PUBLIC VERSION

Commonwealth of Massachusetts

before the

Department of Telecommunications and Energy

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Investigation by the Department of Public)

Utilities into Boston Edison Company's) D.P.U./D.T.E. 97-95

Compliance with the Department's Order)

in D.P.U. 93-37.)

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REPLY OF BOSTON EDISON COMPANY

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In 1993, Boston Edison Company ("Boston Edison" or "BECo") sought approval from the Department of Public Utilities, now the Department of Telecommunications and Energy (the "Department") to invest up to $45 million in its proposed subsidiary, Boston Energy Technology Group, Inc. ("BETG") for the purpose of pursuing unregulated activities having a close relation to its core business of providing electric services. Boston Edison sought this approval because it understood that, with the onset of competition and the prospect of deregulation, it would need to diversify its activities to ensure the future financial strength of the company, both for its ratepayers and its shareholders. See, e.g., Ex. BE-DSH-4 (May Direct), at 3, 5. Equally as important, however, it knew that to pursue this goal of diversification, it would need "sufficient flexibility to take advantage of investment opportunities as they arise without piecemeal approval through repeated applications to the Department." See Boston Edison Company, D.P.U. 93-37, at 3 (June 18, 1993) ("BETG Investment Order"). On June 18, 1993, the Department granted Boston Edison's request, thereby providing the company with the flexibility it needed not only to pursue unregulated activities related to its core business, but to take advantage of investment opportunities as they presented themselves.

Over the next few years, revolutionary movements in both the electric utility and telecommunications industries reinforced the prescient wisdom of Boston Edison's request. In Massachusetts, for example, the Department issued rules and orders, in conjunction with state legislation on the issue, that actively sought to restructure the electric utility industry and create new competitive markets for energy and other relative services. See, e.g., Electric Industry Restructuring Plan: Model Rules and Legislative Proposal, D.P.U. 96-100 (Dec. 30, 1996). These rules and orders actively contemplated participation by the electric utilities in these competitive markets, primarily through unregulated affiliates. Id. At approximately the same time, Congress enacted the Telecommunications Act of 1996, which similarly sought to deregulate the telecommunications industry and to create competition in the provision of telecommunications services. Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston ("PIC"), et al., --- F. Supp. 2d ---, 1999 WL 44329, at *1 (D. Mass. Jan. 27, 1999). Pursuant to this Act, Congress specifically anticipated that electric utilities, which already had fiber-optic networks, would enter the telecommunications market and stimulate competition there. Id. Indeed, it actively encouraged this result. Id.

With this encouragement by federal and state authorities to diversify its activities and undertake commercial telecommunications activities, Boston Edison developed and implemented a telecommunications strategy that would eventually allow it to pursue such activities through an unregulated affiliate. Among other things, this strategy involved completing the on-going construction of its fiber optic network as a

non-utility project. Boston Edison envisioned that when the network was complete, a portion of the non-utility construction (12 strands) would be allocated to the utility, at no cost to ratepayers, so that it would have a complete 12-strand system. All capacity above that, meanwhile, would be used by Boston Edison to pursue its unregulated telecommunications ventures. As Boston Edison implemented this telecommunications strategy, eventually forming BecoCom to conduct this business, its plans and intentions were well-known and well-publicized. Not only did Boston Edison receive a great deal of press coverage of its activities, but it also openly discussed them with Congress, the Department, the Attorney General, and just about every telecommunications provider in the Boston area. At no time did anyone question the propriety of its actions. Indeed, in general, everyone welcomed Boston Edison's enterprise. The cable operators, however, were another story. From the beginning, they viewed Boston Edison's entry into telecommunications as an encroachment on their monopolistic hold on the Greater Boston cable market and have fought back with one legal action after another designed to stop it and its affiliates from competing in their market.

The history of the instant proceeding is illustrative. Back in May 1997, prior to BecoCom's entry into RCN-BecoCom LLC (the "Joint Venture"), Boston Edison formally approached the Department seeking approval for its holding company structure, a vehicle that would, among other things, have allowed it to make investments in its unregulated activities in amounts above and beyond the $45 million cap set by the BETG Investment Order. See BECo's Brief, at 8. The petition preceded Boston Edison's eventual transfer of the right to use its unregulated fiber optic network to BecoCom, not to mention the vast majority of its BETG guarantees and many of its BETG cash contributions.(1) Upon learning of Boston Edison's request, Cablevision Systems Corporation ("Cablevision") and the New England Cable Television Association ("NECTA") (collectively, the "Cable Intervenors") sought to intervene in the proceeding with the purpose of derailing, or at least delaying, Boston Edison's holding company proposal and thereby its telecommunications activities. Unable to attack the proposal itself, they claimed that Boston Edison's request should nonetheless be denied because they had evidence, even then, that Boston Edison had violated the BETG Investment Order. While their gambit failed to stop the Department from properly approving the holding company, they succeeded in delaying that approval, which had the effect of denying Boston Edison the means to make further investments in its unregulated ventures for several months. Equally as important, they also managed convince the Department to give them a forum for their claims against Boston Edison.

The investigation into the charges leveled by the Cable Intervenors has taken over a year-and-a half, involving testimony from 13 witnesses on 27 days of hearing over five months, not to mention the production by Boston Edison of mountains of documents in response to some 612 information requests. The amount of time and money that Boston Edison has been forced to spend responding to the Intervenors' allegations, unsupported as they are, has been staggering. The drain on the Department's resources has been equally acute.

Yet, after all has been said and done, what evidence have the Intervenors produced to support their charges? First of all, they all but concede that they had no evidence of a violation when they made the charges that initiated this investigation. Their allegations of non-compliance now relate to Boston Edison's investments as of December 31, 1997, some several months after they had claimed to have proof of a violation. It is therefore obvious they needed this proceeding to search for the violation they claimed to have already found. Further, the case that the Intervenors now make for a December 31, 1997 violation is equally without merit. Their initial briefs, brimming with innuendo, weave tales of stealth and conspiracy, not to mention post hoc fictions and after-the-fact rationalizations, but the facts and law simply do not match their rhetoric. The record in this proceeding reflects that coincident with changes in the electric utility and telecommunications industries, Boston Edison consistently developed and implemented a telecommunications strategy, of which the Department, the Attorney General, and all providers of telecommunications in the Greater Boston area were well aware. Indeed, with respect to the Department and the Attorney General in particular, Boston Edison

made a point of informing them of its activities, so that it could be sure they would know what it was doing in this area. Although the Intervenors dismiss Boston Edison's explanations as after-the-fact rationalizations, they ignore (as they must) the considerable documentary and historical evidence to the contrary. This evidence clearly demonstrates that from the beginning, Boston Edison had intended to take the actions it did (e.g., complete the fiber optic network as a non-utility project and execute an internal swap of capacity) as a necessary means of implementing its telecommunications strategy.

In addition to being without basis, the Intervenors' rhetoric vainly attempts to distract the Department from the real issues, indeed the only issues, in this case: namely (1) whether the BETG Investment Order authorized Boston Edison to engage in telecommunications, and (2) whether Boston Edison complied with the order's $45 million investment cap. The record on these issues clearly shows that Boston Edison was authorized to invest in areas related to its core business, and that telecommunications is such a business. Further, the record also shows that Boston Edison's investments in BETG (i.e., cash contributions, transfer of the right to use the unregulated fiber optic network, and guarantees) never exceeded $45 million.

On these central issues, the Intervenors press arguments that are simply contrary to both the governing law and the facts in the record. For example, in an attempt to restrict the scope of Boston Edison's activities, they deny the express language of the governing order and settlement agreements and attempt to bind Boston Edison to the incorrect statement of a lay witness on an impermissible question of law. To inflate their value for cash contributions, Cablevision ignores all other heretofore uncontroverted evidence on this component and misleadingly points to a single isolated instance in which a witness misspoke, saying Boston Edison when he meant to say BecoCom. With respect to the transfer of the fiber optic network, the Intervenors rest their argument on the faulty premises that a utility's initial accounting of an asset, however wrong it may be, dictates the rate base treatment of the asset and that the Department's standards in this regard are irrelevant. Finally, on the issue of guarantees, the Intervenors, with no law to support them, choose to focus on that part of Boston Edison's application in the BETG Investment proceeding that requires valuation of the principal amount of guarantees without giving effect to the rest of the language, which requires it also to aggregate the principal amounts of other such financial commitments, like the Parental Guarantee Agreements. It hardly bears mention that these arguments should be rejected.

Accordingly, the Department should find that the Intervenors' claims are and have always been meritless and that Boston Edison complied with the BETG Investment Order.

ARGUMENT

I. BOSTON EDISON HAS COMPLIED WITH THE BETG INVESTMENT ORDER.

A. The BETG Investment Order Permitted Boston Edison to Invest in Telecommunications Activities.

As expected, the Intervenors, in their briefs, take the position that Boston Edison's investments in telecommunications were not authorized by the BETG Investment Order, which, they claim, limited such investments to the areas of DSM, electric vehicles, and electric power generation. To support this position, they cherry-pick the record for references to these examples. At the same time, they intentionally ignore and do not even mention, much less address, the express language cited by Boston Edison in the 93-37 settlement agreements and the BETG Investment Order itself which demonstrates that Boston Edison was permitted to invest in all areas having a close nexus to Boston Edison's core activities and not simply those areas (i.e., DSM, electric vehicles, and electric power generation) that were cited as examples of such permissible activities.

The settlement agreements, for example, which the Department adopted and approved in its final order in the matter, did not restrict Boston Edison to investments in any

particular area. See BECo's Brief, at 18. Indeed, quite the opposite, they reaffirmed Boston Edison's clear intention to use BETG, and thus the investments in BETG, to "carry out activities that are separate from but closely related to the core business of the Company . . . ." See Ex. BE-DSH-6 (RMLD settlement), at 1; Ex. BE-DSH-7 (AG/CONUG Settlement), at 1. The Intervenors, however, choose to ignore this language.

The Intervenors also fail to address express language of the BETG Investment Order, which reflects the fact that the Department allowed Boston Edison to engage in then-unformed activities, so long as those activities had a close nexus to electric services. For example, much to the present chagrin of the Intervenors, the Department acknowledged that Boston Edison had sought the ability to make its requested investments in BETG in order "to provide the Company with sufficient flexibility to take advantage of investment opportunities as they arise without requiring piecemeal approval through repeated applications to the Department." BETG Investment Order, at 3. Perhaps even more telling is the Intervenors' inability to explain the statement in the concurring opinion of Commissioner Barbara Kates-Garnick, which underscores the extent to which the Department understood that the areas of DSM, electric generation services, and electric vehicles represented nothing more than examples of potential areas of investments: "Although the Company indicated the likely areas of BETG's activities in DSM, electric generation services, and electric vehicles, the proposals presented by Boston Edison were unformed and essentially potential activities."(2) Id. at 23 (emphasis added). Indeed, Commissioner Kates-Garnick noted that the BETG Investment Order was different from "previous cases in which the Department approved investments in subsidiaries" in the sense that in those prior cases, unlike the BETG Investment Order, "the planned investment activities were quite clear" and "the Department had definite knowledge of the specific activities that it was approving."(3) Id. at 23-24. In short, given the express language of the settlement agreements and the BETG Investment Order, which the Intervenors optimistically ignore, the Intervenors can hardly claim that the Department intended to restrict Boston Edison to the areas of activities it had offered as examples of potential areas of investment.

