable to expect that these performance requirements increased project costs for suppliers, which were logically reflected in their bids. The Department carefully considered these performance requirements and approved them in its Interim Decision dated November 16, 2006. The Economic Analysis suggests that the costs of such performance requirements, which are embedded in the bid prices and therefore the costs of the contracts, are substantially outweighed by the expected benefits to ratepayers. Finally, the Department finds that the number of conforming baseload combined cycle Financial Bids received and analyzed is not relevant to the issue of whether or not the RFP process was competitive, because the RFP was constructed to be an all-source RFP, where bids from different technologies compete side-by-side. The OCC asserts that this is not possible in its Brief. OCC Brief, p. 17-21. However, direct competition between different resources occurs everyday in the ISO-NE product marketsfor energy, capacity, and ancillary services. Some resources may hold a comparative advantage over others in one product market, and this leads to the selection of that resource over others, and therefore lowers market prices. Such economic activity is precisely the type of activity that this RFP emulates.

### 6. Evaluation and selection of Ameresco project

OCC stated that the Department should reject the Ameresco project because LEI did not evaluate whether it would: "undermine the existing utility-administered energy efficiency projects; overcharge customers for participation in the program, increasing total costs to Connecticut energy customers; skim off the fast, cheap and easily measured energy efficiency opportunities rather than comprehensively capturing savings from treated systems; or leave the treated buildings with new mid-efficiency equipment that must be replaced to reach the efficiency levels of the utility-administered programs." OCC PT, p. 17.

The Department finds that the OCC did not support these assertions with any concrete evidence on the record and that the Ameresco project will, in fact, have any of the ill-effects the OCC is concerned with. The Department was directed to procure supply and demand side resources such that FMCCs for Connecticut ratepayers would be reduced at the lowest cost possible. The RFP process and bid evaluation methodology was structured to identify such projects.

In addition, LEI did compare the energy efficiency project bids to the average costs that Connecticut ratepayers pay for Conservation and Load Management programs run by the electric distribution companies during the short-listing process. This comparison was used to eliminate two energy efficiency projects from the short list. LEI July 5, 2007 Report, pp. 17-21. The Ameresco project remained on the short list for further evaluation in the Economic Analysis. It is also important to recognize that the costs of any project in the RFP are not directly comparable to the electric distribution company run Conservation and Load Management programs. The Department would not expect them to be comparable on a cost basis given that the Department is requiring RFP projects to participate in ISO-NE markets and to sign contracts with rigorous performance requirements, in excess of those standards required in the electric distribution company-run Conservation and Load Management programs. Conservation and Load Management programs are not required to participate in the FCM or meet the types of stringent performance requirements of the Master Agreements.

While OCC implies that the utility programs are much cheaper than Ameresco, the Connecticut electric distribution companies were allowed to participate in the RFP process. Both submitted qualification submissions for demand-side projects. Docket 05-07-14PH02. While any details about Financial Bids is confidential, the fact that neither electric distribution company was selected as a winning bidder would indicate that they either chose not to submit a Financial Bid, that their bid was not economic, or that they were not able to submit prices that were lower than Ameresco's Financial Bid. The Department finds that there is no evidence to support OCC's argument that utility programs would necessarily be cheaper than Ameresco's project.

### 7. Comparison of portfolio with NRG and Kleen projects

As the record shows, LEI misunderstood NRG's request during the July 9-10, 2007 hearings. Instead of running a portfolio that included only projects 146 and 409, LEI ran model simulations composed of a revised Portfolio 89 which included the NRG project, submitted as LFE 25. Although this turned out to not be precisely what NRG was intending, the results are nevertheless telling. The Economic Analysis suggests that after adding the NRG project to Portfolio 89 in a manner consistent with our modeling of all other projects and portfolios, Net Benefits decline by $5 million after taking Other Factors (OF) and Option Value (OV) into account. Portfolio 89, without the NRG project, is still the preferred option.

### 8. Comparison of NRG and Kleen projects

NRG's expert states that if the NRG project had been analyzed using its full capacity, it would have had net benefits that were at least $64 million higher than the Kleen project. NRG Brief, p. 26. LEI has not conducted this analysis given that there was no rational to analyze the NRG project using its full capacity, as discussed earlier in this Decision.

Based on the data and analysis that currently exists, the Department confirms NRG's expert's statement that the NRG project would have had higher net economic benefits than Kleen project if the NRG project's full capacity had been analyzed, due largely to the value of the NRG project's call option. However, the Department does not concur with NRG's expert's estimated dollar difference between the two projects or the assertion that both projects' economic benefits would be identical. Assuming that there were no impediments to the NRG project being analyzed on its full capacity, the NRG project still would not have exactly the same economic benefits as the Kleen project. Given the NRG project's technical characteristics and its economic ability to offer capacity into the LFRM given LEI's analysis, its anticipated FCM benefits would probably be lower than the estimated benefit for the Kleen project's because impacts on LFRM would flow through to the FCM and negate some of the effect related to increasing supply. Likewise, the NRG project's energy benefits would also likely be lower than the Kleen project's due to differences in heat rates and warranted availability, as described in LEI's July 5, 2007 report. LEI July 5, 2007 Report, p. 39. Even if the benefits for project 146 were greater, there are numerous additional risks that project 146 had as compared to project 409, which are of concern to the Department. LEI July 5, 2007 Report, p. 39. These additional factors could cause delays in project operations, as well possibly produce a reduced capacity benefit due to lower qualification level in the FCM per ISO New England standards and would effectively detract from the Net Benefits and therefore produce a sub par outcome given the goals of the Act for least cost solutions, improved reliability, and FMCC minimization.

In its Oral Arguments, NRG continued to focus on this point, claiming that Project 146 was obviously the superior project given that its bid costs were slightly less than Project 409. However, given that NRG's project was a repowering and re-used an existing site, an existing steam turbine, and existing transmission and fuel supply infrastructure, one would actually have expected it to be much much cheaper than Project 409, which was building an entirely new project on a site though brownfield that needed additional electricity-related infrastructure using all new electric generation equipment. The fact that the bid costs for the two projects were so similar was due mainly to the fact that Project 146 appeared to be pricing itself like a new project despite the fact that it was a repowering.

As such, any reasonable comparison of the NRG project with the Kleen project would show that the Kleen project is superior. First and foremost, the NRG project is a repowering that provides much less incremental capacity (approximately 200 MW vs. 600 MW) than the Kleen project. Second, even assuming that the NRG project provided, in incremental capacity, the full amount of its repowered capacity (approximately 600 MW), the Kleen project has heat rate, availability, and project risk advantages that largely offset the nominal net benefits, if any, that such an analysis might show for the NRG project and its related call option.

