D.T.E. 98-119

Petition of Boston Edison Company, an electric company under G.L. c. 164, § 1, for Approval of Pilgrim Divestiture Transaction under the terms of the Electric Restructuring Act, St. 1997, c. 164.

D.T.E. 98-126

Application of Commonwealth Electric Company, an electric company under G.L. c. 164,

§ 1, for Approval of Buyout of Pilgrim Purchase Power Contract and Power Purchase Agreement with Entergy Nuclear Generation Company under the terms of the Electric Restructuring Act, St. 1997, c. 164.

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I. INTRODUCTION

On December 3, 1998, Boston Edison Company ("Boston Edison") filed a petition with the Department of Telecommunications and Energy ("Department") for approval of the following: (1) the sale of its Pilgrim Nuclear Power Station and related assets ("Pilgrim") to Entergy Nuclear Generation Company ("Entergy"); (2) the adjustment of Boston Edison's transition charge after the divestiture closing to reflect the proceeds of the sale through a residual value credit ("RVC"); and (3) the purchase by Boston Edison from Entergy of power from Pilgrim under two power purchase agreements ("PPAs") and the

recovery of any above-market costs associated therewith in the transition charge. This petition was docketed as D.T.E. 98-119.

Pursuant to notice duly published, public hearings were held in Plymouth, Massachusetts on December 21, 1998, and January 5, 1999. Another public hearing was held at the Department's offices on December 22, 1998. The Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention as of right, pursuant to G.L. c. 12, § 11E. The following entities sought and were allowed to intervene in D.T.E.

98-119: the Commonwealth of Massachusetts Division of Energy Resources ("DOER"), Entergy, Locals 369 and 387 Utility Workers Union of America - American Federation of Labor/Congress of Industrial Organizations (UWUA, AFL-CIO) ("Locals 369 and 387"), Commonwealth Electric Company ("Commonwealth Electric"), and Montaup Electric Company ("Montaup"). The petition of the Town of Plymouth ("Plymouth") to intervene as a full participant in D.T.E. 98-119 was denied, but the town was allowed to participate as a limited participant. Western Massachusetts Electric Company ("WMECo") was also allowed to participate as a limited participant.[(1)]

On December 3, 1998, Boston Edison also filed an application for approval of rate reduction bonds ("RRBs") pursuant to G.L. c. 164, § 1H(b). Boston Edison proposes to securitize approximately $800 million of transition costs, the majority of which are associated with the proposed divestiture of Pilgrim. This application was docketed as D.T.E. 98-118 and will be addressed in a separate order.

On December 21, 1998, Commonwealth Electric, a wholesale contract customer of Pilgrim, filed a petition with the Department for approval of the following actions: (1) to terminate and buyout its existing obligation with Boston Edison to purchase power from Pilgrim; (2) to include the buyout amount as an adjustment to Commonwealth Electric's transition charge; (3) to enter into a PPA with Entergy; and (4) to include the above-market value of the PPA with Entergy as an adjustment to its transition charge. This petition was docketed as D.T.E. 98-126.

Pursuant to notice duly published, a public hearing in D.T.E. 98-126 was held at the Department's offices on January 12, 1999. The Attorney General filed a notice of intervention as of right, pursuant to G.L. c. 12, § 11E. The following entities sought and were allowed to intervene D.T.E. 98-126: Boston Edison, Entergy, and Locals 369 and 387.[(2)] On January 30, 1999, the Department granted motions by Boston Edison and Commonwealth Electric to consolidate D.T.E. 98-119 and D.T.E. 98-126.[(3)]

Evidentiary hearings were held on January 20, 21, 22, 25 and 26 and February 12, 1999. In support of its petition in D.T.E. 98-119, Boston Edison presented the testimony of Geoffrey Lubbock, the director of generation divestiture for Boston Edison, and John Reed, president of Reed Consulting Group ("Reed Consulting"). In support of its petition in D.T.E. 98-126, Commonwealth Electric presented the testimony of Michael Kirkwood, director, supply administration, transmission services and system control for

Commonwealth Electric, and Robert Martin, manager of regulatory accounting for Commonwealth Energy System's electric operating subsidiaries. In connection with both petitions, the Attorney General presented the testimony of Timothy Newhard, a financial analyst with the Regulated Industries Division of the Attorney General's Office. Briefs were filed on February 26, 1999, by Boston Edison, Commonwealth Electric, DOER, the Agencies, Entergy, and Plymouth. A brief was filed by the Attorney General on March 1, 1999. Reply briefs were filed on March 5, 1999, by Boston Edison, Entergy, the Attorney General, the Agencies and Commonwealth Electric. The record consists of 344 exhibits and 75 responses to record requests.[(4)]

II. STANDARD OF REVIEW

The Legislature has vested broad authority in the Department to regulate the ownership and operation of electric utilities in the Commonwealth. See, e.g., G.L. c. 164, § 76. The Department's authority was most recently augmented by General Laws Chapter 164, (the "Restructuring Act" or "Act").[(5)] Boston Edison Company, D.P.U./D.T.E. 96-23, at 9 (1998). The Restructuring Act requires that each electric company organized under the provisions of Chapter 164 file a plan for restructuring its operations to allow for the introduction of retail competition in generation supply in accordance with the provisions of Chapter 164. G.L. c. 164, § 1A(a). Among other things, the Restructuring Act requires that all restructuring plans contain a detailed accounting of the company's transition costs and a description of the strategy to mitigate those transition costs. Id. One possible mitigation strategy is the divestiture of a company's generating units. G.L. c. 164, § 1.

In reviewing a company's proposal to divest its generating units, the Department considers the consistency of the proposed transactions with the company's restructuring plan, or in some cases the company's restructuring settlement, and the Restructuring Act. A divestiture transaction will be determined to be consistent with the company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the "sale process is equitable and maximizes the value of the existing generation facilities being sold." G.L. c. 164, § 1A(b)(1). A sale process will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold, if the company establishes that it used a "competitive auction or sale" that ensured "complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale." G.L. c. 164, § 1A(b)(2).

The Restructuring Act provides that all proceeds from any such divestiture of generating facilities "that inure to the benefit of ratepayers, shall be applied to reduce the amount of the selling company's transition costs." G.L. c. 164, § 1A(b)(3). Where the Department has approved a company's restructuring plan or settlement as consistent or substantially compliant with the Restructuring Act, the Department will approve a company's proposed ratemaking treatment of any divestiture proceeds if the company's proposal is consistent with the company's approved restructuring plan or settlement.

III. DESCRIPTION OF THE DIVESTITURE TRANSACTION

A. Overview

1. Purchase and Sale

The entire divestiture transaction is embodied in a Purchase and Sale Agreement ("P&S") signed on November 18, 1998, and exhibits thereto, executed by Boston Edison and Entergy, and eight other closely related agreements. These agreements include the following: (1) Guaranty - Entergy International Holdings, LLC; (2) Interconnection and Operation Agreement between Boston Edison and Entergy; (3) PPA between Entergy and Boston Edison; (4) PPA between Entergy and Commonwealth Electric; (5) PPA between Entergy and Montaup; (6) Fourth Amendment of Power Sale Agreement between Boston Edison and Commonwealth Electric; (7) Third Amendment of Power Sale Agreement between Boston Edison and Montaup; and (8) Partial Assignment of Municipal PPAs between Entergy and Boston Edison (Exhs. BE-5A; BE-5B). On March 18, 1999, Boston Edison filed with the Department and served on intervenors and limited participants the Fourth Amendment of the Power Sale Agreement between Boston Edison and Montaup.[(6)]

The proposed divestiture transaction consists of the sale of Pilgrim to Entergy for the

purchase price of $80 million, subject to several adjustments, including changes in inventory and nuclear fuel, depending on the timing of the actual closing (Exh. BE-5A at § 2.6).[(7)] The specific assets being sold include the Pilgrim nuclear power plant, the Chiltonville Training Center, and approximately 1,700 acres of land on which these facilities are located

(id. at § 2.1).[(8)]

Boston Edison will retain assets defined as transmission, distribution and telecommunication assets (id. at § 2.2).[(9)] Boston Edison will also retain any right it may have for damages relating to a claim of breach by the United States Department of Energy

("US-DOE") of its obligations to take spent nuclear fuel (id.). Entergy will assume and indemnify Boston Edison against certain liabilities relating to the assets being sold, including unknown environmental liabilities and remediations other than off-site liabilities (Exh. BE-5A at § 2.3). Certain liabilities of Boston Edison are specifically excluded from the sale, including any liability arising out of the municipal contracts (Exhs. BE-5A at § 2.3;

AG-BECo 2-5).

2. Decommissioning Trust

As part of the divestiture transaction, Entergy will assume all liability for the decommissioning of Pilgrim. Specifically, Entergy will assume all liabilities relating to

the following: (1) the decommissioning of Pilgrim following permanent cessation of operations; (2) the management, storage, transportation and disposal of spent nuclear fuel; and (3) any other post-operative disposition of Pilgrim (Exh. BE-5A at § 2.3(e)). Boston Edison has agreed to transfer approximately $466 million at closing to fully fund a trust to provide Entergy with funds to address these decommissioning liabilities ("Decommissioning Trust"). The amount to be funded by Boston Edison and transferred to Entergy will be adjusted

depending on applicable tax laws or regulations and the date of the closing (Exhs. BE-7,

at 19-20; BE-5A at § 5.21).

To account for the effect of state and federal taxation on the transfer of the decommissioning funds to Entergy, $70 million of the Decommissioning Trust will be set aside in a separate Provisional Trust. If there is an amendment of the federal tax code or regulations prior to December 31, 2002, allowing the funds to accumulate more rapidly than under the current tax laws, the amounts of the Provisional Trust will be reduced accordingly and rebated to Boston Edison (Exh. BE-5A at § 5.21).[(10)] In addition, Boston Edison and Entergy seek to have the transfer of the Decommissioning Trust occur on a "tax-neutral"

basis.[(11)]

Boston Edison's current decommissioning fund has approximately $190 million accumulated through retail ratepayer contributions, contract customer contributions and interest earned (Exh. BE-7, Att. GOL-2, at 1-5). Boston Edison intends to prefund the balance of the Decommissioning Trust through securitization and additional contract customer contributions (see Exh. DTE-BECo 1-35).[(12)]

3. Power Purchase Agreements

Boston Edison currently sells approximately 25.73124 percent of Pilgrim's output to 16 wholesale contract customers under long-term or life-of-the-unit contracts (Exh. BE-7, at 13). Two contract customers, Commonwealth Electric and Montaup, are investor-owned electric companies. Each of these two companies purchases eleven percent of Pilgrim's capacity and output under similar life-of-the-unit contracts (id.). The fourteen other contract customers are municipal electric departments. In the aggregate, these fourteen municipals purchase 3.73133 percent of Pilgrim's capacity and output under long-term contracts (id. at 14).[(13)] All 16 wholesale contracts are Federal Energy Regulatory Commission ("FERC") regulated and are cost-of-service based (id.).

As part of the divestiture process, Boston Edison would either terminate or assign these 16 wholesale contracts. Both Commonwealth Electric and Montaup have entered into contract amendments with Boston Edison and have executed new PPAs with Entergy for their respective eleven percent shares of Pilgrim's output ("Commonwealth PPA" and "Montaup

PPA", respectively) (Exhs. BE-5A; BE-5B).[14] Commonwealth Electric and Montaup have agreed to fund a pro rata share of the decommissioning funds being provided to Entergy and to contribute a proportional share of the net unrecovered plant investment. In return, Commonwealth Electric and Montaup will each receive eleven percent of the Pilgrim sale proceeds.[15]

Despite negotiations, Boston Edison was unable to secure the municipal electric departments' assent to a termination of its municipal contracts. Accordingly, Boston Edison assigned the physical delivery obligations under the existing contracts to Entergy in 14 partial assignments to become effective upon closing (Exhs. BE-5A; BE-5B). To meet its retained obligation to supply the municipal contracts, Boston Edison entered into a separate PPA with Entergy for 3.73313 percent of Pilgrim's capacity and output ("Municipal PPA") (Exh.

BE-5B, Tab 7). The term of the Municipal PPA is coterminous with Boston Edison's obligation to provide capacity and energy from Pilgrim to the municipals under the existing PPAs (Exh. BE-7, at 26). The continuation of these existing municipal contracts is subject to FERC approval.[16]

As an additional component of the divestiture transaction, Boston Edison has entered into an agreement to buyback from Entergy 74.26876 percent of Pilgrim's capacity and output for a period of time to be used primarily to supply Boston Edison's standard offer customers ("Boston Edison PPA") (Exhs. BE-5B, Tab 6; BE-7, at 25).[17] In the aggregate, the Commonwealth Electric PPA, the Montaup PPA, the Boston Edison PPA and the Municipal PPA provide for the purchase of 100 percent of Pilgrim's capacity and output in 1999, declining to 50 percent of Pilgrim's capacity and output by 2004, when the PPAs (other than the Municipal PPA) terminate (Exh. BE-7, at 25). Boston Edison and Commonwealth Electric have both proposed to include any above-market costs associated with the PPAs as transition costs (see §§ IV(F)-(H), below). In addition, to the extent that the municipals' share of decommissioning costs and net unrecovered plant investment are not paid at closing, Boston Edison seeks to include these amounts as transition costs to be recovered from its retail ratepayers. Boston Edison's and Commonwealth Electric's proposed ratemaking treatment of the proceeds from the divestiture will be discussed in § V, below.

B. Description of the Divestiture Process

Boston Edison began developing its divestiture program in November 1997 when its senior officers established and oversaw a team of employees (marketing key results area team or "KRA"), whose objective was to recommend the best way to maximize the value of Pilgrim (Exhs. BE-7, at 7; BE-10, at 4). The KRA team investigated four possible alternatives for Pilgrim: (1) the sale of the plant; (2) the continued operation of the plant; (3) an alliance with other plant owners; or (4) plant shutdown (Exh. BE-7, at 7-11). The KRA team concluded that the "best future" for Pilgrim was a sale by way of a bid process that would likely result in the highest value for Boston Edison's nuclear assets (Exh. BE-10, at 4).

