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July 21, 2011

Mark D. Marini, Secretary
Department of Public Utilities
One South Station, 5th Floor
Boston, MA 02110

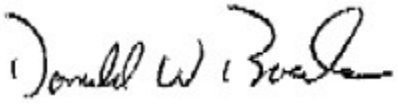
Re: NSTAR/ Northeast Utilities Merger, D.P.U. 10-170

Dear Secretary Marini,

Enclosed for filing in the above-captioned proceeding is the Joint Petitioners' Opposition to DOER's July 14, 2011 Renewed Motion to Stay the Proceeding.

Thank you for your attention to this matter.

Very truly yours,



Donald W. Boecke

cc: Laurie Ellen Weisman, Esq., Hearing Officer
Service List

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Joint Petition for Approval of a Merger between NSTAR and Northeast Utilities	)	D.P.U. 10-170

JOINT PETITIONERS' OPPOSITION TO MOTION TO STAY THE PROCEEDINGS BY THE DEPARTMENT OF ENERGY RESOURCES

I. Introduction

NSTAR Electric Company ("NSTAR Electric") and NSTAR Gas Company ("NSTAR Gas") and their holding company parent, NSTAR, and Western Massachusetts Electric Company ("WMECO"), and its holding company parent, Northeast Utilities ("NU") (hereinafter collectively "Joint Petitioners") submit this reply in opposition to the Motion to Stay the Proceedings submitted to the Massachusetts Department of Public Utilities (the "Department") by the Department of Energy Resources ("DOER") (the "Motion") on July 14, 2011.[1] In the Motion, DOER states that a stay of the proceedings is needed in order to supplement the record with:

1. a merger integration plan documenting the costs and benefits of the merger, including greenhouse gas ("GHG") emissions occasioned by the merger;
2. factual information related to reasonably foreseeable climate change impacts as required by the Global Warming Solutions Act, G.L. c. 21A, § 2(30); and
3. rate changes resulting from the proposed merger.

[1] This is DOER's second attempt at delaying the proceeding. On June 10, 2011, DOER filed a Motion to Compel and Stay the Proceedings claiming that the Joint Petitioners had not provided sufficient information on greenhouse gas emissions ("GHG") associated with utility operations both currently and subsequent to the merger. To address this motion, the Joint Petitioners participated in several discovery conferences with DOER and submitted three separate filings providing substantial information on "business-as-usual" and post-merger GHG emissions. In light of the Joint Petitioners' submission of supplemental information, the Department subsequently asked DOER to either withdraw or update the motion. On July 14, 2011, DOER filed a new motion, which is the subject of this reply.

(Motion at 1-2). DOER requests that the stay remain in effect pending compilation of these three categories of information, as well as for a period sufficient for the Department to conduct a full base-rate proceeding (Motion at 2, 12). Thus, the period of the stay is indefinite and prolonged, with the delay likely to approach a year or more in duration.

The Department should deny DOER's Motion because it is factually inaccurate, has no legal justification, would produce no discernable customer benefit, and ultimately, would be harmful to the interests of Massachusetts customers. Massachusetts customers will not realize the level of cost savings achievable through the Proposed Merger through any other business initiative available to the Joint Petitioners, yet the Proposed Merger will be jeopardized if it is not allowed to move forward to closing in a reasonable time period. DOER seeks to extend the schedule for the proceeding for an unreasonable time period, far beyond the termination date of the Agreement and Plan of Merger dated October 16, 2010, as amended on November 1, 2010 (the "Merger Agreement").[2] The deadlines set in the Merger Agreement recognize that financial circumstances involved in the valuation of the anticipated merger transaction do not stay constant and a substantial passage of time has the potential to affect the financial underpinnings of the transaction. A decision by the Department to grant DOER's Motion would jeopardize the Proposed Merger because it could preclude a merger closing within a reasonable time frame.

Given the potential impact of a prolonged and indefinite stay on the merger closing, there is no customer interest that would be served by a stay of these proceedings given that (1) the substantial level of operating cost reductions that are projected to result from the merger cannot and will not be achieved if the merger transaction is prevented; (2) the Joint Petitioners have

[2] The Merger Agreement sets forth the terms and conditions of the Proposed Merger. Section 7.1 (b) of the Merger Agreement establishes a termination date of October 16, 2011, subject to extension where all of the conditions to closing are satisfied or are close to being satisfied; however, the extension of the termination date per the Merger Agreement cannot exceed eighteen months, or April 16, 2012.

fully addressed on the record DOER's stated concerns consistent with the Department's standard of review; and (3) the relief sought by DOER can be addressed by the Department through a rate proceeding conducted after the merger closing. Neither the Department's consideration of net benefits in the merger proceeding, nor the requested rate review are advantaged by an indefinite and prolonged delay in the merger review. Nor has DOER made any showing that a delay is warranted. To the contrary, DOER's suggested course of action would have the Department conducting a rate proceeding, where it could not consider the impacts of the merger because the merger will not have been approved and will not even be certain to occur. In addition, the outcome of that proceeding will be new rates based on a pre-merger test year, with no relevance to the review of net benefits anticipated to result in the future from the Proposed Merger. The Department has ample authority to protect the interests of customers without posing any risk to the completion of the merger and granting DOER's request would be an arbitrary decision directly detrimental to the public interest.

