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March 7, 2019

Mark D. Marini, Secretary
Department of Public Utilities
One South Station, 5th Floor
Boston, MA 02110

Re: Investigation by the Department of Public Utilities, on its own Motion, into the Effect of the Reduction in Federal Income Tax Rates on the Rates Charged by Electric, Gas, and Water Companies, D.P.U. 18-15

Dear Secretary Marini:

Enclosed for filing in the above-captioned matter please find the Office of the Attorney General's *Motion for Clarification and Reconsideration*. Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions about this filing.

Sincerely,

/s/ John J. Geary

John J. Geary
Assistant Attorney General

Enclosures

cc: Service List, D.P.U. 18-15

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities, on its own Motion, into the Effect of the Reduction in Federal Income Tax Rates on the Rates Charged by Electric, Gas, and Water Companies, D.P.U. 18-15	**D.P.U. 18-15**

THE OFFICE OF THE ATTORNEY GENERAL'S
MOTION FOR CLARIFICATION AND RECONSIDERATION

Pursuant to 220 C.M.R. §§ 1.11(10) and (11), the Office of the Attorney General ("AGO") hereby requests that the Department of Public Utilities (the "Department") clarify and reconsider its February 15, 2019 order in DPU 18-15-F (the "Order"). Specifically, the AGO requests that the Department clarify and reconsider its determination to allow the Affected Companies[1] to keep the federal tax savings accrued from January 1, 2018 through June 30, 2018 (the "Interim Period"), rather than return those savings to customers.

I. BACKGROUND

On December 22, 2017, the Tax Cuts and Jobs Act of 2017 ("TCJA") [2] was signed into

[1] The Affected Companies are: Aquarion Water Company of Massachusetts, Inc.; Bay State Gas Company, d/b/a Columbia Gas of Massachusetts; Boston Gas Company and Colonial Gas Company, each d/b/a National Grid; Liberty Utilities (New England Natural Gas Company) Corp., d/b/a Liberty Utilities; Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid; Milford Water Company; NSTAR Electric Company, d/b/a Eversource Energy; NSTAR Gas Company, d/b/a Eversource Energy; Agawam Springs Water Company; and Pinehills Water Company.

[2] Pub. L. No. 115-97, 131 Stat. 2054: An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.

law. The TCJA, among other things, reduced federal corporate income tax rates paid by public utility companies from 35 percent to 21 percent as of January 1, 2018. On December 20, 2017, pursuant to G.L. c. 164, § 93, the AGO filed a complaint that sought to adjust distribution rates to provide ratepayers with the benefits of the reduced federal income tax rates (the "Petition"). The Department docketed the Petition as D.P.U. 17-181. The Attorney General issued discovery in the docket on January 26, 2018, requesting information regarding the reduction in rates resulting from the TCJA, similar to the information required in the Department's inquiry into the Tax Reform Act of 1986. *Reduction in Federal Income Taxes Rates*, D.P.U. 87-21-A (1987).

On February 2, 2018, the Department issued an order opening an investigation into the effect of the decrease in the federal corporate income tax rate on the rates of the Department's regulated utilities ("D.P.U. 18-15"). D.P.U. 18-15, at 2.[3] In D.P.U. 18-15, the Department held that the reduction in the federal corporate income tax rate "constituted evidence that the rates being charged by each Affected Company may no longer be just and reasonable as of January 1, 2018." *Id.*, at 4–5 (emphasis added). Further, the Department found that it was appropriate to promptly adjust rates to ensure that Massachusetts ratepayers "receive the immediate benefit of this significant change in the federal tax code." *Id.*, at 4 (emphasis added).[4]

The Department set forth how it would proceed with its investigation and ordered the Affected Companies to:

- "as of January 1, 2018 (*i.e.*, the effective date of the reduction in the federal corporate

[3] The Department found that the Petition and its investigation involved common questions of law and fact and consolidated D.P.U. 17-181 with the instant investigation. D.P.U. 18-15, at 3–4.

[4] The Department reaffirmed this finding in D.P.U. 18-15-A and 18-15-F: the "Department finds that the change in the federal corporate income tax rate is a significant, known and measurable reduction in the Affected Companies' cost of service, sufficient to rebut the presumption that rates as of January 1, 2018, are just and reasonable." D.P.U. 18-15-A, at 29 (June 29, 2018), *citing* D.P.U. 87-21-A, at 7–8; D.P.U. 18-15-F, at 38.

income tax rate), account for any revenues associated with the difference between the previous and current federal corporate income tax rates."

- book the benefits from the tax reduction "as regulatory liabilities, effective January 1, 2018, to be refunded to ratepayers in a manner to be determined by the Department in this proceeding."

- file a proposal to address the effects of the TCJA and, in particular, a proposal to reduce rates through the establishment of a revised cost of service incorporating the lower federal income tax rate as of January 1, 2018.

- include in their proposals adjustments of rates going forward and "a timely refund of revenues associated with the lower tax expense."

D.P.U. 18-15, at 5–7 (emphasis added).

