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July 6, 2015

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

Re: D.P.U. 15-37, Investigation into New Natural Gas Delivery Capacity, Including Actions to be Taken by the Electric Distribution Companies

Dear Secretary Marini:

NSTAR Electric Company and Western Massachusetts Electric Company each d/b/a Eversource Energy submit the attached reply comments in the above-referenced docket.

Thank you for your attention to this matter.

Very truly yours,

Daniel P. Venora

Enclosures

cc: David J. Gold, Esq., Hearing Officer
Christina Belew, Assistant Attorney General, Office of Ratepayer Advocacy
Elizabeth Anderson, Assistant Attorney General, Office of Ratepayer Advocacy
Donald Boecke, Assistant Attorney General, Office of Ratepayer Advocacy
Elizabeth Mahony, Legal Counsel, Department of Energy Resources

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities Upon its Own Motion into New Natural Gas Delivery Capacity, Including Actions to be Taken by the Electric Distribution Companies	D.P.U. 15-37

REPLY COMMENTS OF EVERSOURCE ENERGY

I. INTRODUCTION

On June 15, 2015, NSTAR Electric Company and Western Massachusetts Electric Company each d/b/a Eversource Energy ("Eversource" or the "Company") submitted initial comments in response to the notice of inquiry ("NOI") issued by the Department of Public Utilities ("Department") in the above-referenced docket on April 27, 2015. In its initial comments, Eversource described the imperative for action that currently exists for the Department, and provided responses to all of the questions of the Massachusetts Department of Energy Resources ("DOER") and the Department presented in the NOI. The Department also received initial comments from numerous other docket participants addressing various aspects of the questions in the NOI and other issues. These comments reply to certain issues raised by commenters in the initial round of the Department's NOI.

As the Department has likely determined, numerous comments were submitted to the Department on June 15, 2015, but the debate encompassed in those comments centers on only three main issues: (1) whether there is a need for the Department to take action to enable the development of incremental natural gas capacity to alleviate electric reliability and pricing risks, or whether the Department should delay action in deference to other alternatives; (2) whether the Department has the authority to review and approve the execution of gas capacity contracts by

electric distribution companies ("EDCs"), with coincident cost recovery through customer rates; and (3) what the criteria are for demonstrating that an EDC contract for interstate pipeline capacity should be approved. A large number of commenters urge the Department to delay action to allow for additional study and investigation of regional market dynamics and resource needs, or urge the Department to hunt for other alleged solutions that are, in fact, either limited in scope or completely illusory in terms of meeting the overall resource requirement, with all such alternatives likely representing an equal or greater cost to customers. The Department should not view delay and inaction as a reasonable response.

Notably, many of the commenters urging delay, more elaborate study, or the pursuit of ineffective alternatives acknowledge that there is an imbalance of supply and demand in the marketplace for electric supply, and that there are reliability concerns that are inherent in that imbalance.[1] It is also notable that comments urging delay and inaction are put forth by

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[1] See, e.g., *Attorney General Comments at 2* ("[i]n most hours, the marginal generators in New England are fueled by natural gas, and electricity prices during these hours are directly impacted by the price of natural gas paid by the electric generators), *and at 15* ("[e]lectric reliability also must be included in any consideration of potential solutions to high winter gas prices. One of the issues subsumed in concerns about high winter electricity prices due to insufficient natural gas availability is whether there will always be enough generation capacity and fuel to meet electricity demand."); *Conservation Law Foundation Comments at 18* ("[w]ith increased coal-gas switching and coal retirements in the Mid-Atlantic states and the Midwest, the Northeast can expect these same patterns of elevated prices in cold weather periods of high heating and electric generation demand, at least until the overall gas and electric markets become better coordinated—a major goal of recent regulatory efforts at FERC."), *and at 20* ("New England's deliverability issue manifests during a limited winter timeframe, when gas system demand exceeds inbound pipeline capacity from the south and west."); *Direct Energy Comments at 7* ("[t]here are numerous capacity constraints in the Region, mostly impacting deliverability during the winter peak months, but also at times during the summer."); *GDF Suez Comments at 28 (Att. B)* ("[T]he natural gas delivery constraints at peak exist with respect to moving gas from west to east. The Department should seriously consider the option of utilizing existing infrastructure to move gas from east to west and north to south to avoid existing constraints and diversify the supply options for Massachusetts.") *Acadia Center Comments at 2* ("[T]he high regional electricity prices that New England has experienced over the last two winters are caused by two factors: supply and demand for electricity. Due to the prevalence of natural gas-fired facilities in ISO-NE's generation mix, prices in the electric wholesale market are frequently correlated with prices for natural gas, which in turn is driven by supply and demand for gas); *National Energy Marketers Association Comments at 2* ("NEM recommends that a joint New England States-FERC technical workshop be convened about the gas capacity shortage in recognition of the fact that this truly is a regional problem that requires a regionally-developed and regionally-implemented solution.").

environmental interests looking to avoid increased use of natural gas as a fuel source for economic and policy reasons; electric generators that benefit from higher market pricing or have other business interests at stake; or other parties looking to defeat the construction of natural gas pipelines to protect their private interests. Some commenters opposing Department action argue that there is no issue with electricity prices or the reliability of supply and that the Department should simply ignore these concerns. Yet, virtually all of the comments urging delay and inaction fail to acknowledge or directly address the *customer impact* of supply and demand imbalances in the electric supply market.