It is worth emphasizing that a strict economic analysis does not account for the technical concerns the Department had with the NRG project, such as the potential project execution risk given the presence of the RMR contract (as discussed in the July 5, 2007 report and also considered during the hearings and also the transmission interconnection and FCM qualification concerns documented by Mr. Bruce Budris of Siemens PTI. Tr. 7/10/07 pp. 905-913; Tr. 7/09/07 pp. 500-502; Siemens Power Transmission & Distribution, Inc., Power Transmission International's (PTI Siemens) report entitled "Summary of the Transmission Assessment for the Winning Connecticut FCM Portfolio" dated May 2, 2007 p 1-2 (p. 89 of LEI July 5, 2007 Report PDF).

### 9. Other OCC criticisms

The OCC and their experts discussed numerous other issues they had with the way LEI analyzed the bids and the assumptions used in the bid evaluation. However, as LEI testified on July 9 and 10, 2007, many of these assumptions or methodologies were incorporated purposefully, sometimes to reflect needed simplifications in what was already an incredibly complex set of interconnected models, sometimes to reflect the need to compare all projects on an equal footing. LEI responses to these criticisms can be found in the July 9, 2007 transcript as well as in Late Filed Exhibits submitted to the Department as noted by the parenthetical reference behind each of the items below: LEI miscalculated net contract costs (Tr. 07/09/07 pp. 596-597); LEI's price forecast error adjustments incorrect (Tr. 07/09/07 pp. 584-588); the computation of existing generators' fixed costs are skewed because costs for combined cycle units too low (Tr. 07/09/07 pp. 571-573); LEI's FCM modeling contains the flaw of assuming that generic combined cycle units are added solely in Massachusetts (OCC Brief, p. 32); LEI's LFRM modeling is wrong (Tr. 07/09/07 pp. 594); LEI's retirement scenario wrongly concludes that the Newington unit will retire (LFE 13); LEI did not incorporate the value of Auction Revenue Rights in its analysis (Tr. 07/09/07 pp. 581-583); LEI's accurate modeling of the ISO-NE's LFRM market rules "limited the value of peakers when compared to baseload" (OCC Brief, pp. 18-19); LEI ignored market power in the LFRM (Tr. 07/10/07 pp. 779-780; LEI did not take into consideration the impact of congestion (Tr. 07/23/07 pp. 1030-1039. In raising these issues, OCC does not propose concrete resolution to these issues, nor quantify the impact of many of these concerns. Although OCC states that it considered the net contract costs and price forecast error adjustment in its final conclusions, the final numbers that OCC presents appear to be driven primarily by the assumption of zero capacity benefits. OCC PT, p. 67. LEI testified on all these issues directly or indirectly at the hearings, describing their relevance, if any, to the ultimate conclusions. On this basis, and given the Department's findings above regarding bid evaluation assumptions and methodologies, the Department finds these criticisms are immaterial.

## B. Selection Criteria of Conn. Gen. Stat. § 16-243m(i)

### 1. Findings and Analysis on Whether the Contracts Will Increase Reliability

The selected projects will improve reliability. No parties or intervenors presented evidence that the selected projects will not provide reliability benefits. The OCC's expert affirmed that the selected projects would provide reliability benefits. OCC PT, p. 7. LEI submitted reports and testimony on this issue indicating that the projects will increase electric system reliability in the state by adding significant capacity and deliverable energy, relieving congestion. Tr. 7/9/07, pp. 497- 499.

The location of the Kleen baseload project has the potential to reduce transmission congestion across nearby transmission interfaces. The Kleen project also introduces a large incremental capacity to the system which may be important for relieving import overloads under certain contingency conditions. Tr. 7/09/07, pp. 497-498.

The two selected peaking units will also increase reliability. The Waterside peaking project, located directly within the Norwalk sub-zone, is the most capable of delivering energy and voltage support to this critical peak load area of the system. Tr. 7/09/07, pp. 498-499. Although the SWCT Phase I and Phase II projects will greatly enhance deliverability to this subsystem, the project may still provide critical backup support under contingency conditions. Tr. 7/09/07, p. 499. The WaterGen peaking project is capable of providing capacity and voltage support to the critical SWCT sub-zone. This project is proposed for a relatively generation deficient area along the 115 kV corridor between Frostbridge and Devon. As such, it may help off-load this corridor by supplying local load as well as provide reactive (voltage) support to transfers along this corridor. Tr. 7/09/07, p. 499.

The Ameresco energy efficiency project will increase reliability by reducing electricity demand statewide.

Based on the foregoing evidence, the Department finds that all four projects will increase reliability as required by the Energy Independence Act.

### 2. Findings and Analysis on Whether the Contracts Result in the Lowest Reasonable Cost of Such Products and Services

In its brief, the OCC claims that the Master Agreements with the three of the four projects are not at the lowest reasonable cost because: 1) the RFP was not competitive, 2) the contracts would cost $2 billion dollars, 3) the prices of the three projects are too expensive when compared to forecasted market prices and 4) there are potential lower cost electric distribution company owned generation projects and Conservation and Load Management projects that could be cheaper.

LEI's analysis stated that these contracts would result in the lowest reasonable cost for such products and services for two main reasons: (1) the portfolio of contracts was procured through a fully competitive RFP process (Tr. 07/09/07 pp. 480-481) and (2) LEI's economic analysis analyzed bids in terms of their net benefits (Tr. 07/09/07 p. 511), which is a measure of costs to ratepayers and therefore represents the lowest reasonable cost given the products and services procured. First, LEI concludes that the portfolio of contracts was procured through an open bidding process that was fully competitive. LEI and the Department put in place the necessary procedures and provisions to ensure that the process was competitive and that all bidders were treated fairly. Tr. 07/09/07 p. 478-479. LEI also stated that the characteristics of the RFP process and its results indicated the process had been a successfully competitive one. Tr. 07/09/07 pp. 480-481. This was an all source RFP where different types of technologies were competing side-by-side (LEI July 5, 2007 Report, p. 5). The RFP bids were not segmented into baseload and peakers and demand response, as OCC and AG claim in their briefs. OCC Brief, pp. 17-21; AG Brief, pp. 7-8. Neither the Department nor LEI had any preconceived notion about selecting a specific quantity of baseload and a specific quantity of peaking capacity, which would have resulted in a segmented auction. This is evidenced by LEI's portfolio analysis, which covered a variety of combinations of projects. LEI July 5, 2007 Report, p. 35.

