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July 6, 2015

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

Re: D.P.U. 15-37
Investigation by the Department of Public Utilities into the Means by which New Natural Gas Delivery Capacity may be added to the New England Market

Dear Secretary Marini:

Enclosed for filing in the captioned matter please find the Attorney General's *Reply Comments*. Please feel free to contact me if you have any questions. Thank you for your attention to this matter.

Sincerely,

/s/ Christina H. Belew

Christina H. Belew
Assistant Attorney General

Encl.

cc: David Gold, Hearing Officer
Service List, D.P.U. 15-37

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities into the Means by which New Natural Gas Delivery Capacity may be added to the New England Market	**D.P.U. 15-37**

REPLY COMMENTS OF THE MASSACHUSETTS ATTORNEY GENERAL

I. INTRODUCTION

On June 16, 2015, the Department of Public Utilities (the "Department") received Initial Comments from a diverse array of affected stakeholders[1] on the proposal by the Department of Energy Resources ("DOER") to have the Commonwealth's principal investor-owned Electric Distribution Companies ("EDCs") participate in the development and construction of future gas pipeline expansion in the New England region. As more fully set forth in the Initial Comments filed by the Massachusetts Attorney General's Office of Ratepayer Advocacy ("Attorney General's Office" or "AGO"), DOER's proposal to authorize EDCs to enter into the long-term capacity agreements to facilitate pipeline expansion – with the costs and risks of such long-term obligations borne exclusively by electricity ratepayers – suffers from numerous factual and legal infirmities.

In the twenty-one day period allotted by the Department for reply comments, it is not possible to respond to each argument made by the parties in the Initial Comments, either in favor of or opposing DOER's proposal

[1] Comments were filed by parties representing a broad spectrum of interests, including: state policy makers; EDCs such as Eversource Energy and National Grid; energy suppliers (both LNG and electricity); energy users; interstate pipeline companies; electricity generators; environmental organizations and individuals and towns potentially affected by pipeline expansion.

Nevertheless, a limited review of the comments reveals not only that there are sharply differing positions on the lawfulness of DOER's proposal, but that the very facts surrounding the need for additional gas capacity are highly disputed. While there is general agreement by commenters that the wholesale cost of electricity can and does rise during limited "peak times" in winter when capacity on interstate gas pipelines is tight, there is little consensus whether increased wholesale electricity prices represent a problem that can be resolved only by increasing baseline pipeline capacity. Of the fifty-two sets of comments received, only eight support DOER's proposal to have EDCs enter into long term pipeline capacity contracts; unsurprisingly, of those eight commenters, five are EDCs or pipelines (National Grid, Eversource Energy, Tennessee Gas Pipeline, Portland Natural Gas Transmission System ("PNGTS"), and Algonquin Gas Transmission /Spectra Energy) that stand to profit from the proposal, one is an industry group that promotes natural gas and one—Coalition to Lower Energy Costs ("CLEC")—is an end user group.

<u>Disagreement on Need for Additional Pipeline and Role of LNG</u>

Pipeline proponents assert that added pipeline capacity is necessary to lower electricity prices by suppressing the gas basis differential (*see* TGP at 26; Eversource Energy at 18; Spectra/AGT at 3). The generators question that assertion, noting increased competition in ISO-NE's forward capacity market, ninety new generation projects and other pipeline expansion projects financed by conventional means as indicators that the market is steadily and adequately addressing both electric reliability and pricing concerns. NEPGA at 15-17.

Still other parties point out that while there may be peaking capacity constraints on existing west-to-east pipeline routes serving Massachusetts, existing pipeline capacity on pipeline facilities already "in the ground" from the north is not fully utilized, even on the coldest winter days (Repsol at 3-4; PNGTS at 4). Thus, LNG suppliers such as GDF Suez and Repsol point out that constraints on peaking capacity on west-to-east pipelines can be ameliorated, without additional pipeline construction, by the introduction of additional LNG supplies on north-to-south pipelines that enable LNG to "back feed" supply into New England (Repsol at 3-4; GDF-Suez at Attachment D; *see also* NEPGA at 18-20). Additional volumes introduced into Massachusetts via back feed LNG supply free up existing capacity on west-to-east routes.