The Department is the only entity in this discussion that has the authority, impetus and opportunity to take action to protect the interests of customers. The Department should put aside the comments urging delay and inaction and should fulfill its statutory mandate to ensure "a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." G.L. c. 164 § 69I. Questions regarding resource need and resource alternatives are routinely addressed by the Department in proceedings conducted under G.L. c. 164 § 94A ("Section 94"). Therefore, the Department should issue a policy statement describing its authority under Massachusetts law to review and approve EDC contracts for pipeline infrastructure, along with explanation of the criteria by which the Department will approve proposed contracts.

In particular, there is no need for further study or delay as to whether there is a supply and demand imbalance and reliability concern due to the lack of gas capacity. There are numerous studies and industry consensus establishing this fact.[2] The dispute is about the

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[2] See, e.g., Coalition to Lower Energy Costs Comments at 60-66 (citing over 80 studies and supporting documents as evidence of the need for additional gas pipeline capacity into the region).

solution to the identified deficiency and whether a *particular* proposal would be a reasonable solution to the identified deficiency. However, the Department cannot effectively and comprehensively resolve this question outside the context of a particular proposal. Addressing questions as to resource need and resource alternatives in the abstract will be a fruitless exercise that will only divert time and attention away from the critical inquiry. Therefore, the Department should expeditiously issue a policy statement defining its legal authority and establishing the criteria for review and approval of EDC contracts so that specific proposals can be brought to the Department.

In these reply comments, Eversource provides a brief response to the false assertions by other docket participants that the region's reliability problem is not well defined or clearly understood; that the problem and solutions require further study; and that viable alternatives to the construction of interstate pipeline facilities are available to address the problem. All of these claims are simply designed to thwart action by the Department. The Company also responds below to the false assertions that the Department lacks legal authority to authorize the EDCs to contract for new natural gas delivery capacity with coincident cost recovery, and that federal law preempts the Department from taking necessary action to ensure a reliable power supply for retail customers in Massachusetts. Lastly, the Company's reply comments conclude with a recommendation on the standard of review and filing requirements for future applications for approval of EDC gas capacity contracts.

II. RESOURCE NEED AND RESOURCE ALTERNATIVES

The driver for DOER's proposal to the Department is the need to protect the interests of retail electric customers who are currently bearing the risk and cost of a market failure to provide for a necessary energy supply. Comments opposing Department action to allow review and

approval of EDC contracts for pipeline capacity are largely most interested in defeating the construction of incremental pipeline capacity for policy, business or private reasons, and offer little acknowledgment of the ongoing customer impact of capacity constraints.

These commenters generally conflate the issue of whether there is an overall regional market supply and demand imbalance with the examination of resource alternatives to address that imbalance. However, it is important for the Department to distinguish these two areas of inquiry because the question as to whether there is a shortage of gas pipeline capacity, and whether that shortage is causing high and volatile prices in the wholesale marketplace for electric generation, is settled. Consequently, there is no reason that the Department should expend its resources to perform a "regional economic study of new gas capacity" or "analysis of market conditions" or "modeling of solutions to address peak winter electric prices," as suggested by the Attorney General and other commenters urging delay or inaction by the Department (see, e.g., AGO Comments at 3-4). The comments received by the Department belie the fact that a defined and recognized problem exists, and also that the real debate is over what the response to that problem should be.

To obviate consideration of contracts that would support the development of incremental pipeline capacity, commenters urging delay or inaction cite to a wide range of "alternatives" that should allegedly be studied by the Department *prior to* the filing of any specific proposals for the Department's consideration. This makes no sense and nothing will come from a wide-ranging abstract examination of alleged alternatives other than paralysis and inaction. This type of approach simply places all of the work to identify, analyze, support and determine appropriate alternatives in the lap of the Department without (1) any specific proposal against which

alternatives can be evaluated; and (2) any commitment that the alternative will actually move forward effectively, if endorsed by the Department.

The Department's focus in this docket should instead be on the establishment of a *framework* for review and approval of specific proposals, which would be submitted with analysis substantiating the merits of the proposal. This would allow the proposed resource contract to be evaluated in comparison to viable alternatives in an adjudicated proceeding. Comments urging the Department to take a course of delay or inaction in order to explore alternatives are misplaced and should be set aside by the Department in this docket because the Department cannot appropriately evaluate alternatives in a vacuum. Alternatives are appropriately considered in the context of specific proposals with a demonstration made by project proponents.

Notably, the Attorney General's initial comments are indicative of the conflated arguments of interests opposing action by the Department (and indirectly, the construction of incremental pipeline capacity). Specifically, the Attorney General argues that the Department must undertake a "rigorous regional economic study of new gas capacity and alternatives," including: (1) analysis of market conditions, pipeline costs, and effect of planned market incentives; (2) modeling of solutions to address peak winter electric prices; and (3) evaluation of cost effectiveness, electric system reliability impacts, and carbon and fuel diversity impacts of those potential solutions," prior to considering an "out-of-market" proposal (AGO Comments at 3-4). In addition to conflating the issues of the supply and demand imbalance in the wholesale market and alternatives for addressing that imbalance, the Attorney General is essentially arguing that, before taking action, the Department should start all over again to redefine work that has already taken place over the past several years to assess regional energy requirements

and available resources, while conversely evaluating any and all alternatives to incremental pipeline capacity before there is even any specific proposal on pipeline capacity offered up for consideration. The interests of customers are not served by this type of ill-defined, redundant and/or abstract exercise.

