

TO: SRPEDD Distribution List **DATE:** October 15, 2020
FROM: Scott J. Mueller, Counsel for Good Energy L.P.
SUBJECT: Constellation NewEnergy Price Change Notice

Constellation NewEnergy, Inc. (“CNE”), the new competitive supplier under the Electric Service Agreements (ESAs) for the SRPEDD group starting in January 2021¹, has notified Good Energy of its intent to propose a price change under the ESAs based upon a Regulatory Event. As explained below, the Regulatory Event was the issuance of final regulations which create new obligations under an expanded Massachusetts Clean Energy Standard for existing clean generation resources.² We have prepared this initial report and analysis, with the assistance of Sustainable Energy Advantage, to assist the SRPEDD group in responding to CNE.³ As explained below, Good Energy has verified that there has been a Regulatory Event which occurred after the effective date of the ESA and that results in CNE incurring additional, material costs which were not included in the pricing under the ESA. Good Energy also has verified the accuracy of the proposed price increase calculations and the reasonableness of CNE’s underlying assumptions as described below.

I. Background

Following a competitive solicitation and presentation of bids, the SRPEDD group entered into ESAs with CNE on April 21, 2020 (the “Effective Date”), for a 35-month term starting with the first meter reads in January 2021 and extending through the last meter reads in December 2023. CNE was the low bidder and is required to provide all-requirements service for the various program options at a fixed price for the full term of the ESA. The ESA includes a change in law provision, referred to in the ESAs as a Regulatory Event (Article 17), that allows either party to recover an increase (or decrease) in the Supplier’s costs in the event of changes to a governmental rule that has a material impact upon the services and transactions contemplated by the ESA.

¹ CNE entered into ESAs in 2020 with the following members of the SRPEDD group for a 35 month term starting with the first meter reads for January 2021: the Cities of Attleboro; Fall River; and New Bedford and the Towns of Acushnet; Carver; Dartmouth; Dedham; Dighton; Douglas; Dracut; Fairhaven; Freetown; Marion; Mattapoissett; Millis; Northbridge; Norton; Plainville; Rehoboth; Seekonk; Somerset; Swansea; Westford and Westport. CNE also entered into ESA’s with the towns of Stoneham and Hamilton in 2020 under similar terms.

² 310 CMR 7.75

³ Good Energy, L. P. retains Sustainable Energy Advantage, LLC (SEA), one of the leading consultants on renewable markets in Massachusetts, to provide advice on renewable energy matters. Tom Michelman, a Senior Director at SEA, has provided background and input into this memorandum.

II. CNE Proposal

CNE seeks a price increase of \$0.00085 cents/kWh based upon a new CES-E Standard requirement announced by the Massachusetts Executive Office of Energy and Environmental Affairs and Department of Environmental Protection (“DEP”) on July 10, 2020. This price adjustment would increase the price of the product options for the SRPEDD aggregations over the 35-month term of the ESA as follows:

<u>Municipality/Product</u>	<u>ESA Price per kWh</u>	<u>Adjusted Price per kWh</u>
Westford		
Default option (10% Additional RECs)	\$0.10708	\$0.10793
Basic	\$0.10385	\$0.10470
50% Local Green	\$0.11998	\$0.12083
100% Local Green	\$0.13610	\$0.13695

III. Request for Bids

Under the ESA as proposed in the Request for Bids (“RFB”) issued by Good Energy on behalf of the SRPEDD group, the supplier is obligated to provide All-Requirements Power Supply, including all known Renewable Energy Credits⁴ in an amount equal to the:

- (a) Massachusetts DOER's Renewable Portfolio Standards, (b) Alternative Energy Portfolio Standard, and (c) Clean Energy Standard starting with current requirements on the Start Date (“RPS Requirements”)...

ESA, pp. 35-36, Exhibit A, Renewable Energy Credits in System Supply.