By the same token, to accept the Intervenors' position, one also would have to ignore (as the Intervenors have done) the repeated statements in the prefiled testimony of Thomas J. May, in the exhibits to that testimony, and in Mr. May's live testimony that make clear that Boston Edison was seeking permission to invest in then-unspecified activities related to its core business, and that DSM, electric vehicles, and electric power generation were offered merely as examples of potential areas of investment falling into this category.(4) See BECo's Brief, at 13-18. One must also ignore Boston Edison's February 10, 1993 letter to the Department, which explained that pursuant to its enclosed application, Boston Edison was seeking "to invest up to $45 million in a wholly-owned, non-utility subsidiary [BETG]" that "will undertake services in areas related to the core business of Boston Edison . . . ." See Ex. BE-DSH-3 (Horan Letter to D.P.U. dated 2/10/93). In sum, when one reviews the central language in the settlement agreements and the BETG Investment Order, as well as the testimony and exhibits sponsored by Boston Edison, one cannot help but conclude that the Department authorized Boston Edison to engage in all activities related to electric services.

The fact that Boston Edison's petition, which the Department approved, encompassed all activities related to Boston Edison's core business is reinforced by the articles of incorporation for BETG that Boston Edison had also initially intended to file. See Ex. AG-DSH-25 (Letter to AG Attaching Initial Proposed Articles of Incorporation), at 3. These articles provided that the purpose of BETG was "to engage in any business, operation, or activity related to the energy or energy services area," as well as any other lawful activity allowed by Massachusetts corporate law. Id. As an accommodation to the Attorney General, however, Boston Edison narrowed the articles to reflect only the areas of business it had specifically identified prior to the proceedings in D.P.U. 93-37, namely "energy generation, utilization or conservation, and electric transportation." See BECo's Brief, at 20-21. Once Boston Edison identified telecommunications as another core-related area in which it wanted to invest, however, it then amended the

articles specifically to include that activity, as well as all other permissible business activities. See Ex. BE-DSH-10 (Amended Articles of Incorporation), at 3.

The Intervenors claim that Boston Edison needed to get Department approval before it amended its articles, but they cite nothing in the settlement agreements, the BETG Investment Order, or Massachusetts corporate law to support such a proposition. Instead, in the absence of an actual legal requirement, the Intervenors, as expected, rest their claim solely on the response of Mr. May (who is not an attorney) to a legal question (as to which no witness should be allowed to testify). More specifically, Mr. May responded affirmatively when asked whether BETG "would have to seek approval from the Department in order to make changes in its articles of incorporation." Ex. BE-DSH-8 (May Transcript), at 65-66. Contrary to the Intervenors' mischaracterization of this exchange, Mr. May was not asked whether Boston Edison would seek approval before amending its articles of incorporation, and he made no promises to that effect. Rather, he was asked a legal question(5) as to whether Boston Edison "would have to seek approval" before it could do so, and he gave an answer that was wrong.

The Intervenors do not and cannot cite any authority to rebut the black letter law in the Commonwealth that precludes lay witnesses from testifying as to questions of law. See BECo's Brief, at 22. Instead, the Intervenors point to his position as an officer and the fact that his testimony, like all testimony, was under oath.(6) Neither of these assertions do anything to make Mr. May's incorrect lay opinion on a legal question any more binding on Boston Edison.(7) In short, the Intervenors' desperate attempts to impose a legal requirement on Boston Edison by virtue of Mr. May's incorrect answer to an improper legal question must fail.

Further, the truth is that Department would obviously not have relied upon this errant statement, which was impermissible as evidence and (not surprisingly) wrong on the law.(8) As one might expect, there is clearly nothing in the record that suggests that it did so. Quite the contrary, an exchange between the Department and Mr. May (which the Intervenors typically ignore) reveals that the Department not only did not rely on Mr. May's statement, but instead raised the possibility of expressly incorporating into the order a requirement of prior Department approval before any changes to the articles of incorporation could be made. See BECo's Brief, at 23 (citing Ex. BE-DSH-8 (May Transcript), at 101-02). Significantly, although the Department was clearly aware that it could incorporate such a requirement, it chose not to do so. In short, the Department knowingly opted not to require that Boston Edison seek Department approval prior to making any amendments to its articles of incorporation.(9)

The Attorney General, meanwhile, claims that Mr. May's statement "demonstrates beyond any doubt that in its 1993 filing, the Company did not seek approval for investments in any activities beyond DSM, electric vehicles and electric generation, and that both the Attorney General's settlement and the Department's grant of investment authority did not go beyond the scope of the limited nature of the Company's request." AG's Brief, at 10. Yet, this argument is contradicted by the Attorney General's own words and actions both at the time of the hearing and subsequently. A draft of the Attorney General's settlement dated March 30, 1993 (thus, well after Boston Edison had filed its request) reveals that the Attorney General fully appreciated the undefined nature of the scope of activities for which Boston Edison sought approval and that as a result, he even sought to limit the scope of those activities pending the completion of Boston Edison's next rate proceeding. See Ex. AG-RR-4 (Drafts of AG Settlement Agreement; 3/30/93 Draft), at 44 ("The Attorney General believes that the subsidiary activities should be of a defined scope during the initial phase of [the subsidiary's] operations."). The final settlement, however, included no such limitation on Boston Edison's activities. Further, if he had truly believed that the BETG Investment Order precluded Boston Edison from pursuing activities beyond the three examples, the Attorney General would have, at a minimum, voiced his objection when Boston Edison discussed its proposed telecommunications activities in the context of negotiations

over the company's Restructuring Settlement Agreement. See BECo's Brief, at 21. The fact that he did not shows that he did not, in fact, believe Boston Edison to be so limited as he now claims for the purposes of this proceeding.

Finally, the Intervenors do not seriously contest the clear and strong nexus between electric services and telecommunications, particularly in areas such as infrastructure, engineering, and customer servicing.(10) See BECo's Brief, at 23-26. Indeed, it would be foolhardy to do so given the factual and legal support for this nexus, especially in the wake of the Telecommunications Act. See id.

Accordingly, because the BETG Investment Order authorized Boston Edison to invest in areas related to its core business, and because telecommunications is just such an area, Boston Edison's investments in BecoCom were completely appropriate.

B. The Department Should Reject Cablevision's Misleading Attempt to Inflate the Sum of the Cash Contributions.

As Boston Edison stated in its initial brief, its cash investments in BETG totaled approximately $25.2 million as of December 31, 1997. See BECo's Brief, at 26-27. Included among those investments was $6.5 million, which Boston Edison contributed to BecoCom in 1997.(11) Cablevision's witness, Mr. Harpster, accepted that amount as accurate, and Cablevision did not challenge it in other testimony or during cross-examination of Boston Edison's witnesses.(12) In their briefs, the Attorney General and NECTA likewise accepted this amount as "uncontested." See AG's Brief, at 11, 24; NECTA's Brief, at 21 n.38, 41.

Now, for the first time, Cablevision contends that the figure should be $4.5 million higher. See Cablevision's Brief, at 50, 74. Cablevision changed its position because it claims to have learned that Boston Edison gave $11 million to the Joint Venture in 1997, which, it says, is more than the $6.5 million Boston Edison reported that it gave to BecoCom. See id. at 50, 74. Cablevision's "proof" on this point speaks volumes about the quality of its case and the tactics it has used in prosecuting it.

First of all, it bears noting that the argument itself reflects Cablevision's intentional refusal to acknowledge that Boston Edison is not BecoCom and that BecoCom is not the Joint Venture. The argument also highlights Cablevision's feigned ignorance of the fact that Boston Edison made no investments (monetary or otherwise) in the Joint Venture, and that any contributions that were made to the Joint Venture were made by BecoCom.(13)

That being said, while there is considerable (and heretofore, uncontroverted) evidence that Boston Edison invested $6.5 million (and no more) in BecoCom in 1997,(14) there is no proper evidence anywhere in the record that Boston Edison invested any money, much less $11 million, in the Joint Venture at any time.(15) The record shows that although $11 million was invested in the Joint Venture in that year, it was BecoCom, not Boston Edison, who made that investment.(16) See Ex. CSC-RR-3 (Exchange Agreement Valuations), at 8, 14, 25; Ex. CSC-MFF-11 (Updated Summary of Investments).

Cablevision's sole evidence on this point is an affirmative response by Richard Hahn to a question from Cablevision's counsel asking whether Boston Edison had invested $11 million in the Joint Venture. See 27 Tr. 3445-46 (Hahn Cross). Given the facts, it is obvious that Mr. Hahn was thinking about BecoCom when he answered the question. See id. It is equally obvious that Cablevision's counsel had slipped that leading (or rather misleading) question into an unrelated line of questioning in the hopes that Mr. Hahn would answer without first distinguishing between Boston Edison and BecoCom:

Q. And the last two pages, the last section in this, as you can see from the table of contents, is Boston Energy Technology Group. Do you see that?

A. The last page of this document? Yes.

Q. And this was prepared in December of '95?

A. That's correct.

Q. Incidentally, Edison's investment of cash into the joint venture during the calendar year 1997 was $11 million?

A. Approximately.

Q. Take a look at Boston Energy Technology Group, this section here, Page 12. Are any of the activities which are described here, any of the objectives, telecommunications activities? . . .

See id. (emphasis added). Given that there is no evidence to suggest that Boston Edison, as opposed to BecoCom, had invested any money (much less $11 million) in the Joint Venture, and given that there is abundant evidence that BecoCom invested $11 million in the Joint Venture, Cablevision's counsel had no basis for asking the question as phrased, other than to catch Mr. Hahn off-guard so that Cablevision could use this mistaken testimony to inflate further the amount of alleged contributions to BETG.(17) Mistaken answers gained by subtly misleading questioning should not be taken for proof, particularly in the face of extensive credible evidence to the contrary. In short, Cablevision's attempt to artificially inflate the cash contribution number from $25.2 million should be rejected.

C. The Right to Use the Unregulated Fiber Optic Network Was Properly Valued at Book Value For Purposes of Both the BETG Investment Order and the Department's Asset Transfer Rules.

1. For the Purposes of Compliance with The BETG Investment Order, the Transfer of the Right to Use the Fiber Optic Network Must Be Valued At Book Value.

The Intervenors devote much of their briefs to Boston Edison's transfer of the right to use its unregulated fiber optic network. However, in doing so, they completely and no doubt intentionally fail to distinguish between the separate issues of (1) how an asset transfer should be valued for the purposes of compliance with the BETG Investment Order and (2) how it should be valued for purposes of compliance with the asset transfer rules. See BECo's Brief, at 49-51. As explained in Boston Edison's initial brief, the Department expressly approved the $45 million investment limit because it represented a reasonable percentage (4.3%) of Boston Edison's total book equity, as opposed to its market value. Id. at 51 (citing BETG Investment Order, at 17). Therefore, to be consistent with this book value, the transfer of the right to use the fiber optic network must similarly be valued at its book value ($7 million).

This approach only makes sense. The asset transfer rules are designed to ensure that ratepayers receive whatever gain they may be entitled to (if any). The investment limit, on the other hand, was designed with a very different purpose, namely to "maintain[] the stable financial condition of [the] utility and protect[] the Company's ratepayer from harms associated with adverse § 17A transactions," while at the same time, accommodating Boston Edison's "interest in having flexibility in a changing marketplace to meet the long-term objectives of its ratepayers and shareholders." See BETG Investment Order, at 17. When an appreciated utility asset (which is not the case here) is transferred, the ratepayers get the benefit of the appreciation under the asset transfer rules; however, they and the utility are subjected to no greater risk by virtue of the asset's appreciation -- their risk is limited to their investment, the book value of the asset.

