
**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

Nos. SJC-12051 / SJC-12502

ENGIE GAS & LNG, LLC,
Petitioner-Appellant,

v.

DEPARTMENT OF PUBLIC UTILITIES,
Respondent-Appellee.

CONSERVATION LAW FOUNDATION,
Petitioner-Appellant,

v.

DEPARTMENT OF PUBLIC UTILITIES,
Respondent-Appellee.

ON PETITIONS FOR REVIEW OF AN
ORDER OF THE DEPARTMENT OF PUBLIC UTILITIES

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STATEMENT OF THE ISSUE

Section 94A provides that "[n]o gas or electric company shall ... enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the Department" of Public Utilities. G.L. c. 164, § 94A. The consolidated petitions present a question of first impression regarding that text's reach. The answer to that legal question has significant, long-term economic consequences for electric ratepayers. The question presented is:

Does the Department have authority under G.L. c. 164, § 94A to authorize electric distribution companies to enter into first-of-their kind electric ratepayer-backed gas pipeline transportation capacity contracts, where those contracts are designed to finance the electric companies' affiliates' construction of new gas pipelines?

STATEMENT OF THE CASE

The Department has "the general supervision of all gas and electric companies." G.L. c. 164, § 76. That supervision has historically included review and approval of all long-term gas company contracts for gas and all long-term electric company contracts for electricity. G.L. c. 164, § 94A. This case, initiated by a Massachusetts Department of Energy Resources (DOER) proposal, concerns whether the Department may

also use § 94A to approve long-term *electric distribution company* contracts for *gas* (here, natural gas transportation capacity). At no time in the statute's eighty-six year history, however, has it been interpreted to provide that authority to the Department. The Department urges this unprecedented interpretation to permit it to correct what the Department perceives to be a failure of the competitive market that has made it financially disadvantageous for electric generators (power plants) to enter into those gas transportation capacity contracts themselves. The Department believes such contracts are needed to fund new pipelines to alleviate supposed gas capacity constraints and related winter volatility in the wholesale electric market, notwithstanding the fact that the problem the Department seeks to remedy occurred for a few weeks more than two years ago, and the market has since responded to provide adequate gas supplies, even on the coldest winter days—indeed, the 2015 average wholesale power price in New England saw the second lowest level since 2003.

DOER and the Department nevertheless propose a radical market intervention: obligate electric

ratepayers to assume twenty years of risk (the contract length) that no other party has been willing to assume to deal with a short duration dynamic the market is already addressing.

To accomplish that end, the Department has freighted the plain text of § 94A with meaning not intended and never before ascribed, in contravention of both the plain text of the statute and the Restructuring Act, which sought to shift the risks of such investments from ratepayers to utility shareholders—and the Department has done so with rushed and limited process. After it reviewed comments on DOER's proposal, but without a requested hearing, the Department, on October 2, 2015, concluded that it did have authority to implement DOER's proposal. Joint Appendix (JA) 908. The Department found that § 94A's "plain" and "unambiguous" text empowers it to approve long-term electric distribution company contracts for natural gas transportation capacity and to allow those companies to pass their contract costs onto electric ratepayers. JA 931. It then found that neither the 1997 Restructuring Act nor federal law presented a legal impediment to its exercise of that newfound authority, and proceeded to

set forth the criteria by which it would review and approve any electric distribution company petition for approval of a long-term gas transportation capacity contract. JA 940-46, 954-57.

ENGIE Gas & LNG, LLC (ENGIE)(formerly known as GDF Suez Gas NA LLC) and the Conservation Law Foundation (CLF) filed, pursuant to G.L. c. 25, § 5, timely petitions for review of the Department's order with the Supreme Judicial Court for Suffolk County. JA 963, 976.¹ A Single Justice (Cordy, J.) reserved and reported the petitions to this Court for review. JA 1119-20, 1310-11.

INTEREST OF THE ATTORNEY GENERAL

The Attorney General is the Commonwealth's "chief law officer," with a "common law duty to represent the public interest." *Sec'y of Admin. & Finance v. Attorney General*, 367 Mass. 154, 163 (1975). That obligation has particular force here, because the Legislature has designated the Attorney General as the Commonwealth's sole ratepayer advocate. G.L. c. 12, § 11E(a). In that capacity, she has special authority

¹ The Attorney General did not file her own petition in light of significant concerns regarding whether the order was a "final order" under G.L. c. 25, § 5. The Attorney General nevertheless believes it is critically important to put her views before the Court in the event the Court reaches the merits.

to, and regularly does, "intervene, appear and participate in administrative, regulatory, or judicial proceedings" on behalf of Massachusetts gas and electric customers. See *id.*² This Court has recognized the Attorney General's broad authority to act on behalf of all utility consumers. See *Lowell Gas Co. v. Attorney General*, 377 Mass. 37, 48 (1979).

Before the Department, the Attorney General raised serious concerns about both the Department's need for the proposed contracts, including whether additional pipeline capacity is necessary to maintain electric reliability, and the Department's legal authority to authorize them. JA 507-508, 521, 606, 614-615. Those concerns were, and continue to be, grounded in the fact that, if accepted, the Department's exercise of its newfound authority would enable electric distribution companies to place the costs and associated risks of their investment in new gas pipeline construction squarely on the backs of Massachusetts *electric* ratepayers. And if that unlawful experiment fails, it is Massachusetts ratepayers--not the electric distribution companies--who will suffer the serious consequences, which could

² T.B. MERRITT, *CONSUMER LAW* § 27.16, at 819 & n.17 (3d ed. 2010) (explaining the Attorney General's role).

include decades of higher retail prices, stranded costs for underutilized pipelines, and undue barriers to developing cleaner, cheaper energy resources. For these reasons, the Attorney General has a significant interest in the question before the Court.

STATEMENT OF LEGAL AND FACTUAL BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Regulation of Gas and Electric Utility Companies—the Monopoly Years.

1. The Rise of the Gas and Electric Utility Industry in Massachusetts.

In 1822, the first companies began to manufacture gas (primarily from coal) and sell it to illuminate streets.³ With time, they also sold that manufactured gas for indoor lighting, heating, cooking, and industrial uses.⁴ In 1885, the Legislature responded to the rapid expansion of manufactured gas companies, creating a Board of Gas Commissioners to regulate the industry.⁵ At that time, the electric industry was in its infancy--the first Massachusetts electric-light-company having just been organized in 1882.⁶ Five years later, the Legislature extended the Board's authority

³ D.P.U. 89-161, at 11 (May 25, 1990).

⁴ *Id.*; see also St. 1879, c. 202, § 1.

⁵ St. 1885, c. 314, §§ 1, 7-8.

⁶ W. RODMAN PEABODY, A HISTORY OF THE GREENFIELD LIGHT AND POWER COMPANY, GREENFIELD, MASSACHUSETTS--1886-1924, at 11 (1924).

to reach electric companies as well and later changed the Board's name to reflect its new responsibilities.⁷

The co-existence of both gas and electric companies set off a "fierce competitive" struggle between the two types of utilities.⁸ While some gas companies were later authorized to generate electricity, gas and electric companies operated independently of one another.⁹ And, significantly, electric companies did not purchase manufactured gas from gas companies to generate power between 1882 and 1930. Instead, electric companies generated power exclusively with coal (coal-fired boilers) and dams (hydro-power) through at least 1930.¹⁰ Natural gas,

⁷ St. 1887, c. 382, § 1; St. 1889, c. 373.

⁸ JOHN T. LANDRY & JEFFREY L. CRUIKSHANK, FROM THE RIVERS: THE ORIGINS AND GROWTH OF THE NEW ENGLAND ELECTRIC SYSTEM 18 (1996); see also PEABODY, *supra* n.6, at 27.