On June 29, 2018, the Department found that it must reduce the Affected Companies' rates to ensure that the Affected Companies "do not reap an inappropriate revenue windfall as a result of the [TCJA]." D.P.U. 18-15-A, at 59, *see also id.* at 29–30 ("[i]f the cost of service reductions related to the Act are not reflected in rates to consumers, the Affected Companies would reap an inappropriate revenue windfall"). In so doing, the Department rejected the Affected Companies' argument regarding single-issue ratemaking and found that the change in the federal corporate income tax was "a significant, known and measurable reduction" and "sufficient to rebut the presumption that rates as of January 1, 2018, are just and reasonable."[5] D.P.U. 18-15-A, at 29–30, 59 (Jun. 29, 2018). Thus, the Department stated that it would exercise its discretion to investigate and, where appropriate, require single-issue rate adjustments and tax savings refunds to account for the change in the federal income tax rate from 35 percent to 21 percent as of January 1, 2018. The Department concluded that "there [was] an administrative imperative to adjust rates in a timely manner" and ordered the Affected

[5] The Department made an exception for Blackstone Gas because its current base distribution rates were set based on a federal corporate income tax rate of 21.53 percent. D.P.U. 18-15-A, at 43.

Companies to lower their rates as of July 1, 2018.

The Department deferred its determination regarding the refund of the tax savings accrued during the Interim Period, stating that it would render a decision in the second phase of its investigation. D.P.U. 18-15-A, at 27. Nonetheless, the Department "approved the proposals of Bay State, Berkshire Gas, Unitil (Electric), and Unitil (Gas) to refund tax savings accrued from January 1, 2018 through June 30, 2018." *Id.*, at 60.[6] Indeed, the Department "commend[ed] these companies for their recognition that the benefits of such tax savings should promptly be returned to ratepayers." *Id.* The Department also reminded companies that pending resolution of the Phase 2 proceeding, they must "continue to book [savings] as regulatory liabilities." D.P.U. 18-15-A, at 34, 38, 45, 48, 53, 54, 56, 59.

II. THE DEPARTMENT'S ORDER

On February 5, 2019, the Department issued its Phase 2 order addressing the refund to customers of the Interim Period tax savings. D.P.U. 18-15-F. In its Order, the Department first reaffirmed its prior findings that (1) the change in the federal corporate income tax was "a significant, known and measurable reduction"; (2) the reduction was sufficient enough to "rebut the presumption that rates as of January 1, 2018, were just and reasonable;" (3) neither single-issue ratemaking nor the filed-rate doctrine act as a bar to the Department ordering the Affected Companies to refund to customers the Interim Period tax savings; and (4) the Department may

[6] Bay State later attempted to withdraw its proposal as part of its withdrawal of its general rate case, docketed as D.P.U. 18-45, and subsequently filed a motion for reconsideration of the approval in D.P.U. 18-15-A. D.P.U. 18-15-F, at 12–14. The Department granted Bay State's motion (*id.*, at 37, 40) and considered the Affected Companies' arguments that "the Department is prohibited from directing a refund of tax savings for Bay State customers accrued from January 1, 2018 through June 30, 2018 in the Order," among other issues. *Id.*, at 13–14; D.P.U. 15-18-F, at 37–42.

order a refund of the Interim Period tax savings without examining individual companies' actual earnings or rate of return on equity. D.P.U. 18-15-F, at 37–41.

Thus, as presented in the Order, the only potential bar to the Department returning the Interim Period tax savings to customers was the general principle regarding retroactive ratemaking. *Id.*, at 39–40. Specifically, as the Department explained, it must determine in this proceeding whether it is "prohibited by the rule against retroactive ratemaking from ordering a refund to ratepayers" of the Interim Period tax savings. *Id.*, at 40. The Department recognized that if there was time to complete its investigation before the TCJA took effect on January 1, 2018, there would be no need to consider the rule against retroactive ratemaking. *Id.*, at 39–40.

In discussing the legal issue, the Department noted that it generally may not order retroactive adjustments to base distribution rates, but that the "rule is not without exception." *Id.*, at 40–41. For instance, the Department recognized that when a company is on notice that its rates are under investigation and subject to later revision, "what otherwise would be retroactive ratemaking [turns] into a prospective process" (the "Notice Exception"). *Id.*, at 40. The Department also recognized the AGO position that the Affected Companies were on notice as of December 20, 2017, when the AGO filed its original petition with the Department. The Department then further found:

> At the latest, the affected companies were on notice that such tax savings were under investigation as of February 2, 2018, when the Department opened the instant investigation and directed the companies to book as regulatory liabilities any revenues associated with the difference between the previous and current income tax rates as of January 1, 2018.

Id., at 40–41 n.22, *citing* D.P.U. 18-15, at 5.

However, in the very next sentence, the Department declared that it would not require the Affected Companies to return the Interim Period tax savings to customers, stating:

> While retroactive ratemaking may not be an absolute prohibition on the refund to

> ratepayers of extraordinary amounts in all circumstances, we are persuaded by the companies' arguments that the timing of the Act and retroactive nature of any rate adjustments make a refund of tax savings accrued from January 1, 2018 through June 30, 2018 inappropriate.

Id., at 41.

In reaching this conclusion, the Department did not address the Notice Exception to the rule against retroactive ratemaking, nor any other exception.

The Department concluded its order by noting that in reaching its decision not to return the Interim Period tax savings to customers "the Department did not apply a threshold earnings test." Nonetheless, the Department goes on to state that in reaching its decision it was "mindful" of the issues raised by the companies with respect to short-term cash flow constraints and the related potential for credit downgrading. D.P.U. 18-15-F, at 42.