Certain commenters responded that LNG cannot substitute for incremental new pipeline construction because LNG is not a reliable source of supply, nor is LNG purportedly cost-effective in comparison to Marcellus shale gas (Eversource Energy at 16). LNG suppliers countered, however, that LNG prices are in decline; that last winter's available LNG supply proves that greater supplies of LNG are working their way into New England in response to market prices signals (Repsol at 4-5). Additionally, LNG suppliers observed that additional liquefaction resources worldwide are coming on-line and will increase future availability of LNG and moderate LNG prices (Repsol at 4-5; NEPGA at 18). Accordingly, the advantages to LNG as a winter peaking source of energy are not to be discounted.

<u>Dispute Over Benefit to Generators</u>

Another important fact in dispute is whether electricity generators will, as DOER asserts, benefit from lower gas fuel costs through DOER's proposal. Generators generally <u>oppose</u> the DOER/EDCs' plans to employ an out-of-market solution to increase gas capacity. Their trade association, NEPGA, points out that generators not employing gas as a generation fuel (i.e., those using coal, oil, or nuclear fuels or hydro-electric) will be harmed through the contemplated subsidization of gas generators (NEPGA at 26). This state intervention in market forces, it is feared, could force premature retirements and other reductions in non-gas generation. Moreover, the EDC's proposal discriminates among gas generators, because, according to NEPGA, at least thirty percent of generation locations wouldn't have access to the planned Northeast Access pipeline (NEPGA at 27). NEPGA also makes the point that there may be no way EDCs can lawfully restrict capacity released to availability solely to generators (NEPGA at 13, 32; *see also* GDF-Suez at 10). Thus, even the remaining seventy percent of gas generation with purported access to the planned pipeline expansion may not be able to obtain the capacity as needed at a market-efficient price (id.).

Dispute Over Environmental Impacts of Alternatives for Increased Pipeline Capacity

Finally, another notable disagreement may be found between environmental groups, which assert that burning coal and oil on peak winter days is far less environmentally harmful and more in line with the Commonwealth's carbon goals than building a large new pipeline that will be in existence fifty or more years, and certain other commenters, who assert that a pipeline is far preferable because it will hasten the retirement of polluting coal and oil generation.

The comments as a whole clearly support the need for a full adjudicatory proceeding in this matter. As stated by the AGO in its original comments, a hearing is needed to weigh evidence and to determine issues of fact and law necessary to the Department's decisions on these important issues. Accordingly, the Attorney General's Office reaffirms its request for the Department to proceed deliberatively with a full and rigorous examination of the facts and law before reaching any determinations. As demonstrated in more detail below, the contested facts evident from even a cursory reading of the comments, coupled with substantial doubts regarding the Department's authority to approve the proposed EDC contracts, should give everyone pause to carefully consider next steps.

I. A RIGOROUS STUDY IS NEEDED

In its original comments, the AGO called for a rigorous regional study of new gas capacity and alternatives in order to inform decision making on the type and scope of solutions to address peak winter electricity prices. See AGO Comments at 4-17. The AGO believes that existing studies cited by various stakeholders in support of the need for additional pipeline in New England are incomplete or use flawed assumptions and thus are not adequate to fully advise on all potential solutions. The AGO was recently awarded a grant to undertake a study to evaluate all options to address electricity reliability needs in New England through 2030. The study will provide an assessment of costs and benefits, including price impacts, of each option, consistent with the region's energy and climate goals. The study will take into account both winter and summer reliability needs, and include an analysis of all potentially available resource options, in specific quantities, to meet those needs, including natural gas (both natural gas pipelines and LNG), oil, hydro imports, energy efficiency, demand response, and renewables. The study will commence immediately, and be complete in October 2015.