Boston Edison's divestiture process was developed and implemented by its "Pilgrim divestiture team" (id.).[18] As an initial step, Boston Edison sent an early interest letter to approximately 175 potential purchasers indicating its interest in selling Pilgrim

(Exhs. BE-10, at 9; DTE-BECo 1-4 (proprietary)). The early interest letter provided information aimed at educating potential bidders and piquing their interest in order to generate a competitive bidding process (id.).[19] In addition to the early interest letters, Boston Edison continued to market Pilgrim through speaking engagements at industry conferences as well as through one-on-one marketing to leading nuclear operators (Tr. 2, at 182-183; Exhs. BE-10,

at 9; DTE-BECo 1-5). Boston Edison received letters of interest from eleven of the approximately 175 parties initially contacted (Exh. BE-10, at 9).

After receiving responses to the early interest letter, Boston Edison evaluated the qualifications of the interested parties to ensure that they would be capable of purchasing and operating the assets (Exhs. BE-10, at 10; DTE-BECo 1-7). Of the eleven parties expressing an interest, nine parties signed a confidentiality agreement and were approved by Boston Edison as "qualified" (id.).[20] Qualified bidders were invited to submit non-binding indicative bids, and based on those bids, four bidders were invited to participate in the final bidding process (Exhs. BE-10, at 14; DTE-BECo 1-11 (proprietary)).[21] After the final bids were received, Boston Edison conducted confidential discussions with the top two final bidders, and offered each the opportunity to submit a supplemental bid (Exhs. BE-10, at 18; DTE-BECo

1-15 (proprietary)). After evaluating the supplemental bids, Boston Edison selected Entergy as the winning bidder (Exhs. BE-10, at 18; DTE-BECo 2-2 (proprietary); DTE-BECo 2-4 (proprietary)).

IV. REVIEW OF THE ASSET DIVESTITURE

A. Introduction

In its review of the divestiture transaction, the Department first reviews the auction process and then reviews whether the proposed divestiture transaction maximizes the value to ratepayers of the assets being divested. As part of this latter review, the Department will address the claims of the Attorney General and DOER concerning the value of the benefits of the divestiture transaction.

B. Review of the Auction Process

As stated above, the Restructuring Act provides that a sale process will be deemed equitable if an electric company establishes that it used a "competitive auction or sale"

that ensured "complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale." G.L. c. 164,

§ 1A(b)(2). The record establishes that bidders had full access to relevant data on an equal basis, had access to Boston Edison's relevant personnel, and had the opportunity to submit questions and secure responsive answers regarding the facilities being sold (Exhs. BE-10, at 11-13, 15-16; DTE-BECo 1-4 (proprietary); DTE-BECo 1-8 (proprietary)).

Prior to the first round of bidding, Boston Edison issued an offering memorandum to each of the qualified bidders which provided the following: (1) a detailed description of the nuclear assets for sale and the operational improvements that had been achieved in recent years; (2) an overview of the qualifications of the Pilgrim employees;[(22)] (3) a discussion of the New England power market; (4) a summary of Pilgrim's nuclear regulatory compliance program; (5) Boston Edison's proposed terms of sale; (6) an overview of the sales process going forward; and (7) a draft PPA for the purchase of Pilgrim output by Boston Edison for a period of time after the sale (Exhs. BE-10, at 11-12; DTE-BECo 1-4 (proprietary)). Each qualified bidder received a compact disc (or "CD") linked to Pilgrim's secure internet web site with detailed information about Pilgrim allowing the bidders easy and efficient access to documents and thereby facilitating their due diligence inquiries (Exhs. BE-10, at 12;

DTE-BECo 1-8 (proprietary)). Boston Edison also established a physical document room for the bidders' site visits (Exh. BE-10, at 12). All qualified bidders were also given the opportunity to tour the Pilgrim facilities and meet key plant personnel (id.).[(23)]

Similarly, during the final bidding stage, Boston Edison provided an extensive amount of information to the bidders. Final bidders were provided with the opportunity for additional, more detailed site tours. They were also allowed to conduct corporate management meetings at Boston Edison's headquarters, and allowed to hold conference calls with Boston Edison and Reed Consulting personnel to resolve specific issues and questions. Boston Edison and Reed Consulting each dedicated an individual employee to be responsible for documenting, routing and resolving all outstanding bidder questions in a timely and consistent fashion (id. at 15). Boston Edison took measures to ensure that all information was provided in a consistent manner to all bidders. All bidders received the same information in the offering memorandum and the CD (Exhs. DTE-BECo 1-8 (proprietary); DTE-BECo 1-10 (proprietary)). Boston

Edison provided written responses to any questions to all bidders unless the responses were deemed confidential (Exh. BE-10, at 13).

No party contested Boston Edison's assertions that the auction process was equitable. Based on the above evidence, the Department finds that the auction process used by Boston Edison to divest Pilgrim ensured complete, uninhibited, non-discriminatory access to all data and information by all parties seeking to participate in the auction, and

therefore was equitable. The process satisfied the requirements of G.L. c. 164, § 1A(b)(2). C. Maximizing the Value of the Assets Sold

Boston Edison evaluated the bids on the basis of the purchase price offered, and of any exceptions to its proposed sales documents (Exhs. BE-10, at 14; DTE-BECo 1-11 (proprietary)). Boston Edison chose the higher of the two final bids, which was from Entergy (Exhs. BE-10, at 18; DTE-BECo 2-2 (proprietary); DTE-BECo 2-4 (proprietary)).

The Restructuring Act states that the results of a competitive auction that ensures complete, uninhibited, non-discriminatory access to all data by all interested parties seeking to participate in the auction are deemed to satisfy the Act's requirement that a company demonstrate to the Department that the sale process maximizes the value of the generation facilities being sold. Cambridge Electric Light Company, D.T.E. 98-78/83, at 3-4 (1998), citing G.L. c. 164, § 1A(b)(1). An open, rational, transparent, and fairly managed auction tests the market for, and value of, an asset at the time of the offering. Id. at 10. The bid results of such a market test under proven, fair conditions are strong evidence of an asset's worth. Id. at 10-11.

The record shows that Boston Edison employed several measures in its divestiture process to ensure that the Pilgrim assets were sold at the highest price. First, confidentiality was maintained throughout the divestiture process, and therefore the bidders were uncertain of the number and identity of the other bidders (Exh. BE-10, at 10-11). Shielding bidder identity enhanced the competitiveness of the divestiture process, thus maximizing the value of the sale (id. at 11). In addition, strict bidder confidentiality contributed to ensuring that all bidders received equal treatment throughout the process (id. at 10-11).

Second, Boston Edison used the indicative bidding stage as an opportunity to learn about bidders' preferences. During the indicative bidding stage, bidders were invited to submit bids based on their exceptions to a draft P&S and draft PPA (id. at 14). The purpose of soliciting indicative bids based on individual bidders' exceptions was to assess the marketplace acceptability of the P&S and the PPA and to identify the value or cost of those exceptions (id.). Instead of issuing a substantially revised P&S to all "short-listed" bidders, Boston Edison allowed bidders to engage in confidential discussions regarding modifications to the draft P&S so that a bidder could submit a mutually agreeable P&S with its final bid (id.). Offering this flexibility to each of the "short-listed" bidders further maximized the value of Pilgrim by adding additional value to the final bids.

Third, Boston Edison managed the final stage of the bidding in order to produce the maximum value for ratepayers. Boston Edison conducted confidential discussions with the two bidders that had submitted "highly competitive bids," and solicited supplemental bids from each of the two bidders (id. at 17-18). Throughout the negotiations, Boston Edison evaluated the bids with the objective of selecting the bids that provided the highest overall value to customers, the company, and its employees (id. at 18).

The Department notes that no party contested Boston Edison's assertion that the auction process maximized the value of the assets sold. Based on the evidence above concerning the auction process and the bid selection, the Department finds that Boston Edison selected the higher of the two final bids from an equitable auction process.[(24)] Accordingly, the Department finds that the divestiture process used by Boston Edison maximized the value of the generating assets for ratepayers and thus satisfies the Restructuring Act.

D. Benefits of the Divestiture Transaction

1. Introduction

Boston Edison calculates the value of the decommissioning savings to its ratepayers resulting from divestiture to be between $250 million and $300 million (Exh. BE-7, at 11). The Attorney General estimates the value of the entire divestiture transaction for ratepayers to be between $13 million and $75 million (Attorney General Reply Brief at 4; Exh. AG-6, at 17, Att. 2-5).[(25)]

2. Positions of the Parties

a. Attorney General

The Attorney General contends that although the proposed divestiture may produce positive economic benefits, those benefits are uncertain and will likely be much less than estimated by Boston Edison (Attorney General Brief at 8). The Attorney General argues that Boston Edison's estimates of decommissioning and post-shut down cost savings are grossly inflated (id.).

The Attorney General argues that Boston Edison's estimate of decommissioning savings improperly includes the cost of interim spent fuel storage which is the responsibility of

US-DOE and not Boston Edison's ratepayers (id. at 9).[(26)] The Attorney General argues that including these spent fuel storage costs distorts the reported savings (id.). By removing these costs from the calculation, the Attorney General argues that the appropriate amount of decommissioning savings used to determine ratepayer benefit should be $164 million as opposed to Boston Edison's estimates ranging from $250 to $300 million (id. at 9).

b. DOER

DOER argues that Boston Edison's estimate of ratepayer savings based on Entergy's bid price for decommissioning is overstated (DOER Brief at 3). DOER argues that Boston Edison's estimate of savings is based on an early plant shutdown date and, therefore, higher interim spent fuel storage costs (id. at 4).[27] Therefore, DOER argues that comparing Entergy's bid price for decommissioning costs of $466 million to Boston Edison's $758 million decommissioning estimate is like comparing "apples to oranges" (id.). DOER argues that by not accounting for an estimated $128 million in US-DOE liability for failure to take spent fuel, Boston Edison has distorted the reported ratepayer savings (id. at 5). Finally, DOER argues that Boston Edison's estimate is further distorted by the fact that it includes the costs of restoring the site to its original preconstruction condition and Entergy's bid may not include such costs (id. at 4).

c. Commonwealth Electric

Commonwealth Electric contends that the divestiture will provide tangible customer savings with the continued operation of Pilgrim (Commonwealth Electric Brief at 16). Commonwealth Electric argues that these customer savings will be realized primarily through the mitigation of both Commonwealth Electric's and Boston Edison's transition costs and the elimination of future risks related to increases in decommissioning costs (Commonwealth Electric Reply Brief at 16).

d. Boston Edison

Boston Edison argues that the divestiture of Pilgrim is the most beneficial option for ratepayers (Exh. BE-7, at 9). Boston Edison argues that it Pilgrim is not sold, it will prematurely shut down the plant in 2002 (id.). Boston Edison asserts that customers benefit by obtaining the maximum value from the plant through a competitive bid process, thereby minimizing the amount of stranded costs being paid through retail rates (Boston Edison Brief at 25). Boston Edison argues that, even using the Attorney General's estimate of savings, ratepayers will still realize benefits from the divestiture transaction (id. at 27).

In addition to ratepayer savings, Boston Edison argues that additional benefits are associated with the Pilgrim divestiture, including: (1) employment benefits for over 600 plant employees and additional jobs related to servicing the plant; (2) tax benefits paid to Plymouth; and (3) power supply benefits from the continued availability of Pilgrim's capacity (Boston Edison Reply Brief at 4, citing Exh. DTE-BECo 1-24).

3. Analysis and Findings

The major area in which benefits accrue to the ratepayers through this divestiture transaction is not through cash proceeds, but rather through decommissioning savings. For Boston Edison's ratepayers, the divestiture transaction involves the elimination of future risk associated with the continued operation of Pilgrim, including the future risk of changes in Pilgrim's decommissioning costs. Boston Edison's projected savings are derived from comparing the estimated decommissioning payment required for an early

plant shutdown with Entergy's decommissioning bid amount. This savings translates to approximately $300 million. While the Attorney General and DOER do not dispute that the divestiture of Pilgrim is in the public interest and should be approved by the Department, with certain modifications, they caution that Boston Edison's savings estimates are overstated and that without

modifications to the transaction as discussed in § V, below, any benefit from this divestiture would likely disappear (Exh. AG-6, Att. 2; DOER Brief at 5).

Boston Edison concedes that not all benefits of the divestiture transaction are subject to precise analysis (Boston Edison Reply Brief at 2). Decommissioning savings are based on estimates and forecasts and; therefore, the exact amount of the savings can be debated. The Attorney General argues that the forecasts are inflated, while Boston Edison argues that it is just as likely the estimates are understated. Neither Boston Edison nor the Attorney General disputes that decommissioning costs are escalating, and that some savings will accrue to Boston Edison ratepayers from this divestiture transaction as a result of the transfer of decommissioning liability. For example, low level waste burial costs are escalating due to the dwindling availability of burial sites (Exhs. BE-13; DTE-BECo 1-33R). In addition, because of uncertainty about when and whether US-DOE will accept spent fuel for permanent storage, the cost of interim spent fuel storage is significant (id.).