LEI stated during the hearings that it is a basic tenet of economic and financial theory that competitive processes will result in the lowest and most reasonable cost possible at that time. Tr. 07/09/07 pp. 477-478. LEI represents that in the electricity sector alone, most utilities that solicit the development of new generation capacity in their service territory use a competitive RFP process to determine the least expensive option (even if the utility's generation affiliate is allowed to bid in the process) and, that competitive procurement procedures are used across almost all industries and all companies and organizations (including this Department) to ensure that companies can buy goods and services at the lowest cost possible. Tr. 07/10/07 pp. 802-803. Indeed it is Connecticut state law that any state agency that procures a good or service with a value above $25,000 must do so through an open bidding process.[15] The underlying premise is that a competitive process will result in the lowest reasonable cost for the product or service being procured. The Department upholds this philosophy and concludes that the RFP process delivered the lowest reasonable cost products and services possible given market conditions, because it was competitive.

Second, OCC claimed in its Pre-Filed Testimony and during the Hearings that these contracts would cost $2 billion dollars. Tr. 7/10/07 pp. 793-795; OCC Legal and Policy Overview, p. 6. This figure is an inflated[16] and a one-sided view of the contracts that ignores the underlying structure of the contracts and the market value of the products

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[15] See, Conn. Gen. Stat. § 4-215.

[16] Note the exact figure for the sum of the nominal annual contract prices multiplied by the contract quantities is $1.787 billion.

and services procured from these four projects on behalf of Connecticut's ratepayers.[17] The OCC's cost figure only makes sense if the benefits of the contracts are also increased to take into account the full cost of the capacity they displace. (The anticipated costs of Portfolio 89 are $343 million on an NPV weighted average basis.) The analysis done by LEI was incremental in nature, looking at the incremental costs above the capacity market clearing price of the contracts compared to the incremental benefits of lower capacity market clearing prices for all capacity. It appears that the OCC is suggesting that the full cost of the contracts be considered, but without consideration of their full benefits. A proper analysis of the full costs and full benefits of the contracts would simply duplicate the results of a proper incremental analysis. As describe below, there are good reasons for using an incremental analysis in this instance.

Given that the contracts used for the bids were structured as Contracts for Differences which settle against the ISO-NE markets, the bid cost of the projects is less relevant than the actual net benefit of the project, which takes into account both the costs of the projects and their impact on the market. LEI July 5, 2007 Report, p. 13. As described by LEI in the RFP and its Reports recommending winning bidders, the net benefit is based on the total anticipated impact of the project on the prices in the ISO-NE markets as compared to the costs of those projects as settled against the market price. LEI July 5, 2007 Report, p. 22. In calculating the impact of the project on market prices, LEI focused on the change that would occur in the market given this incremental capacity. The actual calculation of benefits, as described by LEI, was based on the difference in the costs to load with and without a project or portfolio. LEI July 5, 2007 Report, pp. 21-22. The costs side of the equation was also effectively focused on the difference in costs to ratepayers with and without the contract. The direct costs of these contracts were calculated based on the difference between market prices and the contract prices. As LEI explained further in their response to Interrogatory 111, ratepayers would be obligated to pay for the peak load share of the ICR in the FCM regardless of these contracts. Therefore, the market component of the remuneration that generators would be receiving is effectively invariant and is implicitly netted out in the calculation. The Department therefore finds LEI's approach for looking at incremental costs of the contracts consistent with the Market Rules and the methodology for calculating the estimated benefits.

OCC goes on to assert in its Brief that "ratepayers will be paying $350 million plus $342 million[18]" (OCC Brief, p. 8). However, this statement again ignores the fact the fundamental structure of the Bid Evaluation and Market Rules. The ISO-NE Markets against which these contracts settle, the FCM and LFRM, have fixed procurement targets. In contrast to the transition period, where all existing capacity is paid an administered price regardless of the total quantity of capacity in the system, ISO New England is not authorized (except for certain circumstances under the FCM market rules) to purchase more than the required amounts of ICR and LFRR, for the FCM and

[17] As proposed by the OCC, the only hypothetical basis for this figure consists of a situation where market prices are zero. Although OCC's expert first put forth this proposition at the hearings, he later conceded that this probably is not correct. Tr. 7/10/07, pp. 945-948.

[18] The actual anticipated costs of Portfolio 89 are $343 million, not $342 million on an NPV weighted average basis. See LEI Report, p. 56.

LFRM, respectively. Therefore, the capacity under this contract would displace other capacity in the market and not expand market obligations. Ratepayers would not be paying an additional $693 million in FMCCs that OCC alleges. The direct contract costs would be $343 million (on a weighted average basis, in present value terms). Although generators would also receive remuneration from the ISO-NE for participating in the FCM, those market costs would be borne by ratepayers regardless of these contracts, based on Connecticut's peak load share of ICR.

Based on LEI's economic analysis, the proposed portfolio of contracts consisted of the best in class projects in each technology class based on average net benefits – the best combined cycle project, the best two peakers, and the best energy efficiency project. LEI July 5, 2007 Report, p. 47. LEI's analysis shows that, in aggregate, the portfolio resulted in the largest net benefit for Connecticut ratepayers totaling $522 million on average over the modeling time horizon on a net present value basis. LEI July 5, 2 007 Report, p. 6. That benefit represents the cost savings expected from these projects to Connecticut ratepayers. It is the highest cost savings achieved from the various combinations of portfolios of conforming bids in this competitive RFP. By definition, it therefore represents the lowest reasonable cost given the products and services procured.

The OCC and the AG both state their concern that the projects have prices that are above LEI's forecast market prices. OCC Brief pp. 8-10; AG Brief pp. 6-7. This does not mean that these projects are not least cost and to not meet the criteria in the EIA. The objective of the RFP was to encourage projects do come on-line earlier than they might otherwise have done.

The OCC stated that LEI should have compared the bid costs to the hypothetical cost of service generation and Conservation and Load Management program costs to ascertain whether the bids were indeed least costs. OCC Brief, p. 7-16. There are numerous issues with OCC's logic. First, this is not how bids are evaluated in commercially reasonable competitive RFPs and this is not how the Department stated that it would evaluate bids in this RFP. The OCC had ample opportunity to offer such suggestions in Docket 05-07-14PH02 and did not do so. Second, such comparison was not required by statute. Conn. Gen. Stat. § 243m. Indeed, even Public Act 07-242 does not require any such comparisons and instead affirms that the Department has authority to proceed with a decision in this proceeding.[19] Third, the electric distribution companies and any allegedly lower cost conservation and load management vendors were invited to bid into this widely-publicized RFP process. The OCC does not provide any potential bid estimates for which either electric distribution company would be willing to develop such projects. While the OCC asserted the projects selected are not the lowest reasonable cost, the OCC presented no evidence of what it believes are the lowest reasonable costs for the types of baseload and peaking generation and energy efficiency projects selected.

[19] See, Public Act, Section 86. Section 86 anticipates that the Department will approve qualified capacity contracts in this proceeding and then direct the electric distribution companies to negotiate electric energy output contracts with generation projects approved by the Department.