II. THERE ARE SIGNIFICANT DISPUTED ISSUES OF FACT

As noted above, the comments of the various parties reveal that there is no agreement on the facts, except perhaps as to the cause of needle peak winter electricity price spikes, and there is no agreement about the need for solutions or what any such solution(s) should entail. The following are specific examples of directly contradictory assertions on significant issues:

Risk to Ratepayers Posed by Long-Term Capacity Contracts

- "Customers will realize substantial net economic and reliability benefits from incremental gas pipeline capacity under a wide range of possible future scenarios, such that customers face minimal risk from the contemplated long-term contracting approach." National Grid Comments at 23.
- "The majority of customer financial risk will be mitigated with the introduction of new

capacity to regional natural gas markets." Eversource Energy Comments at 10.

- "[T]he financial risks that will be borne by the Massachusetts ratepayers would not only be significant, but would be magnified by the fact that the DOER Proposal—by authorizing full cost recovery for the EDCs through rate charges—would expose the EDCs to no risk whatsoever." Comments of GDF Suez at 24.

- "The primary financial risk results from partial, rather than full, utilization of pipeline capacity. The risk derives not from purchasing natural gas pipeline capacity, but from not being able to utilize it every day of the year. . . .Another risk is market saturation – if too much natural gas pipeline capacity is added to the grid, its resale value in the secondary market will drop precipitously, particularly in any non-peak period." PNGTS Comments at 3.

- Flooding the market with capacity will diminish the value of the released capacity, thus making it more difficult to provide benefits to ratepayers in terms of revenue from the secondary market. Comments of Environmental Defense Fund at 4.

- There is a risk additional capacity would most likely result in lower value for all capacity, thus potentially leaving the capacity holder with stranded costs. Direct Energy Comments at 4-5.

Is More New Pipeline Capacity Needed?

- "Based on the Energyzt analysis, if total current interstate gas pipeline capacity into New England is combined with new pipeline expansions (AIM and Northeast Direct) and LNG natural gas delivery capacity, peak demand would have to increase by more than 100 percent before any incremental infrastructure or other energy resources of any type would be needed to address DOER's reliability concerns." GDF Suez Comments at 17.

- "[A]n expansion of the Algonquin system on a west to east basis is required. Access Northeast is such an expansion and as a regional solution will reduce wholesale electricity prices throughout New England. . . .Specifically, Access Northeast will deliver up to 900,000 dekatherms per day of natural gas. . . ." Algonquin Gas Transmission/Spectra Energy Partners Comments at 11.

Is There a Market Failure?

- "The failure of a market-based solution to materialize in response to this problem is in large part due to the fact that the wholesale electricity market does not create the financial conditions and long-term credit support that are conducive to gas-fired generators contracting for pipeline capacity." Tennessee Gas Pipeline Comments at 24.

- "Despite the perception of some stakeholders to the contrary, new pipeline investment dollars are being attracted to the region. Several natural gas pipeline expansions are currently under development. These projects are being developed using well established and lawful open season bidding procedures by interstate pipeline companies under the supervision of FERC." GDF Suez Comments at 16.

Whether Spectra's Access Northeast Pipeline is the Best Pipeline Solution

- "Access Northeast will deliver up to 900,000 dekatherms per day of natural gas for electric generation markets in five identified regional zones that directly connect to approximately 70 percent of New England's electric generation. These direct connections, which cannot be provided by other pipelines, are essential. . . ." Algonquin/Spectra Comments at 11.

- "Spectra has actively promoted its ability to serve a significant number of gas-fired units as evidencing the superiority of its Access Northeast Project over other pipeline proposals. A careful review of ISO New England's CELT Report, however, suggests that the Access Northeast Project has no meaningful advantage." Comments of CLEC at 50.