It is important to note that DOER's request for a rate review is based on two fundamental omissions and misstatements of fact. First, it is not true that NSTAR's cost of doing business has not been exposed to public review or Department examination for over 20 years, as DOER claims (Motion at 11). NSTAR Electric's base distribution rates were last set in 2005 through a rate settlement approved by the Department on December 30, 2005, between NSTAR Electric, the Massachusetts Attorney General's office, Associated Industries of Massachusetts and the Low-Income Energy Affordability Network. NSTAR Electric, D.T.E. 05-85 (2005). The D.T.E. 05-85 Rate Settlement reduced NSTAR Electric's base-rate request from $80 million to $30 million, while also instituting certain performance-based ratemaking mechanisms, including service quality requirements.

Second, DOER fails to mention that NSTAR Electric's witness in this proceeding has already testified that the D.T.E. 05-85 Rate Settlement does not expire until December 31, 2012 and NSTAR Electric is planning to submit its financial information for rate review in mid-2012 so that new rates can be set for January 1, 2013. As a result, the rate review that DOER is suggesting must take place is already scheduled to be commenced just after the merger closing, which would allow the merger to go forward and would provide the Department with the opportunity to factor the merger into the subsequent rate request. DOER's Motion changes the sequence of events so that the Proposed Merger is jeopardized and the rate review takes place on a timeline that precludes consideration of the Proposed Merger in the final outcome of the rate review.[3] Simply put, DOER's Motion is not geared toward an outcome that protects the long-term interests of Massachusetts customers.

In addition to the substantive deficiencies of DOER's suggested course of action, DOER's Motion is procedurally defective because it relies on a misapplication of the statutory standard applicable to the Proposed Merger and effectively constitutes a motion to dismiss if accepted by the Department, although it falls far short of meeting the Department's standard for a motion to dismiss. In addition, this reply demonstrates below that it is not reasonable or feasible for the Joint Petitioners to implement a merger-integration plan before the merger is closed. Lastly, the reply shows that Joint Petitioners have satisfied their burden regarding the analysis of climate change impacts related to the Proposed Merger and that DOER's escalating requests on this point go well beyond any reasonable requirement established by law and necessary to the determination of net environmental benefits in this case.

[3] If the Proposed Merger is not approved at the time of the rate review, and is uncertain to occur because of the delay, the cost impacts of the Proposed Merger cannot legally be factored into any rate decision.

II. Analysis and Discussion

A. DOER's Request to Hold the Merger Proceeding Hostage to an Undefined and Unrelated Future Rate Proceeding Lacks a Reasonable Justification, Does Not Advance Any Merger-Related Purpose, and Puts the Ability to Close the Merger At Serious Risk.

1. There is No Rational Justification for the Indefinite Delay of the Proceeding

In the Motion, DOER's principle claim and request is that the merger proceeding be indefinitely stayed pending the completion of a full base-rate review for NSTAR Electric (Motion at 11-12), which is a period likely to be a year or more in duration given the time that is needed to prepare, file and litigate a full base-rate proceeding. However, DOER's Motion fails at a fundamental level because it does not assert *any reasoned basis* for the requested action. DOER's Motion asks that the Department indefinitely stay the merger proceeding pending a review of rates, but DOER never explains why this is necessary to the Department's merger review or what it would accomplish in relation to the merger review. The Joint Petitioners are not requesting any change in rates; and the Department's approval of the merger would not result in any change in rates. A base-rate review would focus only on historical and current financial data for only one of the Massachusetts companies involved in the Proposed Merger. The rate proceeding could not take into account merger-related savings, because the merger would not be approved and would not even be certain to occur. By comparison, continued Department review of the Proposed Merger proceeding would in no way undercut, diminish or prevent a subsequent rate review by the Department, if approved. Thus, it is clear that the two proceedings at issue, i.e., a review of current rate levels and a review of whether the Proposed Merger will produce benefits for customers, have no connection or relevance to each other if conducted in the illogical sequence suggested by DOER.

