KEEGAN, WERLIN & PABIAN, LLP

ATTORNEYS AT LAW
21 CUSTOM HOUSE STREET
BOSTON, MASSACHUSETTS 02110-3525

(617) 951-1400

TELECOPIERS:
(617) 951-1354
(617) 951-0586

February 13, 2002

**VIA COURIER**

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, Floor 2
Boston, MA 02110

**Re: NSTAR Electric Company D.T.E 01-71A**

Dear Secretary Cottrell:

Enclosed herewith for filing is the Reply Brief of Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, d/b/a NSTAR Electric Company, in the above referenced matter.

If there are any questions regarding this submittal please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

Robert J. Keegan

Enclosures

cc: Andrew Kaplan, Hearing Officer
Wilner Borgella, Jr. Esq.
Charles Harak, Esq.
Mattew T. Morais, Esq.

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| Boston Edison Company,<br>Commonwealth Electric Company<br>Cambridge Electric Light Company d/b/a<br>NSTAR Electric Company | )<br>)<br>)<br>)<br>)<br>) | D.T.E. 01-65<br>D.T.E. 01-71A |

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing document upon the Department of Telecommunications and Energy, and counsel for all parties, by hand or first class mail, in accordance with the requirements of 220 C.M.R. 1.05 (the Department's rules of Practice and Procedure).

Cheryl M. Kimball, Esq.
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, MA 02110
(617) 951-1400

Dated: February 13, 2002

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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# REPLY BRIEF OF BOSTON EDISON COMPANY, COMMONWEALTH ELECTRIC COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY d/b/a NSTAR ELECTRIC COMPANY

Submitted by:

Robert J. Keegan, Esq.
Cheryl M. Kimball, Esq.
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, MA 02110
(617) 951-1400

William S. Stowe, Esq.
Assistant General Counsel
NSTAR Electric Company
800 Boylston Street
Boston, MA 02199
(617) 424-2544

Dated: February 13, 2002

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**COMMONWEALTH OF MASSACHUSETTS**

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# REPLY BRIEF OF BOSTON EDISON COMPANY, COMMONWEALTH ELECTRIC COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY d/b/a NSTAR ELECTRIC COMPANY

## I. INTRODUCTION

Boston Edison Company ("Boston Edison"), Commonwealth Electric Company ("Commonwealth") and Cambridge Electric Light Company ("Cambridge") d/b/a NSTAR Electric (collectively, "NSTAR Electric" or the "Company"), hereby submit this Reply Brief in response to the Initial Brief of the Attorney General (the "Attorney General") and the Division of Energy Resources (the "DOER")(the "AG/DOER Initial Brief"), which was filed with the Department of Telecommunications and Energy (the "Department") in NSTAR Electric, D.T.E. 01-71A on February 5, 2002.[1]

In this proceeding, the Attorney General and DOER propose, inter alia, that the Department disregard the service-quality standards it has established and without reference to any standards, guidelines or regulations assess a service-quality penalty of $22.5 million

[1] This brief also addresses the comments of the Attorney General and DOER (AG/DOER Comments), which were filed on January 30, 2002, in NSTAR Electric, D.T.E. 01-65. The Department has taken administrative notice in this docket of the Company's self-assessment reports (the "Reliability Report"), which were filed in D.T.E. 01-65. Procedural Order, D.T.E. 01-71A at 2, fn.3 (December 6, 2001). Thus, the Company will address the claims set forth in the AG/DOER Initial Brief and the AG/DOER Comments on a collective basis for the purposes of this Reply Brief. References to "this proceeding" made herein will refer to D.T.E. 01-71A, unless otherwise noted.

(AG/DOER Initial Brief at 5-6, AG/DOER Comments at 2, 6-7). The specific claims of the Attorney General and DOER in D.T.E. 01-71 and D.T.E. 01-65 are: (1) that there is a lack of evidence to support the Company's service-quality benchmarks (AG/DOER Initial Brief at 9); (2) that the Department should penalize the Company by assessing a penalty equal to 2 percent of the Company's transmission and distribution service revenues, or $22.5 million, for the two reporting periods of September 1, 1999 through August 31, 2000, and September 1, 2000 through August 31, 2001 (id. at 5-6; AG/DOER Comments at 6-7); (3) that the Company's direct payments to customers should not be included in a penalty assessment by the Department (AG/DOER Initial Comments at 6); (4) that NSTAR Electric's filing in D.T.E. 01-65 contains "admissions of imprudence" with regard to the operation and maintenance of the Company's distribution system (AG/DOER Comments at 3); and (5) that the Department should order the Company to conduct an independent audit of the Company's post-merger management and service-quality data (id. at 7; AG/DOER Initial Brief at 10).

As discussed below, there is no basis for the Department's acceptance of any of the various claims and requests for relief of the Attorney General and DOER. First, the Company has demonstrated that its performance benchmarks and penalties were calculated correctly, and there is no evidence in the record that contradicts or contests the accuracy and completeness of the Company's service-quality data or the calculations of penalties made therefrom in accordance with the guidelines established in Service Quality Standards for Electric and Gas Distribution Companies, D.T.E. 99-84 (2001) ("D.T.E. 99-84"). Second, the Department has no authority to assess penalties that are not in accordance with the requirements of G.L. c. 164, § 1E, which mandates that standards be established by the Department against which performance would be measured. Third, there is no basis in the record for this proceeding to

support a finding of management imprudence, nor does the record "contain admissions of imprudence" by the Company. Lastly, there is no reasonable basis for the Department to order a management audit or an independent audit of the Company's service-quality data, since the record already reflects the results of several independent audits of the Company's operations and reliability data.