⁹ REPORT OF THE SPECIAL COMM'N ON CONTROL AND CONDUCT OF PUB. UTIL., 1930 HOUSE DOC. NO. 1200, at 74 (stating that "[t]here is no necessary connection between the two kinds of businesses.") (1930 SPECIAL REPORT). Manufactured gas companies eventually lost that competition, first changing their focus to other customers, and later shuttering their plants altogether. D.P.U. 89-161, at 11-12.

¹⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR, CENSUS OF ELECTRICAL INDUSTRIES: 1927 - CENTRAL ELECTRIC LIGHT AND POWER STATIONS 41 tbl.28, 45 tbl.30 (1930); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR, SPECIAL REPORT: CENTRAL ELECTRIC LIGHT AND POWER STATIONS 1902, at 141 tbl.121 (1905). The first very small volumes of manufactured gas appear to have been first used to generate electricity in 1932. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR, CENSUS OF ELECTRICAL INDUSTRIES: 1932 - CENTRAL ELECTRIC LIGHT AND POWER

sourced by drilling and piped to customers, was not used as a fuel to generate electricity in the United States until the 1950s.¹¹ And in New England, electric generators did not begin to use natural gas routinely and in substantial volumes at more than a few power plants until the late 1990s.¹²

2. The Department's Authority to Review and Approve Long-Term Contracts for Gas and Electricity (G.L. c. 164, § 94A).

Until 1997, electric utilities in Massachusetts functioned as vertically integrated monopolies. That is, they controlled all three components of the electric utility industry: generation, transmission, and distribution.¹³ During that time, the Commonwealth granted each utility an exclusive right to provide electric service to all consumers located in a defined

STATIONS 35 tbl.22 (1934).

¹¹ ANN CHAMBERS, NATURAL GAS & ELECTRICAL POWER IN NONTECHNICAL LANGUAGE 60 (1999). The first natural gas pipeline did not reach New England until 1953, making the region the last in the country to receive it. CHRISTOPHER J. CASTANEDA, REGULATED ENTERPRISE: NATURAL GAS PIPELINES AND NORTHEASTERN MARKETS, 1938-1954, at 164 (1959).

¹² ISO-NEW ENGLAND, 2016 REGIONAL ELECTRICITY OUTLOOK 8 (2016), http://www.iso-ne.com/static-assets/documents/2016/03/2016_reo.pdf (2016 REGIONAL ELECTRICITY OUTLOOK); see also Michael I. Henderson, Dir. Reg'l Planning & Coord., ISO-New England, The Region's Generation Fleet in Transition 4 (June 29, 2011), http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/prtcpts_comm/pac/mtrls/2011/jun292011/generation_fleet.pdf.

¹³ *Northeast Energy Partners LLC v. Mahar Reg'l School Dist.*, 462 Mass. 687, 695-96 (2012).

territory (a franchise). In exchange, the utility was obligated to provide service on a non-discriminatory basis and to subject its rates to State regulation.¹⁴

The first concerns about this structure were raised in 1925, when the Department (renamed from Board) questioned its ability to regulate utilities as they "passed into the hands of groups of outside capitalists."¹⁵ In particular, the agency doubted its authority to control contracts between "interlocking companies for the exchange of electricity," and its ability to question those contract costs in rate cases.¹⁶ For these reasons, the Department asked the Legislature to enact legislation that would require agency pre-approval for "any contract by a public utility for the supply of electricity or power in excess of one year."¹⁷ While the Department's report referred only to electric companies, its proposed legislation would also have applied to gas companies.¹⁸

¹⁴ THE JOINT COMM. ON ELECTRIC UTILITY RESTRUCTURING OF THE MASSACHUSETTS LEGISLATURE: REPORT AND LEGISLATION 15 (Mar. 20, 1997) (1997 RESTRUCTURING REPORT); see also D.P.U. 95-30, at 1, 4-6 (1995) (describing vertically integrated monopoly structure in Massachusetts).

¹⁵ 1926 House Doc. No. 153, at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The Legislature, on April 30, 1926, enacted House Bill No. 1369--a modified version of the Department's proposed legislation. That statute, which did not apply to gas companies, provided that "[n]o electric company shall hereafter enter into a contract for the purchase of electricity covering a period in excess of three years without approval of the department." St. 1926, c. 298. Enactment of the statute did not, however, alleviate all concerns, and, on June 7, 1929, the Legislature created a Commission to investigate the control and conduct of public utilities.¹⁹ As relevant here, the Commission, finding that the risks associated with the consolidations in electric utilities could extend to gas utilities,²⁰ recommended amending § 94A to cover gas company contracts for gas.²¹ Importantly, the Commission also recognized that "[a]n electric company could not deal in gas under any circumstances."²² The recommended bill was enacted on May 22, 1930, and appears in substantially the same form today. *Compare* St. 1930, c. 342, with G.L. c. 164, § 94A.

¹⁹ 1930 SPECIAL REPORT, *supra* n.9, at 7-8, 15-16 (describing issue), 46-47 (noting risk to consumers due to corporate structures).

²⁰ *Id.* at 42-43.

²¹ *Id.* at 67-68, 83, 92 (proposed bill).

²² *Id.* at 15 n.2.

**B. The 1997 Electric Utility Restructuring Act
--Mandated Competition.**

The year 1997 marked a sea-change in the electric utility industry in Massachusetts. That year, prompted by changes at the federal level and the Department's own investigation, the Legislature restructured the electric utility industry through the Electric Restructuring Act.²³ That Act ended the existence of vertically integrated electric utility monopolies, which had been "obligated to provide ... consumers in exclusive territories with reliable electric service at regulated rates," and shifted the utility industry to a "framework under which competitive producers will supply electric power and customers will gain the right to choose their electric power supplier." St. 1997, c. 164, § 1(c). The 1997 Act accomplished this structural change through the "transition from regulation to competition in the generation sector," which would "consist[] of the unbundling of prices and services and the functional separation of generation services from transmission and distribution services." *Id.* § 1(m); see also §§ 1(g), 1(k), 1(l), 192, 193.²⁴

²³ St. 1997, c. 164; see also D.P.U. 95-30 (1995).

²⁴ See *Shea v. Boston Edison Co.*, 431 Mass. 251, 255 (2000) (stating that existing electric companies would become either "transmission or distribution companies,

The Restructuring Act required electric utilities to offer retail access to electricity supply by March 1998. *Id.* § 193. The Act envisioned that electric utilities would achieve this goal by divesting themselves of their generation assets and facilities, including purchased power contracts. *See id.* § 1G. The statute sought to induce utilities to divest by preventing any company that retained its generation assets from recovering "through rates, charges, or elsewhere any amount of transition costs associated with the retained" generation facilities and associated property.²⁵ *See id.* § 1A. The electricity rate savings that the Restructuring Act aimed to achieve for consumers were tied directly to the divestiture and deregulation of electric generation facilities, since, together, that restructuring would "shift[] the risks of generation development from consumers to generators."²⁶ In short, the Restructuring

and, after a transition period ... divest themselves of ownership of generating facilities").

²⁵ "Transition costs" are "the embedded costs as determined under section 1H which remain after accounting for maximum possible mitigation, subject to determination by the department of public utilities." G.L. c. 164, § 1.

²⁶ D.P.U. 12-77, at 28 (Mar. 15, 2013); *see also* D.T.E. 98-84, at 2 (Aug. 10, 1998)(stating that "the economic consequences of building too many power plants will be borne directly by investors, rather

Act created a publicly-regulated distribution system and a competitive and open electricity supply / generation market. See St. 1997, c. 164, § 1(m). And to effectuate that design, the Legislature mandated that an electric distribution company may only "engag[e] in the distribution of electricity or own[], operat[] or control[] distribution facilities," and may not include any entity or affiliate that "owns or operates [a] plant or equipment used to produce electricity." § 187 (codified at G.L. c. 164, § 1).