In addition, there is no precedent or legal basis for the DOER's request. The lack of any legal basis for the DOER request is underscored by the fact that the Department has approved or reviewed at least 10 utility mergers since 1995 and the Department did not find it necessary in any of these proceedings to require a review of the cost of service of a petitioning utility as a prerequisite to approval of a merger under G.L. c. 164, § 96, except in one limited instance where the petitioning utilities requested the establishment of a savings tracker based on a pre-merger test year. See, Eastern-Colonial Acquisition, D.T.E. 98-128 (1999). Moreover, when the Department made its mid-course change to a net-benefits standard in this proceeding it did not establish a prerequisite to its merger review, and therefore, any attempt to do so now would be entirely arbitrary.

Moreover, not only does DOER fail to show any rationale for its extraordinary request, it fails to discuss or even acknowledge the serious risk of customer harm its proposal would create. Delaying the merger case until after a future rate filing would have no probative value as to whether the merger will produce savings for customers, nor will it move customers any closer to the prospect of enjoying merger savings than approval of the Proposed Merger and a subsequent rate proceeding. The delay can only have the effect of creating risk for customers because of the significant possibility that opportunities to achieve substantial operating cost reductions will be lost.

In addition, a fact that is completely ignored by DOER is that the Department does not need to conduct an investigation of the existing cost of service for NSTAR Electric and NSTAR Gas in order to determine whether the merger of NU and NSTAR will produce net cost savings for Massachusetts customers following the merger. A base-rate review for NSTAR Electric, as a standalone company, would not inform the decision as to whether the merger of NU and NSTAR

can create future opportunities for cost reductions through operational consolidation because the NSTAR operations would have to be reviewed as a standalone company, and the rates that would result from that proceeding could not take future events into account. In addition, no determination of future rate impacts arising from the Proposed Merger could be gleaned from a rate review conducted within the next few months, based on a pre-merger test year.

Even DOER recognizes that the future rate implications for customers are not imminent and will not take place within a short time period of the merger closing. DOER states that the impacts of rate changes arising from the merger "will admittedly take several years," which is a point that is also recognized by the Attorney General's witnesses (DOER at 10). This admission shows the central fallacy of DOER's request because there is no determination of future rate impacts arising from the Proposed Merger that is going to come from a rate review conducted within the next year on the basis of a pre-merger test year. Under DOER's proposal, the rate review could not even address post-merger rate impacts, because it would occur **prior** to the closing of the merger. Under accepted rate making principles, the Department would be legally precluded in its review of rates from reaching any determination that took into account hypothetical future results or impacts from the then still non-existent merger. Therefore, holding the proposed merger "hostage" to an extended review of existing rates adds zero value to either the merger review or the base-rate review, while posing serious risks to the completion of the Proposed Merger.

2. Putting the Merger at Risk is Unnecessary Given that Approval of the Proposed Merger Does Not Prejudice or Limit Future Rate Reviews by the Department.

In approving the merger, the Department retains full regulatory authority over NSTAR Electric, NSTAR Gas and WMECO. The three companies cannot change rates, merge or

consolidate with each other or any other company without the Department's approval. Further, the Department retains full authority in relation to the incorporation in rates of net operating savings that will result from the Proposed Merger. The Department has well-established ratemaking rules and procedures that govern all aspects of the ratemaking mechanisms in place to recover the cost of providing service to customers in Massachusetts, and nothing about the merger approval can or would change this legal authority. An indefinite stay of the proceeding to conduct a rate review adds zero value to the effectiveness or efficacy of the process.

Conversely, although there is no benefit that flows from indefinitely staying the proceeding, there are severe potential risks that would arise from this action. It is undisputed that the merger will generate substantial benefits for customers; the issue under debate is when and how those benefits will be experienced by customers. Although the parties to the proceeding may debate both the quantity of net savings available and the timing of the realization of those benefits by customers, there is no party suggesting that no cost savings will occur, or even that those cost savings will not be substantial, as measured in the hundreds of millions of dollars of projected operating cost reductions across the NU and NSTAR organization. These benefits will not be attained if the merger fails to go forward, which is a significant risk if the merger review is delayed indefinitely pending a comprehensive rate review.

B. DOER's Motion Ignores Important Considerations that Argue Against an Indefinite Stay.

There are several considerations that DOER fails to address in its Motion, which have a significant and direct bearing on the customer interests implicated by an indefinite stay to the proceeding. These considerations are as follows:

First, under G.L. c. 164, § 94, public service companies have a statutory right to propose rate schedules at any time, which are designed to recover the cost of providing service to

customers, including a fair and reasonable return. In the event that the Department were to grant DOER's Motion and indefinitely stay the proceeding pending the outcome of a litigated rate review under G.L. c. 164, § 94, NSTAR Electric and NSTAR Gas will have no alternative but to file rate cases demonstrating the need for an increase in base revenues on the order of $50 million for NSTAR Electric and $15 million for NSTAR Gas. NSTAR's witness in the proceeding has testified to the existence of a revenue deficiency on this order of magnitude for both companies (Tr. 4, at 402-403). Both NSTAR Electric and NSTAR Gas have completed capital projects totaling in the hundreds of millions of dollars since their last rate cases, which are not recovered through the current costs of service. Both companies are experiencing substantial increases in operating costs, including costs to pay property taxes, union wage increases required under collective bargaining agreements and other unavoidable costs required to keep the system safe and reliable and deliver the outstanding level of service NSTAR customers currently receive. Consequently, a base-rate case will likely produce cost increases for customers and there will be no foundation upon which the Department could take into account cost savings resulting from the merger because the merger will not have been approved by the Department at the time that it performs the rate review.

DOER concedes the possibility of a rate increase coming out of a rate review, stating that "DOER is also concerned that the merged entity's revenues could be substantially altered if NSTAR's costs are found to be higher than currently assumed (Motion at 11)." Thus, it is extremely difficult to see how it is in the interests of Massachusetts customers to dismiss the merger petition to conduct a base-rate case for NSTAR Electric and NSTAR Gas based on a pre-merger test year. The Department's approval of the merger would both secure the opportunity to achieve cost savings for the benefit of customers and also preserve the Department's ability to

make sure that customers receive a share of those benefits in future rate proceedings, conducted in a time and manner appropriate to ensure a beneficial outcome for customers.

Second, DOER's Motion ignores the fact that NSTAR Electric is currently operating under a 7-year rate plan approved by the Department in D.T.E. 05-85. A decision by the Department to abrogate the terms of the approved rate settlement would create a strong basis for immediate appeal. Under the D.T.E. 05-85 Rate Settlement, rates are established through December 31, 2012 and so long as NSTAR Electric's operating results are within the confines of that settlement, there is no basis for the Department to seek to change rates (which is the case at this date). The rate plan precludes the company from seeking rate changes prior to that time. DOER's Motion does not address this fact in any manner, and therefore, offers no guidance to the Department on how a base-rate change could be legally achieved. Nor is it clear why the Department would want to given that rates are likely to increase as a result of that proceeding.

Third, DOER's Motion is based on a series of erroneous and inflammatory claims. In particular, DOER claims that NSTAR rates have not been exposed to public view or Department examination for over 20 years and further alleges a slew of un-informed sound bites that are notable because they bear no relation whatsoever to the issues under review by the Department in this proceeding, which is being conducted under G.L. c. 164, § 96. Specific factual misrepresentations and inaccuracies are the following:

1. NSTAR is not charging "high" distribution rates, as compared to other operating systems operating in densely populated urban areas through an underground distribution system and DOER has not shown how this statement is true (Motion at 11). NSTAR customers in fact experience among the highest service quality in the

Eastern United States, according to J.D. Powers, and reported by the Boston Globe on July 13, 2011.

2. NSTAR is not "avoiding decoupling," as claimed by DOER (id.). NSTAR Electric is operating under a long-term rate plan approved by the Department in D.T.E. 05-85, which does not expire until December 31, 2012. Under this rate settlement, NSTAR Electric is precluded from filing for base-rate relief, except for in circumstances identified within the rate agreement. Both NSTAR Electric and NSTAR Gas have testified that they are expecting to file a base-rate case for effect after 2012.

3. NSTAR has achieved fair and reasonable rates of return for its shareholders by maintaining adequate investment to minimize operating and maintenance ("O&M") costs and tightly controlling O&M costs throughout the organization, while providing the highest levels of service to customers experienced across all of the largest operating utilities in the Northeast. DOER has overlooked the fact that NSTAR's rate of return for distribution operations is both consistent with the terms of the D.T.E. 05-85 Settlement Agreement and comparable to the rate of return authorized by the Department for similarly sized electric companies in the Commonwealth. See Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid, D.P.U. 09-39, at 400 (2009). NSTAR's actual rate of return is the result of successful financial management and intensive efforts to control O&M costs at all levels of the organization. In fact, evidence in this proceeding shows that NSTAR Electric operating costs are lower in 2010 than they were in 1999, which was the year before NSTAR was created through the merger of Boston Edison Company and Commonwealth Energy Systems (Exhibit JP-1 (Supp.), at 7; Exhibit AG-NU-7-7).