The range of prices from high to low that LEI and the Department have to evaluate are the actual bid prices of actual projects offered in this RFP based on the contract requirements specified in the Master Agreements, not unknown, speculative, hypothetical projects without accompanying financial data regarding their costs and benefits. The OCC claims in its Brief that recent legislative developments (Public Act 07-242) can serve as a means for achieving "the same benefits," but ignores a number of important considerations. The AG also argued this in its Oral Arguments. The new law went into effect after the conclusion of the RFP, and indeed after the conclusion of the Bid Evaluation process. In addition, neither the OCC nor any other party has presented evidence in the record that cost-of-service peakers (per Section 50 of the Public Act 07-242) or the utilities' role as builders of last resort (Section 117) would actually be less costly to ratepayers than the projects selected in this RFP. They would inevitably come on-line later than the selected projects, and therefore there would be foregone opportunities, similarly to the cost of delays measured by LEI in LFE 26 at the request of Kleen. These costs would be in the order of a minimum $59 million over a two year period (based on foregone benefits, measured on a weighted average basis across the nine scenarios) and in the worst case, could result in supply shortages, with costs in the hundreds of millions, the kind of situation the Department wants to avoid. Tr. 7/23/07 pp. 1157-1158 and 1165-1167. In addition, unlike this RFP, where ratepayers are insulated from the capital costs increases for building the new infrastructure (so long as there are no delays to the Department's proceeding), the capital costs for cost-of-service utility projects may be subject to change and could rise substantially, as suggested by current trends in the industry, exposing ratepayers to escalating costs. Tr. 7/23/07 pp. 1163-1165; LFE 33. These costs of waiting for other processes or cures would need to be netted against any hypothesized benefits.

Finally, the RFP required that projects commit to participating in the ISO-NE markets as this would enable Connecticut ratepayers to benefit from the market-wide price reductions. The RFP's Master Agreements have rigorous performance requirements, and liquidated damages that are incurred if said performance requirements are not met over the life of the contract, to ensure that Connecticut ratepayers receive the benefits of the capacity bidders warranted to in the RFP over the entire tenure of the 15-year contract. Therefore, the costs of these projects would be expected to have a premium as compared electric distribution company-owned generation, Conservation and Load Management programs, and to forecasted market prices in the spot energy market and annual LFRM and FCM auctions, in which suppliers are generally making commitments one year out.

In addition to OCC's concerns about LEI's bid evaluation methodology, which it stated put into question whether the portfolio was indeed the least possible cost overall, the OCC argued that three of the four projects were not specifically the lowest cost and should be rejected. OCC PT, p. 18. OCC claims that there is nothing in the proposed contract that would assure that the Ameresco project would "result in the lowest reasonable cost of such products and services." OCC PT, p. 18-19. OCC is concerned that if Ameresco maximizes its own profit from the contract, it is unlikely to produce significant benefits for Connecticut ratepayers. Without more information and greater oversight, such as that provided by the Energy Conservation Management Board (ECMB) with respect to the C&LM fund, it is impossible to judge whether this project is more cost-effective than conservation projects overseen by the ECMB. OCC PT, p. 18.

Likewise, the OCC believes that the cost of the proposed contract for Kleen project would be roughly twice the contract's forecasted market value, depending on the baseline scenario and thus it cannot be considered to meet the first standard found in the Act, § 12(i), requiring the contract to result in the "lowest reasonable cost" for the project in question. Id., pp. 18-19. Finally, OCC believes that WaterGen's proposed contract is too expensive compared to the forecasted market prices of the capacity delivered under the contract. Id., p. 19. OCC's commentary regarding the three projects ignores the market impact that these projects are expected to create and the value that they are projected to generate for the benefit of Connecticut ratepayers.

The Department finds that the Master Agreements with the four selected projects are at the lowest reasonable cost for the products and services provided. The projects were procured competitively, which is the standard approach for ensuring the lowest cost for procuring products and services at a specific point in time. Tr. 07/09/07 pp. 477-478. The projects in the aggregate maximized net economic benefits to Connecticut ratepayers, which were essentially used as a proxy for determining the lowest reasonable cost in this process, as well as achieving the last criteria required by the EIA (minimization of FMCCs). LEI determined that Portfolio 89 would result in the largest aggregate net benefits to ratepayers, a weighted average of $522 million on a net present value over the 15 year time horizon. LEI July 5, 2007 Report p. 42.

The Department further finds that the Contract For Differences structure and the terms of the Master Agreements mitigate consumers' long-term risk of assuming unreasonable costs. Tr. 07/09/07, pp. 513-516. First, the contract structure is designed to reduce market-wide prices overall by requiring the suppliers to participate on a competitive basis in the wholesale markets. Id. p. 514. The Department believes that this will positively impact the market thereby producing cost savings to ratepayers. Second, the contract structure also protects ratepayers from taking on the burden associated with the operational risks of the suppliers in the wholesale markets, including the penalties that can be imposed by ISO-NE for supplier nonperformance. Id., p. 514. Third, the contract insulates ratepayers from bearing the economic burdens of these projects after the expiration of the contracts. Id. p. 514. Fourth, if market prices rise above the contract price, Connecticut ratepayers will in fact be receiving payment from the supplier to offset the costs of FMCCs. If market prices are below contract prices, ratepayers are obligated to pay suppliers only the difference between the contract price and market price, which means that the direct ratepayer cost exposure is in fact much smaller in total dollar terms as compared to a more conventional power purchase agreement. Id. p. 515. Fifth, there are many performance requirements on suppliers in the contract, in order to ensure that expected benefits are in fact realized. Id. p. 515-516. Sixth, the contract also has a number of terms that serve as safety nets in case of substantial, presently unanticipated, changes in market rules, as seen for example, in Section 12.6 of the Master Agreements. Id. p. 516. Other terms of the contracts that protect ratepayers include the extensive liquidated damages provisions to ensure that ratepayers receive the contracted-for amount and quality of supplies. If suppliers cannot demonstrate the appropriate level of capacity when required or if suppliers are not available when needed, they are required to pay liquidated damages to the electric distribution companies on behalf of Connecticut ratepayers. These provisions, unlike what would normally exist for traditional electric distribution company ratebase generation, provide a financial incentive to suppliers to perform at contracted levels and actually compensate ratepayers for any underperformance.

The Department also finds that there will be no additional costs to consumers resulting from negative accounting or credit rating treatment that increase the costs of the electric distribution companies serving as counterparties to the Master Agreements. In Written Comments filed on June 2, 2006 and at other times in this proceeding and in a related proceeding, DPUC Investigation Into the Financial Impact of Long-Term Contracts on Electric Distribution Companies, Docket No. 05-07-18, UI and CL&P indicated concern that the long-term capacity contracts could have negative impacts resulting from accounting treatments that may: (1) require consolidation under FIN 46; (2) require treatment as a derivative; or (3) require that the CfD be recorded as a capital lease.