The Attorney General argues that Boston Edison's estimates of decommissioning savings fail to account for the fact that US-DOE may face some liability for its failure to accept Pilgrim's spent nuclear fuel (Exhs. AG-BECo 5-1; AG-BECo 5-6; BE-13). While other utilities have pending suits against the US-DOE for damages due to its failure to begin disposing of spent fuel, the record indicates that actual damage awards have yet to be made and claims for damages thus remain contingent (Exh. AG-BECo 5-7). Even if Boston Edison's estimates of decommissioning savings are inflated because they do not account for even the possibility of a future damages, if any, from US-DOE, this does not negate Boston Edison's final analysis of the overall benefits of the transaction. Under the terms of the divestiture transaction, Boston Edison retains its claim against US-DOE, and amounts recovered from US-DOE would be credited to Boston Edison's customers to lower the effective net amount paid for decommissioning (Exhs. BE-5A at § 2.2(g); BE-7, at 30-31). Although an exact figure cannot now be known, the studies and estimates which are part of the record in this case show that Boston Edison ratepayers will receive a significant benefit from the divestiture transaction due to the elimination of future risk associated with decommissioning Pilgrim (Exhs. BE-7, Att. GOL-1; BE-13). Based on the Attorney General's and Boston Edison's estimates, the benefits for ratepayers from decommissioning savings are expected to be between $164 million and $300 million.

In addition to decommissioning savings, when assessing the overall benefit of the divestiture transaction, the Department may also consider collateral benefits such as the continued employment of approximately 600 persons, and the economic benefits to Plymouth including indirect jobs, the payment of taxes when payments in lieu of property taxes expire, and the sale of the unit to an entity that has a great deal of first-hand

experience in the operations of nuclear power plants. Indeed it is obvious that the Restructuring Act itself is replete with such considerations; and the Department would be remiss to overlook them**.** Chapter 164, § 1(A), et. seq. Furthermore, the sale of Pilgrim finalizes Boston Edison's exit from the electric generation business, which is consistent with the goals of Boston Edison's restructuring settlement agreement, Boston Edison Company, D.P.U./D.T.E. 96-23, (1997) ("Settlement Agreement"), and with the Restructuring Act. Accordingly, the Department finds that the divestiture transaction provides both direct and indirect benefits to Boston Edison ratepayers through the mitigation of Pilgrim-related transition costs.

E. Liability For Future Decommissioning

1. Introduction

Entergy is a subsidiary of Entergy International Holdings, LLC ("Entergy Holding") (Tr. 5, at 699-700; Exh. BE-5A, Tab 4). Entergy and Entergy Holding are "members of a group of related corporations and entities, the success of any one of which is dependent in part upon the success of the other members" (Exh. BE-5A, Tab 4). Entergy Holding "expects to receive substantial indirect benefits" from the purchase of Pilgrim (id.).[28] The divestiture transaction does not contain a guarantee by Entergy Holding to provide funding to offset any potential future shortfall in the Decommissioning Trust.

2. Positions of the Parties

a. Attorney General

The Attorney General argues that the Department has an obligation to ensure that adequate funding is available for the decommissioning of Pilgrim as part of its obligation to protect Massachusetts' consumers (Attorney General Reply Brief at 2, citing Commonwealth Electric Company v. Department of Public Utilities, 397 Mass. 361, 369 (1986)). The Attorney General claims that Boston Edison's transfer of decommissioning liability may produce certain liabilities for the consumers of Massachusetts, arguing that Entergy will be an entity of few assets and will be financially isolated from Entergy Holding (Exh. AG-6, at 18). The Attorney General argues that this financial isolation will prevent Entergy access to any needed capital for plant operations or decommissioning, increasing the potential of a sudden plant shutdown (id.). In the event of a premature shutdown, the Attorney General claims that the cost of decommissioning will be higher due to the cost of interim spent fuel storage, and therefore, the amounts in the Decommissioning Trust may be inadequate (Attorney General Brief at 11, citing Exh. AG-6, at 18). The Attorney General contends that, in order to complete the decommissioning, the federal government would likely approach Boston Edison ratepayers, if not federal and/or state taxpayers, to cover any remaining costs of the decommissioning (Exh. AG-6, at 18).

To ensure that sufficient funding is available for a safe and timely decommissioning of Pilgrim, the Attorney General recommends that the Department condition its approval of

the Pilgrim divestiture upon Entergy Holding making "appropriate and enforceable" commitments to provide funding to offset any shortfall in the trust to meet all decommissioning requirements (Attorney General Brief at 11). The Attorney General maintains that absent these commitments, the savings of the proposed transaction may prove illusory as a premature shutdown or a substantial increase in the cost of decommissioning could lead to a trust shortfall borne by the residents in the vicinity of the plant, Boston Edison ratepayers, or federal and/or state taxpayers (id.). Finally, the Attorney General argues that any review by the federal Nuclear Regulatory Commission ("NRC") of Entergy's financial condition is insufficient to safeguard the public interests that the Department is mandated to protect (Attorney General Reply Brief at 2-3).

b. Entergy

Entergy disputes the Attorney General's claim that it will be an "entity of few assets" (Entergy Reply Brief at 1). Entergy states it will be provided with additional financial assurances (from Entergy Holding) of up to $50 million and argues that it will generate significant profits during its first five years of operation (id.). Entergy further argues that it is unlikely there would be a decommissioning shortfall due to its: (1) substantial initial equity infusion; (2) substantial retained earnings; (3) decommissioning trust fund of approximately $466 million, which is in excess of the NRC minimum; and (4) expertise in decommissioning nuclear power plants in a cost-effective manner (id. at 2, citing Tr. 6, at 762-763).[(29)]

Entergy contends that the Attorney General's position is based on the faulty conclusion that the NRC will fail to perform its statutory obligation to assure the financial qualification of newly formed nuclear entities (Entergy Reply Brief at 2). Entergy further argues that, even in the unlikely event of a decommissioning shortfall, there is no evidence to support the Attorney General's claim that Massachusetts ratepayers would be held directly liable (id.). Entergy

submits that the "legislative and judicial branches [of the federal government] will afford sufficient protection to prevent such an outcome" (id.).

Entergy opposes the Attorney General's proposal to condition the sale of Pilgrim upon a commitment by Entergy Holding to guarantee any shortfall in the Decommissioning Trust, arguing that such a condition would fundamentally change the bargained for terms of the transaction and would change the fundamental economic basis upon which the transaction was bid and priced (id.). In addition, Entergy argues that as a registered holding company, Entergy Holding is subject to regulation by the SEC which restricts the amount of investments, including guarantees, that it may have in its unregulated subsidiaries (id. at 2-3, citing

15 U.S.C. § 79z-5a, 17 C.F.R. § 250.23). Because there is no way to quantify the value of the Attorney General's proposed guarantee, Entergy argues that the Attorney General's proposal is "unworkable" and could not be adopted without "substantial risk of violation of law" (Entergy Reply Brief at 3).

c. Boston Edison

Boston Edison argues that the Department should not attempt to modify the terms of the Pilgrim divestiture by requiring that Entergy Holding be contingently liable (Boston Edison Reply Brief at 7). Boston Edison maintains that any alleged financial isolation of Entergy from Entergy Holding is a non-issue as the NRC reviews a company's financial portfolio and its financial ability to operate a nuclear power plant before allowing a transfer of license to a new owner (Boston Edison Brief at 17, n. 18). Boston Edison argues that the transfer of license is based, in part, on a required finding by the NRC that Entergy is financially qualified (Boston Edison Brief at 17; Boston Edison Reply Brief at 7, citing 10 C.F.R. § 50.33(f)(3)). Boston Edison argues that the NRC requires a minimum decommissioning fund to be maintained and that the Attorney General presents no evidence to show that any decommissioning shortfall is likely to occur (Tr. 6, at 775, 792-798; Boston Edison Reply Brief at 8).

Finally, Boston Edison argues that Entergy's bid would have been "significantly different" if the Attorney General's proposed contingent liability was a requisite part of the deal. Boston Edison contends that if the Department were to impose the condition as proposed by the Attorney General, this would prove "fatal" to the transaction (Boston Edison Reply Brief at 7).

3. Analysis and Findings

To implement the Attorney General's proposal to condition the approval of the divestiture transaction on the contingent liability of Entergy Holding for any future decommissioning shortfall, the Department would, in effect, be restructuring the divestiture transaction. Entergy's bid is the product of a competitive process, and to condition the sale on a guarantee by the parent company would change the bargained-for terms of the transaction. The Restructuring Act's divestiture provisions are grounded in the premise that a fair and open market-test is a better determinant of asset value than an administrative determination. We have had such a test for Pilgrim. Only upon the most compelling showing would the Department supplant the results of a market-test. On the evidence developed here, no such showing has been made.

Further, the issues raised by the Attorney General, namely a company's financial qualifications to own and operate a nuclear plant in a safe and reliable manner, are within the jurisdiction of the NRC. The NRC will not authorize the transfer of the plant's operating license unless it finds that Entergy is financially qualified to operate the plant. The NRC requires an applicant for a nuclear power plant operating license to demonstrate its financial qualifications to carry out the activities associated with such license. 10 C.F.R. § 50.33. Specifically, 10 C.F.R. § 50.33(f)(3) requires that each applicant for a

nuclear license submit the following: "(i) the legal and financial relationships it has or proposes to have with its stockholders or owners; (ii) its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and (iii) any other information considered necessary by the [NRC] to enable it to determine the applicant's financial qualification." In addition, the NRC may request additional or more detailed information with respect to an applicant's ability to continue the conduct of the activities authorized by the license and to decommission the facility. 10 C.F.R. § 50.33(f)(4).

The Attorney General does not cite to any law or precedent to support his claim that, after closing, the federal government would directly approach Boston Edison ratepayers or Commonwealth of Massachusetts' taxpayers for any shortfall in decommissioning funds

(Tr. 6, at 772). As discussed in § IV(D), above the principal benefit of the divestiture transaction, as proposed, is the transfer of the decommissioning liability at a cost that is less than what would likely have been experienced by Boston Edison ratepayers in the future if Pilgrim were not sold. The record contains insufficient evidence to show that a guarantee by Entergy Holding is necessary to safeguard ratepayer interests in this area. In fact, if such a condition were imposed by the Department, the record indicates that it is likely that the divestiture transaction, as currently described, would not proceed and the benefit of the transfer of decommissioning liability would be lost.

F. Purchase Power Agreement - Boston Edison

1. Introduction

As described in § III(A)(3), above, Boston Edison entered into a PPA with Entergy to purchase 74.26867 percent of Pilgrim's capacity and output in 1999, declining to 35.26857 percent in 2004, when the contract is scheduled to terminate (Exh. BE-5B, Tab 6). Under the Boston Edison PPA, the price for the output from Pilgrim is $35.00/Mwh in 1999, rising to $47.22/Mwh in 2004 (Exhs. BE-7, at 26; BE-5B, Tab 6, at Article 4). Boston Edison proposes to account for any losses or gains resulting from the resale of the Pilgrim purchases through the variable component of its transition charge.

2. Positions of the Parties

i. DOER

DOER does not object to the PPA because, it states, the Boston Edison PPA is a "necessary cost" to sell Pilgrim since all bids were contingent upon a guaranteed customer for Pilgrim's output in the short term (DOER Brief at 9). The DOER asserts that it is unclear from Boston Edison's petition whether Boston Edison intends to continue to use the Pilgrim output to serve the base load portion of standard offer service or whether it will sell this power in the open market (id.). DOER expresses concern that if Boston Edison uses Pilgrim to supply the base load portion of the standard offer load and solicits supply from other providers for the remaining standard offer load, then standard offer

service will be more expensive because potential suppliers will factor into their bids the risk of having to supply more or less power depending upon Pilgrim performance (id.). DOER states that if Boston Edison solicits bids for standard offer supply, it must require bidders to submit bids for both the entire standard offer load and for the standard offer load less the portion supplied by the Boston Edison PPA, and that it be required to select the least cost option (id.). Further, DOER recommends that the portion of Pilgrim output that is not used for standard offer service should be sold in the spot market (id.).

ii. Boston Edison

Boston Edison states that the Boston Edison PPA is an integral and necessary component of the Pilgrim divestiture and should be approved by the Department (Boston Edison Brief at 58). Boston Edison plans to use the output from this PPA to serve its standard offer customers (Tr. 2, at 135-136; Exh. DTE-BECo 1-20). Boston Edison argues that it should be permitted to maintain flexibility in order to obtain a least-cost power supply for standard offer service (Boston Edison Reply Brief at 18). Without such flexibility, Boston Edison argues that bid prices for standard offer service might actually increase (id. at 19).

3. Analysis and Findings

Any electric company seeking to recover transition costs shall mitigate any such costs. G.L. c. 164, § 1G(d)(1). In order to determine whether the Boston Edison PPA satisfies the Restructuring Act's requirement to mitigate transition costs, the Department must consider the effect of the PPA. When considered on its own, the Boston Edison PPA is forecast to be an above-market contract which has certain costs to Boston Edison's ratepayers. Some might argue that this, in effect, creates a new stranded cost. However, the effect of the Boston Edison PPA should not be considered in isolation, but rather as a part of the larger divestiture transaction.

Boston Edison's ability to sell Pilgrim was contingent on the buyers being able to sell power back to Boston Edison for a period of time after the closing (Tr. 2 at 142-143, 185; Exh. BE-7, at 14-15, 25). While Boston Edison stated that its preference was to sell Pilgrim without an above-market purchase, after discussing this issue with a number of potential bidders, Boston Edison determined that a buyback contract was necessary for the sale (Tr. 2, at 142-143, 185). The record shows that the Boston Edison PPA is an essential component of the overall divestiture transaction. As discussed in § IV, above, the overall divestiture transaction is likely to achieve ratepayer savings and is otherwise in the public interest. The Boston Edison PPA, as an essential component of the divestiture transaction, is, therefore, approved.

In addition, because the Boston Edison PPA is an essential component of the divestiture transaction, any above-market component should be treated in the same manner as other divestiture costs. In the bidding process for the divestiture of Pilgrim, the marketplace had an opportunity to value the Boston Edison PPA, including any above-market portion of the contract obligation. Because Boston Edison included the obligation to enter into the Boston Edison PPA with the assets being divested, the bidders have included contract

mitigation potential in the price offered for the assets being divested. As discussed in § IV above, the divestiture process was equitable and maximizes the value of the assets being sold. Accordingly, the Department finds that the Boston Edison PPA is consistent with the Restructuring Act's requirement to mitigate transition costs and allows the recovery of any above-market costs associated with the Boston Edison PPA in its transition charge.