4. NSTAR has not benefited from any rate treatment that has not been applied to other utilities in various ratemaking forums over the past 10 years. The Department has routinely allowed inflation adjustments in the context of long-term rate plans where utilities have agreed to forego their statutory right to file a base-rate petition for an extended time period (see e.g., Bay State Gas Company, D.T.E. 05-27 (2005); Boston Gas Company, D.T.E. 03-40 (2003); Berkshire Gas Company, D.T.E. 01-56 (2001); Boston Gas Company, D.P.U. 96-50 (Phase I) (1996)). The Department has approved capital cost recovery mechanisms for several utilities, and has done so after finding that capital cost recovery for safety and reliability purposes is in the public interest (see e.g., Bay State Gas Company, D.P.U. 09-30 (2009); Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid, D.P.U. 09-39 (2009); Boston Gas Company, Essex Gas Company and Colonial Gas Company d/b/a National Grid, D.P.U. 10-55 (2010)). The Department has approved carrying costs for utility cost recovery in a multitude of forums and for many, many years in recognition that there is a cost associated with using the Company's financial resources for customer purposes.

The foregoing considerations demonstrate that DOER's arguments in its Motions are exaggerated and baseless. In approving the merger, the Department will retain its authority and expertise to evaluate future rate proposals and to appropriately account for net merger savings and protect the public interest. Alternatively, acceptance of the Motion will jeopardize the Proposed Merger and damage the interests of everyone involved, including customers, who stand to experience substantial reductions in their cost of service that would not be available through any other means.

C. It is Not Reasonable or Feasible for the Joint Petitioners to Implement a Merger Integration Plan Prior to the Merger Close.

In its Motion, DOER also argues at some length that the Department should dismiss the proceeding because the Joint Petitioners have not completed a full-scale merger-integration plan identifying "long-term strategies" for a "business-as-usual" scenario (Motion at 7-10). DOER ignores the record evidence on these issues, which establishes that the integration process is designed to prepare the merged organization for "Day 1" readiness and that full integration will occur post-closing. There is no long-term merger-integration plan that can or will be completed unless the merger is closed.

In order to develop a meaningful, realistic and workable integration plan, it is necessary for NU and NSTAR to identify a new, consolidated management team for the merged company, to allow that team to play an active role in shaping their respective organizations, and to engage in a comprehensive assessment of best practices to identify efficiencies and cost savings. Until the closing occurs and the management team is determined, the implementation of integration efforts beyond Day 1 readiness cannot reasonably be commenced. Decisions will not be made regarding management organization until it is certain that the merger is going to take place because it is impractical and detrimental to the standalone organizations to announce management decision before all approvals are obtained. If the merger is not approved, NU and NSTAR both must be able to move forward to continue to provide service to customers as separate companies without disruption.

Moreover, prior to actual closing of the merger, both NU and NSTAR remain separate legal entities, with responsibilities to their respective customers, shareholders, boards of trustees, employees and all other stakeholders to operate efficiently, safely and reliably. Although the Joint Petitioners are confident of the soundness of their decision to merge, management of both

companies nonetheless have to allow that, for whatever reason, actual closing of the proposed merger may not take place. And while each party to a merger transaction can make reasoned estimates of what its post-merger operations might strive to achieve, neither company can make final decisions on integration strategies, unless and until it actually merges. Thus, there is some level of final decision making in relation to organizational structures and leadership succession, that must be reserved to post-merger management and cannot, by their very nature, be resolved finally, or fully anticipated, unless and until the merger actually closes and a single, consolidated management is authorized to proceed with institutional changes.

Moreover, implementing a comprehensive and well-considered integration plan is an effort that could take up to several years to complete. If post-merger distribution rates are to accurately and fully reflect the net benefits of the merger, the integration plan must be known and implemented, at least to a reasonable extent. Setting rates without this result will not be in the interests of customers. The time-span apparently anticipated by DOER during a "stay" of the proceeding is not consistent with a rational and appropriate merger-integration approach and it is not reasonable or appropriate for the Joint Petitioners to approach it in that fashion. Nor should the Department seek to achieve such an objective because the end result will simply undermine and devalue the benefits that are available as a result of the Proposed Merger. Thus, any base-rate review conducted by the Department during a stay in the merger proceeding will not be informed by a merger integration plan as DOER suggests.

D. The Joint Petitioners Have Fully Demonstrated the Positive Net Benefits of the Proposed Merger with respect to Climate Change.

As a third reason for dismissal of the proceeding, DOER claims that the Joint Petitioners have failed to provide factual information related to reasonably foreseeable climate change impacts that the Department is required to evaluate under the Global Warming Solutions Act,

G.L. c. 21A, § 2(30) (Motion at 5). In support of this claim, DOER describes at length the information that the Joint Petitioners have provided and the several attempts by the Joint Petitioners to address DOER's requests for environmental impacts. By discovery conference conducted on June 20, 2011, DOER agreed to a "business-as-usual" horizon matching the business planning horizons currently in place for NU and NSTAR.[4] This agreement was memorialized in the Joint Petitioners response to DOER-1-11 (Supp.3), at page 1. Now, and without any discussion with the Joint Petitioners as required by the Department's ground rules, DOER claims that neither of these planning horizons is sufficient to evaluate long-term strategies or reasonably foreseeable impacts (DOER at 7). DOER claims that these planning horizons are also inconsistent with the 10-year Net Benefits Analysis. However, there is no requirement and no framework required or established by the Department in terms of future climate change impacts. Nor is it necessary or reasonably possible to develop what DOER suggests.