Thus, in the present case, even if the right to use the unregulated fiber optic network had been a utility asset (which it was not), ratepayers would have been entitled the $4.6 million difference between its book and market values upon its transfer, but the transfer itself would still have been valued at book value for purposes of measuring compliance with the BETG Investment Order.

2. Under Department Precedent, the Post-1995 Fiber Optic Facilities Were Properly Treated as Non-Utility Assets.

The Intervenors do not contest that the fiber optic facilities built before 1996 were utility assets. See BECo's Brief, at 28-30. They claim, however, that the facilities built after 1995 were also utility assets, and that, as a result, they should have been transferred to BETG at market value. As expected, they rely heavily on the accounting error made by Boston Edison when it incorrectly placed the post-1995 fiber optic construction in utility plant accounts. The evidence, however, shows that once Boston Edison discovered that it had improperly accounted for that construction, it corrected that error and transferred the costs of the non-utility portion of the network out of the utility plant accounts. See BECo's Brief, at 41 n.16.

Although Cablevision attempts to relate the correction of the error to its sundry legal activity against Boston Edison in the summer of 1997, it conveniently overlooks the memo from Jack O'Donnell, Supervisor of Capital Investment Accounts at Boston Edison, to Mike Farrell dated January 22, 1997, in which Mr. O'Donnell informed Mr. Farrell:

All investment related to Fiber Optic Investment has been identified . . . . Although the fiber optic investment is currently classified as Electric Plant, it should not be used for rate base treatment. Its ultimate use is not related to electric utility operations. . . . When it is determined how we are going to account for telecommunications assets, we will make the appropriate transfer from Electric Plant.

See Ex. BE-MFF-40 (O'Donnell Memo to Farrell dated 1/22/97). In short, Boston Edison made an honest accounting mistake and corrected it; it should suffer no adverse consequences as a result.(18)

Nonetheless, the Intervenors assert that Boston Edison's original accounting, however wrong, should govern the classification of the post-1995 fiber optic facilities, regardless of how the Department itself would have classified the asset. In doing so, they seek to exact a stiff financial penalty from Boston Edison for what is but an immaterial accounting misclassification. To support this argument, the Intervenors twist Department precedent in a manner offensive to basic principles of utility regulation. More specifically, they repeatedly quote a regulation that allegedly requires that an asset transfer be recorded to reflect gain or loss on utility plant "'[i]f the property disposed of has ever been included in the company's Electric Plant in Service of Construction Work in Progress accounts.'"(19) See Cablevision's Brief, at 33, 43-44, 48 (emphasis supplied by Cablevision); NECTA's Brief, at 22. The Intervenors also cite other Department precedent containing similar language.(20) See Cablevision's Brief, at 33, 43-44, 48; NECTA's Brief, at 22; Attorney General's Brief, at 17-18. What the Intervenors fail to mention, however, is that in each statement they cite, it is necessarily implied that the property in question have been properly included in the utility account to begin with (i.e., "If the property disposed of has ever [properly] been included in the company's [utility] accounts . . . .").

Failure to read this requirement into the language cited by the Intervenors would elevate a utility's unilateral accounting decisions, right or wrong, over the Department's principles governing the proper classification and treatment of assets

for rate base purposes. Cablevision, for one, fully understands the consequential implications of this argument, yet cavalierly embraces it. Indeed, it asserts that where an asset has been accounted for by the utility as a utility asset, the fact that "the Department would never have allowed such costs . . . to be included in rate base and passed on to ratepayers . . . is irrelevant." See Cablevision Brief, at 48 (emphasis added and internal quotations omitted).

Under the new principle of rate base classification espoused by the Intervenors, therefore, it would not matter whether an asset truly belonged in rate base (i.e., whether it was used and useful and its costs prudently incurred). The only thing that would matter would be how a utility had accounted for that asset on its books. While this principle would shorten rate cases considerably, it would strip ratepayers of the protections inherent in Department oversight of rate base determinations. A utility could unilaterally determine what costs and losses to pass on the ratepayers and what gains and revenues to keep for shareholders without regard to Department standards. While Boston Edison could no doubt conjure a litany of undesirable scenarios that inevitably follow from the principle pressed by the Intervenors, it should hardly be necessary. Of course, the Intervenors take this position, contrary as it is to Department precedent and principles, only because it serves their best interests. One can be sure that had Boston Edison made the same error with its investments in the other unregulated subsidiaries (i.e., Rez-Tek International Corp. or TravElectric Services Corp.), the Intervenors would not be so insistent that the error stand.

The truth of the matter is that the accounting treatment of an asset, right or wrong, has no bearing on whether the asset should be in rate base or not. (21) As even Cablevision's own accounting witness admitted, a utility cannot make an asset a utility asset simply by listing it as a utility asset on its books. See 18 Tr. 2989 (Harpster Cross). The ultimate determination as to what can be included in rate base is made by the Department, not the utility. To be included in rate base, the Department requires that the asset in question be currently "used and useful" in the provision of utility service and that the costs associated with the asset were prudently incurred. See BECo's Brief, at 38 (citing cases). Contrary to what Cablevision says, not only is the Department's determination on this issue not irrelevant, it is determinative. The Intervenors, however, are reluctant to accept this standard, no doubt because they realize that the post-1995 construction does not meet it.

Simply put, under the governing used/useful and prudence standards, the portion of the fiber optic network built after 1995 would not have been included in rate base. The fiber that was installed on Boston Edison's structures and rights-of-way after 1995 and whose use was transferred to BecoCom was not installed for utility purposes, has never been used to provide utility service, was never in rate base, and cannot reasonably be considered to be utility plant. BECo's Brief, at 40. The Intervenors apparently do not even attempt to argue that these facilities in BecoCom's use have been used and useful to provide electric service. Instead, intentionally disregarding the effect of the fiber optic swap, they concentrate on the portion of the post-1995 network presently used by the utility (some 888 fiber miles), ignoring the fact that the right to use that portion of the network was transferred to the utility in return for the right to use 552 miles of the pre-1996 network. See id. at 45. That the utility gained the right to use a portion of the unregulated post-1995 construction by virtue of the fiber swap does not make the entire post-1995 network "used and useful" and a utility asset. If that were the case, one could argue that Boston Edison transformed the entire MFS network into utility property simply by virtue of the fact that, pursuant to the MFS fiber swap, the utility has the right to use a portion of that network. See BECo's Brief, at 42-43. In short, the unregulated post-1995 fiber optic facilities are not and never have been used and useful in the provision of electric service.

Further, the Intervenors do not credibly argue that the extensive post-1995 construction represented a prudent utility investment. Although Boston Edison had contemplated that the utility would eventually gain access (as it did through the swap) to up to 12 strands of that construction, Boston Edison, to pursue its

unregulated telecommunications strategy, built in far more capacity than the utility could ever use. While the utility needed only 888 fiber miles to complete its network, Boston Edison built 7,332 fiber miles, some 6,444 more fiber miles than (i.e., eight times as much as) the utility would ever need. In understated fashion, Cablevision, for one, admits that this construction constituted "surplus in comparison to the capacity needed solely to satisfy the utility's own internal communications needs." See Cablevision's Brief, at 46. However, it attempts to address this excess by an explanation that fails to justify rate base treatment. Citing a statement by Mr. Harpster that it describes as "the most cogent explanation of the role of excess capacity in BECO's communications network," Cablevision claims that "[b]uilding the network with excess capacity and leasing that excess capacity to third parties appears to have been the least-cost method of obtaining the internal communications." See id. Cablevision further goes on to explain that excess capacity is justifiable where it "provides an opportunity to reduce the utility's overall costs of service" and where it "could produce additional revenue." See id. at 46-47. Under this theory, Cablevision would have Boston Edison include the entire post-1995 investment in rate base, even though only a portion of it has ever been used in connection with utility service and even if it generated no revenue to benefit ratepayers. This argument, however, overlooks the fact that to qualify as a rate base asset, the asset must first be "used and useful" in the provision of utility (here, electric) service.(22)

A utility cannot invest in any enterprise it so desires and then pass the costs on to ratepayers on the theory that the venture had the potential to produce added revenue that could have been used to reduce the utility's overall cost of service. Nor can it justify excess capacity on this ground. If that were the case, a utility needing five floors to house its offices could construct a 40-floor building (i.e., eight times as many floors as it needed) and lease out the excess capacity, justifying its role as landlord as an opportunity to produce additional revenue and offset the costs of the building. The Department would never allow utilities to risk ratepayer funds on such ventures outside the scope of necessary utility service. Indeed, Mr. Harpster himself, when presented with a similar hypothetical, said that the entire costs of construction would not be included in rate base "because real-estate-development-type activities are not something that's appropriate for and inherently linked to the provision of utility services." See 18 Tr. 3005 (Harpster Cross). Thus, Mr. Harpster's "cogent" theory of including excess capacity in rate base for the purpose of using it in ventures with revenue potential contravenes basic Department principles regarding rate base treatment and therefore fails to justify the post-1995 construction as a prudent utility investment.

Because Cablevision cannot justify the enormous amount of excess capacity as a proper utility expenditure, Boston Edison's assertion stills stands: even if Boston Edison had wanted to, it is unrealistic to believe that the Department would ever have let Boston Edison put these costs in rate base and thereby pass them on to ratepayers. In sum, the Intervenors have failed to show that this investment would have been prudent for utility purposes, or that the asset was ever used for those purposes. As a result, the asset should not be accorded rate base treatment.(23)

Unable to demonstrate that the post-1995 fiber optic facilities meet the governing Department criteria for rate base treatment, the Intervenors instead myopically highlight references to Boston Edison's plans to eventually complete the utility network and fault Boston Edison for what they claim is a lack of contemporaneous documents reflecting its intentions to pursue this construction as a non-utility project. This argument, however, is misguided. If the asset does not meet the objective tests for rate base treatment, it is not a rate base asset, regardless of what Boston Edison's intentions may have been. As it turns out, however, Boston Edison's actions and contemporaneous documents clearly reflect the fact that Boston Edison intended its post-1995 construction to be a non-utility project.

It should be noted at the outset that the Intervenors' assertions that Boston Edison always intended to complete its utility network are beside the point. Boston Edison itself has repeatedly stated that it was "always the plan" to complete the utility network. See, e.g., 1 Tr. 183 (Hahn Cross); 23 Tr. 3457-58 (Hahn Cross). The only

thing that changed in that regard was who would pay for the construction necessary to complete the utility network. In December, 1995, Boston Edison decided to complete the network without resort to utility funds, and with sufficient capacity to allocate some to the utility to complete its network and enough excess to pursue its unregulated telecommunications activities. See BECo's Brief, at 35-36.

The Intervenors' assertions that Boston Edison did not make such a change in course in December, 1995 and that the post-1995 construction was but a continuation of its earlier utility construction are untenable. If Boston Edison truly did not alter its original plans to finish the network as a utility project, why then did it build in eight times as much capacity as the utility could ever use? There is no possible way that Boston Edison could have believed the Department would have considered this to be a prudent investment for a utility to make. Further, what would Boston Edison have done with that excess, other than engage in unregulated activities? What the record reflects is that Boston Edison dramatically shifted course in December, 1995 and undertook completion of the fiber optic network as an unregulated activity. Even as it began this non-utility construction, it knew that it would eventually grant the utility access to the network so that the utility itself could have a completed system; it had simply not yet sorted out the mechanics of how that access would be provided. Indeed, it would not sort those mechanics out until it conceived of and executed the fiber swap. The fact that the utility would eventually be granted a right to access the unregulated network, however, did nothing to change the non-utility nature of the post-1996 construction.