Set forth below is the Company's response to the various claims and requests for relief of the Attorney General and DOER. Silence on any issue should not be construed as agreement with any statement made by the Attorney General or DOER. For the reasons set forth herein and in the Company's Initial Brief, the Department should affirm the Company's service-quality calculations and assess a total penalty of $3,249,499 ($3,207,141 for Boston Edison and $42,358 for Commonwealth), less direct payments to customers on the Boston Edison system of $725,633, for a total credit to customers of $2,523,866 for performance in the reporting period of September 1, 2000 through August 31, 2001.

## II. THE COMPANY'S SERVICE-QUALITY PENALTY CALCULATIONS ARE ACCURATE, COMPLETE AND IN ACCORDANCE WITH THE D.T.E. 99-84 GUIDELINES

The Attorney General and DOER contend that the Company has not met its burden to demonstrate that it has properly calculated its service-quality benchmarks and applicable penalties (AG/DOER Initial Brief at 9). In support of their argument, the Attorney General and DOER assert that (a) the Company does not have records that it is "required to retain," and (b) the Company has not provided information and records requested by the Attorney General (id.). Both claims are unfounded. The Company has provided the complete and accurate data necessary to calculate service-quality penalties in accordance with the D.T.E. 99-84 guidelines. The Attorney General and DOER fail to provide any citation or authority under which the

Company would be required to retain the data that they seek. In fact, the data alleged by the Attorney General and the DOER to be "lacking" were either: (1) not retained by the Company historically because the Department has only recently imposed the requirement to report such data; or (2) not provided because the information requested is outside of the scope of this proceeding, as defined by the Department.

With respect to records that are "required" to be retained, the Attorney General and the DOER point to the Company's response to Exhibit AG-1-21(a), which lists the major outage events (determined by service area) that were historically excluded from the calculation of the SAIDI/SAIFI performance statistics (id.).[2] However, during that historical period, the Department did not have in place a formalized service-quality measurement program, nor was there any requirement for the Company to maintain historic data relating to "excludable major events." Nevertheless, the record shows that the Company has provided five-years of historical data on excluded events for Commonwealth (1994-1998) and Cambridge (1994-1998) (Exhibit AG-1-21; RR-AG-4; see D.T.E. 99-84, at 13 (SAIDI/SAIFI benchmarks will be based on five-year average). In addition, in 2000 (concurrent with the Department's D.T.E. 99-84 proceeding), Boston Edison began to maintain data on excluded outages and has provided the two years of data now available on excluded events (2000-01) (Exhibit AG 1-21; RR-AG-4).[3] The Department's guidelines expressly allow companies to continue calculating SAIDI/SAIFI

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2 SAIDI/SAIFI refers to the System Average Interruption Duration Index and the System Average Interruption Frequency Index, respectively.

3 As indicated in response to Record Request AG-4, the Company did not recalculate the historical benchmark for the SAIDI/SAIFI for Boston Edison since only two years of data on excluded events were available. It should be noted that, if the data on excluded events were available so that the recalculation could be performed, the effect of the recalculation would be to increase the duration and/or frequency of outages reflected in the historical benchmark, thereby reducing the penalty calculated pursuant to the Department's penalty mechanism for the performance period of September 1, 2000 through August 31, 2001 Compare Exhibit NSTAR-2, Appendix B at 2 and Exhibit NSTAR-3 (supp.), Appendix B at 4 (showing that inclusion of excluded major outages raises SAIDI/SAIFI benchmarks from 121.20 and 1.514, to 137.58 and 1.625, respectively).

statistics consistent with their historical methodologies (see D.T.E. 99-84 Guidelines, § I.C). Therefore, since the SAIDI/SAIFI benchmarks for Boston Edison are calculated consistent with the historical data compiled for the five-year period (1994-1998),[4] excluding major outage events by service area, and since there was, previously, no requirement to maintain data on the excluded outages, the computation of benchmarks and performance penalties for the reporting periods of September 1, 1999 through August 31, 2000, and September 1, 2000 through August 31, 2001, are accurate and complete.

The Attorney General and DOER also assert that the Company has not provided information and records requested by the Attorney General (AG/DOER Initial Brief at 9). What the Attorney General and DOER fail to state, however, is that the subject matter of these requests is squarely outside of the context of this proceeding, as affirmed by the Hearing Officer in a ruling on scope during the January 22, 2002 evidentiary hearing (Tr. at 68-69).[5] As the Department has stated, the focus of the D.T.E. 01-71A investigation is: (1) whether NSTAR met the service-quality thresholds established by the Department in D.T.E. 99-84 for the two reporting periods ending August 31, 2001; and (2) if not, what penalties should be imposed by the Department (id. at 68). The Department further stated that the purpose of the narrowed scope is to ensure that any penalties owed are returned to customers in a quick and efficient manner (id.). All of the responses cited by the Attorney General and DOER as examples of what the Company has "failed" to provide with respect to service-quality data are ones that relate to an issue outside of the scope of the proceeding as defined by the Department or to tangential issues

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4 Consistent with the provisions of the D.T.E. 99-84 guidelines, where the Company had the requisite level of data in establishing benchmarks (three or more years), the benchmarks were fixed for the duration of both reporting periods (the periods ending August 31, 2000 and August 31, 2001) (see D.T.E. 99-84 Guidelines, § I.C).

not involved in the calculations of benchmarks and penalties under the D.T.E. 99-84 framework.[6] The Attorney General and DOER are unable to identify a single instance where the Company has failed to provide the data necessary to calculate benchmarks and penalties for the performance measures that are subject to the penalty mechanism (and for which the Company has compiled historical data), nor does the record reflect any evidence contradicting the completeness and accuracy of the data provided.[7]

Specifically, the record in D.T.E. 01-71A shows that the Company has provided complete and accurate data in accordance with the D.T.E. 99-84 guidelines, as follows:

- Percentage of Calls Answered: NSTAR Electric provided six years of historical data for Boston Edison and four years of historical data for Commonwealth and Cambridge (see Exh. NSTAR-2, Appendix C).[8] The Company also provided historical data on the number and average wait time of abandoned calls and recalculated the historical benchmarks and penalty computations to reflect the inclusion of those calls (RR-AG-8).
- Percentage of Service Appointments Met: NSTAR Electric did not track data for this performance measure prior to the Department's adoption of the measure in D.T.E. 99-84. Thus, no data are available for this measure.[9]

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5 The Hearing Officer's ruling on scope was subsequently appealed by both the Attorney General (through a Motion to Compel Discovery), and the Utility Workers' Union of America ("UWUA"). The Company filed a response to both of these motions on January 31, 2002.