Specifically, in DOER-1-11 (Supp.3), the Joint Petitioners identified actual GHG emissions are measured on an annual basis for reporting purposes. This is what is required of NSTAR and NU by Massachusetts law. See, G.L. c. 21N, § 2(a); 310 C.M.R. § 7.71. The Joint Petitioners have quantified and accounted for the net environmental impacts of the merger that are reasonably foreseeable. In seeking a further projection of GHG emissions, DOER is seeking to go far beyond the established routines and methodologies. It should also be noted that the examples cited by DOER (facilities and transportation) as areas where more information should be provided would have the certain effect of only increasing the net benefits already demonstrated.

[4] There were multiple participants in this conference, participating on behalf of NSTAR, NU and DOER. If affidavits are needed to confirm this fact, the Joint Petitioners are ready to provide those affidavits.

According to DOER, the "most significant" issue with the climate change analysis is that neither NU nor NSTAR *forecast* electric line losses, which DOER claims is each company's largest and growing source of GHG emissions with reasonably foreseeable climate change impacts (DOER at 7). Even if this were true, the applicable analysis in this case is not whether electric line losses account for each company's largest source of GHG emissions, *but whether the merger causes any impact to increase or lessen those impacts.* DOER is not focused on the correct analysis for this proceeding. Moreover, a debate over the forecasting of electric line losses is not necessary for this proceeding, and even if it was, it is certainly not a basis for dismissing the merger and preventing the achievement of $784 million in net savings for customers. According to the Department's decision on the standard of review for this proceeding, climate change impacts are an appropriate issue for consideration in the context of the proceeding. See Interlocutory Order on Standard of Review (Mar. 10, 2011) at 25-26**.** However, this issue has been fully and reasonably addressed by the Joint Petitioners, and should not take priority over all of the other objectives at stake in this proceeding including customer costs, which is the primary area of the Department's responsibility under the law.

E. DOER's Motion Is Procedurally Defective and Should Be Rejected by the Department in Accordance with its Procedural Rules.

The bulk of DOER's Motion is devoted to its claim that the record evidence in this proceeding is insufficient to provide the Department with a complete and accurate record upon which to make a determination under G.L. c. 164, § 96 that the Proposed Merger is consistent with the public interest (Motion at 4). This is a claim that is procedurally flawed in several specific respects, including its overall effect. The overall effect of DOER's Motion is that it asks the Department to take the extraordinary step of delaying indefinitely the proceeding based solely on DOER's interpretation of the statute and its unilateral viewpoint that the Joint

Petitioners have not met the statutory standard for approval. Therefore, in granting the Motion, the Department would cede its decisional authority to DOER instead of allowing DOER's positions tested and adjudicated through the normal adjudicatory process in conjunction with the positions of all other parties. The Department should not allow the procedural deficiencies inherent in DOER's request to abrogate the due process rights of all parties to this proceeding, including that of the Joint Petitioners.

1. DOER's Motion Relies on a Misapplication of the Statutory Standard.

DOER asserts that the Joint Petitioners have not provided sufficient evidence on "ANY" of the minimum four factors required by G.L. c. 164, § 96 for the Department's evaluation of whether the Proposed Merger is consistent with the public interest (Motion at 4). DOER identifies these factors as: (1) proposed rate changes at the time of the transaction, if any,[5] (2) long-term strategies that will assure a reliable, cost-effective energy delivery system, (3) any anticipated interruptions in service, and (4) other factors which may negatively impact customer service (Motion at 4, citing, G.L. c. 164, § 96). DOER further claims that the Joint Petitioners have not provided a quantification of reasonably foreseeable climate change impacts, which DOER asserts is required by the Global Warming Solution Act, G.L. c. 21A, § 2(30) ("GWSA") (id. at 6).