Several claims similar to those put forth by the Attorney General were asserted by other parties opposing Department intervention (see, e.g., Acadia Center Comments at 2-3; Cape Light Compact Comments at 4-5; CLF Comments at 9; Environmental Defense Fund Comments at 2; Environmental Entrepreneurs Comments at 2; Environmental League of Massachusetts Comments at 2; Northeast Energy Solutions Comments at 1-2; Repsol Energy North America Corporation Comments at 4). Other parties argued that the market is working as designed and that Massachusetts should simply rely on the market to bring forth solutions and alternatives, although this has not happened to date (Direct Energy Comments at 1-2; GDF Suez Comments at 16-19; NEMA Comments at 4; NEPGA Comments at 3, 14-29; and Wal-Mart Comments at 6). Most all of these commenters have a private interest in creating obstacles to the development of incremental pipeline capacity and none of these commenters, including the Attorney General's office, have squarely addressed the risk and cost that Massachusetts customers will continue to bear over the longer term without incremental gas capacity. Therefore, the Department should rely on the studies and analysis completed to date regarding the cause of supply and demand imbalances in the electric market; and move forward to allow specific proposals that could be reviewed through an adjudicatory process, and evaluated under meaningful criteria designed to further the public interest.

III. LEGAL AUTHORITY AND STANDARD OF REVIEW

In this proceeding, the Department's focus should remain on two key issues: (1) the Department's authority to review and approve the execution of gas capacity contracts by EDCs, with coincident cost recovery through customer rates; and (2) the demonstration that would have to be made to by an EDC to obtain approval of a gas-capacity contract proposal. Under Massachusetts law, there is no basis for the proposition that the Department lacks the legal authority under state and federal law to review and approve EDC contracts, or is preempted by federal law from acting on solutions that would benefit Massachusetts customers. Claims to this effect are summarized as follows:

Authority Under State Law: The Attorney General and other commenters contend that DOER's proposal to allow EDCs to enter into gas capacity contracts is inconsistent with the policies and the principles of the Electricity Restructuring Act of 1997 (St. 1997 c. 164) ("Restructuring Act") and the "legislative intent" of G.L. c. 164, § 94A ("Section 94A").[3] The New England Power Generators Association and others additionally claim that the Department does not have power to act pursuant to its general supervisory authority under G.L. c. 164 § 76.[4] There is also an unfounded claim that these measures would undermine the Commonwealth's climate goals.[5]

Authority Under Federal Law: The Acadia Center claims that the Department action as requested by DOER is preempted by the Natural Gas Act[6] and therefore subject to the exclusive

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[3] AGO Comments at 18, 21-22; Cape Light Compact Comments at 8; CLF Comments at 5; Direct Energy Comments at 3-4; Essential Power Massachusetts Comments at 2; GDF Suez Comments at 3-9; NEPGA Comments at 3-9.

[4] GDF Suez Comments at 5-6; NEPGA Comments at 8.

[5] CLF Comments at 3, 7-9.

[6] 15 U.S.C. § 717 et seq.

jurisdiction of the Federal Energy Regulatory Commission ("FERC").[7] Similarly, GDF Suez and others claim that the Department action requested by DOER is preempted by the Federal Power Act[8] and subject to exclusive FERC jurisdiction.[9] Parties also assert that capacity should be released to the open market and not reserved for generators that would ultimately benefit the EDCs' customers (although there is no such proposal to "reserve" capacity for generators) because to do otherwise would be contrary to FERC rules, or would require additional legislation that would likely be found to violate the dormant commerce clause.[10]

These erroneous legal claims are each addressed in turn below and should be rejected by the Department, particularly as the arguments entirely omit consideration of the Department's overarching public-interest obligations under Massachusetts state law.

A. There Is Ample Authority for Department Action Under Massachusetts State Law.

The arguments asserted by commenters opposing action by the Department in this docket offer two basic theories under Massachusetts law as to the reasons that the Department is not legally authorized to review and approve EDC contracts for gas capacity. First, these commenters argue that DOER's proposal would be inconsistent with the Restructuring Act.[11] Second, these commenters argue that G.L. c. 164, § 94A does not allow for review and approval of EDC contracts for pipeline capacity. Both of these theories are baseless.

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7 Acadia Center Comments at 2.

8 16 U.S.C. § 791 et seq.

9 CLF Comments at 3, 6-7; GDF Suez Comments at 12-15; NEMA Comments at 5.

10 Acadia Center Comments at 2; GDF Suez Comments at 10-12; NEMA Comments at 5; NEPGA Comments at 13-14.

11 AGO Comments at 18-21; Cape Light Comments at 8; CLF Comments at 5; GDF Suez Comments at 6; NEPGA Comments at 6.

With respect to the first claim regarding contravention of the Restructuring Act, commenters ignore the fact that, in the general paradigm outlined by DOER, an EDC pipeline-capacity contract would simply put a resource into the marketplace without imposing any obligation on any wholesale market participant. Nothing would or could be required of electric generators. Wholesale generators would be free to purchase capacity made available from this process or from the marketplace and would have no obligations imposed upon them as a result of a process to have EDCs enter into contracts to support the development of pipeline capacity. There is no intervention in the wholesale market contemplated in any degree. The exercise would simply enable the availability of resources used in the marketplace to relieve supply constraints.