CL&P filed responses to Department interrogatories focused on accounting issues. Based on its preliminary review, CL&P has concluded that, if the Contract for Differences (CfD) is used to contract for capacity, the contract would not require consolidation under FIN 46(R) or treatment as a capital lease. (CL&P Response to Department Interrogatory EL-8). CL&P concluded that it is a derivative, but its response does not clearly indicate if CL&P believes that accounting treatment as a derivative will cause costs that is seeks to recover and whether any actions can be taken now to mitigate against any such costs. Id. UI responded similarly. (UI Response to Department Interrogatory EL-9). Both Companies said that they needed to review the financial information of selected bidders before they could make a final determination regarding any possible accounting treatment associated with the contracts. The Department required selected projects to provide certain financial data to UI and CL&P so that they could analyze the financial and accounting issues they raised.

On July 3, 2007 UI and CL&P filed reports containing their assessment of financial and accounting issues. UI and CL&P concluded that the Master Agreements do not meet the criteria in EITF 01-08 and, therefore, are not leases within the scope of SFAS No. 13; the Master Agreements are derivatives in accordance with the provisions of SFAS No. 133 and will require mark-to-market accounting; and pursuant to FIN46(R), the Master Agreements will not result in the supplier entities having to be consolidated into the electric distribution companies' financial statements. UI and CL&P wish to reserve the right to reevaluate the accounting treatment of the Master Agreements and seek appropriate remedies if there are changes to accounting rules or how they are interpreted, or changes to the terms and conditions of the Master Agreements.

With respect rating agency impact issues raised by CL&P, CL&P determined that it will not need to impute debt to its balance sheet as a result of being a party to the Master Agreements. (CL&P July 3, 2007 filing, p. 2). As a result, CL&P is not seeking any rate relief or other remedies to address a downgrade or potential downgrade to its credit ratings. Id. CL&P continues to reserve its right to rate relief in the event of a downgrade due to the CfDs. CL&P needs to consider its fiduciary responsibilities to maintain target credit ratings, to the extent that policies within the control of management can support credit quality. CL&P shall provide advance notification to the Department of any alleged possible downgrades, and the reasons cited by the rating agencies. Any representation that the CfDs or any other factors than may threaten the current credit ratings should be fully documented to the Department. In the event that CL&P claims that CfDs caused a credit rating downgrade, it shall be required to show what financial policies, if any, were modified to reduce financial risk and improve credit quality.

In a July 18, 2007 filing, CL&P requested that the Department issue orders that all four projects be required to provide CL&P with requested financial data if CL&P decides to reevaluate the accounting treatment for the projects and that, if CL&P is ultimately required to consolidate the financial statements of any of the projects into its balance sheet, that the project(s) must provide CL&P quarterly with certain financial data. The Department denies these requests on the basis that they are premature. In the event that CL&P believes that it needs to reevaluate the accounting treatment of any of the projects, CL&P can seek Department approval for access to such financial data by presenting evidence of need to the Department. In response to CL&P's Motion No. 5, the Department issued a ruling on June 1, 2007 denying without prejudice CL&P's request for certain information that CL&P again seeks in its July 18 filing, i.e. the information CL&P sought in Appendix A to its May 29, 2007 filing. In ruling on Motion No. 5, the Department found that CL&P had not sufficiently justified, at this time, that other additional information is necessary to assess financial accounting issues. The Department indicated that it will reconsider CL&P's request for the other information it requested if CL&P or UI provides the Department with an opinion letter from a qualified third party. The letter must indicate that the third party has reviewed the language in General Statutes of Connecticut § 16-243m regarding CL&P's recovery of the contract price and administrative costs through rates, the Master Agreements and the financial data already supplied to CL&P and opine that CL&P and UI need this additional information, indicating the specific references to SFAS 46R, and the basis for the additional information needed. The Department further indicated that it will make its decision on reconsideration after the third party is made available for cross examination in a special hearing held to address this issue.

Additionally, if at some time in the future it is determined that a project or projects must be consolidated onto CL&P's balance sheet, CL&P can request and the Department will order that the projects provide access to necessary data.

In its Written Exceptions filed on August 15, 2007, CL&P stated that its initial accounting analysis of the Ameresco project is not yet complete and therefore requests that Ameresco be required to continue to cooperate in good faith with CL&P to provide data requested by CL&P in a timely fashion so that CL&P will be able to complete the accounting analysis. The Department grants this request and orders Ameresco to continue to cooperate with CL&P by providing data as directed by the Department in its prior rulings regarding financial data.

Based on the foregoing, the Department finds that there are no additional costs to the electric distribution companies associated with the Master Agreements due to negative accounting or credit rating downgrades that would have to be passed along to consumers.[20]

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[20] As the Department views CfDs as fundamentally different from physical contracts, like the Project 100 contracts, this ruling will not serve as precedent for how the Department will address CL&P's and UI's

### 3. Findings and Analysis on Whether the Contracts Will Minimize Federally Mandated Congestion Charges Over the Life of the Contract

As LEI described in its July 5, 2007 report, and as was discussed in the July 9-10, 2007 hearings, LEI believes that it selected the best group of projects from that competitive pool based on its objective function – which was to maximize the benefits to ratepayers by minimizing future costs to ratepayers, namely future FMCCs. LEI July 5, 2007 Report, pp. 5-6; Tr. 07/09/07 pp. 510-513. LEI states that, by virtue of their market impact, the projects underlying the contracts will reduce wholesale market prices in the energy and capacity markets (and to some degree, depending on market conditions, in the locational forward reserve market) and in so doing reduce Connecticut ratepayers' obligations to pay Federally Mandated Congestion Costs. LEI July 5, 2007 Report, p. 5. These expected benefits are offset by the fact that the direct contract costs from these projects, based on the Contract for Differences settlement process, will also flow into FMCCs.

LEI's bid evaluation specifically looked at the cost-benefit tradeoff allowing LEI to select projects that, in combination, were expected to produce the highest amount of net benefits for Connecticut ratepayers after factoring in the costs of the actual contracts, or in other words, the biggest reduction in FMCCs. LEI July 5, 2007 Report, p. 8. The OCC does not dispute this. OCC Brief pp. 43-44.

The selected projects' technical qualities, for example, the low risk for delays in project execution and the relatively low likelihood of disqualification in the FCM or interconnection problems, as described earlier in this Decision, also reconfirms the Department's conclusion that these selected projects can be expected to minimize FMCCs.

Based on the foregoing, the Department finds that the Master Agreements with the four projects will reduce FMCCs.

## C. Findings and Analysis on Whether the Contracts Are of Fifteen Years or Less In Duration

Based on a review of the terms of the Master Agreements filed in this proceeding and the testimony presented, the Department finds that the duration of all four contracts are for fifteen years or less in compliance with the statutory requirement. Tr. 7/9/07, p. 513.