At the time the ESA was negotiated, a new Clean Peak Energy Standard had been announced, but not finalized, and specific reference was included in the ESA to ensure that this cost was included in suppliers bid prices:

For the purposes of clarity, the Competitive Supplier’s contract prices include the cost of the annual Clean Peak Energy Standard purchase obligations as filed by

⁴ While denoted as “Credits” in the ESA they are technically in Massachusetts named Renewable Energy “Certificates”.

the Massachusetts Department of Energy Resources with the General Court on March 19, 2020.

Id.

In the RFB and in response to bidder questions, Good Energy indicated that all bids should include the bidder's cost for the Clean Peak Energy Standard, which had been announced in draft regulations dated March 19, 2020, because in Good Energy's view the draft regulations provided sufficient detail to allow bidders to forecast and include the cost in their pricing.

During the solicitation, bidders also inquired as to whether they should include in their pricing the potential cost of the CES-E. While the CES-E had been proposed at the time of the solicitation, the timing and calculation of the CES-E was still subject to review and significant debate.⁵ For example, in comments filed in November 2019, parties were arguing over not only the calculation and level of the CES-E, but also suggesting that the CES-E obligation should not be effective until 3 years after the regulations were made final.⁶ Following consultation with its expert advisors, Good Energy determined that the CES-E, like other potential costs that may be incurred by suppliers at some time in the future, was too uncertain to be included in the bids. Requiring inclusion of the potential but unknown CES-E costs in the bids would result in suppliers adding a risk premium to their bids for a cost that they may not incur during the term of the ESA.

Good Energy also believed it was important to clarify for all suppliers what potential costs should be included or excluded in the bidder's pricings in order to ensure an 'apples to apples' comparison of the different bids.

IV. ESA Provisions

Under the ESA, in the event of the implementation of a new or changed governmental rule during the term of the Agreement which has a direct, material and adverse effect on the economic benefits to a Party to this Agreement ("Regulatory Event"), the affected party may seek a price increase or decrease. *See* ESA, Article 1.31 (Definition of Regulatory Event), p.5 and Article 17 (Regulatory Event), p.28. Specifically, Article 17 provides as follows:

If, after the Effective Date, a Regulatory Event occurs or New Taxes are imposed, and such event or taxes have a direct, material and adverse effect on the economic benefits to a Party to this Agreement, the affected Party shall send written notice to the other Party, setting forth the Regulatory Event or New Taxes and reasonably demonstrating the effect of the same on the affected Party. Upon delivery of such notice, the Parties shall use reasonable efforts to mitigate

⁵ See 310 CMR 7.75, Clean Energy Standard – Proposed Amendments.

⁶ See *Comments of Retail Energy Supply Association re Proposed Amendments*, 310 CMR 7.75, Clean Energy Standard – Proposed Amendments, submitted to MA Department of Environmental Protection (Nov. 12, 2019)

such effect. if as a direct result of such a Regulatory Event or New Taxes, Competitive Supplier incurs additional, material costs, Competitive Supplier shall provide a written notice to the Municipality that documents: a) the effective date of the Regulatory Event or New Tax; b) a detailed explanation and reasonable demonstration of the material costs incurred as a result of the Regulatory Event or New Tax; c) the timing of the cost impacts to be incurred by the Competitive Supplier; d) the proposed price increase per kWh to be passed on to Participating Consumers; e) a proposed plan for coordinating with the LDC for an increase in price to be billed by the LDC designed to reimburse the Competitive Supplier for such cost impact. In the event Municipality reasonably believes the documents provided as set forth above do not support Competitive Supplier' invoking a price change due to a Regulatory Event or New Taxes, Municipality shall respond to Competitive Supplier in writing within ten (10) business days of Competitive Supplier's written notice and include with such response sufficient information to reasonably dispute Competitive Supplier's position. If the Parties are not able to agree on reimbursement contemplated by this Article 17, the matter may be subject to dispute resolution in accordance with Article 12.2. In no event shall a price change become effective without providing Participating Consumers with a 30-day advance notice of the price change. The Parties shall use reasonable efforts to develop a mutually acceptable notice and communications to customers regarding the Regulatory Event. The Municipality shall inform the DPU at least fourteen (14) days prior to any price changes resulting from a Regulatory Event.