Similarly, approval of EDC contracts would not allow EDCs to "reengage in the generation sector."[12] No aspect of the contracts will cause the EDCs to become engaged in producing, manufacturing, or generating electricity for sale at wholesale, which are the functions referenced by these commenters. G.L. c. 164 § 1; St. 2007 c. 164, § 92 (defining "wholesale generation company"). Rather, the EDCs would be proposing to purchase gas capacity using their creditworthiness to support the construction of additional pipeline capacity, which would simply put new resources into the marketplace with the use of those resources purely a matter of discretion to electric generators and other possible shippers.

Moreover, a key point in relation to the arguments on the Restructuring Act is that the commenters asserting contravention of the Restructuring Act do not identify or discuss any nexus between the prohibitions and/or provisions of the Restructuring Act and the circumstances of potential EDC contracts. There are only general claims asserting an alleged contravention of

[12] NEPGA Comments at 6; see also AGO Comments at 18-21.

the "intent" of the Restructuring Act. In fact, the EDC contract solution does not violate or even implicate the policies and provisions of the Restructuring Act, nor would the Department's authorization of EDC contracts contravene any of the stated goals of the Restructuring Act. See St. 1997 c. 164, § 1. To the contrary, the Department's action would work to facilitate the continued operation of the marketplace while alleviating some of the inherent impetus for reliability and pricing risk.

With respect to the second claim, commenters alleging that the Department is without authority to approve EDC contracts under Section 94A are ignoring significant and directly applicable legal principles under Massachusetts law. Specifically, these commenters rely exclusively on a very narrow argument regarding the interpretation of Section 94A, based on a single, arcane canon of statutory construction. These commenters completely omit as a point of discussion the fact that the Massachusetts Supreme Judicial Court (the "Court") will not focus exclusively on the precise language of Section 94 in determining the scope of the Department's authority, but rather will consider the plain language of Section 94 in the context of the Department's overarching regulatory authority, as well as the Department's reasoning and justification for taking action to approve EDC contracts under Section 94.

To that end, the Court has consistently held that "[w]here, as here, the case involves interpretation of a complex statutory and regulatory framework, '[w]e give *great deference to the department's expertise* in areas where the Legislature has delegated its decision making authority.'" MCI Telecomm. Corp. v. Dep't of Telecomm. & Energy, 435 Mass. 144, 150-51 (2001), quoting Stow Mun. Elec. Dep't v. Dep't of Pub. Utils., 426 Mass. 341, 344 (1997) (emphasis added). The Court has also consistently affirmed that "[t]he task of [statutory] interpretation is . . . left to the discretionary authority and expertise of the department." See City

of Cambridge v. Department of Telecomm. & Energy, 449 Mass. 868, 875 (2007); Wolf v. Department of Pub. Utils., 407 Mass 636, 370 (1990). An agency's interpretation of its own regulations and statutory mandate will be disturbed only if the interpretation is patently wrong, unreasonable, arbitrary, whimsical or capricious. Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 416 (2001). Therefore, the full dimension of the Department's legal authority on any given issue is not circumscribed or determined by a narrow reading of select language in a single provision of Chapter 164, as these commenters suggest.

The legal principle of deference to the Department's statutory interpretation is a significant consideration for the Department in delineating its legal authority to approve EDC contracts for pipeline capacity. As indicated by the foregoing case precedent developed by the Court, the Department's regulatory and ratemaking authority is plenary and no consideration of Section 94A is valid without consideration of the components of the Department's authority that would be implicated in approving EDC contracts and associated cost recovery. For example, commenters arguing against Department authority also universally ignore the fact that the Department regulates electric distribution companies pursuant to a broad statutory mandate that, among other obligations, requires the Department to ensure that gas and electric companies provide "a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost" (G.L. c. 164 § 69I) ("Section 69I").

Although the enactment of the Restructuring Act changed the nature of the obligation for electric companies under Section 69I, the Restructuring Act *did not eliminate the Department's authority* over long-range resource planning for electric companies under Section 69I, but rather left it to the Department's discretion to implement a planning process that would be in the

"public interest."[13] Thus, the Department's authority to take action to further the Commonwealth's policies to provide a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost *remains in place at the express will of the legislature*. Moreover, the Department has consistently relied on Section 69I as establishing a core mission for the Department and imposing an obligation on gas and electric distribution companies to provide "safe and reliable distribution service *at all times*." Western Massachusetts Electric Company, D.P.U. 10-70, at 229, fn.123 (2011). Lastly, the Department also is charged with the "the general supervision of all gas and electric companies." G.L. c. 164 § 76; see Electric Industry Restructuring, D.P.U. 95-30, at 41 (1995) (Section 76 "grants the Department broad supervision of all gas and electric companies").

In addition, the plain language of Section 94A implicates the Department's plenary ratemaking authority under G.L. c. 164, § 94. Specifically, Section 94A states as follows:

> No *gas or electric company* shall hereafter enter into a contract *for the purchase of gas or electricity* covering a period in excess of one year without the approval of the department, unless such contract contains a provision subjecting the price to be paid thereunder for gas or electricity *to review and determination by the department in any proceeding brought under section ninety-three or ninety-four* . . . . In any such proceeding the department may review and determine the price to be thereafter paid for gas or electricity under a contract containing said provision for review. Any contract covering a period in excess of one year subject to approval as aforesaid, and which is not so approved or which does not contain said provision for review, shall be null and void.