III. ARGUMENT

A. The Department Should Clarify Its Order.

1. Standard of Review

Pursuant to 220 C.M.R. § 1.11(11), a party may seek clarification of a final order within 20 days of service of that order. "Clarification of previously issued Orders may be granted when an Order is silent as to the disposition of a specific issue requiring determination in the Order, or when the Order contains language that is sufficiently ambiguous to leave doubt as to its meaning." *NSTAR Electric Company and Western Massachusetts Electric Company*, D.P.U. 17-05-D, at 5 (2018).

Moreover, G.L. c. 30A, § 11(8) requires that the Department support its decision with subsidiary findings of fact and law. Specifically, the Department must accompany its decision with "a statement of reasons . . . including determination of fact or law necessary to the

decision." *Massachusetts Inst. of Tech. v. Department of Pub. Utlis.*, 425 Mass. 856, 868 (1997) ("MIT"), *quoting Costello v. Department of Pub. Utils.*, 391 Mass. 527, 533 (1984) (additional citations omitted). A purpose of that statutory provision is to require the department to give a "'guide to its reasons' so that this court may 'exercise . . . [its] function of appellate review.' There is thus a 'duty to make adequate subsidiary findings.'" *MIT*, 425 Mass. at 868, *quoting Hamilton v. Department of Pub. Utils.*, 346 Mass. 130, 137 (1963), quoting *Leen v. Assessors of Boston*, 345 Mass. 494, 502 (1963). Without an adequate statement of reasons, the Supreme Judicial Court is "unable to determine whether an appellant has met his burden of proof that a decision of the department is improper." *MIT*, 452 Mass. at 868, quoting *Costello*, 391 Mass. at 533.

2. The Department Should Clarify Its Order Because the Basis for Its Decision Not to Require the Affected Companies to Refund the Interim Period Tax Savings to Customers Is Ambiguous.

According to the Department's own characterization, its task in D.P.U. 18-15-F was to determine whether it is "prohibited by the rule against retroactive ratemaking from ordering a refund to ratepayers." D.P.U. 18-15-F, at 40. Yet, the Department did not clearly state why it decided not to require the Affected Companies to refund the Interim Period tax savings to ratepayers. As noted above, the analysis and findings section of the Order includes a single sentence that describes the Department's reasoning concerning retroactive ratemaking as applied to the facts of this case:

> While retroactive ratemaking may not be an absolute prohibition on the refund to ratepayers of extraordinary amounts in all circumstances, we are persuaded by the companies' arguments that the timing of the Act and retroactive nature of any rate adjustments make a refund of tax savings accrued from January 1, 2018 through June 30, 2018 inappropriate.

D.P.U. 18-15-F, at 41. It is unclear from this sentence whether the Department made its decision

not to require the Affected Companies to return the Interim Period tax savings because (1) the Department was prohibited from doing so due to the rule against retroactive ratemaking or (2) the Department in its discretion, declined to do so. The Department's use of the word "inappropriate" is ambiguous because it leaves doubt as to whether the Department intended to convey that a legal bar applied or that it had made a discretionary finding. Similarly, the Department does not clearly state that the return of the Interim Period tax savings to customers is retroactive ratemaking or something different that has a "retroactive nature." Accordingly, because the above-quoted sentence is the only sentence in the Order that discusses the Department's reasoning relative to retroactive ratemaking to the facts of the case,[7] the Department's Order is "sufficiently ambiguous to leave doubt as to its meaning" and thus meets the standard for reconsideration. *See* D.P.U. 17-05-D, at 5.

Moreover, the Department must clarify its Order to adhere to its duty to provide adequate subsidiary findings. The Department's Order does not contain sufficient subsidiary findings for the Supreme Judicial Court to adequately conduct an appellate review. *See MIT*, 425 Mass. at 868. The Supreme Judicial Court cannot review whether the Department properly applied the rule of retroactive ratemaking if it does not know for sure that the Department actually applied the rule against retroactive ratemaking, nor can the Supreme Judicial Court review whether the Department had an adequate legal basis to create a new standard, if the Supreme Judicial Court does not know for sure whether the Department created a new standard. Absent clarification, the Supreme Judicial Court would remain in the dark about the underlying legal basis for the Department's decision to deny ratepayers the full benefits of the tax savings.

[7] The sentence immediately following discusses the timing of the TCJA, but do not discuss the reasons why such timing should prevent ratepayers from receiving the full Interim Period tax savings.

Moreover, it is not enough for the Department to simply clarify whether it based its decision on the rule against retroactive ratemaking or some other reason. The Department must also provide sufficient subsidiary findings for the reasons supporting the Department's ultimate conclusion. *See MIT*, 425 Mass. at 868. It is not enough, for example, for the Department to state that an adjustment returning the Interim Period tax savings to ratepayers would violate the rule against retroactive ratemaking—the Department must also explain why the adjustment would violate the rule. In its Order, the Department does not provide any reasoning for its decision, except to vaguely state that the Department is "persuaded by the companies' arguments," without specifying which arguments that the Department found persuasive. *See MIT*, 425 Mass. at 871 (holding that the Administrative Procedure Act "requires more from the [D]epartment than merely stating in conclusive terms that such a [a rate] is 'just and reasonable under the unique circumstances of this case'"). The Department must specify which reasons it found persuasive so that the Supreme Judicial Court can evaluate whether the Department's reasons for its decision constitute reversible error or not. *See id.* at 868. Likewise, the Department must also address why it did not find the arguments the AGO raised persuasive. Although the Department recited the arguments that the AGO made, it did not provide any reasons why it rejected them. *Compare* D.P.U. 18-15-F, at 32–35 *with id.* at 40–41. Accordingly, after clarifying the legal basis for its decision, the Department should also provide sufficient subsidiary findings to show how the Department reached its decision.