Of the four factors set forth in G.L. c. 164, § 96 and referenced by DOER, the Motion addresses only one, which is "proposed rate changes, if any." However, DOER's interpretation of

[5] DOER's statement of the statutory provision is not correct. Section 96 states as follows:

> Companies . . . subject to this chapter and their holding companies may, notwithstanding any other provisions of this chapter or of any general or special law, consolidate or merge with one another . . . if such purchase, sale, consolidation or merger, and the terms thereof, have been approved at meetings called therefor, by vote of the holders of at least two-thirds of each class of stock outstanding and entitled to vote on the question of each of the contracting companies, and that the department, after notice and a public hearing, has determined that such purchase and sale or consolidation or merger, and the terms thereof, are consistent with the public interest; provided, however, that in making such a determination the department shall at a minimum consider: **proposed rate changes, if any;** the long term strategies that will assure a reliable, cost effective energy delivery system; any anticipated interruptions in service; or other factors which may negatively impact customer service. . . .

the Joint Petitioners' burden in relation to "proposed rate changes" is legally erroneous. If DOER had applied the correct standard, there would be no dispute that the Joint Petitioners have satisfied their statutory burden because the standard is triggered only in the event that there are "proposed rate changes, if any," and there are no rate changes proposed by the Joint Petitioners in this case.[6] Where there are no proposed rate changes, there is no statutory requirement to demonstrate that the "*proposed* rate changes" are in the public interest. Notably, DOER does not make any assertion or showing that that there is a proposed rate change taking effect, which the Joint Petitioners have not addressed.

Instead, DOER's claim that the Joint Petitioners have not met the statutory standard is based on an idiosyncratic misstatement of what the statute requires from the Joint Petitioners. Specifically, DOER asserts that "*the Department* is not limited to consideration of proposed rate changes on the exact date of the § 96 filing" (Motion at 10) (emphasis added). Clearly, the Department is not limited to consideration of any number of issues, including how the merger might affect costs going forward upward or downward and whether and how those cost changes may be borne by or shared with customers. However, the fact that the Department may consider a range of issues does not create or equate to a statutory burden of proof for the Joint Petitioners, as DOER erroneously suggests. The Joint Petitioners burden of proof in relation to "proposed rate changes" is established by specific statutory language and the Joint Petitioners have met the statutory standard in relation to customer rates because there are no proposed rate changes and therefore no proposed changes to support through the introduction of evidence.

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[6] See, e.g., Joint Petitioners' Initial Petition (November 24, 2010) at ¶ 13, stating that the "Joint Petitioners are not proposing any rate changes to take effect upon the closing of the Proposed Merger for customers of NSTAR Electric, NSTAR Gas and WMECO. Rates will remain at current levels upon closing unless and until a change in those rates is authorized by the Department." See, also, Exhibit JP-1, at 15.

2. DOER's Request for an Indefinite Stay is the Functional Equivalent of a Motion to Dismiss, and therefore, the Same Standard Should Apply

There must be a legal, procedural basis for motions submitted to the Department, yet DOER has not cited to any legal basis for its Motion under the Department's procedural rules. However, given that DOER's Motion would cause a prolonged and indefinite stay in the proceeding if granted, the Motion is the functional equivalent to a motion to dismiss the proceedings. When the appropriate legal standard is applied, it is clear that there is no legal or factual foundation for a Department ruling in favor of DOER, given the record already developed for the proceeding.

Under the Department's procedural rules, motions to dismiss and for summary judgment are governed by 220 C.M.R. § 1.06(6)(e), which allows a party to a proceeding to move for dismissal or summary judgment of all or any issues in a case at any time after the filing of an initial pleading. Whether viewed as a motion for failure to state a claim upon which relief can be granted or a motion for summary judgment, DOER's Motion cannot meet the Department's standard for dismissal of the case.

The Department's standard for ruling on a motion to dismiss was established in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988), and has been consistently applied by the Department since that time. See, Gaslantic Corporation, D.P.U./D.T.E. 96-101 (1999), at 7-8, citing Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27. In Riverside, the Department denied the respondent's motion to dismiss, finding that it did not "appear beyond doubt that [the petitioner] **could prove no set of facts** in support of its petition." D.P.U. 88-123, at 26-27 (emphasis added). In determining whether to grant a motion to dismiss, the Department takes the assertions of fact **as true** and construes them in favor of the non-moving party. Id. at 26-27 (emphasis added). Dismissal will be granted by the Department only if it appears that the

non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Id. Under this standard, DOER's Motion is without merit and should be denied because, if the facts set forth on the record for this proceeding are taken as true (which they are), the Joint Petitioners would meet the Department's net benefit test for approval of the Proposed Merger.

The Department's standard for ruling on a motion for summary judgment requires the Department to review the initial pleadings, pre-filed testimony, responses to discovery and the memoranda of the parties. Cambridge Electric Light Company, D.P.U. 96-33, at 7 (1996); IMR Telecom, D.P.U. 89-212, at 12 (1990). The Department has stated that summary judgment is appropriate if a review of the materials on file shows that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Cambridge Electric Light Company, D.P.U. 96-33, at 7 (1996); Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36 (1995), citing Altresco-Lynn, Inc./Commonwealth Electric Company, D.P.U. 91-242/91-153, at 10 (1991). In Western Massachusetts Electric Company, D.T.E. 97-120-3 (1998), the Department denied a motion for summary judgment by the Attorney General based on the existence of "voluminous discovery issued in the proceeding" and the Department's "serious questions of law and fact [that] remain to be determined in evidentiary hearings and argued on brief." Western Massachusetts Electric Company, D.T.E. 97-120-3, at 10. Based on the record assembled in that proceeding at the time of the Attorney General's motion, the Department found that neither the petitioner's nor the public's interest would be well served by granting the Attorney General's request." Id. Similarly, DOER's Motion should be denied here because there are issues of material fact, there is voluminous discovery on the issues involved in the

proceeding, and there are issues of law and fact that will not be resolved or affected by a separate base-rate review.