G.L. c. 164, § 94A (emphasis added).

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13 Historically, Section 69I required each Massachusetts investor-owned electric company to file biennial forecasts of the electric power requirements in each market area for the ensuing ten-year period. Order Commencing Notice of Inquiry and Rulemaking into (1) rescinding 220 C.M.R. §§ 10.00 et seq. and (2) exempting electric companies from any or all of the provisions of G.L. c. 164, § 69I, D.T.E. 98-84/EFSB 98-5, at 1 (2003). On April 22, 2003, the Department and the Energy Facilities Siting Board issued an order establishing an alternative process to the long-range electric forecast review under G.L. c. 164, § 691, as amended by the Electric Restructuring Act. D.T.E. 98-84/EFSB 98-5 (2003).

The plain language of Section 94A expressly contemplates that gas and electric companies may enter into contracts for gas or electricity *on their own initiative and without the pre-approval of the Department* so long as the cost associated with those contracts is made subject to the Department's review and approval under G.L. c. 164, § 94, which is the Department's plenary grant of jurisdiction over utility cost recovery and rate-setting. In that regard, the Court has held that the "public interest" standard "constitutes an overriding consideration in the department's regulatory and ratemaking scheme." Attorney General v. Dep't of Telecommunications and Energy, 438 Mass. 256, 268 (2002), citing, Boston Real Estate Bd. v. Department of Pub. Utils., 334 Mass. 477, 495 (1956) ("The controlling consideration of the public interest in the exercise of the department's statutory regulating power is implicit throughout the statute. It is the standard which supports the grant of power over rates and regulations in general, and it is not necessary to specify further"). See also Wolf v. Department of Pub. Utils., 407 Mass. 363, 369 (1990) ("the mission of the agency is to regulate in the public interest").

Therefore, no analysis of the Department's authority under Section 94A is complete or accurate without simultaneous consideration of the Department's broad authority to regulate in the public interest (G.L. c. 164, §§ 76, 94, 94A); to allow cost recovery of EDC contracts where it is in the public interest to do so (G.L. c. 164, §§ 94 and 94A); and to take steps to ensure a necessary energy supply at a reasonable cost (G.L. c. 164, § 69I). The Department has broad authority to take action to protect the interests of electric retail customers, and in particular, to allow cost recovery of EDC costs where there is a showing that cost incurrence would serve the public interest by increasing service reliability and reducing prices *even without exercising jurisdiction under Section 94A*. As a result, Section 94A cannot be reasonably construed as

cutting off the Department's ability to approve EDC contracts demonstrated to be in the public interest. The plain language of the statute is a directive to "gas and electric companies" providing forewarning of the Department's plenary authority to disallow costs where there are not provisions for review and acceptance of the cost.

Thus, the limitations suggested by the Attorney General and others regarding the Department's authority to approve contracts for gas and electricity under Section 94A do not exist in the language of the statute, and therefore these commenters argue that these limitations are implied.[14] This attempt to introduce ambiguity where there is none is inconsistent with long-standing principles of statutory interpretation. The Court has stated consistently that "[w]e do not imply language in a statute if the Legislature has not provided it." New England Power Co. v. Amesbury, 389 Mass. 69, 74-75 (1983); Providence & Worcester R.R. v. Energy Facilities Siting Bd., 453 Mass. at 145. Statutory language "is not to be enlarged or limited by construction unless its object and plain meaning require it." Rambert v. Commonwealth, 389 Mass. 771, 773 (1983). Words must be given their plain meaning. Providence & Worcester R.R. v. Energy Facilities Siting Bd., 453 Mass. at 145 (finding that "new" means "new"); Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 782 (1980)). Moreover, the Court has held that, where statutory language may be given several meanings, "the substantial deference owed to an agency's interpretation of a statute it is charged to enforce includes approving an interpretation of statutory language *that may be read in two ways*." Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 448 Mass. 45, 50 n.6 (2006) (emphasis added).

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[14] See AGO Comments at 22 (citing the "statutory construction maxim *reddunda singular singulis* or 'referring each to each'" in support of its reading of Section 94A); GDF Suez Comments at 8 (citing the same statutory construction principle as in the AGO's Comments).

Therefore, in the context of Massachusetts law, G.L. c. 164, §§ 69I, 76, 94 and 94A collectively provide the Department with broad discretion and authority to act on DOER's proposal to protect the interests of retail customers. In fact, a finding that, within the complex statutory and regulatory framework delegated to the Department by the General Court, the Department *does not have* authority to approve EDC contracts on the basis of protecting the interests of retail electric customers would be an extraordinary concession (and setback) for the Department. The Department is the agency within the Commonwealth of Massachusetts with jurisdiction over the reliability and pricing of electric service to customers. Nothing put forth by commenters in this proceeding suggests that abdication of this authority is the appropriate or necessary action by the Department. To the contrary, the Department should move forward with review and approval of EDC contracts, and should do so based on a well-defined set of reasonable criteria for determination that the contracts will be in the public interest.