## D. Findings and Analysis on Whether There Are Other Benefits Resulting From the Contracts

LEI testified that these projects will also accomplish many of the state's other policy priorities with respect to the electricity sector. For example, the selected projects are

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requests for information in Docket No. 07-04-27, DPUC Review of Long-Term Renewable Energy Contracts – Round 2 Results.

expected to substantially reduce emissions of $SO_2$, NOx, and $CO_2$ by displacing the output of less efficient, more polluting resources. LEI July 5, 2007 Report pp. 49-50. The energy efficiency project will reduce energy consumption, consistent with the priorities of the state. Id., p. 48. In addition, all the selected projects make use of existing sites and infrastructure to some degree, as required under Section 12(g) of the Energy Independence Act. Id., p. 45. Although it was not economic to procure sufficient peaking capacity to entirely meet Connecticut's Locational Forward Reserve requirement, the selection of two peaking resources does place Connecticut on the right path - towards sufficiency. Lastly, the construction and implementation of these projects will improve the competitive dynamic in the energy market by increasing overall supply and further diversifying control of electricity generating assets. Tr. 07/09/07 pp. 511 – 513.

While OCC's experts stated that the methods LEI used to value of some of the "other factors" for each project were unreasonably sensitive to the characteristics of other projects (OCC PT p. 16), OCC did not provide any other reasons or evidence demonstrating why or how the selected projects did not provide the other benefits listed by LEI.

The Department finds that the benefits outlined by LEI, including the anticipated reduction in environmental emissions, the use of existing sites, and the diversification of market participants in Connecticut, are additional strengths of the selected projects that further state policy objectives and justify selection of the projects and approval of the contracts.

## III. AMERESCO MOTION FOR CLARIFICATION

Ameresco filed a motion dated July 16, 2007 seeking clarification regarding its ability to participate in alternative markets to the Forward Capacity Auction (FCA), the liquidated damages cap, and the effective date of the Master Agreement. The OCC filed an objection to Ameresco's motion.

### A. Alternative Market Participation

Ameresco seeks a clarification that may meet its obligations under the Master Agreement by participation in the FCA, in a reconfiguration auction, or by entering into a bilateral agreement, or a combination thereof. Motion, p. 2. The OCC sees Section 3.4(b) of the Master Agreement as plainly requiring Ameresco to participate in the FCM FCA.

The Department agrees with the OCC and finds that Section 3.4(b) of the Master Agreement between Ameresco and UI explicitly requires it to participate in the FCA. This was driven by the objective of obtaining a New England-wide price impact in the FCA, which was desirable for the Department in its objective to lower costs for Connecticut ratepayers. The Master Agreements did not intend for winning bidders to participate in reconfiguration auctions or to sign bilateral agreements instead of participating in the FCA. Note, however, that there is a provision in the Demand Resources Master Agreement, Section 3.3 (b), which allows for a renegotiation of the

Master Agreement in case a specific type of demand resource was no longer eligible to participate in the Forward Capacity Market.

### B. Liquidated Damages Cap

Ameresco requests a ruling that termination is not appropriate for events which are curable, and are cured, by liquidated damages, so long as the cap is not exceeded. Motion, p. 2.

The objective of Sections 3.6(f) and 8.1 (a)(k) of the Master Agreement for Demand Resources was to set a cap for the amount of underperformance that ratepayers should be required to tolerate under these contracts. The level of underperformance was determined by using a maximum amount of liquidated damages that the supplier could incur after the facility was in commercial operation. The contract sections mentioned above effectively enable the electric distribution company serving as counterparty to the Master Agreement to terminate the contract once that cap has been reached (note that the cap is different for demand resources and generation resources).

The Department agrees with Ameresco and finds that termination pursuant to Section 8.1 of the Master Agreement is not appropriate for events which are curable, and are cured, by liquidated damages, so long as the cap is not exceeded.

### C. Appeal issues

Ameresco also requests that the Department to modify the Master Agreement to make the effective date the day following the expiration of all appeal periods or, if an appeal is taken, the day following a final decision in such appeal. Ameresco is concerned that it will be required to incur substantial costs, including a posting a substantially higher performance security pursuant to Section 10.1 and 10.2 of the Master Agreement, during the appeal period. Ameresco argues that it should not risk losing expenditures made on security and to meet milestones if there is a possibility the Department's decision is overturned on appeal. Kleen and Waterside filed comment in support of Ameresco's request in their July 31, 2007 briefs. In their briefs, Ameresco, Kleen[21] and Waterside indicate that they will not be able to obtain project financing until it is clear that no appeals will be brought or any appeals brought are resolved and the Department's decision is not overturned. In its brief, WaterGen argues that the Master Agreements should be effective date upon Department approval.

In its written exceptions in Docket No. 05-07-14PH02, UI requested that capacity contracts be considered effective (1) if no appeal is taken, forty six days after the Department Decision approving the contract or (2) if any appeal is taken regarding the contract, the date the on which all appeal issues are finally resolved. The Department ruled that the express language of Section 16-243m(i) states that capacity contracts are

[21] In footnote 4 of its written exceptions, Kleen sought clarification about what would happen to its performance security if the contract is invalidated as the result of an appeal. Consistent with Section 10.1(e) which contemplates the return of the security to the Supplier when the contract terminates, in the event that the contract is invalidated as the result of an appeal, the Department directs that the electric distribution company counterparty return the security to the Supplier.

effective upon Department approval. The Master Agreements approved by the Department at Section 5.1(b) also states that the Master Agreements will be effective upon approval in this docket. Kleen, in its brief at page 13, claims that there is ambiguity between this provision and Section 2.5(e) which provides an exemption from liquidated damages for failure to meet milestones if the delay in meeting the milestone is caused by an appeal.

Ameresco's request is denied as Section 16-243m(i) requires that the Master Agreements become effective upon approval by the Department. The selected projects were evaluated and selected in part due to their representations that the projects would meets certain project development milestones by and be in operation by certain dates. The Department would be required to revaluate the projects if they are permitted to alter the effective date, milestones deadlines and the operation date. The Department will not do this at this late stage in the procurement process. Also, the Department finds that delaying the effective date until resolution of appeals would unnecessarily delay the construction and operation of capacity projects and result in loss of benefits to consumers and increased costs for procuring the capacity if the RFP's November 2007 deadline for project approval is not met.[22] Any docket participants that contemplate bringing an appeal are on notice that there are potential substantial additional costs to the project developers and consumers as well as potential lost benefits that could result from any delays caused by any appeal.

## IV. OCC LEGAL ISSUES

### A. Due Process Claim

The OCC claims in its brief that the Department prejudged the outcome of this proceeding in Docket No. 0507-14PH02 and that the Department acted improperly in the hearing by promoting LEI's testimony and rebutting the OCC's expert testimony.

