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July 6, 2015

Via Hand Delivery

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

Re: Investigation by the Department of Public Utilities into the Means by Which New Natural Gas Delivery Capacity May Be Added to the New England Market, D.P.U. 15-37

Dear Secretary Marini:

Please find enclosed for filing in the above-referenced proceeding the Reply Comments of the New England Power Generators Association, Inc.

Thank you for your attention to this filing.

Sincerely,

Kevin C. Conroy

Enclosures (Original and five copies)

cc: David Gold, Hearing Officer (via email attachment)
dpu.efiling@state.ma.us (by email attachment)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities into the Means by Which New Natural Gas Delivery Capacity May Be Added to the New England Market	D.P.U. 15-37

REPLY COMMENTS OF
THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

I. Overview of Reply Comments

The New England Power Generators Association, Inc. (NEPGA) appreciates the opportunity to submit these reply comments in the above-captioned docket, supplementing its initial comments of June 15, 2015.[1]

NEPGA is the trade association representing competitive electric generating companies in New England. Our member companies represent approximately 25,000 megawatts (MW) of generating capacity throughout New England, including over 11,000 MW of generation in Massachusetts, or 85 percent of the electric generating capacity in the Commonwealth. NEPGA's Massachusetts companies provide power for the Commonwealth from a diverse portfolio of plants, which together pay over $70 million annually in state and local taxes. In addition, NEPGA's Massachusetts companies provide nearly 1,400 well-paying and skilled jobs in Massachusetts. NEPGA's mission is to support competitive wholesale electricity markets in New England. We believe that open markets guided by stable public policies are the best means to provide reliable and competitively-priced electricity for consumers. A sensible, market-based

[1] These Reply Comments represent the views of NEPGA, but not necessarily those of any particular member.

approach furthers economic development, jobs, and balanced environmental policy for the region.

NEPGA remains committed to both the policy and legal arguments made in its initial comments, and incorporates those arguments by reference here. However, this reply focuses on the legal arguments, as NEPGA believes the critical issue for the Department of Public Utilities ("DPU") at this juncture is resolving the twin questions of the DPU's legal authority to review and act upon the DOER Proposal, and whether fundamental legal barriers exist (under either state or federal law) that would preclude the implementation of the DOER Proposal. NEPGA believes that the focus at this initial stage should be squarely on these legal issues, and that a detailed debate on the policy issues — the economic merits of the DOER Proposal, the logistics of its implementation, and the numerous viable alternatives — should be reserved for future discussion.

In the interests of efficiency and expediency, NEPGA supports the formal requests made by several other commenters: that the DPU bifurcate this investigation, resolving the outstanding questions of legal jurisdiction and other legal barriers before turning to questions of economic policy and obstacles to implementation. As DOER itself has noted, legal questions including the extent of FERC jurisdiction and whether "providing a preference to gas generators over other potential buyers would violate any other laws or regulations" are "important one[s] that will require further investigation"(DOER Comments at 28). NEPGA believes that bifurcation is both warranted and appropriate.

As explained in greater detail below, NEPGA believes that neither G.L. c. 164, § 94A ("Section 94A") nor 1997 Mass. Acts c. 164 (the "Restructuring Act") grant either the Department or the EDCs the legal authority to implement the DOER Proposal. In addition, the federal prohibitions on reserving gas pipeline capacity for the exclusive benefit of a limited group of bidders, as well as the myriad potential conflicts involving affiliate relationships and transactions, only strengthen NEPGA's position that the extant legal barriers preclude implementation of the DOER Proposal.

II. The DPU Does Not Have Authority Under Section 94A to Approve EDC Contracts for Gas Delivery Capacity

NEPGA shares the Attorney General's "serious concerns regarding the legality of DOER's proposal [and] whether it is consistent with the laws governing restructuring of the electric industry and the plain language of G.L. c. 164, § 94A." (Attorney General Comments at 18.) Having reviewed carefully the comments submitted, NEPGA continues to believe, as it articulated in its initial comments, that the DPU lacks legal authority to approve either EDC contracts for pipeline capacity or the corresponding cost recovery from EDC ratepayers. NEPGA observes that many of the comments submitted in support of the DOER Proposal failed to even address the complex issues involving Section 94A, beyond either conclusory assertions that "there is no legal impediment to the Department accepting and considering natural gas capacity contracts by EDCs under Section 94A," (ANGA Comments at 2), or reciting DOER's assertion that the "plain language" of Section 94A authorizes the DPU to review such contracts. (DOER Comments at 6, Eversource Comments at 3, National Grid Comments at 10.)

Yet as NEPGA and numerous other commenters demonstrated in their initial comments, the "plain language" argument is inconsistent with the principles of statutory construction that a reviewing court would apply, as well as being inconsistent with the legislative history of Section 94A. (NEPGA Comments at 4-6.) The clear intent of Section 94A as amended was to authorize the DPU to approve electric company contracts for electricity and gas company contracts for gas

— nothing more. The failure of the proponents to address or even recognize these serious legal obstacles is troubling, since in the absence of appropriate and sufficient delegated legislative authority, the DPU lacks jurisdiction to act upon the DOER Proposal in the first instance.