- "[R]elatively minimal modifications would be required on PNGTS and Iroquois pipelines in the US, and some looping and compression in Canada on the TransCanada pipeline, to bring larger quantities of Marcellus gas from Wright to Dracut via the linking TransCanada pipeline. Additionally, injecting gas into the far-northeast end of Massachusetts' pipeline grid via PNGTS would backfeed the other New England pipelines and bolster overall grid reliability and performance." PNGTS Comments at 4.

- "Massachusetts should prioritize commitments to pipeline project(s) that offer: scale, the direct connection to incremental domestic gas supply, direct service to substantial natural gas-fired generation, and the ability to serve other regional pipelines with low cost natural gas. Tennessee's NED Project satisfies these criteria, and will help maximize the benefits to Massachusetts citizens in the form of lower energy costs." Tennessee Gas Pipeline Comments at 3.

Whether a Pipeline Would Advance the Commonwealth's Environmental Goals

- "In addition to lowering electricity prices, increased pipeline capacity into New England will hasten the long-sought retirement of our expensive and polluting oil and coal fired power plants. Increased pipeline capacity into New England is a necessary ingredient in the transition to, and reliable integration of, a renewable and intermittent energy-based portfolio. Increased pipeline capacity into New England will decrease dependence on the stubbornly pervasive use of oil for home heating. Those who argue that building pipeline infrastructure "dooms" New England to burn greater volumes of gas willfully ignore this dynamic, as well as the demonstrated environmental harm of perpetuating existing reliance on coal and oil." Comments of CLEC at 3.

- The region's and state's climate goals are not at "grave risk" from recent use of existing coal and oil generators during peak winter periods. The use of these old fossil fuel generators is waning and will continue to decline further as the gas system is more coordinated with the electric system pursuant to measures taken by FERC and ISO-NE, and innovations such as energy storage and renewable resources begin to take oil's place meeting peak energy demands. Investment in long-lived natural gas infrastructure is a greater danger to the climate goals of Massachusetts and New England because it is incompatible with the GHG targets of the GWSA. Conservation Law Foundation Comments at 8.

- "[W]hile many have presumed that natural gas generation offers significant reductions in greenhouse gas emissions compared with coal and oil generation, that assumption has been questioned. See for example, http://environmentalresearchweb.org /cws/article/news/60392." Comments of Environmental League of MA. at 3, fn.9.

Is a Pipeline Needed for Reliability?

- "[S]ystem reliability can and will be maintained through the competitive markets." Generators will respond to ISO-NE efforts to improve performance and reliability. Comments of New England Power Generators at 3.

- Capacity constraints are real, immediate and "are threatening the reliability of electric service . . . ." Eversource Energy Comments at 2.

Should Any Gas Capacity Solution be Sole-Sourced or Procured via Competitive Solicitation?

- "One mechanism that will help to ensure transparency and limit affiliate abuses is a Department designed and run RFP process for capacity. The State of Maine has used this mechanism; Connecticut appears to be preparing to do so." Comments of CLEC at 9.

- "An alternative to a competitive solicitation is allowable by the Department under § 94B if the company can show that a competitive solicitation would not have produced a viable, cost-effective alternative or that an alternative process yields a contract which presents unique advantages to the EDC and its ratepayers." DOER Comments at 25.

Is LNG a Viable Alternative Solution?

- LNG solutions are not viable because LNG is subject to the world market and cannot offer long-term commitments on terms as reasonable as domestic supplies Eversource Energy Comments at 16.

- "LNG supply offers an economical solution to the peak-day demand needs of the New England market. The necessary infrastructure (LNG import terminals, storage and pipeline capacity) already exists. In addition, LNG supplies are projected to be both available and affordable." Repsol Energy North America Comments at 4.

- GDF's consultant, EZT, found dual fuel and LNG more economic than constructing pipeline. Comments of GDF Suez, Attachment C, slides 14-27).