To deny the true nature of the post-1995 construction, meanwhile, the Intervenors ignore the contemporaneous documents reflecting this construction and the historical context in which it was undertaken. When one looks at this important evidence, one sees clearly that Boston Edison had been developing and pursuing a strategy that would allow it to engage in unregulated commercial telecommunications activities and that as part of that process, it had been envisioned that Boston Edison would complete its fiber optic network with sufficient excess capacity to serve its non-utility needs as well as its utility needs. Against this backdrop, one can appreciate that the decision to construct the post-1995 fiber optic facilities as a non-utility project was simply a rational, if not inevitable, next step in the process, and that it was by no means an after-the-fact characterization.

Boston Edison had begun to explore the possibility of constructing fiber optic facilities for use in commercial telecommunications since as early as the start of 1995, just as Congress was contemplating enactment of the Telecommunications Act and thereby actively encouraging utilities to compete in the telecommunications. While Cablevision turns a blind eye to the JTM Study, this document puts Boston Edison's activities in their proper context. It helped shape the development of Boston Edison's unregulated telecommunications strategy and made concrete suggestions on how to pursue that strategy. Significantly, the JTM Study assumed that Boston Edison would initially engage in these unregulated activities itself (as opposed to through an affiliate)(24) and expressly suggested that Boston Edison complete its in-progress fiber optic network with sufficient additional capacity to facilitate joint use of the network for both utility and non-utility purposes. BECo's Brief, at 31; see also, e.g., Ex. BE-RSH-6 (JTM Study: Communications New Business Case), at 3, 4, 67-70. Perhaps equally as, if not more, important are the extensive efforts, which the Intervenors ignore, undertaken by Boston Edison to pursue and develop its unregulated telecommunications strategy. See BECo's Brief, at 32-33. From as early as mid-1995, for example, Boston Edison was seeking out customers and partners for its non-utility activities and meeting with all telecommunications providers in the Greater Boston area to gauge their interest in these ventures. Simply put, the post-1996 construction and the documents that support it cannot be considered in a vacuum but must be understood in connection with the dramatic new, unregulated course that Boston Edison was undertaking.

Viewed in their proper context, Boston Edison's 1996 Capital Budget and the capital authorization papers (the "Capital Authorization") pursuant to which the post-1995 construction was conducted, provide undeniable contemporaneous evidence that Boston Edison never intended that this investment would be considered a utility asset or

that its costs would be included in electric rates. See BECo's Brief, at 35-37. In the Company's 1996 Capital Budget, created in December, 1995, for example, one sees clearly that Boston Edison had budgeted no money for 1997 fiber optic construction in the "Customer Business Unit," where its utility distribution and transmission projects are located. See NECTA-RR-11 (1996 Capital Budget), at 7-8. The company, however, had included $7 million in the "Headquarters" budget to "develop a strategic communications alliance." Id. at 3, 14. As discussed in Boston Edison's initial brief, the Capital Authorization, meanwhile, is replete with statements describing Boston Edison's intent to use the excess capacity on the new construction to pursue new business opportunities. See BECo's Brief, at 35-37. Perhaps the most compelling and concise evidence on this point comes in the eight page business justification found at the back of the Capital Authorization. See Ex. BE-RSH-8 (Capital Authorization), at 37-44. Prepared on November 8, 1995, the justification recommends authorization of $7 million "to complete the . . . fiber optic network . . . on an accelerated schedule (11/96)." Id. at 37. It specifically states that while 12 strands of the network will be allocated for utility use, the remaining capacity (12 strands or more) will be used for "new revenue and profits." Id. The business justification also recommends the selection of a strategic partner to share capital costs and notes the necessity of soliciting fiber customers, actions inconsistent with a utility project. Id. It then goes on to evaluate the revenue potential for various business scenarios (e.g., "Backhaul for PCS cell sites") and notes the possibility of partnerships with "PCS Licenses . . . Competitive Access Providers . . . CATV (. . . Cablevision) . . . Interexchange Carriers . . . [and] NYNEX." Id. at 39-40. The document stresses the need to act quickly if Boston Edison is to compete with NYNEX or the CAPS and further notes that "[u]nless BECo commits to accelerated construction by 12/1/95, it is not possible to complete fiber network by 11/96."(25) Id. at 40. Finally, it sets forth detailed spreadsheets reflecting the financial projections for these unregulated telecommunications activities. Id. at 43-44. The themes, if not the actual language, of this business justification are echoed throughout the Capital Authorization. See BECo's brief, at 35-37.

The Intervenors do not address the business justification generally. They do, however, attempt to dismiss the references to new business on the ground that such business opportunities would serve utility purposes by producing added revenue. See Cablevision's Brief, at 47. As discussed above, this argument, however, is simply wrong. If it were correct, a utility could engage in any enterprise, no matter how unnecessary to utility service, with ratepayers bearing all risk of failure, so long as there was the potential for added revenue. As a result, these references must be accepted as clear indicia of unregulated activity.

Unable to properly explain this evidence, the Intervenors harp on references in the Capital Authorization to the eventual use of 12 strands of the construction for utility purposes. As noted above, these references serve only to reinforce the notion that the post-1995 non-utility construction was but the continuation of a plan, first described in the JTM Study, to finish the network as an unregulated project and still have enough left over for commercial telecommunications. Further, even without consideration of this context, these references would have, at most, indicated that the first 12 strands were utility, but that the vast majority of the construction (which was far in excess of 12 strands) was non-utility. The fact that ratepayers incurred none of the costs associated with this construction, and that the utility eventually received access to the network only by means of the fiber swap, evidences Boston Edison's successful execution of this plan.

The Intervenors also do not address the fact that the market for leasing fiber optic capacity was fraught with risk. There is no way that Boston Edison would have believed that the Department would have allowed it to subject ratepayers to those risks, particularly in an activity outside the scope of general electric services. See BECo's Brief, at 37-38. They also ignore Boston Edison's efforts to track these non-utility costs by means of Cost Area 3H. Id. Finally, and perhaps most significantly, however, the Intervenors fail to acknowledge that Boston Edison built 7,332 fiber-miles of fiber optic network when the utility itself only needed 888 fiber miles to complete its system. This project was therefore far beyond the scope of what it would have been if it had truly been only a utility project.

In sum, the post-1995 fiber optic facilities are not utility assets because they are not used or useful in the provision of electric services and their costs could not be said to have been prudently incurred from a utility standpoint. Further, there are numerous contemporaneous documents as well as an abundance of historical context that support Boston Edison's position that it undertook and completed the post-1995 construction as a non-utility project.

3. The Fiber Capacity Swap is Not A Post Hoc Fiction, But the Implementation of the Telecommunications Strategy Boston Edison Had Developed Long Before.

Once the construction on the fiber network was complete, Boston Edison made an internal allocation, pursuant to which its unregulated side provided its regulated side the right to use 888 fiber miles of post-1995 capacity in return for the right to use 552 fiber miles of pre-1996 excess capacity. This fiber swap created two completely separate systems, one regulated and one unregulated, with separately defined routes, capacity, and costs. The amount of capacity each side exchanged was specifically chosen in order to give the utility 12 strands throughout its network. See BECo's Brief, at 45.

The Intervenors attempt to distract the Department by asserting that the fiber swap is a post hoc fiction. The facts, however, demonstrate that an allocation like that made by the fiber swap was always part of Boston Edison's telecommunications strategy, even if the fiber swap itself as the precise mechanism was not conceived until late 1996 - early 1997. Again, when Boston Edison began its construction of the post-1995 assets as a non-utility project, it always knew that when that construction was complete, it would allocate a portion of that network (12 strands along its length) to the utility so that the utility's network would be complete. See BECo's Brief, at 36. Boston Edison simply had not yet decided upon the best means of effecting that allocation. Then again, it was not important to do so, so long as the respective networks resided in Boston Edison, where their costs could be tracked and allocated appropriately. It was only when Boston Edison prepared to transfer the asset to BecoCom that it became necessary to execute the allocation.

Further, contrary to what the Intervenors allege, there are numerous documents reflecting the fact that it was always Boston Edison's intention to swap fiber between the regulated and unregulated networks. For example, as early as May 25, 1995, the JTM Study was recommending that Boston Edison complete its in-progress fiber optic network as an unregulated activity, but with sufficient additional capacity to facilitate joint use of the network for both utility and non-utility purposes. See, e.g., Ex. BE-RSH-6 (JTM Study: Communications New Business Case), at 3, 4, 67-70. The very same references that the Intervenors repeatedly cite in the Capital Authorization, meanwhile, also reflect that prior to the non-utility construction, Boston Edison anticipated allocating 12 strands of the non-utility network for utility purposes. Given that Boston Edison also anticipated that the costs of the non-utility network would be paid for entirely by shareholders, the utility would not have acquired the access contemplated in the Capital Authorization unless Boston Edison allocated a portion of the non-utility network to utility use. Thus, documents from as early as December, 1995 reflect Boston Edison's plan to allocate a portion of the unregulated network to the utility at some time in the future, even if it had not yet decided how it would do so.

Another document, created long before the inception of the Joint Venture, shows not only that Boston Edison's intentions in this regard remained constant, but also that it had openly discussed these intentions with the Attorney General. In a November 18, 1996 draft of the Restructuring Settlement Agreement, Boston Edison informed the Attorney General that in connection with the creation of the Joint Venture, it would be transferring "its existing fiber optic network to its telecommunications subsidiary, which will be a direct or indirect subsidiary of BETG . . .[, but that] Boston Edison will retain the right to use 12 fibers on [that] network." See Ex. AG-DSH-23 (Draft Restructuring Settlement Agreement), at 31. Further, the materials from the March 1997 presentation to the Department show that Boston Edison discussed the capacity swap mechanism in noting that ratepayers would benefit by having the

utility fiber network completed at no cost to them. See Ex. BE-DSH-12 (BECo Presentation to D.P.U.), at 1-2. At the same time Boston Edison explained that it would conduct its telecommunications activity for the Joint Venture through an unregulated subsidiary that would use the "existing BECo fiber network." See id. at 2. In short, there are numerous documents that reflect that it had always been Boston Edison's plan to eventually allocate 12 strands of the unregulated utility network for use by the utility. Thus, the fiber swap was not a post hoc fiction, but the eventual execution of this plan.

Further, the choice of the swap itself as a conceptual mechanism is not the conundrum that the Intervenors would make of it. As Boston Edison has noted previously, such swaps are common in the telecommunications industry. More importantly, however, Boston Edison had itself had executed such a swap with MFS. See BECo's Brief, at 42-44. There, as in the case of the later swap, no money changed hands, no assets changed ownership, and each party remained responsible for maintenance of its system.

Perhaps the most persuasive evidence, however, that the fiber swap is not a post hoc fiction is the tangible effect of the swap itself. As described above, at the time of the swap, the pre-1996 network was an incomplete by some 888 fiber miles. Yet, today, the network is complete even though the utility did not spend any further money on fiber construction after 1995. If the fiber swap is a fiction, there would be no way to explain the fact that the utility secured a completed utility network, at no additional cost, thereby saving millions in capital investments, not to mention annual capacity rental payments, for electric ratepayers.

In sum, the fiber swap was not a post hoc fiction, but the next step in the telecommunications strategy formulated long before. Further, there is nothing about the fiber swap that changed the non-utility nature of the asset. Indeed, if anything, it reflects the further implementation of Boston Edison's consistent plan to create an unregulated fiber network.