Lastly, in defense of the false proposition that the Department does not have authority to approve EDC contracts, the Attorney General and other commenters rely exclusively on a canon of statutory interpretation referred to as *reddendo singula singulis* or "referring each to each" (AGO Comments at 21-22 citing Commonwealth v. Barber, 143 Mass. 560, 562 (1887); 2A Sutherland Statutory Construction § 47:26 (7th ed.); see also GDF Suez Comments at 4). This is a narrow and arcane principle that, on judicial review, would not reasonably overcome the broad deference that will be shown to the Department in construing its own statutory provisions in furtherance of the public interest. This canon of statutory construction is invoked only when a text is hopelessly ambiguous and the context is unclear, and even then only as a matter of last resort. See Jeremy L. Ross, A Rule of Last Resort: A History of the Doctrine of the Last

Antecedent in the United States Supreme Court, 39 Sw. L. Rev. 325, 332 (2009).[15] The circumstances of the Department's approval of EDC contracts, and the justification therefore, would completely subsume this narrow legal principle rendering it completely irrelevant.

B. The DOER Proposal Is Consistent with Federal Law and Does Not Violate the Supremacy Clause or the Dormant Commerce Clause

Several commenters raise concerns that the DOER Proposal may be preempted by FERC authority under the Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq.[16] These same commenters allege that, to avoid a preemption challenge, legislative action may need to be taken, which would violate the dormant Commerce Clause of the U.S. Constitution. Other commenters suggest that the proposal may be preempted by the Federal Power Act ("FPA"), 16 U.S.C. § 791 et seq.[17] For the reasons discussed below, these concerns are erroneous. In fact, the Department's approval of EDC contracts for pipeline capacity would not cause any infringement on the exclusive federal jurisdiction of FERC, nor would cause a violation of the dormant Commerce Clause of the U.S. Constitution.

1. FERC's Exclusive Jurisdiction under the NGA

Acadia suggests that a program in which the EDCs purchase natural gas capacity and release it into the marketplace would be preempted by federal law and FERC's exclusive jurisdiction under the NGA. Specifically, Acadia claims that "FERC has exclusive authority to regulate electric distribution companies' purchase of natural gas for resale in interstate

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[15] Indeed, throughout history, the doctrine has been referenced mostly in passing, applied where it is convenient, and disregarded when it is not. Id. Only since 2003, in Barnhart v. Thomas, 540 U.S. 20 (2003), has the doctrine reemerged, but it continues to be an ineffective tool of interpretation for the courts because the rule is flexible and not consistently applied. See, e.g., United States v. Hayes, 129 S.Ct. 1079, 1086-87 (2009) (Ginsburg J.); id. at 1090 (Roberts, C.J., dissenting); Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 343 (2005) (Scalia, J.); id. at 355-56 (Souter J., dissenting).

[16] See, e.g., Acadia Center Comments at 3-4; and CLF Comments at 6.

[17] See, e.g., GDF Suez Comments at 12; CLF Comments at 6; and NEMA Comments at 5.

commerce…" (Acadia Comments at 4). These comments confuse circumstances where the EDCs are contracting for the interstate pipeline capacity with the purchase and resale of the natural gas commodity. However, if the proposal was for the EDCs to engage in commodity transactions, the focus of this inquiry would not be on the *purchase* of the natural gas capacity in the wholesale market, as is the focus in this case, but rather on the *subsequent sale of gas* to the generators. In that regard, a sale of natural gas to a generator for use as fuel to generate electricity is a sale for direct consumption not a sale for resale and falls "firmly on the States' side of [the pre-emption] dividing line."[18]

Even when properly focused on EDC contracts for the pipeline capacity, there is no basis for the exaggerated conclusion that the proposal conflicts with federal regulation (see, CLF Comments at 2 ("any state mechanism that attempted to allow EDCs to purchase gas capacity for resale into the New England gas market would almost certainly violate . . . federal law.")). FERC jurisdiction is shared with the states under the NGA, and this principle is embedded in FERC regulations as exemplified by relaxed capacity release rules for releases in connection with state retail competition. Also, FERC has authorized the targeted release of gas capacity to a gas asset manager under contract to a gas distribution company for the purposes of optimizing a portfolio of gas assets. There are many ways in which the program could be structured that would be compatible with FERC regulation under the NGA and there is also the flexibility for FERC to grant a waiver of one of its requirements, if necessary, which it has done in the past.

In fact, FERC recently indicated that multi-party ownership of pipeline capacity could be achieved without conflicting with FERC regulations and policies. As noted in the comments of America's Natural Gas Alliance ("ANGA"), in Order No. 809, FERC recently adopted a

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[18] ONEOK, Inc. v. Learjet, Inc., No. 13-271, slip op at 11 (U.S. April 21, 2015) ("ONEOK, Inc.").

regulation that requires an interstate pipeline to allow multi-party pipeline capacity contracts with a designated agent or asset manager to manage the use of the capacity.[19] One way in which this method might be used is for multiple EDCs to enter into a single pipeline capacity contract, in which they would be jointly and severally liable, with the capacity managed by an agent. The agent would oversee the release of the contracted capacity to the electric generators. FERC has left the details of how a multi-party contract would be implemented to be fleshed out when an interstate pipeline proposes the terms for its multi-party contract[20] and to the negotiations between the pipeline shippers (the EDCs in this instance) and their designated agent.[21] As approved by the Commission, this option permits several shippers to share the subject capacity without the need to use the capacity release program to transfer the capacity among themselves. In order to satisfy the Commission's shipper-must-have-title policy, the pipelines proposed, and the Commission accepted, tariff provisions ensuring that each shipper under a multi-party transportation contract agree to be jointly and severally liable for all obligations of all shippers and the agent under the single service agreement. (Order 809 at P 148).