The Cost/Benefit of New Pipeline to Ratepayers

- "Considering the high fixed cost of additional pipeline capacity, it is difficult, if not impossible, to envision a scenario in which electricity generated over the relatively small number of days during which new capacity would provide economic benefit would result in cost savings to ratepayers in excess of the all-in cost of new pipeline (including extensive stretches when the capacity is unneeded and lacks meaningful value). . . .To assess the relative electricity customer value of a new 1.2Bcf/day pipeline, EDF and Skipping Stone prepared an economic model which, using cost information from pipelines and natural gas futures indices, predicts the cost of pipeline capacity per megawatt hour generated from gas supplied by the pipeline. Conservatively assuming a 45% load factor for use of the pipeline during the 40-50 day period of need to serve electricity load yields an all-in 2020 cost of $69/MWH in order to recover the fixed cost of pipeline capacity and the projected cost of gas in 2020 (estimated as '"flat"' to the Henry Hub) and spread over the megawatt hours actually produced using the new capacity added by a 1.2 Bcf/d pipeline for the days of its use (approximately 43 in 2020). On the other hand, should the same pipeline be utilized for generation of electricity 16 hours a day for a full year (less 2 weeks per year for generator downtime for maintenance) the per megawatt hour fixed cost of pipeline capacity would drop significantly, but still be approximately $24/MWH produced." Environmental Defense Fund Comments at 6-7.

- Studies done by Sussex, ICF, Synapse and Competitive Energy Services all confirm that incremental pipeline expansion from 250,000 to 2.2 Million MMBtu per day would yield savings by reducing gas basis by 40%. The ICF Study suggests savings to electricity consumers of $.4B to $.8B in a typical winter and as much as $2B in an extreme winter. Eversource Energy Comments at 17-18.

These comments demonstrate that the record currently before the Department is inadequate to enable the Department to resolve the questions presented in this investigation. A pipeline solution is and is not needed; LNG is and is not a viable alternative; the Access Northeast pipeline is and is not the only viable solution; there is little risk and significant financial risk to ratepayers; a new pipeline is and is not more environmentally friendly than burning coal and oil on peak winter days. A decision made by the Department on the basis of this incomplete and contradictory record, without the benefit of further proceedings to develop the evidence, may well be vulnerable to challenge on judicial review. *See Town of Hingham v. Dep't of Telecomm. & Energy*, 433 Mass. 198, 210 (2001) (In order to be upheld on appeal the Department's findings must be "supported by substantial evidence in the record considered as a whole.") citing *1001*

Plays, Inc. v. Mayor of Boston, 387 Mass. 879, 885 (1983) and G. L. c. 30A, s. 14 (7); *see generally*, *District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015) ("An agency is required to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'") quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

III. MULTIPLE COMMENTERS IDENTIFIED SIGNIFICANT LEGAL IMPEDIMENTS

As the AGO noted in its initial comments, the Restructuring Act must inform any interpretation of the scope of § 94A.[2] The general purpose of the Restructuring Act was to take EDCs out of the business of owning generation facilities, producing electricity, and buying fuel to produce electricity. AGO Comments at 18. The mechanisms that formerly existed that would have allowed for Department regulation, review, and corresponding cost recovery through rates for costs associated with electricity supply—such as costs for commodity resources and capacity—are no longer viable because of the Restructuring Act. *See* D.P.U. 98-84/E.F.S.B. 98-5; *Boston Edison Company, Cambridge Electric Light Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company, Nantucket Electric Company and Western Massachusetts Electric Company*, D.T.E. 98-13 (Feb. 20, 1998).