With respect to issues raised by DOER, the Department notes that DOER does not object to the Boston Edison PPA, rather DOER is concerned with the least-cost procurement of the standard offer supply. Although DOER presents one recommendation for selling Pilgrim's capacity above the standard offer, there are other options. For example, Boston Edison could estimate Pilgrim's minimum capacity and then purchase the standard offer for the remaining requirement for its standard offer customers. Under this scenario, any amount of capacity that Pilgrim produces above the estimated minimum could be sold in the open-market. The Department will not impose conditions or restrictions that might reduce Boston Edison's flexibility in procuring power to serve its standard offer customers. Boston Edison is already obliged to procure standard offer supply in the least-cost manner.

G. Purchase Power Agreement - Commonwealth Electric

1. Introduction

Commonwealth Electric has purchased eleven percent of Pilgrim's capacity and output since 1972 under a life-of-the-unit contract (Exhs. COM-3, at 5-6; BE-5B, Tab 8). As part of the divestiture transaction, Commonwealth Electric proposes to end this contract and replace it with a contract to buy a smaller share of Pilgrim's output beginning in 2002. The replacement contract would end in 2004 (Exh. COM-3, at 16-17). Pursuant to this PPA, Commonwealth Electric's entitlement for the output of Pilgrim will decline from eleven percent in 1999, to 5.5 percent in 2004 (Exh. BE-5B, Tab 8). In consideration for terminating the life-of-the-unit contract, Commonwealth Electric has agreed to pay Boston Edison eleven percent of the sum of the following three items: (1) the balance of Pilgrim's net unit investment and related regulatory asset balances, less a contract adjustment of $3.5 million; (2) decommissioning costs less payments made by Commonwealth for decommissioning; and (3) any liabilities Boston Edison may incur arising from its ownership and operation of Pilgrim prior to the closing date (Exh. COM-3, at 11). Commonwealth Electric states that the buyout charge, accounted for as an adjustment to its RVC, ranges from $99.4 million to $107.2 million, depending on the closing date (Exh. COM-4, Atts. 1- 3, at Sch. 6). As a result of the buyout and associated PPA, the overall transition costs that Commonwealth Electric would otherwise be required to collect from its customers are reduced by approximately $33.5 to $37.1 million, on a net present value basis (Commonwealth Electric Brief at 14, citing Exh. COM-3, at 8-9). Commonwealth Electric proposes to include the cost of the buyout agreement in the expenses to be recovered from its customers through the transition charge, and seeks to include any above-market value of the Commonwealth Electric PPA with Entergy as an adjustment to its transition charge.

2. Analysis and Findings

The Restructuring Act requires electric companies to seek to mitigate transition costs, including as one mitigation method the renegotiation of above-market power purchase contracts. G.L. c. 164, § 1G(d)(1)-(2). The Restructuring Act further provides that if a negotiated contract buyout is likely to achieve savings to ratepayers and is otherwise in the public interest, the Department is authorized to approve the recovery of the costs associated with the contract buyout. G.L. c. 164, § 1G(d)(2)(ii).

The Department notes that no party contested Commonwealth Electric's assertion that the contact buyout and the replacement contract, with the associated savings, is consistent with its obligations under the Restructuring Act to mitigate its transition costs. The record shows that Commonwealth Electric's Pilgrim contract buyout, with the associated replacement contract, is likely to achieve savings of approximately $35 million for Commonwealth Electric's ratepayers. The contract buyout will also eliminate Commonwealth Electric's future potential risk associated with the continued operation of Pilgrim. Accordingly, the Department approves the contract buyout as in the public interest. In addition, the Department allows Commonwealth Electric to include any above-market components of this PPA in the variable component of its transition charge.

H. Purchase Power Agreement - Municipal Customers

1. Introduction

As discussed in § III(A)(3), above, because Boston Edison was unable to negotiate a termination of its 14 municipal contracts, it would assign the physical delivery obligations under the existing contracts to Entergy in 14 partial assignments. To meet its retained obligation to supply the municipal contracts, Boston Edison entered into a separate PPA with Entergy for 3.73313 percent of Pilgrim's capacity and output. Boston Edison proposes to include the above-market costs related to the Municipal PPA in the variable component of its transition charge.

2. Position of the Parties

a. Attorney General

The Attorney General argues that the Settlement Agreement limits any Pilgrim stranded cost recovery to the retail customers' 74.26867 percent share of the plant (Attorney General Brief at 13, citing Settlement Agreement, Att. 3, §§ 1.1, 1.5(a), 2.6). The Attorney General states that despite this provision of the Settlement Agreement, Boston Edison has proposed to collect from retail customers any stranded costs associated with the contract customers that it does not ultimately collect from those contract customers (Attorney General Brief at 13). The Attorney General argues that Boston Edison's retail

rates have been determined based on a retail cost of service that excluded the contract customers' proportionate share of the plant's costs, including allowable "cost of service adjustments" (id. at 12-13). Arguing that Boston Edison's proposal is contrary to the Department's "long-standing ratemaking treatment" of these PPA costs as well as contrary to the language of the Settlement Agreement, the Attorney General states that the Department should reject Boston Edison's attempt to recover the above-market costs that may arise from this PPA entered into "for the sole purpose of continuing to provide power" to the municipals (id. at 13-14).

b. Boston Edison

Similar to the Boston Edison PPA, Boston Edison argues that entry into the Municipal PPA was an essential element of the divestiture and should be treated in the same manner as other divestiture costs (Boston Edison Brief at 59). For the same reasons discussed in

§ IV(F)(2)(ii), above, Boston Edison argues that Department should approve the Municipal PPA and the inclusion of the above-market costs associated with this PPA in the variable component of its transition charge (id. at 58-60).

3. Analysis and Findings

Any electric Company seeking to recover transition costs shall mitigate any such costs. G.L. c. 164, § 1A(d)(1). Mitigation efforts that an electric company shall engage in include good faith efforts to renegotiate, restructure, reaffirm, terminate, or dispose of existing contractual commitments for purchased power. Massachusetts Electric Company, D.P.U./D.T.E. 97-94, at 31 (1998). The Municipal PPA, like the Boston Edison PPA, is forecast to be above-market. And as with the Boston Edison PPA, one might argue that this Municipal PPA creates a new stranded cost. However, disposition of the municipal's 3.73313 percent share is a part of the larger requirement to buyback 100 percent of Pilgrim's capacity and output as a condition of the sale (Tr. 2, at 142-143, 185). As Boston Edison was unable to negotiate a termination or buyout of the existing municipal PPAs, the new Municipal PPA to meet Boston Edison's retained obligation to supply the municipal contracts is an essential component of the overall divestiture transaction. The divestiture transaction, as a whole, mitigates Boston Edison's stranded costs. Although we assess the individual features of this transaction, we cannot lose sight of the whole. Any one component of a transaction may not in the abstract be optimal, but that component may be a requirement of the transaction taken as a whole. One must practically assess the cost of seeking optimality in any one component against sacrifice of the whole of the transaction for one of its parts. As the overall divestiture

transaction is likely to achieve ratepayer savings and is otherwise in the public interest, the Municipal PPA, as an essential component of the divestiture transaction, is approved.[30]

The Attorney General's arguments against approval of any above-market costs associated with the Municipal PPA are intertwined with his arguments concerning recovery of the municipals' share of Pilgrim decommissioning and net unrecovered plant investment which are discussed in § V(A)(2), below. While it is clear that one purpose of the Municipal PPA was to fulfil Boston Edison's obligation to serve the municipal customers under their existing contracts, this was not its "sole" purpose, as argued by the Attorney General. As discussed above, the Municipal PPA was an essential component of the overall divestiture transaction and, therefore, any above-market component should be treated in the same manner as other divestiture costs. Boston Edison offered the municipal customers the "same basic buyout offer" as it had offered Commonwealth Electric and Montaup (Exh. BE-7, at 16). In addition, the municipal customers were provided access to the divestiture information provided to the Pilgrim bidders (id.). The record evidence shows that Boston Edison made a good faith effort to renegotiate with the municipals (Exh. BE-7, at 15-17, 37-39; RR-DTE-2 (proprietary)). The Department finds that the Municipal PPA is consistent with the Restructuring Act's

requirement to mitigate transition costs and allows the recovery of any above-market costs associated with the Municipal PPA in its transition charge.

V. RATEMAKING TREATMENT OF PROCEEDS FROM DIVESTITURE

A. Adjustment to Gross Proceeds

1. Introduction

The gross bid price of $80 million to be paid to Boston Edison by Entergy is adjusted for several items provided for in the P&S or the Settlement Agreement. Each such adjustment is addressed below.

2. Inclusion of Municipal Contract Costs

a. Introduction

In the event of plant shutdown, the municipals' current PPAs with Boston Edison require the municipals to pay a 3.73133 percent share of the decommissioning costs and net unrecovered investment in Pilgrim. However, the PPAs do not address recovery of the decommissioning costs and net unrecovered investment in the event of the sale of the unit.

Boston Edison estimates the municipals' share of Pilgrim's decommissioning costs to be $13.2 million, assuming a closing date of March 31, 1999 (Exh. BE-7, Att. GOL-2,

at 4-5). Boston Edison estimates the municipals' share of the net unrecovered investment in Pilgrim to be $30.6 million (id.). Boston Edison currently has a filing before FERC in which it seeks full recovery of these costs from the municipal customers. In the event these amounts are not recovered prior to closing, Boston Edison proposes to include the total costs ($43.8 million) as transition costs to be recovered from all retail ratepayers through the fixed component of the transition charge (Exh. BE-7, at 37-39). In the event that all or a portion of these costs are later recovered from the municipals, Boston Edison will return the funds to its retail ratepayers (Tr. 2, at 145).

b. Position of the Parties

i. Attorney General

The Attorney General argues that Boston Edison is attempting to "saddle" retail customers with the municipal customers' stranded costs (Attorney General Brief at 12-14, Attorney General Reply Brief at 5-6). The Attorney General states that, historically, retail rates have only included Boston Edison's 74.26867 percent share of the plant's costs including allowable cost-of-service adjustments (Attorney General Brief at 12-13). The Attorney General also argues that the Settlement Agreement "limits expressly" any Pilgrim stranded cost recovery to Boston Edison's share of the plant (id. at 13, citing Settlement Agreement, Att. 3, §§ 1.1(iii), 1.5(a), 2.6). In addition, the Attorney General argues that if the Department allows Boston Edison to include these costs in its transition costs (and to securitize these costs in D.T.E. 98-118) then Boston Edison will no longer have any incentive to pursue aggressively the recovery of these costs on behalf of its retail ratepayers from the municipals (Exh. AG-6, at 13).

ii. Commonwealth Electric

Commonwealth Electric argues that Boston Edison has properly included the transition costs associated with the Municipal PPA as an adjustment to its residual value credit (Commonwealth Electric Brief at 23). Commonwealth Electric states that to the extent that the municipals are even partially successful at FERC in challenging their future liability for decommissioning and net unrecovered investment in Pilgrim, such costs would be stranded

(id. at 24). According to Commonwealth Electric, the Settlement Agreement was silent on the sale of Pilgrim (id. at 25). Commonwealth Electric asserts that this "gap" in the Settlement Agreement associated with the specific treatment of the sale of Pilgrim should be resolved in the context of "principles of fairness" and the previous ratemaking treatment afforded to Boston Edison associated with the Pilgrim facility (id. at 25-26). Commonwealth Electric argues that Boston Edison's retail customers were historically responsible for the full revenue requirement of Pilgrim and obtained the full benefit of any wholesale sales credits attributed to Pilgrim through the revenue credit mechanism adopted by Boston Edison in 1983 (id. at 26). Therefore, Commonwealth Electric argues that those same retail customers should be responsible for the transition costs that arise out of the sale of Pilgrim (id.). In addition, Commonwealth Electric states that the

Department has previously found that the Pilgrim wholesale contracts served the interests of Boston Edison's retail customers (id. at 26-27, citing, Boston Edison Company, D.P.U. 1350, at 54 (1983)).

Regarding Boston Edison's incentive to pursue the recovery of these costs from the municipals, Commonwealth Electric argues that the incentive mechanism to mitigate the access charge included in Boston Edison's Settlement Agreement provides Boston Edison with an ample incentive to recover as much as possible from the municipals (Commonwealth Electric Brief at 27).[(31)] Finally, Commonwealth Electric argues that Boston Edison's proposal properly aligns ratepayer interests and shareholder interests in maximizing the recovery of the municipals' contract obligations (Commonwealth Electric Brief at 28).

iii. Boston Edison

Boston Edison contends that all amounts owed by the municipals, to the extent they do not pay the full amount owed at closing, are transition costs of Boston Edison that may be recovered from Boston Edison's ratepayers (Boston Edison Brief at 52). While Boston Edison agrees that it would need to deviate from certain provisions of its Settlement Agreement in order to permit recovery of the municipals' costs, Boston Edison argues that its proposed ratemaking treatment is nevertheless consistent with the "objectives" of the Settlement Agreement (id. 14, 36-37). In addition, Boston Edison states that without variance from the "literal application" of certain provisions of the Settlement Agreement, the divestiture transaction could not occur (id. at 36-37). Boston Edison asserts that the statutory obligation to mitigate transition costs authorizes the Department to permit such variance, where

appropriate, in order to effect a transaction that provides greater overall mitigation of transition costs than the reasonably available alternatives (id. at 37).