Accordingly, the Department should grant the AGO's request for clarification and clarify its legal findings and provide the reasons that support its findings.

A. The Department Should Reconsider Its Order

1. Standard of Review

Pursuant to 220 C.M.R. § 1.11(10), a party may request reconsideration of a final Department order within 20 days of service of the order. "Reconsideration of previously decided issues is granted when extraordinary circumstances dictate that [the Department] take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation." *NSTAR Electric Company and Western Massachusetts Electric Company*, D.P.U. 17-05-F, at 4 (2018). A party may also seek reconsideration when it believes that "the Department's treatment of an issue was the result of mistake or inadvertence." *Id.* Parties should not attempt to reargue issues considered and decided in the main case. *Id.* The Department has granted motions for reconsideration, however, when the final order inadvertently fails to meet the Department's policy goals. *See Massachusetts Electric Company and Nantucket Electric Company*, D.P.U. 15-155-A, at 15–16 (2017) (changing the companies' storm cost recovery mechanism after finding that the interest accrual provision, as set forth in the final order, did not meet the Department's intended goal of striking a balance between avoiding overcompensating the Company and allowing for adequate recovery of storm costs).

2. The Return of the Full Tax Savings Would Not Violate the Rule Against Retroactive Ratemaking.

To the extent that the Department found that the return of the full tax savings would violate the rule against retroactive ratemaking, the Department should reconsider. As described in the sections below, (1) refunding the Interim Period tax savings would not violate the rule against retroactive ratemaking because the Department created a regulatory liability for the tax savings accrued starting January 1, 2018 and (2) even if the rule against retroactive ratemaking would otherwise apply, the case here falls squarely into an exception to the rule against retroactive ratemaking that the Department recognized in its Order. A finding that the Department may and will return the Interim Period tax savings to customers will align the

Department's position with other recent PUC decisions.

a. The Department Created Regulatory Liabilities.

Under the Department's Order, customers' receipt of the Interim Period tax savings is contingent on whether, as a matter of law, the principle of retroactive ratemaking applies here and, if so, whether the principle precludes the Department from returning money to ratepayers.

Yet, the only reason that a refund is necessary is the gap in time between the effective TCJA (January 1, 2018) and the date the Department ordered the companies to change their rates to reflect the lower TCJA rate (June 30, 2018). Indeed, if the Department had put new rates into effect as of January 1, customers would have the full TCJA tax savings in their pockets today and there would be no need for a refund. Even if the Department had put rates into effect in February instead of June 1, customers would have had the benefit of at least four months of the Interim Period tax savings.

Aware of this timing issue, the Department took explicit action to protect the interests of ratepayers until the TCJA savings were reflected in rates on July 1, 2018. Specifically, the Department required the companies to create a regulatory liability for TCJA tax savings. *See* D.P.U. 18-15, at 5 ("[t]o address this issue, each Affected Company shall, as of January 1, 2018, account for any revenues associated with the difference between the previous and current corporate income tax rates," which "shall be booked as regulatory liabilities, effective January 1, 2018"). By doing do so, the Department confirmed that the interim TCJA savings were provisional and subject to possible refund and thus avoided any future claims regarding retroactive ratemaking. Indeed, the entire point of the Department's creation of the regulatory liabilities was to provide ratepayers with the full benefit of the tax savings without violating the rule against retroactive ratemaking.

Yet, in its Order, the Department inadvertently failed to consider that the creation of the regulatory liabilities suffice to avoid the rule against retroactive ratemaking. The Department does not discuss the relationship between the creation of regulatory liabilities and retroactive ratemaking. Nor does the Department explain why it created the regulatory liabilities if not for the purposes of avoiding retroactive ratemaking.

The Department clearly had the authority to do exactly what it sought to do in D.P.U. 18-15—create regulatory liabilities that would allow it to provide the full tax savings to ratepayers. As with regulatory assets, the Department has the authority to direct utilities to create regulatory liabilities where it is reasonably likely that funds will be returned to ratepayers. *See, e.g.*, *Massachusetts Electric Company/Nantucket Electric Company*, D.P.U. 10-54, at 318 n.235 (2010); *Aquarion Water Company of Massachusetts*, D.P.U. 08-27, at 58–59 (2009); *Fitchburg Gas and Electric Light Company*, D.T.E. 02-83, Letter Order at I (December 20, 2002); *Boston Edison Company/Cambridge Electric Light Company/Commonwealth Electric Company/NSTAR Gas Company*, D.T.E. 02-78 (Nov. 27, 2002) (allowing for the creation of a regulatory asset or liability). Critically, the Department has both allowed companies to establish regulatory assets[8] after the expense has been incurred and also required that gains on sale of utility property be reflected in rates regardless of the transfer's timing relative to the test year without implicating the rule against retroactive ratemaking. *Id*. Similarly, utilities often establish regulatory assets and liabilities without the specific approval of the Department. *See* Gas Distribution Company Accounts 186 and 25; Electric Distribution Company Accounts 182 and 254.

[8] The Financial Accounting Standards Board issued Statement of Financial Accounting Standards ("SFAS") No. 71, which sets forth the specific criteria that must be met for a regulated company to establish regulatory assets and liabilities. SFAS 71; D.T.E. 03-47-A, at 3.