C. The Electric and Gas Markets Today

1. Natural Gas Markets

Natural gas in New England is used as fuel to generate electricity (or make other products) or to heat or run appliances in homes and businesses.²⁷ An electric generator that uses natural gas to run its power plant must purchase two separate products: the commodity itself (natural gas) and the use of a

than ratepayers."); EXEC. OFFICE OF HOUSING & ECON. DEV. & EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, RECENT ELECTRICITY MARKET REFORMS IN MASSACHUSETTS 12 (2011), <http://www.mass.gov/eea/docs/doer/publications/electricity-report-jul12-2011.pdf> ("it is clear that the Restructuring Act represents a commitment to a competitive marketplace and a choice to shift risk (and the associated return) from ratepayers to the market.").

²⁷ FEDERAL ENERGY REGULATORY COMM'N, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 9 (2015), <https://www.ferc.gov/market-oversight/guide/energy-primer.pdf> (FERC ENERGY PRIMER).

pipeline to transport natural gas from a wellhead to the power plant.²⁸ This case concerns the latter, the right to use a pipeline to transport gas (i.e., gas transportation (or delivery) capacity). In its simplest terms, a gas transportation capacity contract reserves space on a pipeline for the transportation of separately purchased gas. Persons who hold a firm (guaranteed) gas capacity transportation contract receive priority to ship for the contracted quantity.²⁹

Most New England electric generators do not, however, buy their gas transportation capacity directly from pipeline companies; rather, they purchase it from large gas marketers through varying contract terms and types.³⁰

Unlike most electric generators, local gas distribution companies, which purchase gas to sell to customers to heat and run appliances, enter into firm (guaranteed), long-term contracts directly with pipeline companies for gas transportation capacity.³¹ These contracts ensure that local gas distribution companies can meet their statutory obligation to plan for and deliver enough gas to meet all of their

²⁸ *Id.* at 1, 5-6.

²⁹ *Id.* at 25.

³⁰ *Id.* at 32-34; see also JA 44.

³¹ See FERC ENERGY PRIMER, *supra* n.27, at 25.

customers' needs at any one time. See G.L. c. 164, § 69I. Pipeline owners use these firm transportation capacity contracts both to determine how much pipeline capacity they need to build and to finance new pipeline construction.³²

On days when a gas company does not need all of the capacity it purchased, the gas company releases that capacity into the market pursuant to Federal Energy Regulatory Commission (FERC) rules that allow resale of unwanted pipeline capacity between customers on an equal basis.³³

2. Wholesale Generation and Sale of Electricity

A generator that uses natural gas to fuel its power plant sells the electricity it generates into wholesale markets regulated by FERC and run by the New England Independent System Operator (ISO-NE).³⁴ To meet customers' demand for electricity, ISO-NE, like an air traffic controller, dispatches power plants, starting with the plant that submitted the lowest supply bid in

³² See *infra* n.46 (describing pipeline approval requirements).

³³ FERC ENERGY PRIMER, *supra* n.27, at 25; see also FERC Order 636 in The History of Regulation, NaturalGas.org, <http://naturalgas.org/regulation/history/> (last visited Apr. 6, 2016).

³⁴ *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768-69 (2016); FERC ENERGY PRIMER, *supra* n.27, at 25.

the market. Post-Restructuring, the Department has almost no regulatory authority over the generation or sale of wholesale electricity.³⁵

Because fuel costs are approximately seventy-five percent of a natural gas power plant's operating cost, generators' bids into the electricity market reflect changes in the price of natural gas.³⁶ Thus, in New England, where natural gas is the single most significant means of generating electricity--nearly fifty percent of electricity in Massachusetts is produced by gas-fired generation--the price of wholesale electricity is largely driven by the price of natural gas.³⁷ When natural gas prices increase or decrease, the wholesale market price for electricity typically follows.³⁸ For example, wholesale gas and electricity prices have dropped by eighty-five percent from their peaks during the 2013-14 winter--all

³⁵ *Elec. Power Supply Ass'n*, 136 S. Ct. at 769 (describing how wholesale auction works); see also ENERGY INFORMATION ADMIN.(EIA), U.S. DEP'T OF ENERGY, THE CHANGING STRUCTURE OF THE ELECTRIC POWER INDUSTRY 37-39 (1998), http://www.eia.gov/electricity/policies/legislation/california/pdf/chg_str_issu.pdf (detailing ISOs' roles and responsibilities).

³⁶ 3 THE WORLD SCIENTIFIC HANDBOOK OF ENERGY 72 (GERARD M. CRAWLEY ED., 2013).

³⁷ 2016 REGIONAL ELECTRICITY OUTLOOK, *supra* n.12, at 8.

³⁸ EIA, *Mild Weather, Ample Natural Gas Supply Curb Winter Power and Natural Gas Prices, Today in Energy* (April 5, 2016), <https://www.eia.gov/todayinenergy/detail.cfm?id=25672>(EIA, Price Decline)

without any change in pipeline capacity.³⁹ Generally, the price a customer pays for retail electricity reflects the wholesale market price, though with some time lag.

In addition to purchasing the commodity of electricity, customers also pay to have the electricity delivered to them. Transmission companies transport the electricity from power plants to local distribution lines.⁴⁰ A local electric distribution company then delivers the electricity to the customers in its service territory.⁴¹ Electric distribution companies operating in Massachusetts are regulated by the Department pursuant to G.L. c. 164, and may not include any entity or affiliate that "owns or operates plant or equipment used to produce electricity." G.L. c. 164, § 1.⁴²

³⁹ *Id.* (graph depicting wholesale electricity and gas prices from October 2012 to April 2016).

⁴⁰ More particularly, transmission is "the delivery of power over lines that operate at a voltage level typically equal to or greater than 69,000 volts from generating facilities across interconnected high voltage lines to where it enters a distribution system." G.L. c. 164, § 1.

⁴¹ In contrast to transmission, distribution involves "the delivery of electricity over lines which operate at a voltage level typically equal to or greater than 110 volts and less than 69,000 volts to an end-use customer within the commonwealth." *Id.*

⁴² Again (*see supra* p.13), a distribution company is "a company engaging in the distribution of electricity

II. THE PROCEEDINGS BEFORE THE DEPARTMENT.

A. DOER's Proposal to Authorize Electric Distribution Companies to Purchase Gas Transportation Capacity.

On April 2, 2015, DOER asked the Department to investigate "the means by which new gas delivery capacity may be added to the New England Market, including actions to be taken by the electric distribution companies." JA 7.⁴³ In support of that request, DOER asserted that gas pipeline constraints have caused unreasonably high winter electric prices in New England,⁴⁴ that gas-fired electric generators are "unwilling" to enter into long-term transportation capacity contracts due to the associated risks, and that pipeline companies have, to date, been unwilling

or owning, operating or controlling distribution facilities." *Id.*

⁴³ DOER's request came on the heels of a failed effort by the New England States and ISO-NE to commit regional electric ratepayers to financing pipelines through a FERC transmission tariff, which died in the face of stakeholder skepticism about its legality. See generally Heather Hunt, Exec. Dir., New England States Comm. on Electricity (NESCOE), to Kimberly D. Bose, Sec'y, FERC (June 26, 2015), http://nescoe.com/uploads/Comments_PF_14-22_6-2615.pdf. On April 22, 2014, the electric distribution companies proposed a plan very similar to DOER's. See Ltr. from James G. Daly, VP, Energy Supply Northeast Utilities, et al., to Heather Hunt, Exec. Dir., NESCOE, re: Gas Capacity Infrastructure Expansion in New England (Apr. 22, 2014), http://nescoe.com/uploads/EDCLetter_Regional_Infrastructure_22April2014.pdf

⁴⁴ DOER's prediction regarding annual, unreasonably high gas prices has not materialized. See *supra* n.39.

to construct new pipeline capacity in the absence of such long-term contracts. JA 8-10. Based on this claimed market-failure, DOER called on the Department to create an "innovative mechanism" that would by-pass what DOER identified as a failure to increase gas transportation capacity in the region and thereby lower winter electricity prices. JA 7.