6 See e.g., Information Requests AG-1-9, AG-1-12, AG-1-13 and AG-1-15 (calculation and analysis of service-quality data through December 2001); AG-1-17 and AG-1-18 (requesting information on service quality measures that are not subject to penalty); AG-1-22 (requesting information regarding the Company's customer guarantee program); AG-1-23 (requesting information regarding the Momentary Average Interruption Frequency Index).

7 In fact, in several instances, the Company has updated its filing to provide data that are required under the Department's guidelines or to perform calculations consistent with the methodology established in D.T.E. 99-84 (see e.g. Exh. NSTAR-3; RR-AG-4; RR-AG-8; RR-AG-15).

8 For Commonwealth Electric and Cambridge Electric, only two years of historical data was available for the purpose of calculating benchmarks against which performance in the first reporting period (September 1, 1999 through August 31, 2000) could be measured. Since the Department's guidelines establish that at least three years of performance history must be used to develop benchmarks, no benchmark for this measure was calculated for the first reporting period (see Exhibit NSTAR-3 (supp.); D.T.E. 99-84 Guidelines, § I.C).

9 This performance measure was not adopted by the Department in approving the merger of Commonwealth Energy System with BEC Energy in Commonwealth-Boston Edison, D.T.E. 99-19 (2000). As a result of D.T.E. 99-84, NSTAR Electric is currently tracking this data for all three electric companies.

- Percentage of On-Cycle Meter Reads: NSTAR Electric provided five years of historical data for Boston Edison and four years of historical data for Commonwealth and Cambridge (see Exh. NSTAR-2, Appendix C).[10]

- Lost Work-Day Accidents: NSTAR Electric provided 10 years of historical data for Boston Edison, Commonwealth and Cambridge and calculated benchmarks accordingly (see Exh. NSTAR-2, Appendix C).

- SAIDI/SAIFI: NSTAR Electric provided 10 years of historical data for Boston Edison, Commonwealth and Cambridge (see Exh. NSTAR-2, Appendix C). In accordance with the D.T.E. 99-84 guidelines, NSTAR Electric calculated benchmarks using the five most recent years of available data for each company (id.; D.T.E. 99-84 Guidelines, § I.C; D.T.E. 99-84, at 13). The Company also made the following adjustments to the filed data to conform with the Department's D.T.E. 99-84 guidelines:

  (a) The Company provided updated calculations of the SAIDI performance benchmarks for Commonwealth Electric to reflect the inclusion of "excluded major events" to be consistent with the Department's change in terminology for "operating area" (see Exh. NSTAR-3 (supp.); Exh. AG 1-21; RR-AG-3, RR-AG-4, RR-AG-5; D.T.E. 99-84 Guidelines, § I.B; discussed in NSTAR Initial Brief at 9, fn.14);

  (b) The Company corrected the SAIDI/SAIFI performance data reported for calendar months in 2001 to exclude Momentary Outages and to include outage events that were inadvertently excluded from the initial report (see Exh. NSTAR-3; Exh. NSTAR-3 (supp.); RR-AG-15; Tr. at 7-8, 10-11; D.T.E. 99-84 Guidelines, § V).[11]

- Consumer Division Cases and Billing Adjustments: NSTAR Electric provided 10 years of historical data for Boston Edison, Commonwealth and Cambridge (see Exh. NSTAR-2, Appendix C).[12]

The Attorney General and DOER have not contested or contradicted the accuracy or completeness of the data provided by the Company, nor is there evidence in the record that

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10 For Commonwealth and Cambridge, only two years of historical data was available for the purpose of calculating benchmarks against which performance in the first reporting period (September 1, 1999 through August 31, 2000) could be measured. Thus, no benchmark for this measure was calculated for the first reporting period (see Exhibit NSTAR-3 (supp.); D.T.E. 99-84 Guidelines, § I.C).

11 As explained in response to RR-AG-15, this data correction did not require a recalculation of the historical benchmark because the error occurred during the months of January through July of 2001 and affected only the performance observation for the 12-month period ending August 31, 2001. However, the data correction did result in an improved performance statistic for the period of September 1, 2000 through August 31, 2001, which when compared to the benchmark, reduces the penalty associated with the SAIDI/SAIFI measure for that reporting period (see Exh. NSTAR-3; Tr. at 7-8, 10-11).

12 These data are provided to the Company by the Department's Consumer Division.

would indicate that the data provided is inaccurate or unreliable. The Attorney General and DOER claim only that the Company has not provided information that should have been provided (AG/DOER Initial Brief at 9). However, in each instance cited by the Attorney General, the requested information is not relevant or probative of the issues in this case. Accordingly, there is no basis for applying a penalty other than that calculated by the Company in accordance with the Department's D.T.E. 99-84 guidelines.

## III. THERE IS NO LEGAL OR EVIDENTIARY BASIS TO ACCEPT THE PENALTY RECOMMENDED BY THE ATTORNEY GENERAL AND DOER

### A. The Penalty Recommended by the Attorney General and DOER Is Not Calculated Consistent with the Department's D.T.E. 99-84 Guidelines or Any Other Legal Authority

The Attorney General and DOER argue that the Department should penalize the Company for its alleged imprudence by assessing a penalty equal to 2 percent of the Company's transmission and distribution service revenues, or $22.5 million, for the reporting periods of September 1, 1999 through August 31, 2000, and September 1, 2000 through August 31, 2001 (AG/DOER Initial Brief at 6; AG/DOER Comments at 5-7). Because there is no legal or evidentiary basis for the Department to grant such relief, this grandstanding request by the Attorney General and DOER must be rejected.