Indeed, reasoned consistency requires that the Department treat regulatory assets and liabilities consistently. 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. *See Boston Gas v. Department of Pub. Utils.*, 367 Mass 92, 104 (1975). "This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented." *Id.*, *citing* Davis, Administrative Law Treatise, ss. 17.01, 17.07, 18.01, and 18.02.

Before the Department's Order in D.P.U. 18-15-F, Department precedent provided that the regulatory assets and liabilities did not violate the rule against retroactive ratemaking. In particular, the Department has allowed utilities to create regulatory assets for liabilities associated with pension and post-retirement benefits other than pensions obligations to avoid reductions to stockholders' equity. *Aquarion Water Company of Massachusetts*, D.P.U. 08-27, at 58-59 (2009); *Fitchburg Gas and Electric Light Company*, D.T.E. 02-83, Letter Order at I (December 20, 2002); *Boston Edison Company/Cambridge Electric Light Company/Commonwealth Electric Company/NSTAR Gas Company*, D.T.E. 02-78 (November 27, 2002) (allowing for the creation of a regulatory asset or liability). The Department has also allowed the creation of a regulatory asset for costs related to storm damage restoration. *Fitchburg Gas and Electric Light Company*, D.P.U. 11-128 (2012).

To provide reasoned consistency, if the Department wishes to depart from its long-standing precedent regarding regulatory assets and liabilities and retroactive ratemaking, it must, at minimum, explain the reasons for its decision and make clear that the distribution companies

cannot recover regulatory assets going forward. The AGO respectfully submits that a more prudent course would be to follow long-standing Department precedent, treat regulatory assets and liabilities consistently, and reconsider its decision to deny ratepayers the full Interim Period tax savings and provide a windfall to the utilities.

b. The Affected Companies Had Notice of the Potential Rate Changes Related to the Tax Savings, and Therefore a Department-Recognized Exception Applies Here.

The Department also mistakenly failed to apply or even analyze whether the Notice Exception applies to the Interim Period tax savings. The Department should therefore reconsider its decision to allow the utilities to retain the Interim Period tax savings because, if it had considered the Notice Exception, it would have ordered the Affected Companies to refund the Interim Period tax savings to customers.

As noted above, the Department, in its Order, recognized the Notice Exception to retroactive ratemaking. D.P.U. 18-15-F, at 40-41 ("in certain circumstances, notice that rates under investigation are provisional and subject to later revision may change what otherwise would be retroactive ratemaking into a prospective process"). It also made factual findings indicating that the Notice Exception applies here. Specifically, in its Order, the Department found that "[a]t the latest, the affected companies were on notice that such tax savings were under investigation as of February 2, 2018, when the Department opened the instant investigation and directed the companies to book as regulatory liabilities any revenues associated with the difference between the previous and current income tax rates as of January 1, 2018." D.P.U. 18-15-F, at 41–42 n.22, *citing* D.P.U. 18-15, at 5.

Thus, as of February 2, 2018, "at the latest" the Affected Companies were aware that the Department might refund the savings that they received under the TJCA, and such notice

therefore "change[d] what otherwise would be retroactive ratemaking into a prospective process." *See* D.P.U. 18-15-F, at 40. Indeed, the Affected Companies had notice as of December 20, 2017, the date that the AGO filed a petition seeking the reduction of the rates of certain of the Affected Companies due to the TCJA. *See* D.P.U. 18-15, at 40 n.22. Accordingly, because the Department's reasoning and findings make clear that the Notice Exception to the rule against retroactive ratemaking applies, the Department should reconsider its decision to bar the full return of the Interim Period tax savings to ratepayers, or at least the savings as of February 2, 2018.

c. The Department's Decision Is Inconsistent with Public Utility Commission Decisions on the Same Issue in Other States.

Since September 1, 2018, when the parties filed their reply briefs, many other public utility commissions have flatly rejected utility arguments that a refund of interim tax savings constitutes retroactive ratemaking. The Department should reconsider its Order to ensure that consumers in Massachusetts receive the same benefits as other consumers in other states.

In Michigan, the Public Service Commission ("PSC") required utilities to establish a regulatory liability in December 2017 to account for the upcoming federal tax savings. On April 25, 2018, pursuant to another PSC order, the utilities changed their rates to reflect the lower rate, prospectively. In a separate phase of the proceeding, the PSC ordered Indiana Michigan Power Company's ("I&M") to issue a refund for the interim period, January 1, 2018 – April 25, 2018. In so doing, the PSC rejected I&M's argument that requiring it to issue such a refund constituted retroactive ratemaking:[9]

[9] The Michigan PSC also rejected I&M's arguments regarding confiscation ("ratepayers were compensating I&M at a 35 percent [tax rate since January 1]. As a result, the Commission finds that I&M will receive a windfall if it is not required to return to ratepayers the full amount

> The Commission disagrees. All utilities were required to utilize regulatory accounting 'which includes the use of regulatory assets and liabilities, for all calculated differences resulting from the TCJA and what would have been recorded if the TCJA did not go into effect' [pursuant to the Commission's December 27 order]. Therefore, prospectively, I&M was required to account for the difference in the new tax rates. I&M's contention that the 'revenues collected became the property of I&M' and that they have been 'spent or distributed' demonstrates that I&M failed to comply with the December 27 order. . . . Although the credits will be issued after the revenue was collected, I&M had prospective notice that the tax savings were required to be passed onto the ratepayers. Moreover, . . . the credits are not true refunds, rather it merely returns the amounts that ratepayers overpaid in taxes and is money which already belongs to ratepayers.[10]