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[2] Several parties in favor of the DOER proposal stated they were not aware of any legal impediment to the Department exercising approval under G.L. c. 164, § 94A ("§ 94A") of contracts for pipeline capacity entered into by EDCs, with costs flowed through to electric ratepayers. Those parties did not address the 1997 Restructuring Act. Instead, they resorted to arguments that the "gas *and* electric" language of § 94A could be interpreted "gas *or* electric" under established rules of statutory construction, or simply as a commonsense reading of the "plain language" of the statute as written, thereby allowing the Department to mix and match approval of contracts for gas by EDCs and presumably, by the same logic, contracts for electricity by LDCs as long as it is in the public interest. See, e.g., DOER Comments at 6-7; Eversource Energy Comments at 3-4; National Grid Comments at 10-11; Tennessee Gas Pipeline Comments, Appendix A at A 1-2; Algonquin Spectra Comments at 2, CLEC Comments at 7.

Any interpretation of § 94A in this docket that ignores the language and the purpose of the Restructuring Act is flawed and incomplete. Accordingly, the AGO urges the Department to interpret § 94A in a manner consistent with the Restructuring Act in deciding the important issues presented in this investigation.

In addition, a number of commenters identified another impediment under federal law in addition to federal preemption concerns. NEPGA explained the issue as follows:

> [T]he federal Natural Gas Act and FERC regulations prohibit the apportionment of pipeline capacity on an "unduly discriminatory" basis. The pipeline must "allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of release." 18 C.F.R. § 284.8(e). *See* 15 U.S.C. § 717(d); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1148-57 (D.C. Cir. 1996). Federal law prohibits the EDCs and interstate pipeline company from reserving capacity in the pipeline for the exclusive benefit of the EDCs' ratepayers. Any prospective purchaser can bid for the gas capacity, regardless of the fact that the EDCs' Massachusetts ratepayers will have funded the pipeline's construction or that the DPU may consider those ratepayers to be the intended beneficiaries.

NEPGA Comments at 13.

DOER itself demurred on this issue, noting that “it is unclear whether providing a preference to gas generators over other potential buyers would violate any other laws or regulations, or how the FERC would view any systematic preferential offering of services involving interstate pipeline capacity.” DOER Comments at 28.

It follows that under a worst case scenario, the DOER proposal would lead to a situation where gas capacity that is unwanted by the majority of generators and which the Department has no power to compel them to purchase, cannot be reserved for use by generators but must instead be offered on a non-discriminatory basis to the highest bidder. In addition, an influx of a large amount of pipeline capacity may severely depress the value of released capacity to both EDC customers and LDC customers.[3] In such a scenario all Massachusetts ratepayers would be subsidizing buyers of pipeline capacity in the secondary market. Under these circumstances, the DOER's proposal seems ill-suited to achieve its stated goal of providing released capacity to generators in order to benefit ratepayers by lowering the price of electricity in winter.

In light of the weight of unfavorable legal authority on these key issues, the Department should proceed with caution before authorizing EDCs to proceed with contracts in furtherance of a goal that may not be legally achievable and may not have the intended effect.

IV. CONCLUSION

In view of the many diametrically opposed factual assertions on critical issues, and the importance of the issues to be decided in this investigation, a full adjudicatory process is warranted. The procedural safeguards and evidentiary requirements of G.L. ch. 30A, including pre-filed testimony, opposing testimony, discovery, cross-examination and post-hearing briefs offer the best chance of a thorough vetting of these competing claims. The study to be sponsored by the AGO will provide a wealth of information on available options, including costs and benefits, that currently is missing from the record in this docket. This information will assist the Department in reaching a fully informed decision in this investigation.

[3] See, e.g., Comments of Environmental Defense Fund at 4, fn. 2.

Accordingly, the AGO respectfully requests that the Department order a full adjudicatory proceeding after allowing sufficient time for the AGO study to be concluded.

Respectfully submitted,

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MAURA HEALEY

By: ____________________

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Dated: July 6, 2015

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 C.M.R. 1.05(1) (Department's Rules of Practice and Procedure). Dated at Boston this 6th day of July, 2015.

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