The Department's authority to penalize a utility for service-quality performance derives from G.L. c. 164, § 1E(c), which the Department has consistently recognized in promulgating its

service-quality standards.[13] See D.T.E. 99-84, at 1, 21; Proposed Service Quality Standards for Electric and Gas Distribution Companies, D.T.E. 99-84, at 40 (2000) ("Interim SQ Order"). Moreover, the Attorney General and DOER explicitly refer to the proposed $22.5 million penalty as the "full penalty permitted by law" citing to G.L. c. 164, § 1E (AG/DOER Initial Brief at 6-7; AG/DOER Comments at 5-6).[14] As a result, there is no debate in this proceeding that any authority of the Department to assess penalties is circumscribed by the provisions of G.L. c. 164, § 1E. As discussed below, G.L. c. 164, § 1E provides no basis for the Department to grant the relief sought by the Attorney General and DOER.

G.L. c. 164, § 1E (a) authorizes the Department to promulgate rules and regulations to require performance-based rates ("PBR") for electric and gas companies, and states that "in promulgating such [PBR] schemes, the department shall establish service-quality standards . . . ." In addition, G.L. c. 164, § 1E (c) states that "the [D]epartment shall be authorized to levy a penalty against any distribution, transmission or gas company which fails to meet the [Department's established] service quality standards . . . ." Accordingly, the terms of G.L. c. 164, § 1E authorize the Department: (1) to establish service-quality standards for utilities operating under PBR plans to ensure that service is not degraded as a result of the

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13 It is well established that authority to penalize must be vested in the Department by the Legislature. See Alexander J. Cella, Administrative Law and Practice, 38 M.P.S. § 91, at 211 (1986); Commissioner of Revenue v. Marr Scaffolding Co., 414 Mass. 489, 493 (1993); Commonwealth v. Diaz, 326 Mass. 525, 527, 98 N.E. 2d 666 (1950); Commonwealth v. Racine, 372 Mass. 631, 635-636, 363 N.E. 2d 500 (1977); City of Newton v. Department of Public Utilities, 367 Mass. 667, 678-81 (1975) (the Supreme Judicial Court held that the statutory grant of authority to the Department to regulate and supervise the activities of a company subject to the Department's jurisdiction does not imply the power to impose a broad system of rate rebates for inadequate service); see also Pender Peanut Corporation v. the United States, 20 Cl. Ct. 447, 453 (1990).

14 The Attorney General and DOER repeatedly refer to the $22.5 million penalty as the "Maximum Penalty Amount according to the Company's own calculation" (AG/DOER Initial Comments at 6, fn.6). However, the Company's calculations were made at the request of the Department (Letter to NSTAR from Paul G. Afonso, August 22, 2001). In particular, the Department directed the Company to calculate penalties in accordance with the D.T.E. 99-84 service-quality standards, which allocate the total penalty allowed pursuant to G.L. c. 164, § 1E among eight performance measures. See D.T.E. 99-84, at 21, 32-33.

implementation of a PBR plan;[15] and (2) to penalize such companies where there is a failure to meet the established service-quality standards. Given this legal construct, there is no legal basis upon which the Department could grant the relief requested by the Attorney General and DOER.

Over the past three years, the Department conducted a comprehensive investigation into the establishment of service-quality standards pursuant to G.L. c. 164, § 1E, which resulted in the development of the D.T.E. 99-84 guidelines and the penalty mechanism encompassed therein. The Department has required all utility companies operating in the Commonwealth to file service-quality plans in accordance with the D.T.E. 99-84 guidelines and has approved NSTAR Electric's service-quality plans stating that the plans "incorporate the [g]uidelines and the directives in D.T.E. 99-84-B, as well as maintain consistency among all [electric distribution companies]." Letter to Robert J. Keegan (December 5, 2001). Although the Attorney General and DOER participated in that proceeding and were given ample opportunity to comment on all aspects of the service-quality program under development in the D.T.E. 99-84 docket, they are now asking the Department to put aside the service-quality guidelines that resulted from that proceeding and to levy a penalty based solely on a finding of "imprudence."

However, in formulating the penalty mechanism, the Department expressly considered and rejected a recommendation made by the utility companies during the D.T.E. 99-84 proceeding to incorporate a mechanism for establishing "adequate findings of culpability," rather

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15 As an initial matter, it should be noted that NSTAR Electric is not operating under a PBR plan, and therefore, it is arguable whether the requirements of G.L. c. 164, § 1E even apply to the Company. The Company has submitted a filing in compliance with certain directives of the Department, and has not contested the application of the Department's penalty methodology, because the Company shares the Department objective of developing a standardized, state-wide service-quality program for the benefit of customers. Without waiving any legal arguments or rights, NSTAR Electric will provide payments to customers in the amount it has calculated in this proceeding in accordance with the Department's guidelines established in D.T.E. 99-84. In particular, the Company reserves its right to raise a legal objection to any penalty that may be applied to the Company in accordance with the request of the Attorney General and DOER.

than basing the penalty mechanism on a "strict liability" approach (Joint Comments Of Utility Companies On Proposed Guidelines For Service-Quality Standards For Performance-Based Ratemaking Filings at 17, 18, filed December 3, 1999). In those comments, the utility companies suggested that:

> merely missing a benchmark should not result in the issuance of penalties where no company mismanagement or neglect can be attributed. Utility Companies must, at a minimum, be accorded the right to address whether the reported data reflects a degradation of service and whether such service reduction was as a result of company imprudence or mismanagement.

Id. The Department rejected the suggestion of the utility companies to incorporate a prudence standard, stating that:

> [t]he SQ revenue penalty provision of G.L. c. 164, § 1E (c) is intended to (1) secure performance by the gas or electric distribution company by identifying in advance the revenue consequences of delinquent performance and (2) stipulate "damages" for delinquent performance, in the form of a sacrifice of a preordained percentage of revenues that would otherwise be collected from the overall customer base.