Similarly, in a January 23, 2019 order, the Connecticut Public Utilities Regulatory Authority ("PURA") found that the utilities must return to customers the federal income tax savings retroactively to January 1, 2018. In so doing, PURA found that the 2018 tax adjustment was a permitted exception to the general prohibition against retroactive ratemaking for extraordinary and unanticipated material changes in expenses, outside of the control of the utility, that arise between full rate cases. "The rule against retroactive ratemaking does not circumscribe a public utility regulatory commission's ability to approve direct recovery of such unique costs when the circumstances warrant such treatment." PURA also recognized that it had in the past allowed utilities to defer costs and make other exceptions to the general prohibition against retroactive ratemaking. It found that these exceptions "do not just inure to the benefit of

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collected" for the interim period) and revenue deficiency ("it is irrelevant to this proceeding" that I&M's rates prior to April 26, 2018 were insufficient").

[10] *Commission's Own Motion, to Consider Changes in the Rates of All the Michigan Rate-Regulated Elec., Steam, & Nat. Gas Utilities to Reflect the Effects of the Fed. Tax Cuts & Jobs Act of 2017*, Docket No U-20316: Indiana Michigan Power Co. (Elec.) Files an Application for Determination of Credit B As Described in Orders U-18494 & U-20107, Nos. U-18494 (Jan. 18, 2019).

companies, but must also be made in favor of the ratepayers when appropriate."[11]

Other states making similar findings over the last few months include:

North Carolina

> "It is appropriate in this proceeding to adopt the Public Staff's recommendation that CWSNC should refund to ratepayers the overcollection of federal income taxes related to the decrease in the federal corporate income tax rate for the period beginning January 1, 2018, including interest at the overall weighted cost of capital, as a credit for a one-year period." [12]

Pennsylvania

> Reasoning that the 40 percent reduction in corporate tax rate qualified as an extraordinary one-time event that was unlikely to be repeated, the PUC rejected the utility's retroactive ratemaking argument and required the utility to implement a negative surcharge to return to customers the net tax savings (with interest) for the time period of January 1, 2018, through the effective date of the utility's new rates.[13]

Ohio

> "[W]e once again find it necessary to note that we intend all benefits resulting from the TCJA will be returned to customers. Customers should receive the savings derived from this change, as these savings were never meant to compensate the utilities or increase their respective rates of return, but merely reflect the reality that utilities are required to pay federal income taxes. For this Commission, and as many interested parties conclude in their comments, this COI was initiated to determine when and how any benefits resulting from the TCJA would be passed on to ratepayers, not if they would be passed on to ratepayers."[14]

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[11] PURA ordered the utilities to create a regulatory liability to account for overcollections of the federal tax as of January 1, 2018 and to return that money, plus carry costs, in the utilities' next rate case.

[12] *In the Matter of Application by Carolina Water Serv., Inc., of N. Carolina, 4944 Parkway Plaza Boulevard, Suite 375, Charlotte, N. Carolina 28217, for Auth. to Adjust & Increase Rates for Water & Sewer Util. Serv. in All of Its Serv. Areas in N. Carolina, Except Corolla Light & Monteray Shores Serv. Area*, No. SUB 360, 2019 WL 936788, at *49 (Feb. 21, 2019).

[13] Pennsylvania Pub. Util. Comm'n Office of Consumer Advocate Office of Small Bus. Advocate Matthew Josefwicz Barbara Mcdade, No. C-2018-2646178, 2018 WL 5620905, at *69 (Oct. 25, 2018).

[14] *In the Matter of the Commission's Investigation of the Fin. Impact of the Tax Cuts & Jobs Act of 2017 on Regulated Ohio Util. Companies*, No. 18-47-AU-COI, 2018 WL 5480977, at *9 (F.E.D.A.P.J.P. Oct. 24, 2018).

West Virginia

> while not deciding, noting that "there is considerable authority in decisions from other jurisdictions that the return of a deferred liability resulting from usual or extraordinary circumstances does not violate principles of retroactive or single issue ratemaking."[15]

In the last few months, many PUCs also have reaffirmed that the creation of a regulatory liability for TCJA tax savings avoids retroactive ratemaking. Indeed, these orders emphasize that the purpose of creating a regulatory liability for TCJA tax savings is explicitly to avoid future problems with retroactive ratemaking. For example:

Delaware

> Utilities directed to create regulatory liabilities for TCJA savings "to protect the interests of customers until such time as the federal tax benefits are appropriately reflected in customers' rates and will avoid retroactive ratemaking."[16]

West Virginia

> "[R]egulatory liability recognition on the financial statements of utilities of any cost of service savings would serve to protect the interests of ratepayers until any federal tax benefits can appropriately be reflected in rates."[17]

North Carolina

> "Finally, the Commission finds that it is appropriate to require CWSNC to return the overcollection of federal taxes related to the decrease in the federal corporate income tax rate, including interest calculated at the overall weighted cost of capital, as a credit over a one-year period beginning when new base rates become effective. The rates with respect to the federal income tax expense have been provisional based on the Commission's generic order, so retroactive ratemaking is not at issue"[18]

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[15] *In the Matter of the Effects on Utilities of the 2017 TCJA*, General Order 236.1, November 16, 2018, 2018 WL 6161128 (Jan. 26, 2018).