A copy of a sample ESA is included with this memo as Attachment A.

V. Issues and Analysis

A. Has a Regulatory Event, *i.e.* a change to an existing Governmental Rule which had a material effect on the services and transactions contemplated by the ESA (Article 1.31), occurred since the effective date of the ESA (April 21, 2020)?

Yes. On July 10, 2020, the Massachusetts EEA and DEP issued a final regulation for the Clean Energy Standard which added a new requirement referred to as the Clean Energy Standard for Clean Existing Generation Units or CES-E. *See* 310 CMR 7.75. Under the CES-E, retail electricity sellers are required to annually purchase certificates from "clean existing (pre-2011) generation units". Draft regulations which included the CES-E were first published in October 2019 with a requirement that the CES-E would be effective for 2020. Subsequently, however, the DEP announced via e-mail on January 15, 2020 that

the CES-E requirement would not apply to 2020 electricity sales and did not propose a specific implementation date at that time.⁷

In the final regulation issued on July 10, 2020, the DEP announced that the CES-E requirement will be effective for 2021 electricity sales. For calendar years 2021 and 2022, the percentage requirement for clean existing generation attributes shall be 20%. 310 CMR 7.75 (4)(b). For calendar years 2023 through 2050, the regulations provide a formula for determining the percentage requirement for CES-E for each year based on certain percentages that are published by DEP four years prior to the calendar year in which the percentage will be effective.

The effective date of the ESA was April 21, 2020 and the new CES-E requirement was announced on July 10, 2020. In drafting and negotiating the ESA, Good Energy identified and included all 'known' renewable charges, including the Clean Peak Energy Standard that was announced in March 2020 but not finalized as of the Effective Date of the ESA. The ESA did not include the CES-E and other potential cost that may be subject to future increases, such as revised Purchase of Receivables discount rates, because there was too much uncertainty in regard to the timing and final cost associated with these factors.

Based on our review of the regulations and the proposed price increase, we believe that CNE has met its burden of demonstrating that the Regulatory Event has a "direct, material and adverse effect" on its economic benefits under the ESA.

B. Assuming that a Regulatory Event occurred after the effective date of the ESA, is CNE's calculation of the price increase accurate?

Yes. Under the regulations, 310 CMR 7.75 (4)(b), for calendar years 2021 and 2022, the percentage requirement for clean existing generation attributes shall be 20%. For calendar years 2023 through 2050, the regulations provide a formula for determining the percentage requirement for CES-E for each year based on certain percentages that are published by DEP four years prior to the calendar year in which the percentage will be effective.

While the 2023 percentage requirement has not been published yet, CNE's calculations assume that the CES-E percentage requirements would remain at 20% for 2023. We concur that this is the most defensible assumption of CES-E percentage requirements at this time. In addition, we confirmed that CNE's

⁷ In that same January 15, 2020 email, the DEP also stated "The CES standard for 2020 will remain at 20%..."

assumed cost per CES-E qualified Renewable Energy Certificate (REC) was reasonable by inquiring with three different REC commodity brokers.

C. Are there any off-setting cost decreases that should be applied to eliminate or mitigate the proposed cost increase?

We have explored but not identified any cost decreases associated with the ESA that might be applied to mitigate or reduce the price change.

VI. Other Considerations

The SRPEDD Aggregation Plans and ESAs include provisions for notifying customers and the Department of Public Utilities of a change in law and proposed price change which occurs during the term of the ESA. Because the change in law occurred before the service term of the ESA and prices under the ESA have not been announced to date, notice of the price adjustment should not be required. The SRPEDD municipalities will be required to notify customers of the final pricing under the new ESA by issuing a media release and posting a notice on the program website.