Boston Edison does not dispute the Attorney General's claim that the language of the Settlement Agreement separately allocates the municipals' cost responsibility (id. at 49).[(32)] However, Boston Edison proposes to "revenue credit" the wholesale power contracts in order to resolve this situation (id.). Boston Edison asserts that this proposed revenue credit method would be consistent with the historic treatment of revenues associated with the municipal contracts (id.). In addition, Boston Edison argues that allowing recovery through the revenue credit mechanism would result in greater and more certain mitigation of stranded costs by allowing the sale to proceed, rather than delaying it due to uncertainty as to cost recovery at FERC (id. at 49-50).

Boston Edison states that in order to sell Pilgrim, it incurs a risk of non-recovery of the municipals' share of the Pilgrim costs (id. at 49). Absent the decision to sell the unit, Boston Edison argues that the likelihood of recovery of such costs would be particularly high in the event of a plant shutdown and, therefore, the risk of the non-recovery is essentially created by the sale decision (id.).[(33)] In addition, Boston Edison argues that ratepayers have a significant interest in concluding the sale and may be willing to incur

additional risk of recovery through closing the sale before the municipal contract issue is resolved at the FERC (id. at 51). Boston Edison contends that shareholders do not receive a "commensurate benefit" from the sale and would be harmed by proceeding with the sale before the municipal contract issue is resolved (id.). Finally, Boston Edison states that the access charge mitigation incentive and the mandate of the Restructuring Act to mitigate fully its stranded costs, ensure that it will aggressively pursue the recovery of these costs at FERC on behalf of its retail ratepayers (Boston Edison Brief at 53-55).

c. Analysis and Findings

When considering the propriety of including the costs associated with the municipals' share of the decommissioning and net unrecovered investment in Pilgrim in Boston Edison's transition costs, the Department must consider whether it is consistent with Boston Edison's Settlement Agreement and with the Act. As part of this analysis, the Department will consider whether the overall benefits that will be achieved by the sale of Pilgrim outweigh any potential costs incurred by Boston Edison's ratepayers as a result of the sale.

In January 1998, the Department approved Boston Edison's Settlement Agreement. The language in the Settlement Agreement did not require that Boston Edison divest Pilgrim (Settlement Agreement, at § V.C.2(b)). The parties agree that the wording of the Settlement Agreement precludes Boston Edison from recovering from its retail ratepayers any portion of Pilgrim related costs associated with Boston Edison's wholesale contract customers (Boston Edison Brief at 49; Commonwealth Electric Brief at 25-26; Attorney General Brief

at 13). The parties, however, disagree whether the Settlement Agreement anticipated the sale of Pilgrim and, therefore, whether its language should be strictly applied in that context.

There are conditions under which the Department can and should allow electric companies to depart from previously approved settlement agreements. In fact, the Department has previously exercised this discretion to alter provisions approved as part of a restructuring plan. In Massachusetts Electric Company, D.P.U./D.T.E. 97-94, at 12 (1998), the Department approved changes to the terms of the contract termination charge that previously had been approved as part of Massachusetts Electric's restructuring plan. The Department approved the proposed modifications as consistent with the Restructuring Act and with the Department's goals of "near-term rate relief, rate stability, and ensuring an orderly and expeditious transition to competition." Massachusetts Electric Company, D.P.U./D.T.E.

97-94, at 37 (1998).

The Department notes that a significant or material change in circumstances may warrant a departure from a previous ruling or determination.[(34)] For example, in Boston Edison Company v. Department of Public Utilities, 417 Mass. 458, 464-65 (1994), the SJC held that the Department may properly refuse to revisit decisions where the change in circumstances was anticipated. Where the change is "extraordinary," it may be appropriate for the Department to reconsider an earlier decision.[(35)] Boston Edison Company v. Department of Public Utilities, 419 Mass. 738, 747-748 (1995). A recent application of this principle can be found in our decision in Petition of MCI WorldCom Corporation, D.T.E. 98-85, at 13 (1998), where we determined that Bell Atlantic must implement intraLATA presubscription by April 20, 1999, rather than upon entry into the interLATA market, as previously ordered by the Department in NYNEX, D.P.U./D.T.E. 96-106 (1997). In doing so, we stated that it "would be unfair to Massachusetts consumers if the Department failed to reassess the timing question given the significant change in circumstances." Id.

The Attorney General relies on the argument that the Settlement Agreement precludes Boston Edison's proposed treatment of the costs related to the municipal contract customers. The Settlement Agreement is undeniably important, but it was approved as consistent with the Restructuring Act because it was substantially compliant with the Act. The Settlement Agreement could not have provided for every contingency in the array of multi-party transactions that make up electric restructuring. There is no integration clause in the Settlement Agreement that precludes the Department from considering and approving Boston Edison's proposed treatment of the costs related to the municipal contract customers. Without some flexibility on this point, a Pilgrim sale generally beneficial to ratepayers may not have occurred.

The Department notes that Boston Edison conducted the first successful competitive bid process for the sale a nuclear plant in the nation. The Department finds that the success of this process creates significant, extraordinary, changed circumstances, the occurrence of which could not have been anticipated at the time the Settlement Agreement was signed. This change in circumstances is sufficient to warrant that the Department use our discretion to alter the application of the sections of the Settlement Agreement that preclude recovery of the municipals' share of the Pilgrim transition costs because such treatment is necessary in order to obtain the greater mitigation available through Pilgrim's sale to Entergy.

In order to sell Pilgrim, Boston Edison incurs a risk of non-recovery of the municipal customers' share of Pilgrim contract costs. This risk of non-recovery is essentially created by the decision to divest, because the existing municipal contracts allow recovery in the event of a plant shutdown, but are silent in the event of a plant sale. If the municipal customers are successful in challenging their obligation to pay their future obligation for decommissioning and net unrecovered plant investment, such costs would be stranded. Requiring Boston Edison to forego recovery of the municipal costs as specified in the Settlement Agreement may disrupt the sale, and in turn damage the mitigation efforts of Boston Edison (Tr. 2, at 161-166). This damage could result in higher transition charges for Boston Edison, which, in turn, would mean higher rates for ratepayers.

Concerning compliance with the Restructuring Act, G.L. c. 164, §1G(d)(1) states that in order for an electric company to recover transition costs, the Department must first issue an order finding that the electric company has demonstrated that it has taken all reasonable steps to mitigate these costs to the maximum extent possible. The Department finds that Boston Edison has made and continues to make reasonable efforts to mitigate the costs related to the municipal contracts through attempted renegotiations of the PPAs and through seeking recovery of these funds through its pending filing at FERC.[(36)] As stated in our request to participate in the FERC proceeding, the Department has an interest in ensuring that stranded costs are borne by those customers for whom those costs were incurred. Motion to Intervene of the Massachusetts Department of Telecommunications and Energy, EC 99-18, EL 99-22, ER 99-1023, at 2 (March 11, 1999). In addition, the Department finds that the mandate of the Act for maximum mitigation of stranded costs and the access charge mitigation incentive contained in Boston Edison's Settlement Agreement are sufficient incentives to encourage Boston Edison to pursue aggressively the recovery of these costs from the municipals. Boston Edison is directed to provide the Department with updates regarding all efforts to recover these costs from the municipals. Such updates shall be filed with the Department every six months from the issuance date of this Order, until this issue has been resolved.

The Restructuring Act does not require electric companies that own nuclear generating assets to divest those units. The Act did not and could not foresee all of the ramifications of the shift to a restructured electric utility industry. The costs at issue here are but one aspect of the divestiture of the Pilgrim, and subsequent mitigation of transition costs related to Pilgrim. The sale of Pilgrim provides many benefits to ratepayers and the exclusion of the costs related to the municipal contracts would disrupt the divestiture of Pilgrim and would place these benefits in jeopardy. Because mitigation of stranded costs is one of the main tenets of the Restructuring Act and the divestiture of Pilgrim achieves the goal of mitigation, the Department finds that the inclusion of the costs associated with the municipal contracts in Boston Edison's transition charge is consistent with the Act.

The Department finds that the overall benefit to ratepayers of the divestiture transaction outweighs the cost of possible non-recovery of the $43.8 million, or portion thereof, associated with the municipal contracts. In the event that Boston Edison is successful in recovering all or a portion of these costs from the municipals, Boston Edison shall fully reimburse its ratepayers for these costs. For the reasons stated above, the Department finds that Boston Edison is permitted to include the $43.8 million associated with the municipals' potential liability for the decommissioning costs and net unrecovered investment in the Pilgrim unit in the fixed component of its transition charge.

3. Inventory and Nuclear Fuel

a. Introduction

Boston Edison proposes two adjustments to the bid price to account for inventory of materials and supplies ("M&S") and for nuclear fuel at closing (Exh. BE-7, Att. GOL-2,

at 1). For inventory, the purchase price is to be increased by the net book value of inventory as of the closing date less $20,053,272 (Exh. BE-5A at § 2.6(a)(i)). If the net book value of inventory less $20,053,272 is negative, the purchase price will be decreased by that amount (id.). Similarly, the purchase price is to be increased by the amount that the net book value of Boston Edison's nuclear fuel exceeds $67,934,706 (id.).

b. Positions of the Parties

i. Attorney General

The Attorney General recommends that Boston Edison's proposal to base the adjustment on the net balances (or the gross amount less the amount amortized) be rejected, because the amount amortized may be different from the amount collected from ratepayers, resulting in a net book value that may be different from the amount left to be recovered from ratepayers (Attorney General Brief at 16). Further, if the Department approves the divestiture, the Attorney General recommends that the Department require that the adjustment for inventory and nuclear fuel be based on the gross amount less the amount already collected from ratepayers through base rates and the transition charge (id.).

ii. Boston Edison

Boston Edison asserts that the Attorney General's proposal results in a reconciliation that is unnecessary and would duplicate reviews that have been or will be conducted (Boston Edison Reply Brief at 15-16). Boston Edison states that nuclear fuel costs were recovered through its fuel charge until the initiation of retail access, and since then through the performance-based ratemaking ("PBR") mechanism (id. at 16). According to Boston Edison, any balance is being recovered from Entergy per the terms of the P&S (id.). Boston Edison argues that the portion recovered through the fuel clause was reviewed as part of fuel charge filings, and the amount recovered through the PBR mechanism will be reviewed as part of the transition charge reconciliation proceeding (id.). Therefore, Boston Edison contends that there is no value to an additional review in this proceeding (id.).

Similarly, Boston Edison states that the inventory charged to expense will be reviewed as part of the transition charge reconciliation proceeding, and Entergy is paying Boston Edison the difference between the gross amount and the amount already expensed (id.). Further, Boston Edison claims that the Attorney General did not raise this issue in the

sale of the fossil generating units even though the issue was presented in that proceeding (id.).

c. Analysis and Findings

The amounts that Boston Edison is showing as expensed or already collected from ratepayers will be reconciled in its next transition charge reconciliation proceeding. If the actual amounts collected from ratepayers for inventory and nuclear fuel expenses are different from those Boston Edison has used in this proceeding, the Department will require Boston Edison to refund the additional amounts. In this way, the Department will ensure that there is no double recovery of inventory or nuclear fuel expenses. Because these amounts will be resolved in the transition charge reconciliation proceeding, the Department finds that it is not necessary in this proceeding to reconcile the amounts used by Boston Edison in its calculations with the actual amounts. Therefore, in the transition charge reconciliation proceeding, the Department directs Boston Edison to reconcile the amounts shown in this proceeding as recovered in the transition charge to the actual amounts recovered.

4. Pilgrim Going Forward Costs

a. Introduction

Under terms of the Settlement Agreement, as long as Boston Edison continued to operate Pilgrim from the retail access date through December 31, 2000, its operating costs were to be recovered through a PBR (Settlement Agreement, Att. 3, § 2.7). According to the PBR mechanism, 25 percent of Pilgrim's reasonable operating costs, excluding the contract customers' portion of the costs, less revenues from the sale of 25 percent of Pilgrim's energy and capacity were to be recovered through the transition charge (id.).

In the current proceeding, Boston Edison proposes to adjust the bid price by subtracting 100 percent of the going forward costs for: (1) required nuclear expenditures; (2) uncompleted pre-approved projects; (3) low level radiation waste ("LLRW") disposal; and (4) the nuclear refueling outage (Exh. BE-7, Att. GOL-2, at 1).

b. Positions of the Parties

i. Attorney General

The Attorney General asserts that the required nuclear expenditures, uncompleted

pre-approved projects, LLRW disposal costs, and nuclear refueling outage costs are normal operating and maintenance costs that should be shared in the ratio of 75 percent by shareholders and 25 percent by ratepayers per the PBR mechanism in the Settlement Agreement (Attorney General Brief at 17-18). The Attorney General argues that by reducing the bid proceeds by 100 percent of these costs and not sharing them in the ratio of 75/25, Boston Edison is unfairly shifting the burden for all of these costs to ratepayers (id.). For the refueling outage costs, the Attorney General uses the analogy of an automobile, and states that, ". . . [Boston Edison] has run the automobile for two years during which time it has retained 75 percent of the benefits of those operations, and now, when the tires are worn out, the oil needs changing, and the spark plugs have to be replaced, [Boston Edison] sells the car, passing on the lower value of the unmaintained asset to the customers" (id. at 18). The Attorney General argues that Boston Edison benefitted from the operations of the plant over the first year or two of operation, deferring maintenance, and now is leaving customers with the lower value of the plant, which he argues is "patently unfair" (id.). The Attorney General recommends that all of the operations and maintenance expenses, including the refueling outage costs, should be recovered through the 75/25 sharing mechanism (id. at 18-19).

ii. DOER

DOER asserts that, while Boston Edison portrays the proposed ratemaking treatment for the divestiture as neither benefitting nor harming shareholders, the proposed treatment does in fact benefit shareholders at the expense of ratepayers (DOER Brief at 5). DOER states that the PBR mechanism resulted in a 75/25 (shareholders/ratepayers) sharing of any profit or loss from the operation of Pilgrim, but the calculation of the RVC shifts all the costs to ratepayers (id. at 6).