[16] *See* Delaware Public Service Commission Order No. 9177 (Feb. 1, 2018).

[17] *In the Matter of the Effects on Utilities of the 2017 TCJA*, General Order 236.1, November 16, 2018, 2018 WL 6161128 (Jan. 26, 2018).

[18] *In the Matter of Carolina Water Service, Inc.*, Docket No. W-354, Sub 360, North Carolina Utilities Commission, 2019 WL 936788 (Feb. 21, 2019).

New Mexico

> After one utility asserted that a Commission order requiring the refund of the savings resulting from the changes in the tax rates under the TCJA from January 1, 2018 would violate the prohibition against retroactive ratemaking, the Commission reminds all the utilities that they were notified on January 24, 2018 that the Commission was considering the disposition of tax savings. Thus, they "are still subject to the Federal Tax Review Order and all revenue collected through general rates for the purpose of payment of federal income taxes is and will continue to be collected subject to possible refund upon a subsequent determination to be made in the appropriate pending or future Commission adjudicatory hearing."[19]

The Department should reconsider its Order to bring it in line with orders in other states to ensure that customers in Massachusetts also enjoy the full benefits of the tax savings.

3. A Finding That a Return of the Interim Period Tax Savings Would Result in Unjust and Unreasonable Rates, Lack Substantial Evidence, and Lack Sufficient Subsidiary Findings.

As described in § III.A *supra*, the Department's Order is not clear whether the Department determined that it could not refund the Interim Period tax savings due to the rule against retroactive ratemaking, or whether the Department created a new standard, whereby it exercised its discretion and found a full refund to be "inappropriate" due to the adjustments' "retroactive nature." As described in § III.B.2 *supra*, a finding that a refund of the Interim Period tax savings would violate the rule against retroactive ratemaking is problematic for several reasons. However, a Department decision that found that a full refund of the Interim Period tax savings, while not barred for retroactive ratemaking reasons, was "inappropriate" and therefore, still not allowed, would also be a legal error, albeit for different reasons. Specifically, a discretionary finding that the refund is "inappropriate" would result in unjust and unreasonable rates, lack substantial evidence, and lack requisite subsidiary findings.

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[19] *In the Matter of the Investigation of the Impact of the Fed. Tax Cuts & Jobs Act of 2017 on All Utilities in the Jurisdiction of the New Mexico Pub. Regulation Comm'n*, No. 18-00016-UT, 2018 WL 4537764, at *1 (Sept. 12, 2018).

First, a decision that a refund would be "inappropriate" would result in rates that are not just and reasonable. The Affected Companies, as part of their costs of service, receive amounts from ratepayers for their federal income tax expense. Although the Department may have an interest in encouraging the Commonwealth's distribution companies to discover efficiencies and benefit from reductions of their cost of service, there is no policy reason for allowing the distribution companies to keep the savings from the TCJA. The TCJA was an act of Congress and had nothing to do with any new efficiencies created by the Affected Companies. The savings represent money ratepayers paid to the Affected Companies for the sole purpose of exercising the Affected Companies' federally-mandated duty to pay taxes. Accordingly, the tax savings represent ratepayer money, designated for a particular purpose, that the Affected Companies no longer need. Indeed, for these reasons, the Department already held that the reduction of the Affected Companies' corporate income tax rates "constitutes evidence that the rates being charged by each Affected Company may no longer be just and reasonable as of January 1, 2018." D.P.U. 18-15, at 4–5.

Similarly, any Department decision that a refund is "inappropriate" lacks substantial evidence. The Department must support its decisions with substantial evidence. *See New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 465 (1981) (internal citations omitted). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id., quoting Boston Edison Co. v. Selectmen of Concord*, 355 Mass. 79, 92 (1968).

Here, the Department relies on little to no evidence sufficient to rebut the presumption the Department found in February that the tax savings rendered the Affected Companies' rates

not just and reasonable as of January 1, 2018.[20] None of the Affected Companies have filed a cost of service. No Affected Company has marshaled any evidence that suggests that the tax savings, if kept by the Affected Companies, would constitute anything but a windfall. The only "evidence" supporting the Department's decision is a cite to certain briefs of the Affected Companies, which in turn cite to websites concerning credit rating downgrades of companies that are not the Affected Companies. *See* D.P.U. 18-15-F, at 42 (internal citations omitted). A "reasonable mind" would not accept this proffer as sufficient to rebut a showing that ratepayers are due tens of millions of dollars for tax liabilities that no longer exist. *See New Boston Garden Corp.*, 383 Mass. at 465. Indeed, evidence in the record presented by the AGO demonstrates that no Massachusetts company's credit has been downgraded since the passage of the TCJA. *See* AGO Phase II Reply Brief, at 7–10. The Department should reconsider its decision and direct the Affected Companies to refund the Interim Period tax savings back to their customers.[21]

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[20] The AGO established a prima facie case as to over-earnings under § 93 with the Department's finding in its February 2, 2018 order, that the reduction in federal corporate income tax rate "constituted evidence that the rates being charged by each Affected Company may no longer be just and reasonable as of January 1, 2018." *Id*. at 4–5. The concept of prima facie evidence gives conclusive effect to the proof of specified facts unless rebutted. *Fitchburg Gas & Electric Light Company*, D.P.U. 99-118, at 7–8 (2001). "The burden of production shifted to the Affected Companies to produce evidence necessary to rebut the allegations raised against it. *Id.*, at 9. They had the obligation to introduce substantial evidence that their rates were still just and reasonable after the tax reduction in order to avoid an adverse finding. *Id.*