Significantly, FERC has invited requests for waiver of its capacity release regulations and its shipper-must-have-title policy on a case-by-case basis in the context of a specific multi-party contract that would facilitate "natural gas-fired generators in obtaining access to firm transportation service in a transparent and not unduly discriminatory manner."[22] Therefore, this or other options could be used as a basis for structuring the way in which the EDCs contract for

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[19] Order No. 809, Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities, 80 Fed. Reg. 23198 (April 24, 2015) (promulgating a new Section 284.12 (1)(iii) to be effective July 8, 2015).

[20] Order No. 809 at P 144.

[21] Order No. 809 at P 147.

[22] Order No. 809 at P 146 (citations omitted).

the pipeline capacity and then make that capacity available to generators without raising any pre-emption issues.

In examining whether state regulation is pre-empted by the NGA, the Supreme Court has recently provided a timely reminder that the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."[23] Where state regulation could be applied to matters appropriately within the state's authority as well as within FERC's authority, the Supreme Court has proceeded "cautiously, finding pre-emption only where detailed examination convinces [the Court] that a matter falls within the pre-empted field as defined by [the Court's] precedents."[24] As a result, where there is no specific proposal pending before the Department, it is premature to assume that it is pre-empted by the NGA and it is far from a foregone conclusion that there would be any conflict at all with federal regulation under the NGA.

2. Dormant Commerce Clause of the U.S. Constitution

Based on the erroneous presumption that EDC contracts for pipeline capacity would be preempted by the NGA, Acadia and CLC claim that legislative or other actions will have to be taken to limit action to intrastate markets, which would therefore violate the dormant Commerce Clause of the U.S. Constitution.[25] However, as discussed above, EDC contracts can be approved and utilized in a manner which does not raise preemption concerns, which invalidates the premise underlying the alleged dormant Commerce Clause concerns, or at a minimum underscores that these concerns are purely speculative.

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[23] ONEOK, Inc., at 10 (quoting Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507, 517-518 (1947)).

[24] Id., at 10-11.

[25] Acadia Comments at 4, CLF comments at 7.

In addition, the action contemplated in this docket is designed to secure new gas delivery capacity **into the region** to benefit electric ratepayers **in the region**. As the U.S. Supreme Court has noted, "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[26] No aspect of the paradigm described by DOER suggests any design to benefit in-state economic interests by burdening out-of-state competitors. Nor do the comments of Acadia or CLF point to any such aspect of the arrangement that would have this impact. Therefore, the dormant Commerce Clause claims are speculative and unwarranted.

3. FERC's Exclusive Jurisdiction under the FPA

GDF Suez argues that "[t]here is a significant likelihood that intervention in the wholesale electricity markets in the manner proposed by DOER is preempted by the FPA."[27] In support of this position, GDF Suez points to the recent court decisions in PPL Energyplus, LLC v. Nazarian, 753 F3d 467 (4th Cir. 2014) ("Nazarian") and PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014) ("Solomon"), which found that state programs in Maryland and New Jersey that subsidized the participation of electric generators in wholesale energy markets as preempted by FERC's exclusive jurisdiction under the FPA over the wholesale sale of electric power in interstate commerce. These cases do not, however, support GDF Suez's contention that the circumstances proposed by DOER in this docket are likely to be similarly preempted by the FPA.

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[26] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328,337-38 (2008) (quoting New Energy Co. of Ind. V. Limbach, 486 U.S. 269, 273 (1988)).

[27] GDF Suez Comments at 12. CLF and NEMA also provide more generalized comments that the DOER Proposal is preempted by FERC's exclusive jurisdiction over wholesale electric markets.

The programs in Maryland and New Jersey were each found to be preempted by the FPA on the basis that the program set or otherwise regulated the wholesale price for energy or capacity, which is an area of exclusive federal (*i.e.,* FERC) jurisdiction. The Maryland program sought to incentivize the construction of new generation facilities in the state by offering a fixed, 20-year revenue stream secured by a contract for differences.[28] The contract for differences required that the plant sell its energy and capacity into the federal interstate wholesale market and provided that the generator would receive a payment equal to the difference between the guaranteed revenue stream and whatever it received from its actual sales into the wholesale market.[29] The Court found these payments to "plainly qualify as compensation for interstate sales at wholesale" and thus preempted by the FPA.[30]

Similarly, the New Jersey program required the generator to sell its capacity into the wholesale capacity market managed by PJM and, in return, guaranteed the generator that it would receive a specified rate for each quantity of capacity offered at the PJM capacity auction and not solely the auction price it would otherwise have received pursuant to the auction results.[31] The Court agreed that this program "essentially sets a price for wholesale energy sales" and, as a result, is preempted by the FPA.[32]

Unlike the Maryland and New Jersey programs, which set a price or level of compensation for a generator's participation in the wholesale energy market, EDC contracts for pipeline capacity would not be associated with an attempt to set the rates or the level of

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28 Nazarian, 753 F.3d at 473.

29 Id. at 473-474.

30 Id. at 476.

31 Solomon, 766 F.3d at 252-253.

32 Id. at 253.

compensation the generator receives for its sale of energy and/or capacity at wholesale, nor does it even require participation in any wholesale energy market. Rather, EDC contracts would simply make incremental pipeline capacity available for generators *and other parties* to obtain released capacity for their use, but only *if they elected to do so on their own initiative*.