Referring to the adjustment for uncompleted pre-approved projects, DOER states that Boston Edison's proposed ratemaking treatment deducts the entire $6.7 million of these costs from the bid proceeds (id.). Arguing that these costs are for projects that are necessary for the continued operation of Pilgrim, DOER states that if Boston Edison continued to operate the plant, ratepayers would have had to pay only 25 percent of the $6.7 million (id.). Similarly, DOER states that ratepayers would have paid only 25 percent of the refueling outage costs if Boston Edison continued to operate the plant compared to 100 percent of the refueling outage costs that ratepayers are being asked to pay according Boston Edison's proposal (id. 6-7).

Regarding the costs for LLRW disposal, DOER states that to the extent these costs represent an on-going operational expense, they should be divided in the ratio 75/25 between shareholders and ratepayers (id. at 7). If however, these costs have already been collected from ratepayers, DOER recommends they should not be deducted from the bid proceeds (id.).

DOER estimates that Boston Edison's proposed treatment of these costs results in a "windfall" for Boston Edison's shareholders ranging from $21 to $26 million depending on the closing date for the sale of Pilgrim (id. at 8). DOER recommends that the

Department allow Boston Edison to deduct only 25 percent of the uncompleted pre-approved projects, the refueling outage costs, and the LLRW disposal costs only if they are ongoing expenses (id.).

iii. Commonwealth Electric

Commonwealth Electric asserts that the Settlement Agreement explicitly states that the PBR mechanism is applicable while Boston Edison continues to operate Pilgrim (Commonwealth Electric Brief at 20). Commonwealth Electric contends that the PBR mechanism was designed to provide an incentive to Boston Edison to operate the plant efficiently, and therefore should be applicable "only to those expenditures undertaken by Boston Edison in furtherance of its operation of Pilgrim" (emphasis in original) (id. at 20-21). Commonwealth Electric argues that the sale of Pilgrim takes the expenditures outside the PBR mechanism (id. at 21). According to Commonwealth Electric, Boston Edison is no longer at risk for the operation of the unit, and it is fair that Boston Edison ratepayers should bear the full costs of running and operating the plant up to the time of the sale because they get the

full benefits of the sale (id.). Commonwealth Electric also states that the proposed

recovery of these expenditures is similar to the recovery in other divestiture transactions

where the Department approved the company's share of capital investments after December 31, 1995 (id.).

iv. Boston Edison

Boston Edison states that, at present, there are no required nuclear expenditures, and therefore the issue of their recovery may be moot (Boston Edison Brief at 43). However, if there were such expenditures, Boston Edison argues that they should be deducted from the bid proceeds (id.). Boston Edison argues that such expenditures would most likely be incurred to satisfy NRC requirements, and if Boston Edison were to incur such an expense "out of pocket" without being able to recover it through a deduction from the proceeds, it would be unfair (id.). Boston Edison further states that the proposed treatment for these expenses is similar to that for other expenses reimbursable from third parties (id.).

Regarding the deduction for uncompleted pre-approved projects, Boston Edison states that these costs would be incurred only when Boston Edison has not completed a project that Entergy assumed would be completed when making its bid (id. at 44). According to Boston Edison, the sale proceeds would be decreased because Entergy would pay less for a plant that has certain projects not yet completed (id.). Because Boston Edison would not have incurred the cost, but would simply be receiving less money from Entergy, Boston Edison states that there would not be any double recovery (id.). Boston Edison asserts that there is no unfairness or cost to ratepayers because of this adjustment (id.).

Boston Edison concedes that its proposal results in the double counting of the LLRW disposal costs. Boston Edison has agreed to make the appropriate adjustments to its deductions from the bid proceeds to correct this problem (id.).

Regarding the treatment of the refueling outage costs, Boston Edison contends that this deduction shows the fact that the plant is worth $40 million more immediately following a refueling outage, and shows the intent of the parties that the economic effect on each party is the same whether closing occurs before or after a refueling outage (id. at 44-45). Boston Edison disputes the Attorney General's claim that these costs are "normal operations and maintenance expenses" that should be recovered through the PBR mechanism (id. at 45). According to Boston Edison, the appropriate accounting treatment of the refueling outage costs is amortization over the following operating cycle (id.). If the closing occurs after the refueling outage, Boston Edison proposes to account for any amortization expense between the outage date and the closing date according to the PBR mechanism and split both expenses and revenues for that period in the 75/25 ratio (Boston Edison Reply Brief at 12). Boston Edison asserts that the Attorney General's argument that the entire refueling outage expense be split in the ratio of 75/25 "appears to be based on a view that outage costs consist of deferred maintenance that relates to and needs to be matched with power and revenue generated in prior periods" (emphasis in original) (id. at 13). Boston Edison claims that view is, "fundamentally flawed, completely unprecedented, and is directly contrary to the method of accounting used for refueling outage expenses, i.e., these expenses are amortized over post-outage periods to match them with corresponding revenue, not allocated back against revenue for prior periods" (id.). Further, Boston Edison argues that any other treatment of the refueling outage costs would create a "perverse incentive" to either delay or advance the closing date in order to create a windfall for either ratepayers or shareholders (Boston Edison Brief at 45).

c. Analysis and Findings

Regarding the applicability of the PBR sharing mechanism to required nuclear expenditures, costs for uncompleted pre-approved projects, LLRW disposal costs, and refueling outage costs, the Department notes that the PBR mechanism is only applicable,

"[s]o long as Boston Edison continues to operate Pilgrim" (Settlement Agreement, at 237,

§ 2.7(a)). Furthermore, we find that the PBR mechanism was intended to provide an incentive to Boston Edison to operate the plant efficiently, and that the sale of Pilgrim takes the expenditures under consideration here out of the PBR mechanism.

The expenses in question relate to actions required to be taken by Boston Edison in order to adhere to NRC requirements. Therefore, the Department approves the adjustment for "Expenses for Required Nuclear Expenditures" as proposed by Boston Edison. Similarly, the Department finds that it is reasonable for Boston Edison to deduct from bid proceeds any amounts for "Uncompleted Pre-Approved Projects." Entergy's bid was based on a requirement that the projects in question be complete. If a project within the

contemplation of the Pilgrim sale contract is not complete, the value of the Pilgrim asset is decreased and the corresponding reduction in value is properly borne by Boston Edison ratepayers. Boston Edison has conceded that its proposal for the treatment of LLRW disposal costs results in double counting. Therefore, the Department directs Boston Edison to adjust the bid price to reflect the contribution by ratepayers for LLRW disposal costs.

On the issue of the refueling outage costs, the Department is not persuaded that Boston Edison has benefitted from the operations of the plant over the first year or two of the PBR mechanism, has deferred maintenance, and has left the customers with a lower-valued plant. These are unsupported assertions. Refueling outage expenses are amortized over post-outage periods, and are not allocated back against revenue from prior periods. Western Massachusetts Electric Company, D.P.U. 85-270, at 166A (1986). In this sense, a refueling outage is not deferred maintenance. The refueling outage prepares the plant for another two years of operation and Entergy is willing to pay $40 million for the capability to run the plant for another two years. If Boston Edison incurs costs to "enhance" the value of the plant for Entergy, it should be allowed to recover those costs. Furthermore, we agree that disallowing the deduction for the refueling outage costs would lead to a perverse incentive to either delay or advance the closing date to create an advantage for ratepayers or shareholders at the expense of the other. Therefore, the Department finds that Boston Edison's treatment of refueling outage costs is reasonable and approves the deduction of refueling outage costs from the bid proceeds. If the closing occurs after the refueling outage, the Department directs Boston Edison to account, as it represents it would, for any amortization expense between the outage date and the closing date according to the PBR mechanism and split both expenses and revenues for that period in the 75/25 ratio.

5. Capital Additions

a. Introduction

Boston Edison proposes to deduct from the bid proceeds approximately $15 million for capital additions made since December 31, 1995 (Exh. BE-7, Att. GOL-2, at 1).

b. Positions of the Parties

i. Attorney General

The Attorney General concedes that the Settlement Agreement allows for recovery of capital additions in the case of the sale of a unit, but asserts that Boston Edison has not provided any evidence to support the prudence of these capital additions (Attorney General Brief at 20). The Attorney General contends that some of the capital additions, specifically the capital addition related to the generator rewind, were the result of imprudent actions by Boston Edison or its contractor (id.). The Attorney General states that the failure of the main generator may have been caused by low oxygen content in the stator water cooling ("SWC") system or because of the use of an ion exchange resin in

the SWC system that was not approved by the manufacturer (Exh. AG-6, at 10-11). The Attorney General recommends that the Department deny the adjustment for capital additions and defer resolution and recovery of these costs until Boston Edison's next transition charge reconciliation proceeding (Attorney General Brief at 20).

ii. Commonwealth Electric

Citing The Berkshire Gas Company, D.P.U. 92-210 (1993), Commonwealth Electric states that the Department requires reviewable documentation for investments that any company seeks to recover in rates (Commonwealth Electric Brief at 29-30). Commonwealth Electric states that Boston Edison provided a variety of documentation sufficient to support the prudence of the capital additions (id. at 29).

iii. Boston Edison

Boston Edison states that, "the record is adequate and that the prudence of each of the relevant investments has been supported by information request, by testimony and by record request" (Boston Edison Brief at 45-46, n. 53). Regarding the Attorney General's specific allegation of imprudence involving the main generator failure, Boston Edison asserts that the Attorney General's argument is based on mere speculation (id. at 46-47). Boston Edison refers to a detailed root cause analysis of the outage by Altran Materials Engineering, which it argues, refutes the points raised by the Attorney General (id. at 47). Regarding the other two capital projects after December 31, 1995, Boston Edison asserts that it has provided

complete details that demonstrate that the projects were in response to NRC imposed requirements (id.).

c. Analysis and Findings

For costs a company seeks to recover in rates, the expenditures must be prudently incurred, and the resulting plant must be used and useful in providing service to ratepayers. Fitchburg Gas & Electric Light Company, D.T.E. 98-51, at 12 (1998), Boston Gas Company, D.P.U. 93-60, at 24 (1993). A prudence review must determine whether the utility's actions, based on all that it knew or should of known at the time, were reasonable and prudent in light of the circumstances that then existed. D.T.E. 98-51, at 12. A determination of reasonableness and prudence may not properly be made on the basis of hindsight judgments, nor is it appropriate for the Department merely to substitute its own judgment for the management of the utility. Attorney General v. Department of Public Utilities, 390 Mass. 208, 229 (1983). A prudence review must base its findings on how a company reasonably should have responded to the particular circumstances and whether the company's actions were in fact prudent in light of all the circumstances that were known or reasonably should have been known at the time the decision was made. D.P.U. 98-51 at 12. The Settlement Agreement allows Boston Edison to recover its share of "undepreciated capital investments" incurred after December 31, 1995 (Settlement Agreement, Att. 3, § 1.5(b)).

The record shows that Boston Edison provided an extensive amount of information sufficient to support a finding of the prudence of its requested capital additions (e.g., the materials cited in Boston Edison Brief at 46, n. 53). The costs of three of the capital projects,

(the motor-operated valve ("MOV") program, the Emergency Core Cooling System

("ECCS") suction strainer modifications, and the generator rewind) constitute 83 percent

of the total capital additions that Boston Edison seeks to recover in this proceeding

(Exh. AG-BECo 1-11). The MOV program and the ECCS suction strainer modifications were required by the NRC, and therefore, the Department finds that the costs associated with these projects were unavoidable and thus prudent expenditures (RR-AG-17; RR-AG-18). Indeed, it would have been imprudent of Boston Edison to disregard NRC requirements and not make these expenditures.

Regarding the main generator failure, record evidence shows the failure was not caused by improper water chemistry or non-approved resin, thus refuting the Attorney General's allegation of imprudence by Boston Edison or its contractor (Exh. AG-BECo 5-18,

at 280-281). The failure analysis for the generator states that the cause was flow restriction which, in turn, was caused by a small piece of gasket material (id. at 280). It could not be determined how or when this material got into the cooling system for the generator winding (id.). However, there is no record evidence to indicate that the presence of the gasket material was caused by imprudent actions by Boston Edison. Mere failure of a part in a component of a complex nuclear plant does not itself spell imprudence. Furthermore, the Department finds that Boston Edison acted prudently in analyzing the fault and repairing the generator. Therefore, the Department finds that the costs associated with the generator failure were prudently incurred.

Based on the foregoing analysis, the Department finds that Boston Edison has provided sufficient evidence to establish that the three main projects, which account for 83 percent of the capital additions, were prudent. A review of other projects included in the capital additions shows these projects were necessary to maintain the safety and reliability of Pilgrim

and were, therefore, prudent (Exh. AG-BECo 1-11).[(37)] As the capital additions were prudent, the Department approves the deductions for capital additions proposed by Boston Edison. 6. Transaction Costs

a. Introduction

Boston Edison proposes to reduce the bid proceeds by $5 million for transaction costs incurred in the sale process (Exh. BE-7, Att. GOL-2, at 1).

b. Positions of the Parties

i. Attorney General

The Attorney General claims that Boston Edison's $5 million estimate of transaction costs is large (Attorney General Brief at 20). He recommends that this estimate should be reviewed and reconciled with the actual transaction costs incurred (id. at 20-21). This review would occur during Boston Edison's next annual transition charge reconciliation filing.

ii. Boston Edison

Boston Edison states that it was necessary to provide a "good faith estimate" of the transaction costs because the exact amount for the transaction costs will not be known until the closing (Boston Edison Reply Brief at 17). Boston Edison emphasizes that the Attorney General has not criticized the transaction costs as unreasonable (id.). Boston Edison proposes to make any changes to the transition charge based on the actual closing statements and updated closing costs for the transaction (id.). Further, Boston Edison states that the transaction costs will be trued-up as part of the annual transition charge reconciliation filing (id.).

c. Analysis and Findings

Boston Edison agrees with the Attorney General that the transaction costs of $5 million are estimated. In previous divestiture transactions, the Department has allowed a company to use estimates of transaction costs for the purposes of calculating a residual value credit with a reconciliation to be performed in subsequent proceedings for that company. Boston Edison Company, D.T.E. 97-113, at 24-25; Massachusetts Electric Company, D.P.U./D.T.E. 97-94, at 37. Therefore, the Department will allow Boston Edison to use an estimate of the transaction costs identified in Exh. BE-7, Att. GOL-2, at 1, to calculate its RVC, but directs Boston Edison to file the actual transaction costs in the next transition charge reconciliation proceeding. At that time, based on its review of the transaction costs, the Department will require Boston Edison to make an adjustment to its transition charge so that any over or

under-collections can be rectified.