4. The Market Value of the Right to Use the Unregulated Fiber Optic Network Was Set at $11.6 Million Through Arms-Length Negotiations.

Boston Edison has repeatedly asserted that the market value ascribed to the right to use the unregulated fiber optic network is irrelevant, both because the BETG Investment Order itself measures investments according to their book value and because the asset was a non-utility asset that was properly transferred at cost. Thus, the only value of that asset that matters is the $7 million book value figure that Boston Edison ascribed to its transfer of that asset to BecoCom. See BECo's Brief, at 47-48. Boston Edison, however, has also consistently asserted that if for whatever reason, the Department deemed market value to be relevant, that figure is easily ascertainable without resort to the exaggerated and flawed valuations offered by Cablevision. Quite simply, the market value of the right to use the fiber optic network was set at $11.6 million by means of arms-length negotiations and therefore meets the criteria set by even Cablevision's own witnesses for market value. See BECo's Brief, at 52-53. For their part, the Intervenors fail to explain why this figure should not be accepted as market value.(26) Thus, contrary to Cablevision's curious assertion to the contrary, Boston Edison has offered a valuation of the fiber optic network in this proceeding -- a real world valuation (as opposed to a theoretical model) conducted at the exact time of the transfer (as opposed to years before) and on the asset itself (as opposed to unknown segments of unknown assets in unknown regions). It goes without saying that this valuation should govern.

Unable to articulate any proper reason that the $11.6 million figure should not be accepted as market value, the Intervenors, nonetheless, continue to profess reliance on Dr. Silkman's flawed analysis, but serve only to further undercut it by their token defense of it. [CONFIDENTIAL MATERIAL DELETED.]

To begin with, rather than attempting to rehabilitate Dr. Silkman on this point, the Intervenors choose instead simply to ignore his abrupt reduction of his lit fiber valuation by approximately $23 million on the morning of his hearing. Dr. Silkman's

present $39 million dark fiber analysis, however, is no more sound. As Boston Edison has pointed out, it purports to reflect the rates for fiber in this area, but completely ignores the lease rates established by the Department for the dark fiber that Bell Atlantic must make available to telecommunications competitors. See BECo's Brief, at 55-58. To justify this glaring omission, the Intervenors attempt to distinguish the assets leased by Bell Atlantic from those leased by BecoCom, but they completely miss the point. Boston Edison is not saying that RCN could have or would have gone to Bell Atlantic and received the same deal it got from BecoCom. Rather, it makes the simple observation that any objective analysis of the market value of a dark fiber asset in the Boston area would have to incorporate the Bell Atlantic studies, as well as the corresponding interim agreement and rate proposals, as significant points of data. Indeed, given that Bell Atlantic is by far the largest lessor of fiber in the Massachusetts area, its rates would, by and large, set a relative ceiling on the rates other lessors could reasonably charge. A rate far in excess of the Bell Atlantic rates (i.e., Dr. Silkman's) would just not be realistic -- what customer would pay such a rate? Yet, as it turns out, not only did Dr. Silkman not include these studies in his analysis, he did not even know about them.(27)

Further, while the Intervenors attempt (unsuccessfully) to distinguish the details of the Bell Atlantic tariffs, the Intervenors themselves provide little to no information regarding the bases for Dr. Silkman's dark-fiber valuation. Dr. Silkman himself refused to identify the sources of his information or to supply any transaction data from the "market" upon which he relies. See BECo's Brief, at 58. While the Intervenors can quibble with the Bell Atlantic studies, there is absolutely no way to verify the information upon which Dr. Silkman based his analysis and its applicability to the situation here.(28) Given the error Dr. Silkman made on the lit fiber analysis and the dramatic difference between his numbers and those found in the Bell Atlantic studies, there is good reason to believe such verification is warranted.

The Intervenors also cannot credibly defend the unrealistic assumptions underlying Dr. Silkman's valuations. While they claim that a 100% occupancy assumption in the third year is reasonable, they can present no example of a carrier coming close to such a figure. Boston Edison, meanwhile, provided numerous examples to show that on average, such rates are much lower. Id. at 59, 61-62. Further, they make no attempt to rationalize his gross miscalculation of annual expenses, such as SG&A, O&M, and property taxes. Id. Nor do they try to respond to the myriad other problems with his lit fiber valuation (not the least of which was his underestimation of the cost of electronics), or address Boston Edison's showing that when these problems are corrected, this valuation drops to a more realistic range of $7 - $12 million. Id. at 62-63. The Intervenors also do not address Boston Edison's demonstration of the many ways in which the examples Dr. Silkman uses to "corroborate" his valuations are simply not appropriate. They similarly offer no justification for how Dr. Silkman can arrive at a value of $38.5 million for one lit fiber scenario when he values dark fiber at $39 million. Id. at 60 n.31. Finally, the Intervenors cannot explain why, if the prices cited by Dr. Silkman were accurate, Boston Edison could not find any buyers at prices even close to those levels.

[CONFIDENTIAL MATERIAL DELETED.(29) (30)]

The Attorney General's attempt to come up with a figure to corroborate Dr. Silkman's analysis is equally as misleading. [CONFIDENTIAL MATERIAL DELETED.]

As a final fall-back position, Cablevision shamelessly takes numbers that BecoCom proposed to RCN in negotiations and represents to the Department that these numbers, which reflected BecoCom's attempts to maximize the market value attached to the asset, can be taken as a measure of the asset's actual costs and market values. See Cablevision's Brief, at 61-64. With this argument, Cablevision, in free fall, shows it is simply grasping for any number higher than the true one.

[CONFIDENTIAL MATERIAL DELETED. (31) (32) (33)]

Accordingly, Cablevision's attempt to characterize the figures proposed to RCN in negotiation as measures of the actual cost or market value of the right to use the non-utility fiber optic network should be rejected. Like the other efforts by the Intervenors to displace the actual values for cost ($7 million) and market value ($11.6 million) ascribed to the asset, it is completely without merit.

D. Boston Edison Properly Aggregated the Principal Amount of the Guarantees Against the Commitments Embodied in the Parental Guarantee Agreements.

With the exception of a few fanciful hypotheticals that never came to pass, the Intervenors do not seriously contest that the practical effect of the Parental Guarantee Agreements with Williams and Unicom was to diminish Boston Edison's potential liability under the EnergyVision and Northwind guarantees to its pro rata share in each joint venture, namely $9.5 million as of December 31, 1997. See BECo's Brief, at 67. They do not challenge the legal authority and accounting standards that Boston Edison cites in support of its decision to reflect the effect that these Parental Guarantee Agreements had on its potential exposure under the guarantees. See id., at 67-72. Nor do they present any authority under § 17A that prohibits Boston Edison's valuation of the guarantees to reflect this right to contribution. Rather, in order to further inflate their investment calculation, they disregard the real- world effect of the Parental Guarantee Agreements and in the absence of precedent on the issue, attempt to seize upon the wording of Boston Edison's application without giving that wording its full effect. More specifically, the Intervenors stress that "the principal amount of all such indebtedness guaranteed" must be counted against the cap without acknowledging that amount must also be "aggregate[d]" against "the principal amount of all . . . such other commitments."(34) See Ex. BE-DSH-2 (BECo Application), at 1. By virtue of Boston Edison's commitments to Williams and Unicom embodied in the Parental Guarantee Agreements, Boston Edison incurred certain financial obligations (i.e., the pro rata share of the guarantees signed by its partner)(35) and also received certain financial benefits (i.e., the contribution by its partner of its pro rata share of the guarantees signed by Boston Edison). See BECo's Brief, at 65-67. Consistent with its application, Boston Edison aggregated its obligations and rights to contribution arising under the Parental Guarantee Agreements against the underlying guarantees themselves to properly value the guarantees.(36)

Given the interplay of the Parental Guarantee Agreements and the guarantees, it is no coincidence that the Parental Guarantees Agreements were in place before, or at least coincident with, Boston Edison's execution of the guarantees.(37) Indeed, it only makes sense: why would Boston Edison guarantee a joint venture unless it first had comfort that its partner could be counted on for its share of the potential liability? In short, Boston Edison always treated the Parental Guarantee Agreements as inextricably linked to the guarantees and aggregated the commitments going both ways to accurately reflect Boston Edison's potential exposure. Contrary to the Intervenor's reading of Boston Edison's petition, that petition not only allows this aggregation, it promises it.

Equally as important, in attempting to value the guarantees that Boston Edison entered into, the Intervenors have lost sight of the purpose behind the $45 million investment limit, namely to "maintain[] the stable financial condition of [the] utility and protect[] the Company's ratepayer from harms associated with adverse § 17A transactions," while at the same time, accommodating Boston Edison's "interest in having flexibility in a changing marketplace to meet the long-term objectives of its ratepayers and shareholders." See BETG Investment Order, at 17. In the absence of any express authority for valuing guarantees under § 17A, this purpose provides some guidance. Accordingly, any such valuation should ensure that it accurately measures the extent to which utility funds are truly at risk, but at the same time, should not be so conservative as to overstate the actual amount at risk and thereby unnecessarily compromise the flexibility that the utility sought in the first place. Boston Edison's acknowledgment of the real-world interplay of the Parental Guarantee

Agreements and the underlying guarantees struck just such a balance in that it conservatively reflected Boston Edison's potential liability so as to protect ratepayers and yet also gave the utility more flexibility than a valuation blind to this interplay would have. Given that a wildly extreme chain of events would have had to occur in order for Boston Edison to have been ultimately responsible for the full face value of the guarantees, the valuation suggested by the Intervenors, by comparison, is so divorced from reality that it would have unnecessarily restricted Boston Edison's flexibility and yet would not have provided, from a practical perspective, any more protection to ratepayers. Again, the fact that Boston Edison never had to pay any money under the guarantees only underscores the speculative nature of the Intervenors' argument on this point.

With respect to Boston Edison's Capital and Liquidity Support Agreement with BankBoston ("Support Agreement"), meanwhile, the Intervenors have failed to establish that it is a guarantee or other form of financial commitment(38) that should be counted against the cap. The express terms and practical construction of the agreement preclude such characterization and further make Boston Edison's performance under the agreement contingent upon prior Department approval. BECo's Brief, at 74-77. Thus, under the Support Agreement, Boston Edison would not have been obligated to pay even a penny unless the Department had first authorized it to do so and thereby reset the investment cap at a higher level. As a result, the Department should find that the Support Agreement is not a guarantee or other such financial commitment that would be counted against the investment cap. In addition, because Boston Edison properly aggregated the Parental Support Agreements and the underlying guarantees so that its pro rata share of any potential liability was reflected, it should find that Boston Edison's valuation of the guarantees at $9.5 million was completely appropriate and consistent with the BETG Investment Order.(39)

In sum, because, as of December 31, 1997, Boston Edison had made $25.2 million in cash contributions to BETG, had transferred the right to use its unregulated fiber optic network at a book value of $7 million, and had entered into guarantees and other financial commitments totaling $9.5 million in the aggregate, the Department should find that Boston Edison invested only $41.7 million in BETG and that it therefore complied with the terms of the BETG Investment Order.