DOER's proposed plan would work like this:

(1) the Department will authorize, pursuant to G.L. c. 164, § 94A, electric distribution companies to enter into ratepayer-backed contracts to purchase gas pipeline transportation capacity; (2) the pipeline owners (that in this case will include electric distribution companies' affiliates)⁴⁵ will use those transportation contracts to help finance the construction of new gas pipeline capacity in the region;⁴⁶ (3) after the pipelines are expanded, the

⁴⁵ JA 529 (describing electric distribution companies' equity ownership interests in proposed New England pipeline projects).

⁴⁶ These contracts are also critically important to the prospective pipeline owner's ability to obtain a "Certificate of Public Convenience and Necessity" from FERC to construct any new or expanded natural gas pipeline. That is because a party must prove that, as a threshold matter, the proposed project is financially viable without reliance on subsidization from its existing customers, and one way to do that is by relying on long-term contracts (or precedent agreements) for new capacity. See Stmt. of Policy:

electric distribution companies will release (resell) their contracted-for capacity to electric generators or "into to the market";⁴⁷ (4) the release of that capacity will increase gas supply and thus lower the wholesale price of gas and electricity; and (5) the electric distribution companies will then recover all costs related to this plan from their customers. JA 11. In short, the plan is designed to allow pipeline and electric distribution companies to develop new gas pipeline capacity with *electric* ratepayer funds.⁴⁸

B. The Department's Investigation and Order.

On April 26, 2015, the Department voted to investigate the proposal set forth in DOER's petition and what standards it should employ to review long-term gas transportation capacity contracts, JA 16, 18-21, and it established a schedule for receiving

Cert. of New Interstate Natural Gas Pipeline Facilities, 64 Fed. Reg. 51,309, 51,314-15 (1999).

⁴⁷ It is not clear at this time whether, in fact, the electric distribution companies will be permitted to release the contracted-for capacity in this manner, since federal law prohibits resellers from directing their contracted capacity rights to a particular party unless FERC grants a waiver. Recently, FERC suspended Algonquin's request for such a waiver, finding that it appears may be "unjust, unreasonable, unduly discriminatory, or otherwise unlawful." Order, *In re Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,269, at 16 (Mar. 31, 2016), http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20160331-3021.

⁴⁸ *Id.* at 1 ¶ 2; see also JA 351-52.

written comments. JA 21. In response, fifty-two individuals and entities filed initial comments with the Department. JA 1-2. Of those commenters, only eight supported DOER's proposal, seven of which have a vested commercial interest in expanded pipeline capacity. JA 606.

The overwhelming majority of commenters identified serious legal and factual flaws in DOER's proposal. The Attorney General, for example, questioned the Department's authority to implement the proposed plan under G.L. c. 164, § 94A. JA 524. In addition, she challenged the fundamental assumptions underlying DOER's proposal, including: whether a market failure exists; whether new pipeline capacity is needed for electric reliability; and the risk that ratepayers would be saddled with "stranded costs."⁴⁹ JA 506-07. Later, in her reply comments, the Attorney General highlighted the significant disagreement among commenters about both the factual and legal bases for DOER's proposal, and informed the Department that she

⁴⁹ In this context, stranded costs refer to out-of-market ratepayer-financed infrastructure that is underutilized due to low demand, regulatory changes (e.g., stricter greenhouse gas emissions limits on gas-fired power plants), or the introduction of more cost-effective solutions (e.g., energy efficiency) or technology (e.g., electricity storage).

planned to commission a study to evaluate comprehensively all options to address electric reliability needs in New England. JA 609-16.⁵⁰ For these reasons, the Attorney General concluded that the highly disputed nature of the proceeding "should give everyone pause to carefully consider next steps," including the Department holding the hearing that she, and others, had repeatedly requested. JA 316 n.2, 608.

The Department did not pause. Instead, without a hearing, and in the face of the heated dispute about the factual assumptions underlying DOER's proposal, on October 2, 2015, the Department summarily found that "DOER and other parties ... have provided sufficient information to support DOER's assessment of current New England wholesale market conditions and to arrive at the conclusion that increasing regional gas capacity will lead to lower wholesale gas and electricity prices." JA 922. Having accepted the factual predicate, the Department next ruled that

⁵⁰ That study, which was completed by Analysis Group, Inc. in November 2015, found that New England's existing market structure will provide adequate gas capacity to ensure electric reliability through 2030, and that development of new gas pipelines is not necessary to maintain electric reliability. PAUL J. HIBBARD & CRAIG P. AUBUCHON, POWER SYSTEM RELIABILITY IN NEW ENGLAND: MEETING ELECTRIC RESOURCE NEEDS IN AN ERA OF GROWING DEPENDENCE ON NATURAL GAS iii (Nov. 2015), <http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf>.

(1) § 94A's "plain" and "unambiguous" language authorizes the agency to review and approve electric distribution company recovery of long-term gas transportation capacity contract costs from electric ratepayers, (2) the 1997 Restructuring Act does not present a barrier to such review and approval, and (3) federal law does not preempt the proposed state action. JA 922-46. The Department then set out the criteria by which it would review any electric distribution company petitions for approval of long-term gas capacity contracts. JA 946-57.

C. Post-Order Petitions for Department Approval of Proposals for Electric Distribution Companies to Enter Into Long-Term Gas Transportation Capacity Contracts.

The electric distribution companies did not pause either. Eleven days after the Department issued its Order, on October 13, 2015, Eversource and National Grid issued a joint request for proposals for natural gas transportation capacity "based on the requirements of [the Department's Order]." JA 1042, 1061.⁵¹ Bids

⁵¹ By all accounts, the groundwork for soliciting and finalizing the respective contracts was well underway in 2014. Indeed, Eversource and National Grid had already entered into memoranda of understanding with their pipeline developer affiliates to develop the approximately \$3 billion Access Northeast pipeline financed by their affiliates' electric distribution companies' gas transportation capacity contracts. See

were due one month later on November 13, 2015. JA 1043, 1061. Between that date and December 18, 2015, Eversource reviewed bids, selected the winning bid, and negotiated and executed a contract worth billions of dollars, and then filed a 596-page petition with the Department for approval of a ratepayer-backed gas transportation contract on Algonquin's proposed Access Northeast pipeline. JA 1037. National Grid followed suit, filing contracts for transportation capacity on Access Northeast and another proposed pipeline with the Department on January 15, 2016. JA 1054, 1072. While the Attorney General and other parties have asked the Department to stay its review of the Eversource contracts pending the outcome of this case, the Department appears intent on moving forward quickly--contemplating a final order in October 2016.⁵²

SUMMARY OF THE ARGUMENT

1. Section 94A covers Department approval of gas company contracts for gas and electric company contracts for electricity--nothing more or less. The

D.P.U. 15-181, *Daly Test. on Behalf of NSTAR Elec. Co. & Western Mass. Elec. Co., each d/b/a Eversource Energy*, at 44-47 (PDF pp.72-75) (Dec. 18, 2015), http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=15-181%2finitial_filing_part1of3_Petiti.pdf.

⁵² D.P.U. 15-181, *Procedural Notice, Service List, and Ground Rules* (Mar. 8, 2016).