7. Other Costs

a. Introduction

Because of uncertainty about the closing date, Boston Edison proposes to file new tariffs within three months following closing of the Pilgrim divestiture with updated schedules

showing the calculation of RVC based upon actual closing statements and updated closing costs for the transaction (Boston Edison Brief at 58). Boston Edison states that closing costs and certain issues related to the divestiture may not be identified until the actual closing (id.). These closing costs are in addition to the transaction costs discussed in § V(6), above. At present, Boston Edison identifies the following two issues: (1) "closing delivery requirements" related to materials contracts with General Electric Company; and (2) costs that may be incurred to obtain Montaup's waiver of its closing condition regarding long-term financing (id. citing Exhs. BE-5A, § 2.10(g), Sch. 2.1(e); BE-5B, Tab 11, § 10(f)).[38]

Boston Edison argues that, in a complex transaction such as the Pilgrim divestiture, there will remain costs that cannot be identified or finally resolved until closing (Boston Edison Reply Brief at 17). Boston Edison states that it has provided the Department with an initial estimate of those costs, where known, but understands that the amount to be actually recovered from customers will be based upon final accounting and submitted at the next transition charge reconciliation proceeding (id.). Boston Edison argues that these additional costs are required in order to close the divestiture transaction, "either because they are necessary to effectuate a required delivery at closing or to close out or terminate a Pilgrim-related obligation" (id.).

Regarding the contract issues with General Electric, Boston Edison states that these represent "the resolution of contract issues associated with the fabrication and delivery of nuclear fuel over the remaining plant license, and estimated that current vendor claims to resolve this issue are in the order of $10 million" (id. at 18, n. 15). Boston Edison does not provide an estimate of the Montaup-related costs (id. at 18). Finally, Boston Edison states that other, not yet identified costs may arise before closing (id.). It is Boston Edison's "intention and expectation that Department approval of the Pilgrim divestiture transaction should encompass approval of the necessary costs incurred in order to close, subject to appropriate true-up and documentation" (id.).

b. Analysis and Findings

Boston Edison seeks an order that gives it approval to recover from ratepayers all costs which, in its sole judgment, are "necessary costs incurred" in order to close the Pilgrim divestiture transaction. The Department cannot yet grant such an approval. The record contains no evidence regarding the General Electric, Montaup, or "other" closing costs. The issue of recovery of "last minute" costs related to the closing was not brought to the Department's attention until Boston Edison's initial brief. By presenting the issue of these "other costs" for the first time through its briefs, Boston Edison did not provide the Attorney General, the Department, or other parties adequate time to investigate and address this issue. The transaction costs and other adjustments of gross proceeds discussed in § V, above, were identified by Boston Edison in its petition and described by its witnesses in direct testimony. Cost categories were identified, "good faith" estimates of the costs were presented, and a rationale for recovery of the costs was argued. The Attorney General and the Department had the opportunity to examine record evidence regarding these transaction costs before reasoned findings were made. In fact, when

discussing the use of transition cost estimates in its RVC, Boston Edison argues to its advantage that "none of [the transition cost] estimates have been criticized by the [Attorney General] as unreasonable" (Boston Edison Reply Brief at 17). An unsupported, extra-record estimate of possible "Pilgrim-related" closing costs cannot justify a proposed adjustment to the sale proceeds.

The Department is cognizant of Boston Edison's need for a reasonable amount of flexibility to deal with transaction closing costs. This flexibility is accommodated by our finding in § V(6) that allows Boston Edison the recovery of certain transaction costs based on "good faith" estimates, and subject to a later reconciliation. However, granting approval of all "necessary costs incurred to close" as requested by Boston Edison, would not be in the public interest. A general approval creates significant risk for Boston Edison's ratepayers. The $10 million in "other costs" is already significant in relation to Boston Edison's "good faith" estimate of transaction costs ($5 million) and when compared to the gross proceeds of the sale ($80 million). To allow the recovery of unlimited, unexamined costs could threaten the overall benefits of sale. Accordingly, the Department rejects Boston Edison's proposal to recover "any and all costs" that may be required to close the transaction with Entergy. Boston Edison may seek recovery of these costs in its next transition charge reconciliation proceeding, upon a showing that they were reasonable and necessary costs incurred in order to close. The Department would also consider an earlier petition, in this docket, if Boston Edison determines that a ruling by the Department regarding these costs is necessary to complete the divestiture transaction.

B. Residual Value Credit and Transition Charge Reduction

1. Introduction

Boston Edison proposes to credit customers with its share of the net proceeds from the sale of Pilgrim (Boston Edison Brief at 40, citing Exh. BE-7, Att. GOL-2). To determine its share of the net proceeds, Boston Edison proposes several adjustments to the gross proceeds of $80 million. In addition, Boston Edison is proposing to include $466 million for the Decommissioning Trust, discussed in § V(A), above (Exh. BE-7, Att. GOL-2, at 1). Using these adjustments and Boston Edison's 74.26867 percent share of Pilgrim, Boston Edison calculated an RVC of negative $256.6 million (based on a closing date of June 30, 1999) (Exh. BE-7, Atts. GOL-2, at 1, GOL-4, at 7).[(39)]

Boston Edison's proposed RVC acts to increase the transition charge in two or three years and reduce it in the rest, compared to the transition charge approved by the Department in Boston Edison's fossil divestiture, Boston Edison Company, D.T.E. 97-113 (1998) (Exh. DTE-BECo 1-48).[(40)] On a net present value basis, Boston Edison calculates that the Pilgrim divestiture would serve to reduce its total transition charges by $15 to $29 million, depending on the closing date (see RR-BECo-7).

The positions of the parties concerning the calculation of the RVC were discussed in

§ V(A), above, as they relate to the various adjustments to the gross proceeds proposed by Boston Edison. It is not necessary to repeat those arguments here.

2. Analysis and Findings

The Restructuring Act requires that all proceeds from the divestiture and sale of generation facilities by electric companies that inure to the benefit of ratepayers, net of tax effects and other adjustments approved by the Department, be applied to reduce the amount of the selling companies' transition costs. G.L. c. 164, § 1A(b)(3). The Settlement Agreement

provides that Boston Edison shall implement an RVC as a direct offset to the access or transition charge (Settlement Agreement, Att. 3, § 1.5).

The Department notes that the RVC will reduce Boston Edison's transition charge when compared to a shut down scenario, if the sale were not approved. The RVC should also reduce the overall transition charge when compared to the continued operation of Pilgrim by Boston Edison. Therefore, the Department finds that Boston Edison's proposal to credit its ratepayers with an RVC equal to Boston Edison's net proceeds from the proposed sale of Pilgrim, as adjusted and approved above by the Department, is consistent with the Restructuring Act and with the Settlement Agreement, which was found to be in substantial compliance with the Restructuring Act. The Department will review the exact amounts of the

adjustment factors to the gross proceeds after the Pilgrim sale is finalized, specifically during Boston Edison's next reconciliation proceeding.[(41)]

VI. RATEMAKING TREATMENT OF COMMONWEALTH ELECTRIC'S

PROCEEDS FROM THE DIVESTITURE TRANSACTION

A. Introduction

Commonwealth Electric proposes to eliminate the portion of its variable transition charge related to the Pilgrim contract and replace it with a buyout charge collected in the fixed portion of the transition charge (Exh. COM-4, at 6-7). The net effect of these changes is to decrease the total amount of transition charges to be collected from Commonwealth Electric's ratepayers by $33.5 to $37.1 million on a net present value basis, depending on the date of closing (id. at 7). Under Commonwealth Electric's proposal, the total transition charge would be lowered, for every year from 1999 through 2012, by an average of 0.11 to 0.12 cents/KWH, with the exact amounts depending on the closing date (see Exh. COM-4,

at Att. 1-3). Commonwealth Electric characterizes the reductions in its transition charges due to the Pilgrim divestiture as being about 4 percent initially. The reductions increase somewhat in the later years of the current Pilgrim contract (Exh. COM-4, Atts. 1-3). No

other parties commented on Commonwealth Electric's proposed changes in its transition charges.

B. Analysis and Findings

The Restructuring Act requires that all proceeds from the divestiture and sale of generation facilities by electric companies, net of tax effects and less any other adjustments approved by the Department that inure to the benefit of ratepayers, shall be applied to reduce the amount of the selling electric companies' transition costs. G.L. c. 164, § 1A(b)(3).

The Department recognizes that Commonwealth Electric's Pilgrim contract buyout and associated contract replacement will reduce Commonwealth Electric's transition charge by about $35 million, or at least 4 percent. Therefore, the Department finds that Commonwealth Electric's contract buyout and replacement contract constitute mitigation of its transition costs as required by the Restructuring Act and pursuant to Commonwealth Electric's restructuring plan. Accordingly, the Department finds that Commonwealth Electric's contract buyout and replacement contract is in the public interest. The buyout agreement and the above-market costs of the replacement contract may be included and recovered as part of Commonwealth Electric's transition charge, in accordance with its proposal as adjusted to conform with Department findings in § V(A), above. The Department will review the exact amounts of the adjustments to Commonwealth Electric's transition charges after the Pilgrim sale is finalized, specifically during Commonwealth Electric's next reconciliation proceeding.

VII. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That the asset divestiture involving the sale by Boston Edison Company of its Pilgrim Nuclear Power Station and related assets, as embodied in the Purchase and Sale agreement and other related documents (Exhs. BE-5A, BE-5B), is approved; and it is

FURTHER ORDERED: That the purchase by Boston Edison Company of power from the Pilgrim Nuclear Power Station, as embodied in the two power purchase agreements between Boston Edison Company and Entergy Nuclear Generation Company (Exhs. BE-5B, Tab 6, Tab 7), and the recovery of any above-market costs associated therewith in the transition charge, is approved; and it is

FURTHER ORDERED: That Boston Edison Company's proposed ratemaking treatment of the proceeds from the sale be and hereby is approved, subject to reconciliation and refund; and it is

FURTHER ORDERED: That Commonwealth Electric Company's termination and buyout of its existing obligation to purchase power from the Pilgrim Nuclear Power Station, and the inclusion of the buyout amount associated therewith in its transition charge, is approved; and it is

FURTHER ORDERED: That the purchase by Commonwealth Electric Company of power from the Pilgrim Nuclear Power Station, as embodied in the power purchase agreement between Commonwealth Electric Company and Entergy Nuclear Generation Company (Exh. BE-5B, Tab 8), and the recovery of any above-market costs associated therewith in the transition charge, is approved; and it is

FURTHER ORDERED: That Commonwealth Electric Company's proposed ratemaking treatment of the proceeds from the sale be and hereby is approved, subject to reconciliation and refund; and it is

FURTHER ORDERED: That Boston Edison Company and Commonwealth Electric Company comply with all other orders and directives contained herein.

By Order of the Department,

_____

Janet Gail Besser, Chair

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk

of said Court. (Sed. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. The petitions to intervene in D.T.E. 98-119 of Citizens Urging Responsible Energy ("CURE"), John T. O'Connor, and Massachusetts Citizens for Safe Energy ("MCSE") were denied (Hearing Officer's Ruling on Petitions to Intervene (December 23, 1998)). MCSE's and CURE's appeals of the hearing officer ruling were also denied. D.T.E. 98-119/126, Interlocutory Order Denying CISR's, MCSE's and CURE's Appeals of Hearing Officer Ruling (March 19, 1999).

2. The petition to intervene in D.T.E. 98-126 of Cape & Islands Self Reliance ("CISR") was denied (Hearing Officer's Ruling on Petition to Intervene of Cape and Islands Self Reliance (January 19, 1999)). CISR's appeal of the hearing officer ruling was also denied. D.T.E. 98-119/126, Interlocutory Order Denying CISR's, MCSE's and CURE's Appeals of Hearing Officer Ruling (March 19, 1999).

3. Although the Department granted the motion to consolidate D.T.E. 98-119 and D.T.E. 98-126, it declined to consolidate D.T.E. 98-118 with D.T.E. 98-119/126. Nonetheless, the Department determined that all three proceedings would have one evidentiary record for the purpose of hearings (Tr. 1, at 5).

4. A subset of documentary responses to information requests (some of which were later marked as exhibits) and to record requests were determined to qualify under G.L.

c. 25, § 5D. When cited here, these documents are denoted "proprietary".

5. An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provisions of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein, signed by the Governor on November 25, 1997.

St. 1997, c. 164

6. On March 18, 1999, Boston Edison filed a motion seeking to reopen the evidentiary record and admit as exhibits the following: (1) the Fourth Amendment to the Pilgrim Power Sale Agreement between Boston Edison and Montaup, dated March 9, 1999, and (2) the Agreement between Boston Edison and Plymouth concerning property taxes, dated March 16, 1999. Boston Edison states that there is no objection to this filing. Accordingly, the Department grants the motion and marks and admits the Montaup amendment and the tax agreement as exhibits BE-5B, Tab 11R and BE-17, respectively.