II. THE INTERVENORS' ALLEGATIONS OF ANTI-COMPETITIVE PRACTICES ARE BEYOND THE SCOPE OF THIS PROCEEDING.

In their briefs, the Cable Intervenors continue to press their allegations of discriminatory access and preferential treatment (which have nothing to do with the BETG Investment Order) as if these issues were properly within the scope of this proceeding. In doing so, they choose to ignore the Department's order clarifying the scope of the proceeding. BETG Investigation, Interlocutory Order on Motion for Order on Burden of Proof, D.P.U. 97-95, at 6 (July 2, 1998) ("Burden of Proof Order"). In that order, the Department made it clear that it was interested solely in the issue of whether Boston Edison had complied with the BETG Investment Order, and that allegations of anti-competitive impact were relevant only to the extent that they resulted from actual noncompliance with that order.(40) Id. The Department could not have been more direct: "the scope of this proceeding need only focus on whether BECo has complied with D.P.U. 93-37." Id. (emphasis added). Indeed, the Department expressly limited Boston Edison's case to its compliance with the BETG Investment Order. Id. ("Accordingly, it is appropriate to require BECo to prepare its direct case on the issue of compliance with D.P.U. 93-37."). Where the Department has ordered Boston Edison to present its case on the issue of compliance with the BETG Investment Order, without regard to extraneous claims of anti-competitive practices, it would be inappropriate for the Department to decide these extraneous issues in this proceeding.(41) Given the Department's clear statements on this matter, the attempts by the Intervenors to shovel their anti-competitive claims into this proceeding should be rejected as beyond its scope.

Further, there is good reason why the Department chose to exclude the Cable Intervenors' allegations of anti-competitive practices. These same issues were

already raised by Cablevision and other NECTA members in the Pole Attachment Rate Proceeding.(42) There, the Department decided certain of these issues, but determined that it lacked jurisdiction to decide the others.(43) The Department has since commenced a rulemaking with the intent of invoking its jurisdiction over those issues (i.e., discriminatory access to poles, ducts, conduits, and rights-of-way); however, it does not yet have that jurisdiction.(44) Accordingly, when it clarified the scope of this proceeding, the Department no doubt recognized that to the extent it had jurisdiction over the Cable Intervenors' claims of anti-competitive practices, it had already decided those issues in the Pole Attachment Rate Proceeding. To the extent that it lacked jurisdiction over such claims in that proceeding, on the other hand, it still lacks jurisdiction pending the results of the Nondiscriminatory Access Rulemaking.(45)

In short, the Intervenors' claims of anti-competitive conduct are properly beyond the scope of this proceeding. Further, to the extent that they have not already been decided in the Pole Attachment Rate Proceeding, they are also beyond the jurisdiction of the Department. As a result, the Department should decline decision on these claims at this time.(46)

NECTA, in particular, devotes the bulk of its brief to matters beyond the scope of this proceeding. Although the Department should decline the invitation to examine these issues at this time, Boston Edison nonetheless takes a moment to point out a few of the liberties that NECTA has taken with the record that severely undercut the credibility of its intervention in general:

• NECTA, typically declining to pay attention to what has been said, asserts on brief that "Boston Edison anointed BecoCom the exclusive construction contract in the so-called `power' space of the poles. . . . In either case, only BecoCom or one of its contractors may perform the work," a limitation NECTA claims violates the Telecommunications Act. NECTA's Brief. at 53. Mr. Hahn's testimony, though, was -- repeatedly and consistently -- that the physical work is done by Boston Edison, either using in-house employees or the same contractors who construct power systems for Boston Edison, in either case under the direct supervision of Boston Edison, and that this policy is both of longstanding and applied equally to everyone. See, e.g. Ex. BE-RSH-1 (Hahn Direct) at 35:

RCN-BecoCom LLC can "access" BECO in two ways. It can sign an Aerial License Agreement with BECO, and have access to the communication space and build their own facilities, just as the cable operators do. It can also request that BecoCom construct facilities in the power space for RCN-BecoCom LLC to use. These facilities installed in the power spaces are constructed, owned, and maintained by BecoCom using BECO employees or by qualified contractors under the direct supervision of BECO. RCN-BecoCom LLC is not allowed to construct its own facilities in the power space.(47)

As Congress has explicitly ordained, "[n]otwithstanding paragraph (1) [which imposes the duty of non-discriminatory access], a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis . . . for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2), as amended by P.L. 104-104, Title VII, at 703, 110 Stat. 149 (Feb. 8, 1996). Thus, Boston Edison treats everyone the same, and it treats them in a way that Congress has (for eminently prudent reasons) approved of by statute.

• NECTA complains that, since Boston Edison uses BecoCom as its instrumentality for implementing use of the rights-of-way for commercial telecommunications development, the cable television companies are forced to "disclose" competitively sensitive information. The fact of the matter, though, is that the existence of BecoCom has nothing logically to do with this complaint. Had Boston Edison never formulated BecoCom, it would have (i) handled the question of access to the power space through

BECO-constructed systems itself, and (ii) held the investment in the Joint Venture itself. The "one brain" complaint would be unchanged. Indeed, the only solution to this catchy lament that could ever permit the cable operators to purchase BECO-provided services in secret would be if Boston Edison were enjoined from either conducting commercial telecommunications or owning an interest in anyone who does -- this, at bottom, is the real goal of the intervenors. However, it is an illegal goal. Beyond this, it may be observed that the location of any telecommunications facilities in Boston Edison-owned facilities is either a matter of public record (if the facilities are located in conduit in the City of Boston) or public inspection (if the facilities are erected on poles exposed for all the world to see). There is little that is confidential about that which all the world can learn and anyone who is interested no doubt already has.

• NECTA makes the extraordinary request that this department to take "administrative notice" of the fact that CLECs (who are not parties to this proceeding) "are being delayed interminably in obtaining access to Bell Atlantic conduit and denied the right to construct significant conduit or use city-owned duct space pending the City's consideration of a new fee policy, [while] BecoCom and the Joint Venture are being allowed to build fiber within existing electric conduit throughout all of Boston." NECTA's Brief, at 50. We hope the Department does not take official notice (or any other kind) of such false statements.(48) The Joint Venture is building nothing in Boston Edison conduit in the City of Boston, and the cable television companies are as free to avail themselves of the capacity of that conduit on the same basis (i.e., Boston Edison-constructed systems) as anyone else, but have not done so! The absence from this record of any evidence offered by the cable television companies of requests for such access that has been denied is not a matter of trial oversight, and snide insinuations that such access is not available border on dissimulation.

• Astoundingly, NECTA contends on brief that "Cable operators . . . attempting to create 'long haul' fiber runs, for example, to create fiber rights or to interconnect headends, are vitally interested in attaching to transmission towers." NECTA's Brief, at 52. One notes that no citation is offered for this assertion, which in fact carefully eschews any assertion that there is any present interest in Massachusetts by any of the cable television companies who are party to this proceeding. Indeed, if the assertion were true in fact, how does NECTA explain the fact that, when the non-utility backbone system was offered to the NECTA members, there were no takers? Once again, the Cable Intervenors don't want what the Joint Venture (and others) have; they want the Joint Venture to be denied what the entrenched operators have spurned. Such a gambit may champion a number of things, but fair competition is not one of them.

• The amount of ink devoted by NECTA and Cablevision to the issue of the enforceability of the so-called "exclusive" provisions of the BecoCom-Joint Venture IRU is extraordinary given that, in this case in which virtually everything has been contested, there is no disagreement on this point! As Mr. Hahn has testified repeatedly, without contradiction and without a shred of contrary evidence, Boston Edison and BecoCom recognize an obligation of non-discriminatory access to the rights-of-way to any genuine potential competitor in the telecommunications field who is desirous of such access and willing to pay for it.(49) The record is also clear that, while there have been other customers than the Joint Venture, conspicuously not among them are any of the existing cable television companies.

• NECTA claims that "there are serious questions of whether BECO retains some or all of its legal obligations under G.L. c. 166, § 25A and 220 C.M.R. 45.00 and whether BecoCom is in any respect subject to those statutes and rules." NECTA's Brief, at 46. It isn't clear whence NECTA perceives these to be "serious questions," since Boston Edison is quite content to acknowledge that it remains obliged to fulfill its obligations of non-discriminatory access (as it really exists), and that BecoCom is merely the means by which it does so. Nor is there any reason to lose sleep about whether BecoCom is subject to the jurisdiction of the cited statutes and rules, for the instant that Boston Edison determines (or is authoritatively informed) that BecoCom has to do something differently in order the Boston Edison's obligations be

satisfactorily discharged, it will so instruct its wholly-owned subsidiary. Once again, NECTA is fixated on non-issues.(50)

• For some unexplained reason, NECTA's brief in mid-course dismounts advocacy of NECTA's interests and assumes the role of the spokesman for "competing local exchange carriers," CLECs. NECTA's Brief, at 50-51. No CLEC intervened in this proceeding and no CLEC submitted any claims in this proceeding and no CLEC submitted to discovery in this proceeding. For this reason, the Department should abjure the treacherous adventure of exploring territory not explored on the record or adjudicating the rights of persons not a party to the proceeding.

That said, there is nothing of merit to NECTA's concerns about non-parties' rights. Boston Edison denies physical access to the conduits to everyone, for the plain and obvious reason that these conduits are occupied by very high voltage electricity that poses a life-hazard to those who work in close proximity to it.(51) The fact that Boston Edison, which necessarily works in the conduits every day, is prepared to take unused space and make it available to anyone who wants it by the device of constructing systems that those others may use does not mean that the prudence of excluding others from physical access must be surrendered. There is no earthly reason why, if a CLEC wants the same arrangement that is available to the Joint Venture, and has been offered to everyone, it may not have it. As NECTA seems to acknowledge, so long as the paperwork is done properly, there is nothing in physical access or "ownership" that is essential to the practicality of such an arrangement, as the Joint Venture's use of it demonstrates.(52)

• NECTA claims that Mr. Hahn "admitted" that the 30-inch "rule" of the NESC does not permit communications wire to be installed by the electric company within 30 inches of "open wire secondary." Mr. Hahn's testimony was exactly the opposite. Ex. BE-RSH-26 (Hahn Rebuttal) at 37-39:

Q. Is there a provision in the NESC for spatial separation of electric wires and communication wires in that circumstance [i.e., constructed in the power space by the electric utility], and, if so, what is it?

A. Yes; 16 inches or 0 inches, depending on certain technical parameters.

Q. Putting aside this error on Mr. Glist's part, he says that the 30-inch rule to which Boston Edison is adhering does not apply where the electric secondary is "open wire secondary;" is he correct about that?

A. That's a trick question. It is true that the 30-inch exception to the 40-inch rule does not apply if the next higher wire is open-wire secondary. However, the 30-inch rule is an exception to the 40-inch rule, and neither applies where the communication plant is installed in power space by power workers. Second, Boston Edison has virtually no open wire secondary, and what little is left is in the process of being replaced with non-open-wire secondary (which we call "Triplex" cable).

In essence, NECTA seeks rather shamelessly to capitalize on the "trick question." Finally, NECTA seems to ignore the fact that the drawing to which it refers does not depict open wire secondary, according to the person who prepared it. Id. at 39 n.12.

• NECTA, apparently observing that it cannot find any citation in the NESC Code for the notion that there is a 40-inch "no man's land" in which nothing may be erected, defaults to the so-called NESC "Handbook," which NECTA claims is "a compilation" "of official interpretations of the NESC." NECTA's Brief, at 62. Shame on NECTA; the "Handbook" sternly directs at the very outset of the "Handbook" that "No statement herein should be considered to be an official requirement or an official interpretation of the NESC." Handbook, "Introduction" (emphases added).

In sum, the Department should decline to decide the Intervenors' allegations of anti-competitive practices, but the meritless nature of these allegations should inform the Department's view of the rest of their claims in their proceeding.