D.T.E. 99-84, at 36; Interim SQ Order at 44. Instead, the Department instituted an automatic penalty system, based on the application of a "non-linear formula," stating that such a mechanism provides a "stronger link between a utility's performance and the consequences of failing to meet service-quality measures." Interim SQ Order, at 46. The Department also found the non-linear formula to be straightforward and readily understood. Id. Under this formula, the maximum allowable penalty of 2 percent of transmission and distribution revenues is allocated among measures, with the maximum penalty for each measure incurred at a service-quality level equal to two standard deviations from the historical performance for that category. Id. at 46-47; D.T.E. 99-84, at 21-22, 32-33. Thus, the Department has established a system of service-quality standards to meet the requirements of G.L. c. 164, § 1E, which cannot now be thrust aside to

support a penalty assessment based on a finding of "imprudence," even if the record for this proceeding were to support such a finding, which it does not.[16]

In fact, the Attorney General and DOER are compelled to argue that the Department should apply an "imprudence" standard because a penalty of $22.5 million cannot be derived as a result of applying the Department's established service-quality standards.[17] The penalty requested by the Attorney General and DOER of $22.5 million represents 2 percent of Boston Edison's distribution and transmission revenues for the two reporting periods August 31, 2000 and August 31, 2001, or $10,806,310 and $11,756,385, respectively (see Exh. NSTAR-3 (supp.)). For this penalty to apply, under the Department's penalty formula, the Company would have had to under-perform on all eight service-quality measures for both reporting periods, and such under-performance would have had to fall to a level equal to two standard deviations from the historical benchmark (for all measures). This conclusion is not supported by the record in this proceeding. The record shows that the Company's performance in the reporting period of September 1, 1999 through August 31, 2000, on the Boston Edison system met or exceeded the established benchmarks, resulting in a net performance credit of $2,119,290 (see Exh. NSTAR-3 (supp.)). The record also shows that, for the reporting period September 1, 2000 through August 31, 2001, the Company's performance data fell below the standard deviation deadband for only three measures on the Boston Edison system and one measure on the Commonwealth Electric

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16 The Supreme Judicial Court has held that a party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions. Boston Gas Co. v. Department of Public Utilities, 324 N.E.2d 372, 379, 367 Mass. 92 (Mass. 1975), citing Davis, Administrative Law Treatise, §§ 17.01, 17.07, 18.01, and 18.02 (1958 and 1970 Supplement).

17 It should be noted that the Attorney General and DOER request that the Department assess the "maximum statutory service quality penalty allowable" under G.L. c. 164, § 1E, or $22.5 million, and to credit that penalty to customers through a reduction in distribution rates (AG/DOER Initial Brief at 5-6). However, G.L. c. 10, § 62 requires service-quality penalties assessed under G.L. c. 164, § 1E to be credited to the Commonwealth's Ratepayer Parity Trust Fund, and not to the Company's customers. It is the very fact that the Company believes that G.L. c. 164, § 1E is not applicable in this case that provides the basis for the Company's proposal to pay the penalty through a credit to customers.

system, resulting in a net penalty (penalties less applicable offsets) of $3,207,141 for Boston Edison and $42,358 for Commonwealth (id.).

Based on the foregoing, the request of the Attorney General and DOER for the imposition of a $22.5 million penalty cannot be supported by law.[18] There is no dispute in this proceeding that the Department's authority to penalize is derived from G.L. c. 164, § 1E. This statutory provision grants the Department the authority to levy a penalty where a company (operating under a PBR plan) fails to meet service-quality guidelines that are prescribed by the Department. The Department has established service-quality guidelines pursuant to the authority granted by G.L. c. 164, § 1E, and in the course of establishing those guidelines, considered, and rejected, a proposal to include an imprudence standard. The Company has calculated historical benchmarks and service-quality penalties in accordance with the Department's guidelines, which results in a total penalty of $3,249,499. As a result, there is no basis in law or fact for the penalty requested by the Attorney General and DOER. Accordingly, the claims of the Attorney General and DOER should be rejected by the Department.

### B. The Department Should Find That A Portion of The Penalty Resulting From This Proceeding Has Been Paid to Customers Through the Claims Process

The Attorney General and the DOER challenge the Company's request to include in the total penalties for the September 1, 2000 through August 31, 2001 reporting period, the amount of direct payments made to customers via the Company's claims-reimbursement program (AG/DOER Initial Brief at 6). However, the record shows that the Company was under no obligation to make direct payments to customers and the direct-payment approach represents the

[18] Even putting aside the Department's standards, the $22.5 million claimed by the Attorney General and DOER includes approximately $10.8 million for a year in which Boston Edison experienced no service-quality issues, especially in relation to SAIDI/SAIFI performance (Exh. NSTAR-3, (supp.)).

only feasible approach for targeting penalty payments for distribution to those customers who were most severely affected by the outages (Exh. DTE 1-4; ; see FMR Corporation v. Boston Edison Company, 415 Mass. 393 (1993)). During the summer of 2001, customers were experiencing significant inconvenience and losses as a result of certain extended non-storm related power outages (Exh. DTE 1-6). Through the establishment of the claims centers, the Company was able to identify approximately 2500 customers with demonstrable losses that could be mitigated through a direct payment from the Company (Exh. DTE 1-5; RR-AG-16). The Company viewed this approach as equitable and in keeping with the focus of the Department's service-quality program. Moreover, these payments represented a good-faith effort by the Company to respond to customers and to distribute penalty payments in a targeted and timely manner without having to await the outcome of this proceeding before offering the payments.