Department's effort to stretch § 94'a text to--for the first time--cover electric company contracts for gas is incongruous with a natural, symmetrical reading of the § 94A's text, its legislative history, and the historical context in which it was enacted. Indeed, at the time of § 94A's enactment, electric companies were prohibited from dealing in gas and did not use gas to fuel their power plants (pp.28-36).

2. The Department's plan to allow electric distribution companies to enter into ratepayer-backed natural gas transportation capacity contracts is irreconcilable with the Restructuring Act and both the Department's and the Legislature's post-Restructuring Act actions. Except where the Legislature has specifically allowed, the Act precludes ratepayer assumption of risks associated with generation-related infrastructure projects. The Department may not override that legislative policy judgment by re-exposing ratepayers to those very risks simply because it prefers its policy over the Legislature's (pp.36-50).

ARGUMENT

I. STANDARD OF REVIEW

The Department's interpretation of G.L. c. 164, § 94A is subject to a familiar two-step inquiry. First, the court determines, "[u]sing conventional tools of statutory interpretation, whether the Legislature has spoken with certainty on the ... question." *Goldberg v. Bd. of Health of Granby*, 444 Mass. 627, 632-33 (2005). The conventional tools of statutory interpretation include the statute's text, structure, and purpose, and its history. *See, e.g., Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 186 n.22 (2009).⁵³ If, after employing those tools, the Court determines that the Legislature's intent is unambiguous, then the Court must "give effect to" that intent. *Goldberg*, 444 Mass. at 633. Second, if the Legislature's intent is ambiguous, then the Court must determine whether the agency's interpretation "may 'be reconciled with the governing legislation.'" *Id.* (citation omitted). And, if it can

⁵³ *LS Starrett Co. v. FERC*, 650 F.3d 19, 25 (1st Cir. 2011) (same under federal *Chevron* two-step inquiry); *see also Mahar*, 462 Mass. at 693 (stating that courts should interpret statutes "in connection with their development, their progression through the legislative body, the history of the times, prior legislation, [and] contemporary customs and conditions.").

be, then the agency's interpretation is entitled to "substantial deference." *Biogen*, 454 Mass. at 187.

The Court's review is also cabined by another familiar rule. That rule provides that this Court "will not supply a reasoned basis for the [Department's] action that the agency itself has not given." *Costello v. DPU*, 391 Mass. 527, 536 (1984). For that reason, the Court may uphold the Department's interpretation based only on the rationale it stated in its Order, not some other rationale that it may proffer for the first time on review. See *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 93-94 (1943).⁵⁴ The Department's sole basis for its determination rests on its finding "that the plain [and unambiguous] language of Section 94A provides the [agency] with the statutory authority to approve gas capacity contracts entered into by EDCs." JA 929, 931.⁵⁵ And that finding has consequences here, because an agency's pronouncement on a statute's "plain meaning" is never

⁵⁴ See *MIT v. DPU*, 425 Mass. 856, 869 n.30 (1997).

⁵⁵ The Department expressly disavowed reliance on any alternative source of authority to support its approval of electric distribution company contracts for gas transportation capacity. JA 925 n.16.

entitled to any special deference. *Franklin Office Park Realty Corp. v. DEP*, 466 Mass. 454, 460 (2013).⁵⁶

II. SECTION 94A'S PLAIN LANGUAGE AND THE RESTRUCTURING ACT FORECLOSE THE DEPARTMENT'S INTERPRETATION.

A. Section 94A's Text, History, and Historical Context Unambiguously Bar the Department's Results-Driven Interpretation.

Section 94A of Chapter 164 states plainly that "[n]o gas or electric company shall ... enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the Department." G.L. c. 164, § 94A. To find that this language authorized it to approve electric distribution company contracts for gas transportation capacity, the Department concluded, summarily and without a single citation, that the term "electric company" relates not only to the phrase "purchase of . . . electricity," but also to the phrase "purchase of gas." The Department's interpretation is facially deficient, see *Stow Mun. Elec. Dep't v. DPU*, 426 Mass. 341, 344 (1997) (requiring an especially thorough explanation when the issue is novel and important, as it is here), and

⁵⁶ That is because agencies exercise interpretive discretion only where a statute's silence or ambiguity requires an agency to "clarif[y] the Legislature's plan." *Goldberg*, 444 Mass. at 633-34.

contradicts the statute's natural, grammatical meaning, legislative history, and historical context.

1. Section 94A's Text Precludes the Department's Interpretation.

Section 94A's text forecloses the Department's strained interpretation. Here, of course, the Court's primary obligation is "to effectuate the intent of the Legislature," *Water Dep't of Fairhaven v. DEP*, 455 Mass. 740, 744 (2010), and "the primary source of" that "intent ... is the language of the statute." *Provencal v. Commonwealth Health Ins. Connector Auth.*, 456 Mass. 506, 513 (2010). While the Department viewed the term "or" as an unconventional invitation to relate the phrase "electric company" to the term "gas" instead of the term electricity as it should have, the perfect symmetry between the first clause (gas or electric company) and the second clause (gas or electricity) belies that construction. And the Legislature's decision also to employ the singular term "contract" instead of its plural, contracts, fortifies that conclusion.⁵⁷

⁵⁷ It bears emphasis that the Department has never before interpreted the statute in the manner it has here. Thus, affording § 94A's text its plain, natural meaning will not undermine the Department's historically exercised authority under this statute.

An interpretation that relates gas companies to gas, and electric companies to electricity, is also required by the longstanding rule of statutory construction *reddendo singular singularis*. That rule, which would have been familiar to the lawmakers who drafted and enacted the statute in 1930, provides that "[w]here a sentence in a statute contains several antecedents and several consequents, they are to be read distributively"--"each phrase is to be referred to its appropriate object." HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 226 (2D ED. 1911).⁵⁸ For example, in a sentence (structurally similar to the one here) that read "for money or other good consideration paid or given," a court concluded that "the consequent 'paid' ... referred to the antecedent 'money' and the consequent 'given' to the antecedent 'consideration'; that is, the sentence should be read as if it spoke of 'money paid or other good consideration given.'" *Id.* So too here: gas refers to gas companies and electricity refers to electric companies.

⁵⁸ See *Commonwealth v. Barber*, 143 Mass. 560, 562 (1887)(noting that the rule "is well established").

2. Section 94A's Legislative History Reinforces the Statute's Plain Meaning.

Section 94A's legislative history reinforces its plain meaning--the reference to gas companies relates only to gas and the reference to electric companies relates only to electricity. Indeed, as explained next, § 94A's legislative history demonstrates that the harm the Legislature sought to remedy related to contracts within each utility type (gas to gas and electric to electric) and not between them.⁵⁹

Section 94A applied originally only to electric companies: "[n]o electric company shall hereafter enter into a contract for the purchase of electricity covering a period in excess of three years without the approval of the department...." St. 1926, c. 298. It was enacted to address the Department's concerns that newly consolidated, "interlocking companies" would enter into contracts "for the interchange of electricity," and that it might have to accept those non-arms' length transactions in later-filed electric rate cases. See *supra* p.9 ("rate regulation is bound to

⁵⁹ Contrary to the Department's rigid position, courts frequently, and quite appropriately, "seek guidance" from a statute's legislative history to test the statute's plain meaning. See *Commonwealth v. Welch*, 444 Mass. 80, 85 (2005), *abrogated on other grounds*, *O'Brien v. Borowski*, 461 Mass. 415 (2012); see also *Mahar*, 462 Mass. at 692

be crippled"). To address this problem, the Department asked the Legislature to give it authority to pre-approve contracts between affiliated companies for the "interchange of electricity."⁶⁰ The Legislature responded by enacting St. 1926, c. 298.