The Department has ruled on these issues in response to Motions 14 and 17. In addition to the discussion below, the Department incorporates those rulings by reference into this Decision.

If the OCC sincerely believes that the Department has not been fair and impartial, the Department is disappointed because it conducted an unprecedented extensive stakeholder process to develop the RFP and Master Agreements, it has not prejudged issues in this proceeding, it has no interest whatsoever of any kind in the outcome of this proceeding in terms of what projects get selected or not, and it did not act improperly by asking its consultant LEI to respond on the record to the OCC's and NRG's witnesses' testimony. The only objective of the Department is to carrying out the legislative intent of Section 16-243m to the best if its ability.

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[22] Under the terms of the RFP, if projects do not receive final approval by November 2007, they can withdraw their bids or have their bid price adjusted using a utility price index. The Department assumes conservatively that any adjustment to the bid price based on the utility price index will result in a price increase as the cost of labor and commodities necessary to construct and operate the projects is not likely to become cheaper going forward.

The purpose of Section 16-243m is for the Department to conduct an RFP to select projects that can enter into contracts with the local distribution companies for the development of long-term projects that will reduce FMCCs and increase reliability at the lowest reasonable cost. See, Conn. Gen. Stat. § 16-243m(c), (g) and (i). The legislature directed the Department to conduct this process in an unprecedented two-part process. In past electricity product and service procurement statutes for standard offer, transitional standard offer, and standard service, the legislature directed the electric distribution companies to conduct the procurement and directed the Department to review and approve contracts with selected bidders in one uncontested proceeding. Under Section 16-243m, the legislature has directed that the Department conduct the RFP and the decide what projects should be selected in an uncontested proceeding and then, in a second subsequent contested case proceeding, decide whether to reject, modify or approve contracts with the same projects selected in the first proceeding.

In the first proceeding, Docket No. 05-07-14PH02, the Department conducted an uncontested proceeding with the assistance of consultants in which it developed the RFP and the capacity contracts, Master Agreements, and selected projects that would be considered for capacity contracts in this proceeding. The entire purpose of Docket No. 05-07-14PH02 was to select projects that the Department believed satisfied the preferences identified in Section 16-243m(g) and that could likely satisfy the requirements of Section 16-243m and be awarded contracts in this proceeding, i.e. projects are the lowest reasonable cost, reduce FMCCs, and increase reliability. It would have been absurd, as the OCC urges, for the Department to select projects in Docket No. 05-07-14Ph02 that the Department did not at least have a preliminary belief could increase reliability and reduce FMCCs at the lowest reasonable cost, given that this is the overall purpose of Section 16-243m RFP process. There is no doubt that there are issues that overlap and are common to both proceedings, but that is an inevitable feature resulting from the two-step process the legislature established for the Department to implement Section 16-243m.

Given the two-part process established in Section 16-243m(i), the OCC asks for the Department to meet an impossible standard. As described above, it is legally and factually impossible for the Department to bifurcate all of the issues in this procurement process into discrete separate bundles in the two separate proceedings when there are several overarching statutory preferences[23] and criteria[24] that all must be satisfied at all times in order to satisfy the legislative intent of Section 16-243m by obtaining additional capacity resources that benefit Connecticut. Additionally, it is also not feasible, mathematically in the case of Commissioners, and pragmatically from staffing expertise and availability standpoint for the Department to have two completely different sets of staff and consultants work on each proceeding. Moreover, Section 16-243m has no such requirement.

In the second part of the process, this contested case proceeding, the Department heard evidence from its consultants, the OCC and NRG on the issues of whether the Master Agreements with the four projects meet the criteria of Section 16-243m(i). Contrary to the OCC's assertions, the Department had not prejudged whether to

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[23] Section 16-243m(g).

[24] Section 16-243m(i).

approve, reject or modify the proposed contracts with the four selected projects prior to the issuance of this decision. The Department conducted a full and fair hearing in this proceeding. Prior to the hearing, the Department's consultant, LEI, was made available for two days of technical meetings to answers questions from the OCC's witnesses. LEI also answered one hundred sixteen interrogatories. Prior to the hearing, the OCC and NRG filed pre-filed testimony criticizing LEI's selection of the four projects. At the hearing, in response to questions from the Department LEI provided testimony responding to testimony filed by the OCC and NRG, was then made available for cross examination, and was cross examined by the OCC and NRG for several days. Although the OCC objects to LEI responding to the OCC's and NRG's testimony, the Department believes that LEI needed to respond in order for there to be a full and complete record. If LEI did not respond to the OCC's and NRG's testimony, the Department and/or LEI would have been criticized for failing to address the OCC's and NRG's testimony or the OCC or NRG would have argued that the Department must accept their evidence as conclusive despite that fact that LEI may have had different evidence.

The Department paid careful attention to all of the evidence and arguments presented. After a review of the entire record, the Department finds by a preponderance of evidence that the Master Agreements with the four projects meet the criteria of Section 16-243m(i). If the OCC or NRG convinced the Department by a preponderance of the evidence that other projects should have been selected, that it should reject some or all of the proposed contracts, or that the contracts needed to be modified to avoid unintended unforeseen harm or achieve greater benefits, the Department would taken appropriate action in each scenario. The Department believes that this decision is in the public interest and will benefit Connecticut consumers more so than the OCC's proposal that calls for adding only a small amount of additional capacity with the Waterside project. While the Department understands that NRG wishes to revisit the selection process outcome which was decided in the uncontested proceeding in this contested case proceeding, the Department finds that LEI properly evaluated the NRG project according to the rules of the RFP and evaluated only the incremental added megawatts as there was no evidence that the unit would actually retire going forward and thus it was not selected as a winning bidder.

The Department finds by a preponderance of the evidence that the four proposed projects, based on their financial bids and the terms and conditions of the Master Agreements that they have agreed to adhere to, meet the criteria of Section 16-243m(i). This conclusion is supported by LEI's economic analysis discussed more fully above which the Department finds by a preponderance of the evidence to be reasonable and consistent with evaluating the proposed Master Agreements with the approval criteria of Section 16-243m.

## B. Contracts for Differences

### 1. Description of the Master Agreements

Section 16-243m(e) states that the capacity contracts shall contain such terms and conditions as the Department directs. The contract structure of the Master Agreement, called a Contract for Differences (CfD), will require settlement against the ISO-NE Markets and will assure that the capacity acquired will count toward satisfying Connecticut's requirements in the FCM. In most cases, the CfD will be settled against the FCM, or its successor market, and, at the election of the Bidder, against the LFRM and/or the Day-Ahead Energy Market. The Supplier will be required to participate in the ISO-NE Markets for which it qualifies (both technically and economically) in order to receive payment. Because of the long-term nature of the CfD, the CfD will also have certain physical performance requirements of the projects over time. There are two Master Agreements – one for generation projects and another for demand resource projects.