Accordingly, the Department should allow a portion of the penalty amount to be returned to customers in a manner that recognizes the impact of the outages on individual customers by including in the total penalty, for the reporting period ending August 31, 2001 (for Boston Edison), the payments made to customers through the claims-reimbursement program. The record shows that the application of the Department's service-quality guidelines to the two post-merger performance periods ending August 31, 2000 and August 31, 2001 results in a total penalty of $3,207,141 million for Boston Edison of which the Company has made direct payments totaling approximately $725,633 to Boston Edison customers specifically affected by the outages. The remaining $2,481,508 million penalty should be credited to Boston Edison customers in a manner consistent with the methodology proposed by the Company (Exhs. DTE 1-4; D.T.E. 1-11).

## IV. THERE IS NO BASIS IN THE RECORD TO SUPPORT A FINDING OF MANAGEMENT IMPRUDENCE, NOR IS THERE ANY ADMISSION OF IMPRUDENCE BY THE COMPANY.

The Attorney General and DOER make a number of misrepresentations in relation to the Reliability Report prepared and submitted by the Company in D.T.E. 01-65. Specifically, the Attorney General and DOER claim that the Reliability Report: (1) "contains admissions of imprudence in the operation and maintenance" of the distribution system; and (2) indicates a "widespread failure to reasonably manage, maintain and operate the distribution system" (AG/DOER Comments at 3; AG/DOER Initial Brief at 4-5). In particular, the Attorney General and DOER contend that the Reliability Report shows that the Company "saved millions of dollars by decreasing capital spending on the distribution system, allowing the Company to increase its earnings while customers paid the price with blackouts" (AG/DOER Initial Brief at 5; AG/DOER Comments at 4). However, there is no reasonable interpretation of the statements made by the Company (or its consultants) in the self-assessment reports that would support the claims of the Attorney General and DOER.

As discussed below, these claims should be treated by the Department for what they are, i.e., inflammatory statements designed to provide support for the claimed $22.5 million penalty, which in itself is unsupportable by law or fact. The statements of the Attorney General and DOER do not represent a legitimate attempt to analyze the evidence in this proceeding, nor to provide the Department with a reasoned basis upon which the requested relief could be granted. The assertions of the Attorney General and DOER regarding capital spending are inconsistent with record evidence in D.T.E. 01-65, which provides contains no information regarding the Company's earnings or overall spending levels. Accordingly, the claims of the Attorney General and DOER should be rejected by the Department.

Specifically, the claims of the Attorney General and DOER are substantively flawed in two primary respects: (1) there is no evidence in the record to support the claims of the Attorney General and DOER and the evidence cited by the Attorney General and DOER is misquoted and misrepresented in order to support that claim; and (2) there is evidence in the record that directly contradicts the claim that the outages are a result of management imprudence, which has been ignored by the Attorney General and DOER. In fact, from an overall perspective, the record in this proceeding indicates that the summer outages resulted from the culmination of a number of factors, not the least of which was the extraordinary growth in demand for electricity in the region resulting from the economic prosperity experienced in past years. The record also shows that the Company has dealt with the issues presented by this past summer's outages in a decisive, focused and results-oriented manner. Accordingly, there is no basis for a finding by the Department of management imprudence, and certainly no basis to order additional audits of the Company's operations.

### A. There Is No Evidence in the Record To Support the Claims of the Attorney General and DOER

The Attorney General and DOER contend that the Reliability Report filed by the Company in D.T.E. 01-65 "contains admissions of imprudence in the operation and maintenance" of the distribution system (AG/DOER Initial Brief at 4-5; AG/DOER Comments at 3-4). The Attorney General and DOER also contend that the Reliability Report shows that the Company "saved millions of dollars by decreasing capital spending on the distribution system, allowing the Company to increase its earnings while customers paid the price with blackouts" (id.). Both of these statements are patently false and inconsistent with information contained in the Reliability Report.

First, the Attorney General and DOER state that a $22.5 million penalty should be levied "based on NSTAR's admission in its System Reliability Reports that it has failed to properly manage, operate, and maintain its distribution system" (AG/DOER Comments at 2). However, the Attorney General and DOER fail to make a single reference to the Company's so-called "admissions of imprudence." There are no citations to language, text or particular provisions of the Reliability Report, or any other documents filed by the Company, wherein the Company has made an "admission of imprudence." In fact, the Company has not acted imprudently in managing its system, nor has the Company made any admissions of imprudence in any proceedings under consideration by the Department.

Instead of citing record support for claimed "admissions of imprudence," the Attorney General and DOER make reference to the Company's "acknowledg[ement] that its service has been deficient" (AG/DOER Initial Brief at 4, citing Exh. NSTAR-2, at 7; NSTAR-3, Appendix B at 1-4; NSTAR System Reliability Reports). Statements by the Company regarding service deficiencies, however, does not constitute an "admission of imprudence," especially when those statements are made in relation to the Department's service-quality indices. There may be many reasons for the Company's service on a particular measure to fall below historical levels, not the least of which may be the impact of random external factors like weather and economic growth. As discussed above, the Department has explicitly determined that its service-quality penalty mechanism is designed to reflect a "conclusive presumption" that customers are receiving a lower level of service than they are due, without a judgment as to the reasons for that lower level of service. Interim Order at 43-44, 51.

The Attorney General and DOER also refer to "NSTAR's admission in its System Reliability Reports that it has failed to manage, operate, and maintain its distribution system"

(AG/DOER Comments at 2). NSTAR Electric has made no such admission, nor does the material included in the Reliability Report support such a statement. Moreover, in an effort to support this claim, the Attorney General and DOER refer to the report of ABB Consulting, Inc (the "ABB Report") included in the Reliability Report, stating that the Company's self-assessments show that the Company "saved millions of dollars by decreasing capital spending on the distribution system, allowing the Company to increase its earnings while customers paid the price with blackouts" (AG/DOER Initial Brief at 5; AG/DOER Comments at 4). This conclusion is unfounded and based on a mischaracterization of the material presented in the ABB Report.