But that enactment did not alleviate all fears about how burgeoning holding companies and the consolidation of electric utilities under them would impact ratepayers. For that reason, the Legislature created a special commission just three years later to investigate the control and conduct of public utilities in the Commonwealth. 1930 SPECIAL REPORT, *supra* n.9, at 7. Unlike the Department's 1925 report, which did not reference gas companies in the relevant discussion, see 1926 House Doc. No. 153, at 3, the Commission was directed to investigate both electric *and* gas companies. 1930 SPECIAL REPORT at 7-9.

A review of the Commission's detailed report (covering more than 200 pages) provides absolutely no indication that the Legislature was concerned about gas company purchases of electricity or electric

⁶⁰ The report of the Committee on Power and Light which accompanied the bill that was enacted reflects this intention. 1926 House Doc. No. 1369 ("recommending a statute to make contracts for the sale of power between domestic utilities subject to the approval of the Department").

company purchases of gas. Indeed, the Commission made a special point of noting that, under existing Massachusetts law, "[a]n electric company could not deal in gas under any circumstances." 1930 SPECIAL REPORT, *supra* n.9, at 15 n.2 (citing G.L. c. 164, §§ 22, 23). Instead, the report reflects a concern about the consolidation of independent operating companies, and how those consolidations might unjustly increase ratepayer costs for gas or electricity. *Id.* at 15-16, 34, 46-47, 52-53 68-69, 240-41. Significantly, it also reveals why the Legislature sought to extend St. 1926, c. 298 to gas companies: the Commission predicted that the same concerns about electric companies would arise with respect to gas companies, too. *Id.* at 41-42. Finding that St. 1926, c. 298 provided "valuable protection against excessive charges for electricity," it recommended extending the existing statute to cover gas company contracts for the purchase of gas. *See id.* at 67-68.

On May 22, 1930, the Legislature enacted the Commission's recommended amendment to St. 1926, c. 298. *Compare* St. 1930, c. 342, *with* 1930 SPECIAL REPORT, *supra* n.9, at 92-93. That Act repealed the then-existing § 94A and replaced it with new "[n]o gas or"

and "gas or" language that appears in the statute today. St. 1930, c. 342. Because the "proceedings incident to the enactment" of that statute demonstrate that the Legislature did *not* intend to alter the meaning of the prior electric-company-purchases-of-electricity law, those re-enacted words "continue to have attached to them the same sense as in the preceding enactment." *Commonwealth v. Welosky*, 276 Mass. 398, 409 (1931). And because "[i]t is the intent of the [Legislature] that enacted [the section] ... that controls," the Commission's report is decisive. See *Oscar Mayer v. Evans*, 441 U.S. 750, 758 (1979).

3. The Historical Context In Which Section 94A Was Enacted Confirms the Statute's Plain Meaning.

Even if § 94A's text and legislative history, viewed on their own or together, were not so decisive, the historical context in which the current version of § 94A was enacted in 1930 confirms its meaning. An equally venerable rule of statutory construction instructs courts to interpret statutes in light of "the history of the times" and "the contemporary customs and conditions" when they were enacted, so that a statute's text is "not stretched by enlargement of signification to comprehend matters not within the

principle and purview on which they were founded when originally framed and their words chosen." *Tilton v. City of Haverhill*, 311 Mass. 572, 577 (1942); accord *Mahar*, 462 Mass. at 693. Here, consideration of the electric utility industry's practices at the time gas company purchases of gas were added to § 94A in 1930 demonstrates, unequivocally, that the Legislature did not intend § 94A to cover electric company contracts for gas (or here gas transportation capacity).

The historical record reflects three facts that are significant to an accurate understanding of the Legislature's intended reach of § 94A in 1930. *First*, gas and electric companies operated independently of one another; both competing for largely the same customers. See 1930 SPECIAL REPORT, *supra* n.9, at 74; LANDRY, *supra* n.8, at 18; 1902 CENSUS REPORT, *supra* n.10, at 28 (noting that the "chief use of gas and electricity" is the same). *Second*, electric companies were prohibited, by statute, from "making or selling gas," or, as the Special Commission wrote, "dealing in gas." G.L. (Ter. Ed.) c. 164, § 22; 1930 SPECIAL REPORT at 15 n.2. *Third*, and most significantly, in 1930, electric companies simply did not use manufactured gas to generate electricity. 1927 CENSUS REPORT, *supra* n.10,

at 41 tbl.28, 45 tbl.30; 1902 CENSUS REPORT, *supra* n.10, at 141 tbl.121; see also 1930 SPECIAL REPORT, *supra* n.9, at 38 (noting that electricity was generated with coal or water). In other words, electric companies did not purchase manufactured gas--the only gas available in Massachusetts at the time--from gas companies, either for resale or for use as fuel to generate electricity.

Taken together, these facts demonstrate that the Legislature never could have intended in 1930 to grant the Department authority over electric company contracts for gas--because such contracts could not, and did not, exist. See *supra* p.10; see also St. 1930, c. 342. Because the Legislature "has spoken with certainty on the question," the Department's unnatural reading of the statute's plain text cannot stand. See *Franklin Office Park*, 466 Mass. at 460 ("we will reject any [agency] interpretation ... that does not give effect to the Legislative intent.").

B. The Department's Decision to Expose Ratepayers to the Risks Inherent in DOER's Proposal Is Foreclosed by the Legislature's Decision In the Restructuring Act to Insulate Ratepayers from Those Very Risks

Because the Legislature has spoken with certainty on § 94A's scope, this Court need not go further. But, if it does, it should also reject the Department's

interpretation because it is incongruous with the Legislature's policy judgment embodied in the 1997 Restructuring Act, the Department's own responses to the 1997 Restructuring Act, and the Legislature's own post-Restructuring Act actions.

1. In 1997, the Legislature Took Electric Distribution Companies Out of the Electric Generation Business.

Policy-making authority exercised by State agencies is limited to the scope of authority provided to them by the Legislature; agencies have no inherent policy-making authority. See generally *Globe Newspaper Co. v. Beacon Hill Arch. Comm'n*, 421 Mass. 570, 586 (1996). A fundamental policy decision the Legislature made in the 1997 Act was to take electric distribution companies out of the electric generation business.

Specifically, electric distribution companies no longer plan for, build, operate or profit from the making and selling of electricity. Instead, the business of an electric distribution company is to plan for, build and operate *distribution* infrastructure (poles, wires, substations), deliver electricity, and get paid for doing so.⁶¹

⁶¹ See e.g., G.L. c. 164, § 1, added by St. 1997, c. 164, § 187 (defining "distribution company" and "distribution service" and "distribution facility");

Soon after the Act's passage, the Department recognized the limited role of electric distribution companies post-Restructuring, by exempting them from their pre-Restructuring Act fuel management and power planning business obligations. First, in 1998, the Department acknowledged that electric distribution companies would no longer be buying fuel for power plants or recovering from ratepayers the costs of that fuel. Thus, the Department exempted electric distribution companies from G.L. c. 164, § 94G's pre-Restructuring Act fuel procurement and cost recovery program. D.T.E. 98-13, at 4 (Feb. 20, 1998).⁶² The agency concluded that "opening ... the Massachusetts electricity market to competition ... negates the need for the fuel charge requirements." *Id.* at 4.

Second, the Department exempted electric distribution companies from G.L. c. 164, § 69I's power planning requirement, and directed distribution

G.L. c. 164, § 94 (Department authority over distribution company rates).