For the CfDs that settle against the ISO-NE Markets, the contract will have a variable payment structure incorporating the FCM and LFRM payments already in place. Bidders will submit a Financial Bid in $/kW per annum terms, referred to as the Annual Contract Price. This price, along with market clearing prices in the FCM and the LFRM (at the option of the Bidder), will be used to settle the monthly payments between the contract counterparties. If the Annual Contract Price is above the actual market clearing price in the FCM and, if elected, the LFRM, the Buyer will true up the Supplier, by paying the difference between the Annual Contract Price and market clearing prices in the Forward Capacity Auction (FCA) and the Forward Reserve Auction (FRA), with some adjustments, thus ensuring a stable stream of revenue to the Supplier. If the Annual Contract Price is lower than actual market clearing prices, the Supplier will make payments to the Buyer, based on the difference between the Annual Contract Price and the market clearing prices, subject to certain adjustments.

### 2. OCC's Claim

Section 16-243m(e) of the EIA requires that the contract under the EIA shall include the transfer to the electric distribution companies of all rights to the installed capacity, including, but not limited to, rights to locational forward reserve capacity. Section 16-243m(e) authorizes the Department to determine what type of contractual provisions are best suited to achieve this purpose. In its brief, the OCC claims that the CfD for capacity does not comply with this provision because the electric distribution companies do not take ownership of the capacity.

The Department finds that the CfD complies with Section 16-243m(e). Suppliers become obliged to provide new or incremental capacity, and are obligated to perform according to certain levels and in line with certain requirements as a result of the CfD. Although the distribution companies do not take title to any physical capacity rights, the CfD allows for the effective acquisition of capacity rights for the benefit of ratepayers. Moreover, NRG notes that capacity is not a physical delivered product under ISO-NE's FCM in their written comments in Docket No. 05-07-14PH02.[25] The Department believes that the CfD is consistent with the statutory obligations of the EIA and that it results in the acquisition of new or incremental capacity that would otherwise not have been obtained but for the contracts.

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[25] August 3, 2006 Written Comments of NRG, Exhibit A, Section 4.1(a).

The CfD structure was preferred over a physical contract for a number of policy reasons. First, it allowed the Department to shield the electric distribution companies from taking on operating risks if they were to take title to the physical capacity rights and then re-sell or self supply into the FCM. In fact, UI notes in its written comments that the CfD structure is simpler to administer than a traditional physical purchase agreement.[26] UI also notes that it eases some of their concerns regarding accounting issues.[27]

Section 16-243m(i) states that the distribution companies can retain or sell capacity rights acquired under the contracts as determined by the Department. The Department has determined that it is not in the best interest of ratepayers or the distribution companies to have the distribution companies engaged in the sale of capacity in the ISO-NE Markets because of the potential operating risks and potential adverse financial and accounting impacts.

The CfD structure approved by the Department is not a purely financial instrument in that it places contractual obligations on the Suppliers maximizes the impact of the incremental or new capacity solicited in this RFP. Suppliers are obligated to participate in ISO-NE Markets to the fullest extent possible and therefore are expected to make an impact on overall market prices. There will be a multiplier effect for the benefit of ratepayers as a result of the hedge created by these CfDs – even if the contracted capacity is a small portion of the supply meeting Connecticut's requirements, these contracted resources are expected to lower the market clearing price and therefore reduce costs to all load. The CfD is also expected to minimize accounting issues of concern to the electric distribution companies, as it does not, on balance, shift ownership risk from the Suppliers to the distribution companies.

Moreover, CfD contracts have successfully been used in the US and internationally in the electricity sector. The objectives behind the use of CfDs are diverse. CfDs are useful for hedging future market costs. They have also been utilized to incentivize new generation, and have also been successfully applied to mitigate market power. The RFP takes advantage of all these features of the CfD structure.

In summary, the Department believes that the CfD structure with settlement against the FCM and LFRM (the latter, only if selected by supplier) is the preferred approach in the context of the ISO-NE Markets and ISO-NE Market Rules and complies with the legislative intent to procure capacity for Connecticut in manner designed to reduce FMCCs.

## V. ENERGY CONTRACTS UNDER SECTION 86 OF PUBLIC ACT 07-242

Section 86 of Public Act 07-242 requires that

[26] August 3, 2006 Written Comments of UI, pgs.8-9.

[27] Id.

> Sixty days after the Department of Public Utility Control issues a final decision approving long-term contracts pursuant to section 16-243m of the general statutes, the department shall direct an electric distribution company to negotiate, in good faith, long-term contracts for the electric energy output of each of the generation projects selected and approved by the department to provide capacity pursuant to said section 16-243m, provided the rates paid for such electric energy output when added to the payments made pursuant to such capacity contracts shall be the project's cost of service plus a reasonable rate of return. The electric distribution company shall apply to the department for approval of any such energy output contract. No such contract shall be effective unless approved by the department. The department may approve only such contracts it finds would reduce and stabilize the cost of electricity to Connecticut ratepayers. Such contract may not exceed the term of the capacity contract for such generation project.

The Department directs that Kleen, Waterside and WaterGen make compliance filings within ten days of the date of the final decision indicating whether or not they are interested in negotiating contracts with the electric distribution companies for the sale of electric energy output. If any of these projects indicate interest, the Department directs that the electric distribution companies to enter into negotiations as required by Section 86. If the parties are able to agree on a contract, the negotiating electric distribution company shall file the proposed contract with the Department for its review and approval.

## VI. CONCLUSION AND ORDERS

### A. Conclusion

Based on the foregoing, the Department finds that each of the selected projects meet the criteria of Conn. Gen. Stat. § 16-243m(i). The Department therefore approves the Master Agreements with each project. The Master Agreements will become effective on the date of the Final Decision in this proceeding.

### B. Orders

1. Kleen, Waterside and WaterGen shall each file a letter within ten days of the final decision indicating if they are interested in negotiating a contract with the electric distribution companies for their electric energy output as provided in Section 86 of Public Act 07-242.

2. 60 days after the date of the final decision, if Kleen, Waterside or WaterGen indicate that they wish to negotiate a contract for electric energy output, the appropriate electric distribution counterparty shall begin engaging in negotiations and file a status report on the negotiations with the Department every 30 days until negotiations terminate unsuccessfully or a proposed contract is filed with the Department.

**DOCKET NO. 07-04-24 DPUC REVIEW OF ENERGY INDEPENDENCE ACT CAPACITY CONTRACTS**

This Decision is adopted by the following Commissioners:

Donald W. Downes

Anthony J. Palermino

John W. Betkoski, III

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

August 22, 2007
Date