The Attorney General and DOER base their claim that NSTAR has "saved millions of dollars by decreasing capital spending on the distribution system" (and increased earnings) on an assessment set forth in the ABB Report. The Attorney General and DOER fail to acknowledge that, although the ABB Report notes that spending was decreased in relation to certain capital expenditure categories, spending in relation to other capital-expenditure categories was <u>increased</u>, with the overall spending level increasing over the 1997 through 2000 time frame (ABB Report at 6-7, Figure ES-3). Figure ES-3 of the ABB Report (page 7) shows the following approximate spending levels for the years 1997 through 2000 by major cost category:

| Cost Category | 1997 (millions) | 1998 (millions | 1999 (millions) | 2000 (millions) |
|---|---|---|---|---|
| New Customer Connections | $19.5 | $26.0 | $24.0 | $33.5 |
| 4kV Replacement | $11.5 | $8.0 | $12.0 | $5.5 |
| Capacity Improvements | $1.5 | $7.5 | $2.5 | $4.0 |
| Tech Support | $14.0 | $9.0 | $10.0 | $9.0 |
| Reliability | $3.0 | $11.0 | $10.0 | $6.5 |
| Split Fiber Main | $0.5 | $1.0 | $2.5 | $3.5 |
| System Failure Replacements | $31.5 | $25.0 | $24.5 | $17.5 |
| Overhead Systems | $8.5 | $11.0 | $15.5 | $18.5 |
| TOTALS | $90.0 | $98.5 | $101.0 | $98.0 |

As indicated on the above chart, spending on the major capital-cost categories relating to operation and maintenance of the distribution system did not decrease for all categories, but in fact, increased for some categories, especially in relation to New Customer Connections and Overhead system replacements. In presenting the Reliability Report to the Department, the Company made it clear that the backlog in corrective and preventive maintenance developed primarily as a result of a diversion of resources to (1) new customer connections; (2) electric-generation interconnection activities; and (3) congestion management (Reliability Report at 28-29). Nowhere in the Reliability Report is there a basis for the conclusion that the Company decreased overall spending in order to increase earnings. The ABB Report explicitly states that "the intent [of the Company] was to fully fund capital expenditures" (ABB Report at 6). Moreover, in developing capital spending plans, there is always a need to establish priorities. The fact that these priorities change on a year-to-year basis and result in more or less capital being allocated to specific areas of the Company's operations indicates only the ebb and flow of routine business practices. Changes in the annual allocations of capital does not provide support

for the conclusion drawn by the Attorney General and DOER that there has been an overall reduction in capital spending in order to increase earnings.

Accordingly, there is no evidence in the record to support the claim of the Attorney General and DOER that NSTAR has decreased capital spending in order to increase earnings or that the spending levels were inappropriate given the service obligation that the Company has in hooking up new customers and performing interconnection services for new electric generation facilities. Since this claim represents the basis for the penalty and audit recommendations of the Attorney General and DOER with respect to the Company's alleged "imprudence," there is no basis to support the imprudence finding sought by the Attorney General and DOER.

### C. There Is Substantial Evidence in the Record That Directly Contradicts the Claim That the Outages Are a Result of Management Imprudence

On October 29, 2001, the Company filed its Reliability Report with the Department, which represents a comprehensive and objective examination of all aspects of the Company's operations, including system design, long-term planning and operations and maintenance practices. To assist in its self-examination, and in response to the Department's recommendation, the Company retained the services of three independent consultants with differing investigative mandates. These consultants were: (1) ABB Consulting (to perform a study of the overall distribution system infrastructure); (2) KEMA Consulting (to evaluate the outage-management process and related information system); and (3) Stone and Webster (to investigate the root causes for three particular outages affecting customers in the City of Boston last summer) (Reliability Report at 6-7).

The record in D.T.E. 01-65 shows that, from an overall perspective, the outages resulted from certain precipitating factors, including unusually severe summer storms, unprecedented demand for electricity, and exponential load growth in particular areas of the distribution system,

which occurred at a time when the Company was mid-course in the implementation of new, sophisticated outage-management systems and field resources were necessarily allocated to non-maintenance activities, such as new customer connections (Reliability Report at 3, 28-29, Attachment 1; D.T.E. 01-65 (Tr. 1, at 18, 37, 66)). Thus, although the independent assessments offer suggestions for improving the Company's operations in certain areas (as should be expected in any independent assessment designed to identify problem areas), there is no indication that the outages resulted from the "widespread mismanagement" of the system, as claimed by the Attorney General and DOER. Rather, the record reflects the fact that management has a strong focus on system performance and has taken all the steps necessary to ensure that the system is being operated at a high level of reliability and that measures have been taken to increase the flexibility of the system to withstand the combination of precipitating factors experienced this summer.

For example, the Attorney General and DOER ignore evidence in the D.T.E. 01-65 record that indicates that, prior to the summer of 2001, the Company had taken a number of steps to improve its forecasting methodologies. Specifically, the record in D.T.E. 01-65 shows that, in early 2001, NSTAR Electric improved its long-range forecasting techniques in switching to a small-area spatial load forecast system, which will significantly improve the Company's ability to tailor investment to areas of the distribution system with above-average load-growth rates. The ABB Report states that this forecasting technique is the "most advanced and most accurate load forecasting method in the industry and it places NSTAR with industry leaders in terms of long-range forecasting" (see e.g., Reliability Report at 8; ABB Report at 8, section 3.1.2, at 32; D.T.E. 01-65, Tr. at 21-22).

Another example is the implementation of the outage-management information system. The D.T.E. 0165 record shows that NSTAR Electric is in the process of implementing a new, sophisticated information system to improve its internal outage-management process and that the Company has invested over $144 million information systems since 2000 (Reliability Report at 9). Although the internal and external assessments point out that additional work is needed in reaching a "seamless integration," the D.T.E. 01-65 record also shows that "NSTAR has made good selections of the core information systems related to outage management . . . ." (KEMA Report at 2-2). In addition, the record shows that the "basic processes that are used for system restoration are adequate," with the primary task being completion of the system implementation, and that "senior management is committed to making the integration of these systems and processes a reality" (ABB Report at 9, 53).