III. NO REMEDIES ARE WARRANTED.

In light of the fact that Boston Edison has fully complied with the BETG Investment Order, Boston Edison reiterates that there is no need for the Department to impose on it any remedies.

CONCLUSION

Accordingly, for the reasons set forth above, Boston Edison respectfully requests that the Department find that Boston Edison complied with the terms of the BETG Investment Order and deny the Intervenors' requests for remedies.

Respectfully submitted,

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1. Given that Boston Edison sought Department approval of a vehicle to permit it to make further investments in unregulated activities before (in many cases, long before) the bulk of the investments challenged by Cablevision and NECTA, their insinuation that Boston Edison opted to violate the $45 million cap rather than seek Department approval is ludicrous and should be dismissed. In a similar vein, the Department should also dismiss their efforts to recharacterize Boston Edison internal memos which serve only to emphasize Boston Edison's commitment to compliance with all legal obligations.

2. The Attorney General's feeble attempt to address this argument is simply nonsense. AG's Brief, at 8-9. The argument that it was the activities within each of the areas of DSM, electric generation services and electric vehicles that were "unformed" and "essentially potential" is belied by the record of that proceeding and the rules of English andshould be considered to be beneath the line of acceptable advocacy.

3. These words are sufficient, in and of themselves, to distinguish this order from the orders cited by the Intervenors for the proposition that the Department generally rejects requests for approval of investments in business activities unless the activities are specified in detail. See Cablevision's Brief, at 28 (citing cases); NECTA's Brief, at 16 (citing cases). More importantly, however, these words show that the Department was well aware that what is was doing here was different than what it had done in prior decisions, namely allowing Boston Edison to engage in unregulated activities related to its core business without knowing exactly what those activities would be.

4. For its part, Cablevision claims that "[o]ver and over, BECo officers testifying before the Department in 93-37 reaffirmed that BETG's activities would be focused on DSM services, electric vehicles and electric generation." Cablevision Brief, at 24 (emphasis added). Yet, it offers only one example to support this claim -- and that example completely contradicts its position:

Q: [Ms. Kwan] Could you please list for the record in the greatest detail possible the types of businesses that the technology group contemplates entering into in the future?

A: [Mr. May] In our testimony we've talked about the three general areas of interest being the demand-side management services business, the electric transportation business, and generation services business.

Q: Are there any others?

A: I think those are the three we talked about.

Q: So the answer is no?

A: No. Those are the general categories we've talked about.

Ex. BE-DSH-8 (May Transcript), at 66 (emphasis added). The express text shows that Mr. May disagreed when the Assistant Attorney General attempted to characterize his answer as "no" to the question, "Are there any other [businesses that BETG contemplates entering into?]" In other words, he disagreed with the proposition that there were no other businesses that Boston Edison might enter into and stated that DSM, electric transportation, and generation services were simply "the general categories we've talked about." In typical fashion, Cablevision has taken the clear meaning of the words and attempted to make them mean something completely different. In this case, they take Mr. May's answer "no" and want the Department to believe it means "yes."

5. The question followed two other legal questions that were equally impermissible. See Ex. BE-DSH-8 (May Transcript), at 65 ("Is it true that the technology group cannot legally enter into any business other than those listed in its articles of incorporation?"; "The technology group would have to change its articles of

incorporation in order to enter into any businesses that are not listed in the articles of incorporation, is that true?").

6. In each of the cases cited by Boston Edison, the testimony that was stricken as pertaining to a question of law was or would have been under oath. See BECo's Brief, at 22 (citing cases).

7. Cablevision also tortures the doctrine of judicial estoppel in an attempt to make it apply here. See Cablevision Brief, at 27-28 & n. 8. The doctrine, however, applies only to positions taken by parties (e.g., through counsel, in pleadings, or papers), not to statements by mere witnesses. See Patriots Cinemas, Inc. v. General Cinemas, Inc., 834 F.2d 208, 212 (1st Cir. 1987); Smith v. Boston Elevated Railway Co., 184 F. 387, 389 (1st Cir. 1911). Further, even if Mr. May were Boston Edison (which he is not), the doctrine also only applies in cases of intentional self-contradiction. Patriot Cinemas, 834 F.2d at 212. Moreover, mistaken assertions are not binding on a party. See Patriot Cinemas, 834 F.2d at 213 (citing Smith, 184 F.2d at 389). For that matter, neither are statements on questions of law. See, e.g., Wasserman v. Tonelli, 178 N.E.2d 477, 479 (Mass. 1961)(citing cases). Finally, the doctrine also applies only when the position taken by the party was adopted by the court in the prior proceeding. Fay v. Federal National Mortgage Ass'n, 647 N.E.2d 422, 426 (Mass. 1995). A position taken in a proceeding that is resolved by settlement, therefore, cannot bind a party. East Cambridge Savings Bank v. Wheeler, 664 N.E.2d 446, 448 (Mass. 1996). In sum, Boston Edison has never taken or sanctioned the position that Department approval was necessary in order to amend its articles of incorporation. Rather, that incorrect statement came from a lay witness in response to an improper legal question. The statement was also never adopted by the Department. Cablevision's attempt to bind Boston Edison to that incorrect statement of law should therefore be rejected.

8. For the Attorney General, the chief law officer of the Commonwealth, to have relied on a lay person's view of the law is an even more ludicrous proposition.

9. Curiously, as part of its "stealth" motif, Cablevision, in the section of its brief on this issue, claims that "BECo did not even notify the Department of its [telecommunications] activity, much less seek its approval." See Cablevision's Brief, at 25. Yet, nothing could be further from the truth. Boston Edison fully explained to the Department, prior to executing the final Joint Venture documents, its intention to pursue telecommunication activities through BETG. See BECo's Brief, at 19. At no time during this presentation did the Department express any concern over the Boston Edison's authority to pursue those activities. Id.

10. Cablevision's citations to Boston Edison's brief to the Supreme Judicial Court (which is, by the way, not part of the record in this proceeding) in the appeal of the Department's Holding Company Order are completely irrelevant. See Cablevision Brief, at 22 n.6. The fact that the telecommunications and energy markets are unrelated for the purposes of regulating competition does not, in any way, detract from the many other ways in which they are related.

11. See Ex. CSC-MFF-11 (Updated Summary of Investments); Ex. BE-MFF-36 (Updated Summary of Investments as of 7/31/98); 15 Tr. 2551-52 (Farrell Cross).

12. See Ex. CSC-GCH-8 (Revised Investment Table); Ex. CSC-GCH-7 (Revisions to Testimony); Ex. CSC-GCH-1 (Harpster Direct), at 6.

13. See, e.g., Ex. CSC-MFF-11 (Updated Summary of Investments); Ex. CSC-RR-3 (Exchange Agreement Valuations), at 8, 14, 25; Ex. BE-RSH-7 (JV Agreements: Operating Agreement), at 48.

14. See, e.g., Ex. CSC-MFF-11 (Updated Summary of Investments); Ex. BE-MFF-36 (Updated Summary of Investments as of 7/31/98); 15 Tr. 2551-52 (Farrell Cross).

15. See, e.g., Ex. CSC-MFF-11 (Updated Summary of Investments); Ex. CSC-RR-3 (Exchange Agreement Valuations), at 8; Ex. BE-RSH-7 (JV Agreements: Operating

Agreement), at 48.

16. [CONFIDENTIAL MATERIAL DELETED.]

17. Of course, it is possible that, like Mr. Hahn, Cablevision's counsel had himself simply made an honest mistake and innocently asked about Boston Edison, when he really meant to say BecoCom or BETG. Such a slip would have been understandable given that there are no doubt numerous instances in the record where counsel or witnesses have slipped and said one while meaning the other. However, the fact that Cablevision now attempts to capitalize on this exchange in order to inflate the cash contribution total -- indeed, relying on it as its sole evidence that the total cash invested should be higher -- renders that possibility unlikely. In any event, even if the question itself had not been intentionally misleading when asked, the attempt to portray that exchange as credible evidence surely is.

18. The fact that this error was unfortunately carried over into Boston Edison's 1996 FERC Form 1 does nothing to change this analysis. Ex. CSC-MFF-3 (1996 FERC Form 1). The practical reality is that Boston Edison would have assumed its books to be correct and would have accurately reflected those books in its filing. Boston Edison's Controller, Robert Weafer, certified that to the best of his knowledge, the filing accurately reflected the company's business and affairs. See Ex. CSC-MFF-3 (1996 FERC Form 1), at 1. Notwithstanding their hyperbole, the Intervenors can offer no evidence that he had reason to believe it did not. Further, although they contend that Boston Edison should have scrutinized this entry (which is only one item out of hundreds in the filing) and caught the error, the relative immateriality of the error renders this contention unrealistic ($5.3 million or .1% of $4.4 billion in total utility plant). See Ex. CSC-MFF-3 (1996 FERC Form 1) at 1; Ex. CSC-RSH-24 (Hahn Memo to Farrell dated 9/17/97). Finally, it should be noted that once it realized its error, Boston Edison promptly corrected it in its next FERC Form 1.

19. Indeed, Cablevision so heavily relies on this quote and its reading of it that it recites the quote (each time with editorial emphasis) no fewer than three times in its brief, lest the Department miss its drift.

20. None of the cases cited by the Intervenors stand for the proposition that even assets mistaken included in a utility accounts must be afforded utility treatment. See, e.g., Boston Edison Co., D.T.E. 97-63 at 42 (asset had been, at some point, used and useful); Assabet Water Co., D.P.U. 95-92, at 29 (1996) (same); New England Telephone and Telegraph, D.P.U. 86-17 (1986), at 13-15 (same).

21. See, e.g., Massachusetts Electric Company, D.P.U. 95-40, at 62-63 ("[N]either federal accounting requirements nor general accounting standards preempt the Department's treatment of accounting issues for ratemaking purposes."); Massachusetts-American Water Company, D.P.U. 95-118, at 107 (same); Massachusetts-American Water Company, D.P.U. 92-239-A/92-240-A, at 4 (Dec. 14, 1993) (same).

22. See, e.g., McNamara Water Service, D.P.U. 91-196, at 2 (March 27, 1992) (utility may include capital asset in the rate base only during "the time in which it is used and useful in the provision of utility service to customers") (emphasis added); Pricing and Ratemaking Treatment for New Electric Generating Facilities Which are Not Qualifying Facilities, D.P.U. 86-36-A, at 7-8 (April 7, 1987) (rate base treatment allowed only when asset is "used and useful for the provision of service to customers") (emphasis added); Western Massachusetts Electric Company, D.P.U. 85-270, at 23 (June 30, 1986)("when a utility makes a capital expenditure . . . it is permitted to begin collecting [associated] costs from ratepayers . . . and to earn a return on the investment by including it in rate base only when the facility becomes used and useful for the provision of service to ratepayers") (emphasis added).

23. Notably absent from Cablevision's brief on this issue is any reference to the New Conduit Policy of The City of Boston's Public Improvement Commission. During the hearings, Cablevision's counsel defended her lengthy cross-examination on this issue

on the ground that it was relevant to the utility nature of the network, yet it appears nowhere in Cablevision's brief. Cablevision did use the testimony, however, only days after it was elicited, as the basis of a motion for preliminary injunction brought in federal district court.

24. The Intervenors do not contest Boston Edison's ability to act as utility service provider and as a non-utility enterprise. See Cablevision's Brief, at 47-48 ("no party is arguing that a utility cannot operate a below-the-line, non-utility business, with the profits going to shareholders.").