The Supreme Court has emphasized "the importance of considering the *target* at which the state *aims* in determining whether that law is pre-empted," noting:

> For example, in *Northern Natural Gas Co. v. State Corporation Comm'n of Kan.,* 372 U.S. 84 (1963), the Court said that it had "consistently recognized" that the "significant distinction" for purposes of pre-emption in the natural-gas context is the distinction between "measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at" subjects left to the States to regulate. *Id.,* at 94 (emphasis added). And, in *Northwest Central*, the Court found that the Natural Gas Act did not pre-empt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, *i.e.,* jurisdictional sales. 489 U.S., at 514.[33]

Similarly, the Court in Nazarian observed:

> It goes without saying that not "every state statute that has some indirect effect" on wholesale rates is preempted, [citation omitted] for "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market. [citation omitted.]"[34]

The mere fact that the availability of incremental pipeline capacity could have an indirect effect on wholesale rates by increasing the ability of natural gas-fired generators to participate in wholesale energy markets cost-effectively is not sufficient to raise preemption concerns. In fact, the Solomon Court noted that "New Jersey could have used other means to achieve its policy goals":

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33 ONEOK, Inc., at 11.

34 Nazarian, 753 F.3d at 478.

> For example, permissible means may include "utilization of tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, and the relaxing or acceleration of permit approvals." [citation omitted.] New Jersey may also directly subsidize generators so long as the subsidies do not essentially set wholesale prices.[35]

Thus, there is no basis to suggest that an EDC contract is likely to infringe on FERC's exclusive power to specify wholesale rates. No element of the arrangement would set the price at which the generators, acquiring the pipeline capacity made available through the EDCs, must sell their output or otherwise set the compensation that those generators would receive. No element of the proposal even requires that generators participate in a wholesale energy market. Rather, any impact that the EDC contract proposal might have on any wholesale energy market would appear to be only indirect and a legally permissible means of effectuating a state policy to ensure the availability of a natural gas supply for electric generation purposes without setting the wholesale price for such generation. Accordingly, based on current legal precedent, contrary to the suggestions of GDF Suez and others, the Department's approval of EDC contracts for pipeline capacity would not be preempted by the FPA.

C. Standard of Review and Filing Requirements

Under Section 94A, the Department's approval of a supply contract requires a "determination that the contract is consistent with the public interest." Western Massachusetts Electric Company, D.P.U. 14-57 (2014); Commonwealth Gas Company, D.P.U. 94-174-A at 27 (1996). In its initial comments, the Company explained that Section 94A does not expressly dictate to the Department what the elements of the "public interest" test would be under Section 94A, which means that the Department has a level of discretion in setting the criteria for

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[35] Solomon, 766 F.3d at 253, n.4.

the standard of review (Eversource Initial Comments at 6-7). From an overall perspective, the Department should approve EDC execution of gas-capacity contracts where the EDC is able to demonstrate that the electric reliability and electric-supply pricing benefits generated by the relief of capacity constraints warrant expenditure of the costs for gas capacity (id. at 7). The public interest is served where electric reliability and electric supply price relief is enabled at a reasonable cost (id.)

Eversource proposed that the Department should require the EDCs to demonstrate that the proposed acquisition of a pipeline-capacity resource is consistent with the public interest, based on a showing that the acquisition is: (1) consistent with the EDC's "portfolio objectives," which would be electric reliability and lower costs, among other potential objectives, and demonstrating that the proposed contract is consistent with (and will further) those objectives to the benefit of Basic Service customers; and (2) that the proposed resource contract compares favorably to the alternative options reasonably available to the EDC at the time of the acquisition (to the extent that there are viable alternatives), including evaluation of both price and non-price factors (Eversource Initial Comments at 7). Because the problem is clearly defined, and because the Department clearly has legal authority to act, the Department should set this as the standard of review for evaluating future EDC proposals.

Contrary to other comments offered by the Attorney General, comments offered on the nature of an adjudicated proceeding by the Attorney General are more constructive. Specifically, the Attorney General comments that, in any future proceeding, the "EDCs must establish how their proposal furthers the public interest better than alternative candidate solutions" (AGO Comments at 31). Eversource agrees with this fundamental proposition, and also agrees that the EDC, as the proponent of the gas capacity contract, "would have the burden to establish the

economic merits of its proposal," and to show "how it considered and analyzed the benefits in comparison to other potential solutions" (see AGO Comments at 30).

In addition, Eversource recognizes that it will need to be prepared to demonstrate that the proposal is the product of a fair reasonable procurement solicitation process; that the costs are economic, and "that shareholder interests were not placed ahead of ratepayer interests and consistency with affiliated transaction rules" (see AGO Comments at 31). The Company also anticipates that the Department would "evaluate proposals using standard procedural safeguards and evidentiary requirements of G.L. c. 30A, including pre-filed testimony, opposing testimony, discovery, cross-examination and post-hearing briefs" (see AGO Comments at 31).

IV. CONCLUSION

There is an established need for additional gas pipeline capacity to address electric system reliability issues and volatile prices for retail customers. Long-term contracts with the EDCs are the solution that (1) will most directly moderate retail electricity prices on an economically efficient basis; and (2) can be implemented in the shortest possible timeframe balancing considerations of reliability and cost. Because the construction of incremental pipeline capacity resources will take a number of years, there is an imperative for the Department to act decisively and expeditiously in this investigation to establish the legal framework for reviewing future EDC contract proposals.

Respectfully submitted,

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