The Attorney General and DOER also ignore evidence in the record relating to the wide-reaching steps that NSTAR Electric has taken to ensure the reliable operation of the distribution system. The record indicates that these efforts include: (1) the acceleration of planned infrastructure improvements (Reliability Report at 20-23, Attachment 6)[19]; (2) the addition of approximately 100 new field personnel (D.T.E. 01-65: Tr. at 36; Presentation A at 3, 5, 8); (3) aggressive and focused efforts to reallocate field resources to eliminate the non-routine backlog in maintenance activities and to ensure consistency with the current preventive maintenance plan (D.T.E. 01-65: Tr. at 68-70; Presentation A at 8); (4) increased frequency of key maintenance activities, including circuit walk-downs, inspections, and infra-red surveys (id. at 55-56 (tree-trimming), 68-70 (maintenance activities; Presentation A at 8, 10);

[19] In total the Company will complete well in excess of 90 infrastructure improvement projects spanning 35 communities, including 17 special projects committed to for the Town of Brookline and City of Boston (D.T.E. 01-65, Tr. at 59-60).

(5) infrastructure improvements to improve reliability (id. at 38, 58-67; Presentation A at 11); and (6) capacity-enhancement projects (id.)

Therefore, taken as a whole, the record reflects that, during the summer of 2001, the Company was confronted with a unique set of circumstances and that management has responded in an expeditious and thorough manner to address the system-reliability issues that arose as a result of those circumstances. Specifically, the operation of the system was affected by a number of precipitating events, such as hot summer conditions, severe summer storms, unprecedented demands for electricity and well above-average load growth in particular areas of the system (Reliability Report at 3, 28-29, Attachment 1; D.T.E. 01-65: Tr. 1, at 18, 37, 66). The record shows that, these factors, taken in combination with then-existing operational constraints of the system caused frequent and extended service outages. The record also shows that the operational constraints were the results of certain, identified and discrete issues that are being fully addressed by the Company. Nowhere in the record for this proceeding is there any evidence to support the claim of the Attorney General and DOER that the outages resulted from a "widespread failure to manage, operate, and maintain its distribution system" (AG/DOER Comments at 2). The Company took aggressive steps to conduct an independent review of its operations to identify problems and devise solutions. The baseless and grandstanding claims of the Attorney General and DOER, if adopted by the Department, would only create a disincentive for utilities to identify areas that may need improvement. Accordingly, the Department should reject the claims of the Attorney General and DOER in this proceeding.

## V. THE ATTORNEY GENERAL'S AND THE DOER'S RECOMMENDATION FOR ADDITIONAL INDEPENDENT AUDITS SHOULD BE REJECTED

The Attorney General and the DOER requests that the Department: (1) order an "independent management audit" of the Company's operations (AG/DOER Comments at 7); and

(2) require the Company to conduct an independent audit of its service-quality data (AG/DOER Initial Comments at 10). There is no reasonable basis for the Department to grant these requests because (1) the operations of the Company have already been audited by three independent consultants at the request of the Department; (2) the Attorney General and DOER have failed to indicate, much less demonstrate, what benefit would be achieved by either audit; and (3) the record in this proceeding does not warrant such action, especially in light of the monumental efforts that the Company has undertaken to avoid a recurrence of this summer's outage experience. The record in this proceeding shows that the Company has performed an in-depth review of its operations with the assistance of three independent consultants. The results of these independent assessments reflect the objective and unbiased approach undertaken by each consultant, as demonstrated by the unsparing analysis provided to the Department in this proceeding. There is no benefit to be derived from an additional audit of the Company's operations.

Most importantly, the record in this proceeding does not point to a need for such an analysis. The Attorney General and the DOER have not in any way undermined the thoroughness or the integrity of the findings of any of the Company's independent consultants. Nor have the Attorney General and the DOER shown that the Company's service-quality data are unreliable. The KEMA study explicitly addressed the Company's reliability data-gathering and compilation process and an additional audit will not produce different results. The Company's focus, at this juncture, is on making the changes necessary to ensure that the system is better prepared to deal with exigent circumstances like those experienced last summer so that the events of last summer are not repeated. Accordingly, the Department should reject the

request of the Attorney General and DOER for the Department to order additional audits of past events.

## VI. CONCLUSION

The record shows that the application of the Department's service-quality guidelines to the two post-merger performance periods ending August 31, 2000 and August 31, 2001 results in a total penalty of $3,207,141 million for Boston Edison of which the Company has made direct payments totaling approximately $725,633 to Boston Edison customers specifically affected by the outages. The remaining $2,481,508 million penalty should be credited to Boston Edison customers in a manner consistent with the methodology proposed by the Company. As a result, NSTAR will have paid total penalties $3,249,499 ($3,207,141 for Boston Edison, plus an additional $42,358 for Commonwealth Electric).

The Attorney General and the DOER have failed to cite any legal or factual basis to support a penalty for the Company in an amount greater than that outlined above. The claims of the Attorney General and DOER are not supported by the facts or by the law, but instead, constitute inflammatory statements calculated to garner public attention to the Department's consideration of the issues in these dockets. Accordingly, the Department should dismiss the claims of the Attorney General and DOER and assess the penalties calculated in this proceeding pursuant to the Department's D.T.E. 99-84 guidelines.

Respectfully submitted,

**NSTAR ELECTRIC COMPANY**

By its attorneys,

Robert J. Keegan, Esq.
Cheryl M. Kimball, Esq.
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, MA 02110
(617) 951-1400
(617) 951-1354 (fax)

William S. Stowe, Esq.
Assistant General Counsel
NSTAR Electric Company
800 Boylston Street
Boston, MA 02199
(617) 424-2544
(617) 424-2733 (fax)

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