25. In light of statements like this, Cablevision's contention that "BECo cites no contemporaneous documentation to support [its] claim" that "it decided to accelerate the completion of the fiber optic backbone as an unregulated activity" is foolish. See Cablevision Brief, at 46.

26. NECTA and the Attorney General claim in conclusive fashion that the figure was not the product of arms-length negotiation, yet they provide no support for this conclusion and do not address the considerable evidence that Boston Edison has produced to show otherwise. NECTA Brief, at 31-32; AG's Brief, at 22. Cablevision, meanwhile, does not even mention it.

27. NECTA's claim that the Bell Atlantic numbers could be used to support Dr. Silkman's results is simply wrong. The $65.38 per mile charge is a per pair mile charge, and must be divided by two to get the per fiber cost. Further, because the route/air mile multiplier (1.42) is not applicable to the BecoCom fiber, it must be backed out. When these modifications are made, one gets the same $23.02 per mile figure found in John Antonuk's analysis (65.38 ÷ 2 ÷ 1.42 = 23.02). See Ex. BE-JEA-1 (Antonuk Rebuttal), at 83.

28. Dr. Silkman could offer little more information on his lit fiber model, other than to say that it was based on prices supposedly taken from a New York City tariff for DS3 and OC3 transport.

29. [CONFIDENTIAL MATERIAL DELETED.]

30. [CONFIDENTIAL MATERIAL DELETED.]

31. [CONFIDENTIAL MATERIAL DELETED.]

32. [CONFIDENTIAL MATERIAL DELETED.]

33. [CONFIDENTIAL MATERIAL DELETED.]

34. Of course, Cablevision ignores this language as applied to the Parental Guarantee Agreements, which constitute clear commitments, but highlights it in its discussion of the Capital and Liquidity Support Agreement, which places no obligation upon Boston Edison to make payments unless and until it has received Department approval.

35. See BECO's Brief, at 67 n. 38.

36. NECTA's assertion that Boston Edison discounted the guarantees based on the degree to which payment in the future would be necessary is ridiculous. See NECTA's Brief, at 34. If it had, it would have valued them close to zero as supported by the fact that Boston Edison never had to pay a penny on these guarantees.

37. Compare Ex. BE-MFF-6 (Northwind Parental Guarantee Agreement) (dated 1/1/96) with Ex. BE-MFF-4 (Northwind Guaranty) (dated 7/2/97) and compare Ex. BE-MFF-7 (EnergyVision Parental Guarantee Agreement) (dated 4/30/97) with Ex. BE-MFF-8 (EnergyVision Guarantees)(dated 4/30/97 and later).

38. Cablevision's new argument -- that the Support Agreement could also be considered a financial commitment -- serves only to highlight the extent to which

even Cablevision acknowledges the weakness of its consistent characterization of the agreement as a guarantee. See Ex. CSC-GCH-1(Harpster Direct); 18 Tr. 2946 (Harpster Cross) (stating Support Agreement is a guarantee). Sadly, its characterization of the agreement as a commitment is just as weak given that, regardless of what one calls the agreement, Boston Edison is not committed to pay anything under the agreement unless and until the Department allows it to do so. Since Departmental approval was required, any such approval would have, by definition, superceded the $45 million limit. If approval were to have been sought and not granted, on the other hand, the Support Agreement could have never become a guarantee, by its terms.

39. The Department should also reject the Intervenors' half-hearted efforts to convert Boston Edison's service invoices to BETG into investments. First of all, this issue, like the other irrelevant service issues mentioned in passing by the Intervenors, has nothing to do with Boston Edison's compliance with the $45 million investment cap. Rather, these issues are rightly governed by and have long since been resolved under the Management Services Agreement. Further, the Intervenors neglect to mention that Boston Edison consistently netted these invoices against the tax benefits owed to BETG, which, as of December 31, 1997, were over $1 million more than the invoice amounts owed to Boston Edison. Finally, even if one were not to consider this net effect, the invoices were still nothing more than accounts receivable and did not become loans just because they were not paid on a timely basis. Simply put, the fact that a third party is late in paying its bills to Boston Edison does not make it an investor in that third party. If that were the case, utilities would have to apply for § 17A approval every time they performed billable services for third parties and provided electricity to customers, lest the third parties or customers unilaterally turn their invoices into loans by their late payment. Not surprisingly, the Intervenors can cite no legal support for their proposition. The fact that Cablevision and the Attorney General do not even include it among the other inflated figures in their final calculations of investments says much about how weak they know this argument to be.

40. As discussed above, the Intervenors have failed to show that Boston Edison has violated the BETG Investment Order, much less that any cross-subsidization or negative impact on competition has occurred as a direct result of this violation.

41. NECTA appropriately anticipates that the issues it raises are beyond the scope of the proceeding, but fails to justify any expansion of scope at this late date.

42. See Boston Edison Company, Pole Attachment Rate Proceeding, Final Order, DPU/DTE 97-82, at 46-51 (Apr. 15, 1998); Boston Edison Company, Pole Attachment Rate Proceeding, Order on Scope of Proceeding, Order D.P.U./D.T.E. 97-82, at 1, 7-8 (Feb. 11, 1998).

43. Pole Attachment Rate Proceeding, Final Order, DPU/DTE 97-82, at 46-51; Pole Attachment Rate Proceeding, Order on Scope of Proceeding, D.P.U./D.T.E. 97-82, at 7-8.

44. See Nondiscriminatory Access Rulemaking, D.T.E. 98-36, Opening Order, at 1-2 (Dec. 9, 1998); Pole Attachment Rate Proceeding, Final Order, D.P.U./D.T.E. 97-82, at 6; accord Cablevision v. PIC, --- F. Supp.2d at ----, 1999 WL 44329, at *11 n.2.

45. During its cross-examination of NECTA witness Paul Glist, who sponsored testimony entirely on allegedly anti-competitive practices, the Department itself appeared to express skepticism with notion that the Intervenor's anti-competitive claims should be decided in this proceeding, asking "What issues would you say that the Department did not address in 97-82 and will not be able to address in the rulemaking and therefore should address in this proceeding?" See 19 Tr. 3096 (Glist Cross). In his evasive response, meanwhile, Mr. Glist was unable to identify even a single issue raised by his testimony that should be addressed in this proceeding. Id. at 3096-97. Rather, in telling fashion, the only justification he could provide for his presence in this proceeding (and implicitly, for NECTA's) was that the proceeding provided another opportunity to seek from Boston Edison the extraordinary

remedies (i.e., evacuation of the power space) that the cable operators have always sought from Boston Edison. See id. at 3096-97.

46. Although the Intervenors' anti-competitive claims are beyond the scope of the instant proceeding, Boston Edison believes that the claims could be expeditiously resolved in a separate proceeding, without further evidentiary hearings, once the Department has concluded its Nondiscriminatory Access Rulemaking and secured jurisdiction over those claims. In that separate proceeding, the Department could, if it so chose, simply incorporate and rely upon the evidentiary record developed in the present proceeding and in the Pole Attachment Rate Proceeding, where the cable operators have twice already asserted these claims and presented what little evidence they have to support them. After inviting the interested parties to submit briefs focused solely on these issues, the Department would then be in a position to decide them without having to conduct further hearings on the matter.

47. See also id. at 45: "[F]or the technical reasons I have set forth above, access to the `power space' is different from access to the `communications space' because only Boston Edison, using workers having Edison-approved training and supervision, and operating to Edison construction and safety standards, will perform work in that area, whether to build or maintain electric facilities, regulated communications facilities, non-regulated communications facilities, or anything else."

See also 4 Tr. 725 (Hahn Cross): "what we've consistently told everybody, including the joint venture and all these people we've spoken to, that we don't want third parties working in that manhole system because we're concerned that, A, they might get hurt, they're not used to that environment; and B, it could possibly have a negative impact on the electric delivery system. So we have said that we'll build it and let them use it. I'm not aware of anyone that's really had a -- among the carriers' carrier group that's had a complaint about that. They get what they need, which is connectivity between Point A to Point B."

48. See G. L. (1996 ed.) ch. 30A, § 11(5); Liacos et al., Handbook of Evidence (6th ed. 1994) at 39: "Matters are judicially noticed only when they are indisputably true."

49. It may also be observed that RCN, the other member of the Joint Venture, is on record to the same effect: "[The Telecommunications Act, 47 U.S.C.] § 224 generally requires an electric utility to offer nondiscriminatory access to its conduits to cable television systems and telecommunications carriers. . . . Boston Edison is clearly a utility that owns conduits and rights of way that are used for `wire communications' and therefore Boston Edison must provide Cablevision with `nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by' Boston Edison." "Brief of Defendants-Appellees RCN-BecoCom, LLC, RCN Telecom Services of Massachusetts, Inc. and RCN Corporation," filed April 27, 1999, in Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston et al., 1st Cir. No. 99-1222. (This Department may, if it wishes, take official notice of the records of another court in a related proceeding. Brookline v. Goldstein, 447 N.E.2d 641, 644 n.5 (Mass. 1983).)

50. NECTA seems to have a curious notion about he role of witnesses and evidence in an adjudicatory proceeding. First, it called a lawyer to the witness stand to offer "testimony" on what the law is. Then it flogs Boston Edison for not committing the same fundamental error of evidence. NECTA's Brief, at 46-47. Perhaps NECTA advocates the resurrection of trial by compurgation?

51. See 5 Tr. 866-67 (Hahn Cross):

"The conduit systems in downtown Boston, the electrical conduit systems, are confined, heavily congested work spaces. It's not a particularly clean environment. In many cases they fill up with everything from ocean water to sewerage to people that change their oil by opening the petcock right over the manhole. In order to go into them, you have to sometimes pump them dry, you have to ventilate them to get out the methane or gas that leaks in, you have to prepare a work surface on a wooden

platform so you can stand on.

"In the manholes there are typically lead-covered cables at anywhere from 240 volts to 14,000 volts. You'll also have transformers, switches, capacitor banks, the same kind of equipment. Because it's a confined work space, the safety rules are a little more strict, a little more stringent, than what you'll find on the pole, because you have to abide by OSHA confined work-space standards.

"Q. When you say confined work, how many feet are you talking about, recognizing it may depend on the situation?

"A. Well, some of the old ones are made out of red bricks, and they could be as small as 3 by 4, 3 foot by 4 foot by 6 foot deep. Some of the more modern ones might be as big as 6 foot by 8 foot. But those are the ones that likely have equipment in them. So when you're in there, most of the time you have the ability to rub your body up against the lead sheath of an energized cable. Most times when you go into the manhole, after you've pumped it dry, ventilated it, put the wooden platform in, a lot of times you're required to put fire blankets. In case one of those cables decides to let go, it offers some protection against a manhole explosion. Complete protection is probably not possible.

"But it takes a special person, in my view, to work down there on a day-to-day basis."

52. NECTA seems to be saying that one needs "ownership" in order to achieve "depreciability" under the Internal Revenue Code, but then immediately seems to recognize (correctly) that a properly-drawn IRU may achieve the same thing. NECTA's point, therefore, is fatally obscure.

Note at the same time that NECTA apparently assumes, and asserts, that one seeking access to the power space through Boston Edison (and BecoCom) is limited to a "leaseback" arrangement. Significantly, NECTA cites no record authority for this assertion of fact, which is contrary to the offer that was made to the cable television companies prior to the discovery of RCN, and which is certain not based on any request for an IRU-type construction that has ever been denied. Once again, the Cable Intervenors are really not interested in any of the things they erroneously claim to have been denied.