⁶² As relevant here, section 94G required electric companies to demonstrate to the Department that their plans to procure fuel for their power plants would "maintain sufficient reserves of power for purposes of reliability and efficiency." § 94G(a). Section 94G(a) also allowed electric companies to recover their fuel costs from customers and adjust the rate based on fluctuations in fuel prices. *Consumers Org. for F.E.E. v. DPU*, 368 Mass. 599, 601-02 (1975).

companies to focus instead exclusively on distribution. D.T.E. 98-84, at 1 (Aug. 10, 1998). Significantly, section 69I had required electric companies to assess expected customer electricity demand over a ten-year period and ensure that they would have the right fuel and infrastructure mixture to serve that expected demand.⁶³ By exempting electric distribution companies from § 69I, the Department recognized that the 1997 Act relieved such companies of their obligation for "forecasting, planning, and procuring long-term electricity supplies for their customers."⁶⁴

By exempting the electric distribution companies from both sections 94G and 69I, the Department recognized the exit of electric distribution companies from all aspects of the generation business, including not only power plant construction, but also the

⁶³ That requirement mandated "[e]very electric company . . . [to biennially] file with the department a long-range forecast with respect to the electric power needs and requirements of its market area . . . for" a forward-looking ten-year period. G.L. c. 164, § 69I. Prior to the Restructuring Act, the Department used this device to regulate electric companies' "procurement of and cost recovery associated with, resources to meet [their] customers' electricity needs." D.T.E. 98-84/EFBS 98-5, at 1 (Aug. 8, 2003).

⁶⁴ *Accord* D.T.E. 98-84, at 1 (Aug. 10, 1998) ("electric companies will no longer be in the position of, or responsible for, planning for all customers' needs on a monopoly basis").

planning and fuel management aspects of generation. The Department's inconsistent treatment of electric distribution companies here cannot stand. See *Boston Gas Co. v. DPU*, 367 Mass. 92, 104 (1975) (agencies must act with "reasoned consistency" in their actions.").

2. The Restructuring Act Shifted the Risks Associated with the Power Generation Business from Ratepayers to Private Power Plant Developers and Operators.

By taking electric distribution companies out of the electric generation business, the Legislature "shifted the risks of generation development from consumers to generators" to "insulate[] [consumers] from construction, operational and price risks D.P.U. 12-77, at 28 (Mar. 15, 2013).⁶⁵ Shifting this risk off of ratepayers was a priority because, prior to Restructuring, ratepayers were often forced to pay higher rates caused by "excessive investments" in expensive and poorly managed long-lived infrastructure projects.⁶⁶ For example, in the 1980s, Massachusetts

⁶⁵ *Accord* D.T.E. 98-84, at 2 (Aug. 10, 1998) ("A market framework based on competition . . . will mean that the economic consequences of building too many power plants will be borne directly by investors, rather than ratepayers.").

⁶⁶ Bernard S. Black & Richard J. Pierce, *The Choice Between Markets and Central Planning in Regulating the*

ratepayers were saddled with the costs related to prematurely and later-abandoned nuclear plants.⁶⁷

The Restructuring Act sought to “insulate[]” consumers from these risks.⁶⁸

3. The Department’s Decision Improperly Re-Exposes Ratepayers to Risks Private Parties are Unwilling to Take.

The Department’s adoption of DOER’s proposal will re-expose ratepayers to the risks inherent in the pre-Restructuring Act regulatory scheme. Neither the Department nor DOER has been shy about this intention.

U.S. Electricity Industry, 93 COLUM. L. REV. 1339, 1344-45, 1349, 1386 (1993).

⁶⁷ See, e.g., *Attorney General v. DPU*, 390 Mass. 208, 219, 222, 228-29 (1983) (affirming DPU decision that authorized electric company to recover, through increased rates, the costs it incurred in a later-abandoned Pilgrim II nuclear power plant); see also *Norwood v. FERC*, 80 F.3d 526, 530-31 (D.C. Cir. 1996) (affirming, in part, FERC decision to allow nuclear plant operator to recover costs for prematurely closed Rowe, Massachusetts-based nuclear plant); *Cost of Seabrook Plant Begins to Hit Customers*, N.Y. TIMES, Feb. 1, 1987, <http://www.nytimes.com/1987/02/01/us/cost-of-seabrook-plant-begins-to-hit-customers.html> (describing Massachusetts ratepayer costs associated with construction of the Seabrook nuclear power plant). After the expenditure of \$900 million, plant owners would later cancel one of Seabrook’s two units (the second unit cost ratepayers \$6.5 billion). ALAN M. HERBST & GEORGE W. HOPLEY, *NUCLEAR ENERGY NOW* 44 (2007).

⁶⁸ D.P.U. 12-77, at 28; see also REISHUS CONSULTING, LLC, *ELECTRIC RESTRUCTURING IN NEW ENGLAND—A LOOK BACK* 7 (2015), http://nescoe.com/wp-content/uploads/2015/12/RestructuringHistory_December2015.pdf (restructuring was intended to “shift the risk of long-lived, capital intensive investment decisions from utility ratepayers to the shareholders of unregulated players”).

Indeed, DOER announced boldly in its petition that gas-fired generators are "unwilling" to assume the "risks" associated with long-term gas pipeline capacity contracts because there "is no means by which they can" assure recovery of those contract costs. JA 9.⁶⁹

The Department's finding that its Order does not contravene the policy embodied in the Restructuring Act because it does not allow the use of ratepayer funds to construct a power plant, but merely enormously expensive pipeline to supply power plants, is disingenuous at best.⁷⁰ The Order is completely antagonistic to the re-calibrated risk-allocation design embodied in the 1997 Restructuring Act. See *Cardin v. Royal Ins.*, 394 Mass. 450, 456-57 (1985) (holding that an agency's "interpretation of [a] statute ... is 'hardly persuasive' where ... [it] violates the language and policy of the statute").

⁶⁹ The pipeline companies have been even more blatant in their exposition of the proposed plan, stating: "together with certain New England [electric distribution companies], [they] are *developing* the Access Northeast [gas pipeline] Project. See FERC Order, *In re Algonquin*, *supra* n.47, at 1 ¶ 2.

⁷⁰ In its Order, the Department found that implementation of DOER's "innovative" proposal is consistent with the Restructuring Act because it would not result in electric distribution companies reentering the now-forbidden electric generation realm. JA 937.

Under the Department's effectuation of DOER's plan, ratepayers will be ensuring that power plants get the fuel they need to operate, by paying for the delivery of that fuel and financing the construction of new gas pipelines. As noted above, the Department itself has recognized that fuel procurement and planning is an integral part of the electric generation business. *See supra* p.42. Indeed, fuel-related costs constitute seventy-five percent of a natural gas-fired plant's generation costs.⁷¹ That is why pre-Restructuring Act, the Department required electric companies to consider both the type and amount of fuel they would use to generate power when they calculated whether they could supply enough electricity to match expected demand. *See supra* p.38. With respect to financing gas pipelines, the Restructuring Act does not allow electric distribution companies to finance *electric* generation investments, so it certainly does not allow those companies to go even further by investing in infrastructure that is not only unrelated to electric distribution service, but is in a completely different business, the gas business. Under either situation the entire risk of

⁷¹ WORLD SCIENTIFIC HANDBOOK OF ENERGY, *supra* n.38, at 72.

the investment shifts on to the backs of ratepayers--a shift the Legislature clearly intended to preclude.⁷²

4. Recent Experiences Demonstrate Why the Department's Unauthorized Adoption of DOER's Plan is A Gamble that Ratepayers Should Not be Forced to Accept.

While the Restructuring Act has shielded Massachusetts electric ratepayers, experiences of other states' ratepayers demonstrate that changes over the course of a long-term investment often leave ratepayers on the losing side of the equation. Take, for instance, a recent New Hampshire example--New Hampshire, unlike Massachusetts, is not fully deregulated--where a state-regulated coal-fired power plant invested \$424 million in new pollution controls that New Hampshire ratepayers will have to pay for long after the plant is sold and likely closes.⁷³

In contrast, Massachusetts ratepayers will not have to pay the \$1 billion a Massachusetts-based power plant owner invested in pollution controls because, after the Restructuring Act, those costs cannot be

⁷² Compare D.P.U. 12-77, at 28.