Conversely, if DOER's Motion is not treated as a motion to dismiss or a motion for summary judgment, then the Motion fails because the Department rules specifically establish that the filing of a motion, either prior to or during any adjudicatory proceeding, and any action thereon *shall not delay* the conduct of such proceeding. 220 C.M.R. 1.04(5) (emphasis added). Under Massachusetts law, an adjudicatory proceeding is a proceeding before an administrative agency in which the legal rights, duties or privileges of individuals or corporations are required by any provision of the general laws to be determined after opportunity for an agency hearing. G.L. c. 30A, § 1. This rule of the Department recognizes that, where a party's rights are being adjudicated, there is an obligation incumbent upon the Department to conduct that proceeding with due process, fairness and administrative efficiency. DOER's Motion satisfies none of these requirements and has no foundation in law or the Department's rules of procedures, as a result.

Since the commencement of the case on November 24, 2010, the Joint Petitioners have submitted: (1) an initial petition, including testimony and exhibits, dated November 24, 2010; (2) a supplemental filing dated April 8, 2011, including detailed testimony and a comprehensive Net Benefits Analysis covering both economic and environmental net benefits resulting from the merger; (3) rebuttal testimony filed on June 10, 2011; (4) responses to approximately 1,000 discovery requests; and (5) have participated in nine days of evidentiary hearings involving participation by the Commonwealth of Massachusetts Office of the Attorney General, DOER, low-income intervenors, labor unions, competitive generators and competitive market suppliers and environmental policy groups. There is no dearth of probative evidence in this case, as claimed by DOER, and no independent observer could come to the conclusion that there is no set

of facts or evidence existing on the record that would meet the Department's net benefits test. In fact, because of the Department's change in standard, there now exists in the record a greater demonstration of net benefits for customers in relation to the Proposed Merger than in any other merger petition coming before the Department in its history.

Moreover, what is notable about DOER's claim that the Joint Petitioners have not provided evidence on "ANY" of the minimum four factors required for consideration by the Department under G.L. c. 164, § 96, is that DOER must argue at length the very record evidence that it claims not to exist , which underscores that fact that DOER's Motion cannot meet any of the Department's standards for delay and dismissal of a case. The Department can reach DOER's requested result only by examining the record evidence, considering the legal arguments put forth by DOER and effectively rendering a final decision on the merits of the evidence submitted. As a result, there is no basis by which the Department can come to a conclusion that a prolonged and indefinite stay is warranted or appropriate.

Thus, it is clear from the Motion that DOER is arguing the merits of the case, which is an exercise appropriate for briefing, not a basis for an indefinite stay of the proceeding. By granting the Motion, the Department would take the step of substantially delaying the case based on the premature legal argument of one party, while wholly disregarding the fact that other witnesses, including the Attorney General's witnesses, have testified that the Joint Petitioners have demonstrated that net cost savings will occur as a result of the merger and that the Joint Petitioners have met the net benefits standard relating to environmental impacts (see, e.g., Exhibit AG-AEP-1 (Pereira Testimony), at 12). The Joint Petitioners have made far more than a prima facie case regarding all of the four factors referenced by DOER, as well as in relation to the quantification of reasonably foreseeable climate change impacts arising from the Proposed Merger. The determination of the merits is up to the Department following completion of the adjudicatory process, which allows

parties the opportunity to submit legal briefs arguing whether the applicants have carried the burden of proof to meet the standard of review applicable in this case. It would be highly inappropriate for the Department to allow DOER to pre-empt the adjudicatory process and effectively dismiss the case on the basis of legal argument put forth by a single participant.

III. Conclusion

For the foregoing reasons, the Department should deny DOER's Motion because it is factually inaccurate, conceptually flawed and ultimately detrimental to Massachusetts customers. No customer interest would be served by a stay of these proceedings given that (1) the substantial level of operating cost reductions that are projected to result from the merger cannot and will not be achieved if the merger transaction is prevented; (2) the Joint Petitioners have fully addressed on the record DOER's stated concerns consistent with the Department's standard of review; and (3) the relief sought by DOER is fully and appropriately achievable by the Department following the merger closing.

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