7. For example, if the closing occurs before the scheduled May 8, 1999, refueling outage, the purchase price remains $80 million, but Boston Edison will reimburse Entergy for Entergy's actual costs of the refueling outage, up to $40 million (Exh. BE-5A

at § 5.16). If the closing occurs after the refueling outage, the purchase price will remain $80 million, but Boston Edison will deduct the unamortized portion of the refueling outage costs from the bid proceeds, and consequently the amount ratepayers receive will be reduced by the unamortized portion of Boston Edison's refueling outage costs (id. at § 2.6(a)(v)).

8. The property sold by Boston Edison to Entergy is more particularly described in the P&S and related agreements filed with the Department and included as exhibits BE-5A and BE-5B. It is the transfer of the property as described therein that the Department approves.

9. However, the existing Pilgrim ring bus and switchyard are included as part of the sale

(Exh. BE-5A at § 2.2).

10. Under the current federal tax code, regulated utilities may accumulate certain decommissioning funds in a "qualified" trust which is taxed at a reduced rate.

26 U.S.C. § 468A. The favorable tax treatment for qualified funds allows the

trust to grow faster than if the entire trust were taxed at normal corporate tax rates (Exh. BE-7, at 28). Because Entergy is an unregulated entity, the provisions of the tax code regarding the qualified trust are not currently available to it (Tr. 2, at 225). Boston Edison and Entergy are currently seeking legislative changes that will allow Entergy to maintain as much of the Decommissioning Trust as possible on a qualified basis (Exh. BE-7, at 29-30).

11. Under current tax law, Boston Edison's qualified portion of the decommissioning fund is "disqualified" upon transfer to Entergy and may be treated as a distribution of assets to Boston Edison and thus as taxable income. Such treatment would cause Boston Edison to incur approximately $60 million in taxes (Exh. DTE-BECo 1-35). Both Boston Edison and Entergy have made a joint filing to the Internal Revenue Service for private letter rulings that will allow for a tax-free transfer of the Decommissioning Trust (Exh. BE-7, at 28; RR-AG-16). If a favorable tax ruling cannot be obtained, Boston Edison states that "the [divestiture] will not be consummated"

(Exh. DTE-BECo 1-35).

12. For example, if the closing date is April 1, 1999, the amount of funding in the Decommissioning Trust will be $396 million, and the amount of funding in the Provisional Trust will be $70 million, for a total funding of $466 million. If the closing date is June 30, 2000, the amount of funding in the Decommissioning Trust will be $418

million, and the amount of funding in the Provisional Trust will be $70 million, for a total funding of $488 million. If the closing date occurs between April 1, 1999, and June 30, 2000, a daily adjustment factor will be computed based on the difference in funding required. Regardless of the actual closing date, the amount of funding in the Provisional Trust will remain $70 million (Exh. BE-5A at § 5.21(a)).

13. The fourteen municipal customers are: Boylston Municipal Light Department, City of Holyoke Gas & Electric Department, Hudson Light and Power Department, Littleton Electric Light & Water Departments, Marblehead Municipal Light Department, Middleborough Gas and Electric Department, North Attleboro Electric Department, Peabody Municipal Light Plant, Shrewsbury Electric Light Plant, Templeton Municipal Light Plant, Wakefield Municipal Light Department, West Boylston Municipal Lighting Plant, Westfield Gas & Electric Light Department, and Reading Municipal Light Department.

14. Under the Commonwealth PPA and the Montaup PPA, the price for the output of Pilgrim follows a specified schedule ranging from $35.00/Mwh in 1999 and rising to $47.22/Mwh in 2004 (Exh. BE-7, at 26).

15. On February 5, 1999, Montaup filed a Petition for Declaratory Order Approving Proposed Amount and Treatment of Purchased Power Agreement "Buydown" Costs, seeking regulatory approval of these transactions from FERC (Exh. BE-17).

16. On December 24, 1998, Boston Edison filed a request for a declaratory order from FERC on the following issues: (1) that the contracts between Boston Edison and the municipals remain in effect after the sale of the plant and that the partial assignments of the physical delivery obligations under these contracts to Entergy is valid; (2) that the recovery of costs under the municipal contracts is not affected by the sale to Entergy and that Boston Edison will continue to recover costs as if Pilgrim had not been sold; and (3) that the municipals are obligated to reimburse Boston Edison for the decommissioning payment which Boston Edison is making to Entergy as part of the sale of the plant (Petition for Issuance of Declaratory Order, EL 99-22 (December 24, 1998)). In the event that FERC accepts jurisdiction over this matter, the Department has sought to intervene. See Motion to Intervene of the Massachusetts Department of Telecommunications and Energy, EC 99-18, EL 99-22, ER 99-1023 (March 11, 1999).

17. Standard offer service is available from 1998 through 2004 to customers who do not choose a competitive electricity supplier. The price for standard offer service rises each year, according to a schedule provided in Boston Edison's Restructuring Settlement Agreement, D.P.U./D.T.E. 96-23 (1997), but the total price of electricity paid by standard offer service customers meets the ten and 15 percent rate reduction requirements of the Restructuring Act.

18. The Pilgrim divestiture team was composed of: (1) Boston Edison employees;

(2) management consultants from Reed Consulting; (3) energy consultants from the Northbridge Group; and (4) attorneys from the law firms of Ropes and Gray; Bruder, Gentile and Marcoux; Shaw, Pittman, Potts and Trowbridge; and Miller Chevalier (Exh. BE-10, at 4). The team was subdivided into four primary sub-teams:

(1) communications; (2) terms of sale; (3) marketing, due diligence, and bidder support; and (4) closing (Exh. BE-10, at 4).

19. The early interest letter provided a brief description of the nuclear facilities that were being divested, as well as a general description of the New England Power Pool ("NEPOOL") and the establishment of an Independent System Operator, which will make NEPOOL one of the first competitive electric power markets in the United States. Boston Edison claims that this information was an important element in the marketing process, because many of the companies that received the early interest letter were located outside New England or even the United States (Exhs. BE-10,

at 9; DTE-BECo 1-4 (proprietary)).

20. The remaining two parties chose not to continue with the bid process after reassessing their business strategies (Tr. 2, at 183-184; Exh. BE-10, at 10).

21. Qualified bidders were provided with a draft P&S and a draft PPA. Valuation of the indicative bids by Boston Edison combined bid price and any requested changes to the draft documents (Exhs. BE-10, at 14; DTE-BECo 1-11 (proprietary)).

22. Qualifications and continuity of the Pilgrim workforce are important, for Pilgrim is not just physical assets, it is a highly specialized, going enterprise. If the Pilgrim unit were not sold, or, if the sale process were not orderly, it would create a situation of uncertainty regarding the continued operation of the unit. This uncertainty would spur employees to seek work elsewhere.

23. Plant managers made operating personnel available to conduct site tours, answer questions, and provide any additional documentation required by the bidder as part of its due diligence process (Exh. BE-10, at 12). Site visits were governed by a site visit protocol and a representative from Reed Consulting was present during each visit to ensure that bidders were treated similarly and that the tours and discussions were unbiased (i.e., each bidder received the same treatment, access to the same information, and all questions were responded to in a timely manner) (id.).

24. While selection of the highest bid is strong evidence of maximizing value, it is not the sole criterion used by the Department when evaluating the results of a company's auction process.

25. The Attorney General's savings estimates are premised on the Department's acceptance of all the Attorney General's proposed changes to the gross proceeds from the sale discussed in § V(A), below.

26. Interim spent fuel storage is defined as being the difference between the time US-DOE is required to accept spent fuel and the time US-DOE actually takes the fuel.

27. DOER argues that Boston Edison's decommissioning estimate includes a 2002 shutdown date, while Entergy's bid assumes plant shutdown at the end of the license life in 2012 (DOER Brief at 4).

28. This language appears in a "Guaranty" to Boston Edison wherein Entergy Holding guarantees all obligations which Entergy enters into "with or for the benefit" of Boston Edison prior to closing (Exh. BE-5A, Tab 4). This guarantee is limited to the sum of $50 million and terminates upon the closing (id.).

29. The P&S requires Boston Edison to fund at least the NRC minimum funding amount for decommissioning (Exh. BE-5A at § 5.21). At the time of the signing of the P&S, the NRC minimum funding amount was approximately $514 million. In December 1998, new rules for calculating the NRC minimum funding amount were introduced that yield a minimum funding amount which is approximately $327 million (Exh.

DTE-BECo 1-33R).

30. The price for electricity paid by the municipals to Boston Edison is considerably higher than the price that Boston Edison will pay Entergy for that electricity. For example, in the year 2000, the price paid by the municipals to Boston Edison is projected to be 6 cents per KWH (Exh. DTE-BECo 1-19), while the price paid by Boston Edison to Entergy will be 3.8 cents per KWH (Exh. BE-5B, Tab 7, at 585). The price paid by the municipals to Boston Edison includes recovery of decommissioning costs and unrecovered investment in Pilgrim, as discussed in § V(A)(2).

31. Commonwealth Electric states that the access charge mitigation incentive mechanism provides Boston Edison with a higher rate of return on common equity where it is able to lower the overall accumulated access charge on a rolling-average basis (Commonwealth Electric Brief at 27). Commonwealth Electric asserts that the potential to earn a higher return on common equity provides Boston Edison with an incentive to recover as much of the Pilgrim related municipal costs as possible (id.).

32. Under the proposed revenue credit method, all of the relevant costs for Pilgrim would be assigned to retail customers and any revenue received from the wholesale contracts would be credited to retail customers (Boston Edison Brief at 49).

33. As noted above, while the municipal contracts contain language that assures full recovery of decommissioning costs and net unrecovered investment in the event of plant shutdown, the contracts do not contain contingencies for the sale of the unit

(Exh. BE-7, at 38). As a result of this situation, Boston Edison argues that if the municipals are unwilling to renegotiate their contracts, recovery of the Pilgrim costs

becomes difficult (id.). Boston Edison states that recovery of these costs would need to be pursued at FERC, which could involve several years of litigation (id.).

34. The Department is mindful of the dictates expressed in Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 104 (1975), wherein the Supreme Judicial Court ("SJC") stated:

A party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions. This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time presented.

See also, New England Telephone & Telegraph Co. v. Department of Public Utilities, 371 Mass. 67, 84 (1976) ("When a major change in the regulatory standard is in prospect, there should ordinarily be warning sufficient to enable the Company to adjust both its practices and its proof to the new situation") and Boston Gas Company v. Department of Public Utilities, 405 Mass. 115, 120-121 (1989) ("It is generally unacceptable for an agency to announce a new standard in its final decision in an adjudicatory proceeding and then rule, often not surprisingly, that a party who had no notice of that standard failed to meet it").

35. We further note that in Boston Gas Company, the SJC suggests that the principle of res judicata need not be strictly applied to agency decisions. 367 Mass. 92, 104; see also Stowe v. Bologna, 32 Mass. App. Ct. 612, 616 (1992), citing Ramponi v. Board of Selectmen of Weymouth, 26 Mass. App. Ct. 826, 829-830 (1989). In Stowe, the court stated that "administrative decisions, even if adjudicatory in the sense that they determine rights and duties of specifically named persons, frequently have a regulatory component that may warrant reexamination in the light of changes in regulation, purpose, later decisional law, or applicable on-the-ground facts." 32 Mass. App. Ct. 612, 616 (1992).

36. For a description of the FERC proceeding, see n. 16, above.

37. The other projects included in the capital additions are for the following items: Annunciator Improvement, Pilgrim Room Lighting, Pilgrim Pump Vibrator Monitor, Security System Upgrade, Building Improvements, Control Panel Betterment, Cooling Water System Betterment, Reactor Water Clean-up System Pipe Replacement, LTP551-10 C.F.R. § 20 Implementation, Miscellaneous Minor Modifications, Radioactive Waste Filter/Demineralizer, Pilgrim Battery Replacement, Sanitary Sludge System, Pilgrim-IV

Heating Ventilation Air Conditioning Upgrade, Underground Fuel Storage Tank, Bleeder Trip Valves, Recirculating Motor Generator Set Control, Augmented Fuel Pool, Emergency Control Panel Monitoring System, Storage Modules LLRW, Degraded Upgrades, Main System Line Plug, Shop Equipment/Tools, Roof Replacement Phase I, Perimeter Barriers, Cooling Water System, Ramp New Engine Building, Diesel General Roof Replacement, Pilgrim Wireless Communication, Control Monitors, and 3D Monicore (Exh. AG-BECo-1-11).

38. On March 9, 1999, Boston Edison filed with FERC a Fourth Amendment to the Montaup PPA (Exh. BE-5B, Tab 11R; see n. 6, above). With respect to Montaup, Boston Edison has stated "assuming that payments are made by Montaup as called for under the Fourth Amendment. . . Boston Edison would not be seeking recovery for Montaup's eleven percent share of Pilgrim costs from retail customers (i.e., that Montaup's share of costs would be treated as depicted in BE-7, Att. GOL-2) (Letter from Boston Edison to Department accompanying "Motion to Update Record" (March 18, 1999)).

39. Boston Edison calculates a net balance for the RVC flow-back of negative $264.0 million for a closing date of March 31, 1999, and a flow-back of negative $250.3 million for a closing date of December 31, 1999 (Exh. BE-7, Atts. GOL-3, GOL-5, at 7). Boston Edison's overall annual RVC, (including the $62 million RVC from its fossil divestiture), would be reduced to between $27 million and $29 million for most years from 2000 through 2009 (Exh. BE-7, Atts. GOL-3, GOL-4,

GOL-5, at 2).

40. Net of the financial effects of the proposed securitization in D.T.E. 98-118.

41. Because the accounting has not yet been done, a finding on the adjustment factor calculation must be deferred. Deferral of a finding on this calculation to the reconciliation proceeding filing should not and may not be construed in any way as a reservation regarding the Department's approval of the asset sale to Entergy. The approval of that sale, as compliant with the Restructuring Act and with Boston Edison's and Commonwealth Electric's restructuring plans, is final and unconditional.