⁷³ See Bob Sanders, *Merrimack Scrubber at the Center of Eversource's Divestiture Plan*, NEW HAMPSHIRE BUSINESS REVIEW, March 20, 2015, <http://www.nhbr.com/March-20-2015/Merrimack-scrubber-at-the-center-of-Eversources-divestiture-plan/> ("All of Eversource's New Hampshire customers are going to have to pay for about \$500 million for a scrubber on a coal plant whose days may be numbered.").

passed on to electric ratepayers.⁷⁴ Or, assume that a few years ago the Department had decided that electric distribution companies should invest ratepayer money in the construction of new liquefied natural gas (LNG) import terminals (through long-term contracts for LNG) as a means to lower electricity costs: today's ratepayers would be on the hook for expensive facilities that are used much less than planned.⁷⁵

The execution of the Department's Order is also a gamble that forecloses ratepayers from taking advantage of lower cost options or technologies that

⁷⁴ See Paul McMorrow, *The Zombie Coal Plant*, COMMONWEALTH MAGAZINE, Fall 2013, <http://commonwealthmagazine.org/environment/004-the-zombie-coal-plant/> ("Dominion ate the \$1 billion tied to Brayton's cooling towers and scrubbers.").

⁷⁵ See Jay Fitzgerald, *2 Costly LNG Terminals Sit Idle*, BOSTON GLOBE, Jan. 23, 2013. The Massachusetts LNG terminal story is particularly illustrative. In that case, LNG companies invested millions of dollars to construct two offshore terminals to supply the New England market. The investment made sense at the time, because natural gas prices were high. But, as the article describes, "the bottom fell out of the natural gas market and neither offshore terminal ha[d] received a drop of imported fuel in more than two years." *Id.* As of January 2013, the LNG terminal developers did not know whether they would ever see their "investments pay off." *Id.* Since that time, market shifts have resulted in some use of these terminals. Imagine now the consequences if ratepayers had also invested in those projects: they too would be exposed to the financial risks caused by these market swings.

may develop during the twenty-year contract term.⁷⁶ Just recently, for example, Duke Energy announced the deployment of a cost-effective electricity storage system, which it believes will both "address the challenges involved in integrating renewables" and "help utilities avoid overbuilding power plants and transmission lines to meet demand spikes."⁷⁷ And, even more recently, a solar plant owner announced that it has figured out a way to "store enough energy" at its plant "to power 75,000 homes for ten hours."⁷⁸ The Department's execution of its Order will deprive ratepayers of the benefits of these innovations--benefits the Legislature plainly meant ratepayers to enjoy when it shifted generation to a competitive market.

The Department's overly simplified view of the 1997 Act elevates its own experimental policy preference over the Legislature's clearly expressed

⁷⁶ There are two reasons for this: first, the ratepayer subsidized contracts make it harder for these new technologies to compete on a level playing field; second, ratepayers could be paying for pipeline infrastructure that is no longer needed.

⁷⁷ Richard Martin, *New Grid Storage Technology Helps Integrate Renewables*, MIT Tech. Rev. (Mar. 10, 2016), <https://www.technologyreview.com/s/600962/new-grid-storage-technology-helps-integrate-renewables/>.

⁷⁸ Phil Taylor, *Nev. Plant Solves Quandary of How to Store Sunshine*, GREENWIRE, Mar. 20, 2016.

mandate (which the Department previously accepted⁷⁹) to insulate ratepayers from the types of risks inherent in plan adopted by the Department's Order. Like the judiciary, agencies, of course, have no authority to substitute their "notions of correct policy for that of [the] popularly elected Legislature." *Zayre Corp. v. Attorney Gen.*, 372 Mass. 423, 433 (1977).

C. Post-Restructuring, the Department May Not Re-Expose Ratepayers to Utility Investment Risks Absent Explicit Legislative Authorization.

Post-Restructuring Act, when the Legislature has decided to allow electric distribution companies to take action that the Act would otherwise preclude, the Legislature has done so clearly and explicitly. In other words, when the Legislature has wanted to override its risk-allocation policy judgment, it has said so expressly, and after careful consideration of the interests involved. And that, as this Court has made clear, is particularly relevant to a proper understanding of the Restructuring Act and its purpose. *See Protective Life Ins. v. Sullivan*, 425 Mass. 615, 620-21 (1997).

In the 2008 Green Communities Act, for example, the Legislature directed electric distribution

⁷⁹ *See supra* n.26.

companies to seek proposals from renewable energy developers, and, if they received reasonable proposals, to enter into ratepayer-backed long-term contracts to buy the renewable power. See St. 2008, c. 169, § 83. The Legislature determined that these contracts were necessary to "facilitate the financing of renewable energy generation facilities." *Alliance to Protect Nantucket Sound, Inc. v. DPU*, 461 Mass. 166, 168 (2011). Significantly, in the Green Communities Act, the Legislature explicitly provided the Department with the authority to review and approve the ratepayer backed renewable energy contracts. St. 2008, c. 169, § 83 ("all [such] proposed contracts shall be subject to the review and approval of the department").

In the Green Communities Act, the Legislature also specifically carved out a limited exemption from the Restructuring Act's restriction on distribution company ownership of generation. Specifically, to promote renewable generation, the Legislature allowed each distribution company to construct, own and operate 25 megawatts (MW) of solar generation before January 1, 2009 and 50 MW after January 1, 2010. St. 2008 c. 169, § 58. That provided that to recover the

construction costs of a solar generation facility, a company had to obtain prior approval for cost recovery from the Department. The statute has since been amended, but, significantly, continues to provide an express, limited exemption from the Restructuring Act.⁸⁰

Similarly, in the 2012 Act Relative to Competitively Priced Electricity, the Legislature authorized (but did not require) the Department to order electric distribution companies in the Northeastern Massachusetts/Boston load zone (NEMA--the zone that includes the Salem Harbor generation facility) to solicit proposals for electricity generation and, if they received reasonable proposals, to enter into ratepayer-backed long-term contracts to buy the generation for use in the NEMA load zone. St. 2012, c. 209, § 40. The Legislature once again explicitly authorized the Department to review and approve any resulting contracts if the Department decided that they were justified. *Id.*

Like the provision in the 2008 Green Communities Act, this clear statutory directive represented both recognition of, and a break from, the Legislature's

⁸⁰ St. 2012 c. 209, § 17.

considered policy choice in the Restructuring Act. Ironically, however, in that instance the Department chose *not* to exercise its authority even though it found that there was in fact a "need for additional capacity." D.P.U. 12-77, at 28-29. Significantly, the Department chose not to do so precisely to protect ratepayers from being re-exposed to the risks associated with ratepayer-backed utility investments. See *id.* at 28-29.

The Department's plan will re-expose ratepayers to the precise ratepayer risks that the Legislature sought to preclude when it enacted the Restructuring Act--if the plan does not go as the Department hopes, it is ratepayers who will pay the price. As the examples above make clear, when the Legislature wants to re-expose ratepayers to those risks by allowing the Department to review and approve otherwise prohibited ratepayer-backed contracts, it does so expressly.

CONCLUSION

For the forgoing reasons, if the Court reaches the merits, it should vacate the Department's Order in D.P.U. 15-37.

Respectfully submitted,

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April 8, 2016

MASS. R. A. P. 16(K) CERTIFICATION

I, Seth Schofield, certify that the foregoing Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Seth Schofield
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CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on April 8, 2016, I served the foregoing Brief of the Attorney General, by sending a copy thereof by E-mail and First Class Mail, postage prepaid, to:

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