COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Franklin W. Olin College of Engineering	)	D.T.E. 01-95

OPPOSITION OF THE WELLESLEY MUNICIPAL LIGHT PLANT TO BOSTON EDISON COMPANY'S MOTION TO JOIN BABSON COLLEGE AS A PARTY TO THIS PROCEEDING

Wellesley Municipal Light Plant ("WMLP") submits this memorandum in response to the Motion of Boston Edison Company, d/b/a NSTAR Electric ("Boston Edison"), to join Babson College as a Party in this Proceeding. WMLP respectfully requests that the Department of Telecommunications and Energy ("Department") strike and deny Boston Edison's motion.

I. The Department's Regulations Do Not Permit the Compulsory Joinder of Parties.

The Department should deny Boston Edison's motion to join Babson College as a party in this proceeding because the Department's regulations contain no provision to compel the joinder of an unwilling party. Department's regulations only permit the *intervention* of persons *desiring* to participate upon the filing of a written petition. See 220 CMR 1.03. See 220 CMR 1.03 (a) states:

> (a) Any person who desires to participate in a proceeding shall file a written petition for leave to intervene or to participate in the proceeding.

Babson College has not filed a written petition to intervene or otherwise expressed any desire to participate in this proceeding.

Boston Edison cannot rely on 220 CMR 1.06(6)(c) or the Massachusetts Civil Rules of Procedure for authority to compel the join Babson College as a party to this proceeding. See Boston

Edison Motion, at 2. 220 CMR 1.06(6)(c) explicitly pertains only to discovery issues and only to certain specific discovery rules. The relevant sections state 220 CMR 1.06(6)(c):

> 2. **Rules Governing Discovery**. Because the Department's investigations involve matters with a wide range of issues, levels of complexity and statutory deadlines, the presiding officer shall establish discovery procedures in each case which take into account the legitimate rights of the parties in the context of the case at issue. In establishing discovery procedures, the presiding officer must exercise his or her discretion to balance the interests of the parties and ensure that the information necessary to complete the record is produced without unproductive delays. **In exercising this discretion, the presiding officer shall be guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq.** These rules, however, shall be instructive, rather than controlling.
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> 4. **Motions to Compel Discovery**. A party may move for an Order to compel compliance with its discovery request. Unless otherwise permitted by the presiding officer for good cause shown, such motion shall be made no later than seven days after the passing of the deadline for responding to the request. **If the presiding officer finds that a party has failed to comply in a reasonable manner with a legitimate discovery request without good cause, he or she may, after issuance of an Order compelling discovery, order whatever sanctions are deemed to be appropriate, including, but not limited to, those listed in Rule 37 of the Massachusetts Rules of Civil Procedure.** A party's failure to file a motion to compel discovery in a timely manner, absent a showing of good cause, may result in a waiver of its right to compel the response.

220 CMR 1.06(6)(c) (emphasis added). Boston Edison cannot infer from these provisions that the Department has the authority to compel the joinder of a party or otherwise to invoke Mass. R. Civ. P. 19(a). In fact, 220 CMR 1.06(6)(c) shows that the Massachusetts Rules of Civil Procedure do not govern administrative practice before the Department. This regulation only indicates that the Department merely *may* look to certain civil procedures to resolve discovery disputes. The Massachusetts Rules of Civil Procedure are not controlling.

II. Babson College Is Not a Proper Party to this Proceeding.

Boston Edison's motion should be denied for another reason: Babson College is not a proper party to this proceeding. 220 CMR 1.03(2)(a) defines "party" as:

> (a) the specifically named persons whose legal rights, duties or privileges are being determined in an adjudicatory proceeding before the Department;
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> (b) any other person who as a matter of constitutional right or by any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding and who enters an appearance;
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> (c) any other person allowed by the Department to intervene as a party.