[21] Recently, the Pennsylvania PSC considered this issue and found:

"The Commission does not deem it appropriate to permit utilities to retain TCJA savings due to a perceived risk of possible negative outlooks from credit rating firms. Once again, if a utility's cash flow is of concern, a general rate increase is the appropriate vehicle to address such a concern. But, as pointed out by I&E, an increased cash flow realized because a utility is permitted to retain revenues resulting from customers paying a "phantom 35%" income tax rate would not be lawful or appropriate. . . . Indeed, while utilities are entitled to recover in rates all reasonable and prudently incurred expenses, there is no warrant for the recovery of taxes or other expenses from consumers that are not incurred. . . . Accordingly, the Commission declines to allow rates for non-existent tax expenses for the purpose of artificially augmenting a utility's cash flow."

Moreover, to the extent that the Department decided to allow the distribution companies to keep tax savings for reasons other than the rule against retroactive ratemaking, the Department's decision lacks sufficient subsidiary findings. As discussed in § III.A *supra*, the Department has a duty to support its decisions with adequate subsidiary findings. *See MIT*, 425 Mass. at 868. The Department does not provide any reasons supporting the Department's new standard for rate adjustments. The Department's Order does not provide any reasons why the Department's traditional rule against retroactive ratemaking is somehow insufficient. Nor does the Department's Order provide any reasons why a new standard that bars recovery of savings that (while not retroactive ratemaking) have a "retroactive nature," is necessary or helps promote any interest of the Department. *See* D.P.U. 18-15-F, at 41. If, under this new standard, the Department exercises discretion regarding whether adjustments with a "retroactive nature" are appropriate or inappropriate, the Department has provided no reasoning as to why the adjustments in this instance were "inappropriate," while other adjustments in the future may or may not be. *See id.*

Indeed, there is not a compelling reason for the Department to expand the rule against a retroactive ratemaking or to create a new rule that bars rate adjustments that are not retroactive ratemaking but have a "retroactive nature." The rule against retroactive ratemaking "finds its source in the statutory construction of G.L. c. 164, § 94, which mandates determination by the department, after a public hearing and an investigation, of the 'propriety' of the new base rate. *Fitchburg Gas and Elec. Light Co. v. Department of Telecommunications and Energy*, 440 Mass.

Pennsylvania Pub. Util. Comm'n Office of Consumer Advocate Office of Small Bus. Advocate Matthew Josefwicz Barbara Mcdade, No. C-2018-2646178, 2018 WL 5620905, at *70 (Oct. 25, 2018) quoting Tax Cuts and Jobs Act of 2017 Temporary Rates Order, Docket No. M-2018-2641242 (Order entered May 17, 2018) at 16-17.

625, 627 (2004). However, because the Department directed the Affected Companies to create regulatory liabilities for the purposes of refunding the full tax savings to ratepayers, the rule against retroactive ratemaking and the statutory prohibition do not apply. Indeed, the Supreme Judicial Court has recognized that adjustments that do not violate the rule are "consistent with [the Department's 'broad authority to determine ratemaking matters in the public interest'" and are "well within its authority to protect consumers." *See Fitchburg*, 440 Mass. at 637, 639.

Accordingly, any new standard proposed by the Department would weaken the Department's ability to carry out its statutory mandate to protect consumers in exchange for no benefit that is apparent on the record. The undesirability of the new standard is particularly salient in this instance, where the newly created standard results in a windfall to the Affected Companies and higher rates for Massachusetts ratepayers, who already pay some of the highest distribution rates in the country.

Moreover, the Department did not provide notice that it was considering creating a new standard for rate adjustments in this proceeding. Therefore, it should re-open the issue for the parties to properly brief it. "It is generally unacceptable for an agency to announce a new standard in its final decision in an adjudicatory proceeding and then rule, often not surprisingly, that a party who had no notice of that standard failed to meet it." *Boston Gas Co. v. Department of Pub. Utilities*, 405 Mass. 115, 120–21 (1989). If the department does not make changes in ratemaking principles by regulation or by prospective adjudicatory decision making, it must grant the party or parties to an adjudicatory proceeding the opportunity to satisfy the requirements of a new rule once that rule (or the possibility of the adoption of a new rule) is announced. *Id.* Here, although the Department considered evidence on whether the adjustments complied with the rule against retroactive ratemaking, the Department provided no notice that it

was considering a new standard that would bar rate adjustments that, while not retroactive ratemaking *per se*, have a "retroactive nature." Accordingly, as an alternative to reconsideration, the Department should open an investigation into its contemplated new ratemaking standard so the parties and other interested persons can fully brief the Department and the Department can have full information regarding the costs and benefits of the new standard.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Office of the Attorney General respectfully requests that the Department clarify and reconsider its decision to allow the Affected Companies to keep the TCJA tax savings accrued from January 1, 2018 through June 30, 2018.

Respectfully submitted,

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Dated: March 7, 2019

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities, on its own Motion, into the Effect of the Reduction in Federal Income Tax Rates on the Rates Charged by Electric, Gas, and Water Companies, D.P.U. 18-15	**D.P.U. 18-15**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 C.M.R. 1.05(1) (Department's Rules of Practice and Procedure). Dated at Boston this seventh day of March, 2019.

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