This proceeding does not involve any legal rights, duties, or privileges of Babson College, but only involves the rights that Boston Edison and WMLP have to provide electric service to Franklin Olin College of Engineering ("Olin College") and Olin College's right to choose WMLP as its electricity supplier pursuant to G.L. c. 164, § 1B. Boston Edison is improperly seeking to expand the scope of this proceeding to go on a fishing expedition to explore potential violations by a third person of WMLP's tariff and G.L. c. 164, which have no relevance here. Babson College also is not a proper party because there is no constitutional or statutory right of Babson College to participate in this proceeding, nor has Babson College petitioned to intervene, much less been allowed by the Department to do so.

A person cannot become "party" simply because it may possess useful information. Boston Edison has not shown that the information sought from Babson College, e.g., arrangement between Babson College and Olin College, Olin College's electricity demand, is not available from any other source. Boston Edison merely states that Olin College has not provided such information.

Moreover, if Boston Edison wishes to obtain relevant information from Babson College, it certainly may do so without requiring Babson College to participate as a party in this proceeding. Babson College could provide the requested information directly to Boston Edison on a voluntary basis. If Babson College refuses, Boston Edison could issue a subpoena to obtain evidence from Babson College pursuant to 220 CMR 1.10(9), which states: "The Department and all other parties shall have authority in accordance with M.G.L. c. 30A, § 12 and M.G.L. c. 25, § 5A to issue subpoenas requiring the attendance and testimony of witnesses and the production of any documents in question in the proceeding. [220 CMR 1.15(3)]." It makes no sense to compel Babson College to become a party to this proceeding for the purpose of filling in "informational gaps in the record."

Finally, much of the information sought from Babson College, such as Olin College's electricity demand, is not relevant to whether Boston Edison has an exclusive right to serve Olin College. What is relevant is that the Olin College site originally was owned by Babson College, Babson College was and is WMLP's customer, and Boston Edison never has provided electric service to that area. Accordingly, the Department has sufficient information to determine that Olin College can choose WMLP as its electricity provider pursuant to Massachusetts Elec. Co., D.T.E. 98-122 (2002).

III. Boston Edison Has No Standing To Investigate WMLP's Tariffs.

Boston Edison raises as a major point in its motion to join Babson College as a party in this proceeding that Babson College is violating WMLP's Large General Service – Primary Tariff ("WMLP's Tariff"). Boston Edison has no standing to adjudicate WMLP's interpretation or

enforcement of its Tariff. This Tariff is an arrangement between WMLP and its rate customers and it does not involve Boston Edison.[1]

Indeed in another border customer service territory case, in Boston Edison, EC-95-6 (1995)[2] the Department did not allow the intervention of Massachusetts Electric Company ("MECo"). In EC-95-6, MECo tried to raise the issue of the propriety of allowing Boston Edison's other customers to subsidize the below cost-of-service rates offered to the border customer, Suffolk Downs. The Department agreed with Boston Edison and Suffolk Downs that MECo did not have standing to raise that issue. Similarly, Boston Edison does not have standing to raise the issue of WMLP's interaction with its customer regarding a WMLP Tariff.

Furthermore, WMLP does not believe that Babson College is violating the Tariff. As set forth in WMLP's Response to BE-2-23, any electric service received by Olin College is not being metered or resold. Moreover, as set forth in Paragraph two (2) on page one (1) of the Tariff, a customer has an obligation to purchase, install, operate and maintain all necessary distribution equipment. See, WMLP response to BE-2-1, Exhibit 1.

Even the Department has extremely limited, if any, jurisdiction over a municipal light plant's, such as WMLP, rates and tariffs. Board of Gas & Electric Commissions of Middleborough v. Department of Public Utilities, 411 Mass. 536 (1992).

[1] Boston Edison would certainly not countenance WMLP challenging Boston Edison's implementation of its tariffs with its customers.

CONCLUSION

For the foregoing reasons, the Wellesley Municipal Light Plant respectfully requests that the Department deny the Motion of Boston Edison Company, d/b/a NSTAR Electric, to Join Babson College as a Party in This Proceeding.

Respectfully submitted,

WELLESLEY MUNICIPAL LIGHT PLANT

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[2] This decision was cited by the Department in support of its recent decision Massachusetts Electric Company v. Peabody Municipal Light Plant, D.T.E. 98-122 (2002).