NEPGA also disagrees with DOER's assertion that the reason the DPU has authority to approve the DOER Proposal under Section 94A is because "if there are conditions causing extreme price volatility or price increases, EDCs are not only permitted but *have an obligation* to address supply." (DOER Comments at 7 (emphasis in original).) This rationale appears directly contrary to the Legislature's stated purpose in enacting the Restructuring Act: ensuring "the functional separation of generation services from transmission and distribution services." 1997 Acts c. 164, § 1(m). As the Attorney General observed, the DPU has itself stated that the purpose of the Restructuring Act was to "relieve[] electric companies of the obligation to plan for and serve the generation needs of their customers." (Attorney General Comments at 19.) In the aftermath of the Restructuring Act, contending that EDCs have a legal obligation to address supply makes no more sense from a legal perspective than contending that competitive suppliers have a legal obligation to address distribution system issues.

The DPU should, however, take note of DOER's opinion that "[u]ntil a specific structure and implementation plan is developed, <u>it is difficult to assess whether there may be any other legal or regulatory barriers to this concept</u>." (DOER Comments at 24 (emphasis added)). NEPGA made the same point in its initial comments, noting that the "insufficient information provided in the NOI regarding the specific structure of the Access Northeast interstate pipeline joint venture or similar ratepayer-funded proposals [makes] it difficult for NEPGA to fully assess the issues," (NEPGA Comments at 11), and is pleased that DOER has recognized these challenges. To NEPGA, DOER's concession signals that this investigation may be premature, and that further elaboration on the conceptual proposal currently before the DPU is needed — particularly before the numerous interested parties are asked to invest additional time and resources in responding to the same.

Finally, even if Section 94A granted the DPU the necessary legal authority to review EDC contracts for gas delivery capacity, Section 94A still requires that the DPU act in the "public interest." NEPGA notes that of the over fifty initial comments filed in this Investigation, fewer than ten were filed by those who could be characterized as proponents of the DOER Proposal — and each of those (save one) was submitted by an entity or organization with a vested commercial interest in expanded pipeline capacity. Indeed, Tennessee Gas Pipeline declared forthrightly that "Massachusetts should prioritize commitments to pipeline project(s), one of which <u>must</u> include Tennessee's [North East Direct] Project," and that "a single pipeline cannot fully accomplish these goals." (Tennessee Gas Pipeline Comments at 29 (emphasis added)). Such rhetoric should engender skepticism of the contention that additional pipeline capacity is important because it will "maximize the benefits to Massachusetts citizens." Id. In assessing the benefits and costs of the DOER Proposal to ratepayers, the factors that should be considered include all direct <u>and</u> indirect costs and benefits to ratepayers — including but not limited to the opportunity costs to ratepayers of investing in pipeline capacity (instead of other alternatives for addressing electricity and gas peak load demand); commodity price risk; stranded cost risk; risk of construction cost overruns allocated to ratepayers; incremental Global Warming Solutions Act compliance costs caused during the twenty-year term of the pipeline expansion contract; loss of investment capital in the New England electricity market due to governmental interference in the market; and increased infrastructure capital costs resulting from that governmental interference. No public interest determination can be made without consideration of these and many other factors affecting ratepayer interests.

In sharp contrast to the limited number of comments in support, a wide range of commenters raised significant questions and/or concerns about the DOER Proposal, including commercial ratepayers, municipal ratepayers, individual ratepayers, and the Attorney General acting in her capacity as the ratepayer advocate. NEPGA concurs with the observation of the Attorney General that "as currently structured, the [DOER] proposal lacks standard ratepayer protections such as competitive processes, transparency, avoidance of conflicts of interest, and incentives to achieve the best results for ratepayers." (Attorney General Comments at 4.) Given these and other serious questions about the legality of the DOER Proposal in its current form, NEPGA does not believe that the DPU has a sufficient legal basis on which to conclude that approval of the DOER Proposal is in the public interest.

III. The Restructuring Act Remains a Significant Legal Obstacle to the DOER Proposal

NEPGA, along with numerous other commenters, observed that the DOER Proposal would contradict the express will of the Legislature as articulated in the Restructuring Act. In specific, NEPGA noted that the central purpose of the Restructuring Act was to transition Massachusetts to a competitive electricity market by deliberately separating the market functions of EDCs and wholesale electric companies. Under the DOER Proposal, however, NEPGA noted that EDCs would assume a market function reserved for generators, leading to the accumulation of vertical market power that the Restructuring Act sought to eliminate. (NEPGA Comments at 6-7.)

Given that the Restructuring Act constitutes the blueprint establishing the parameters of the restructured market, NEPGA would underscore the conspicuous absence in proponents' comments of any efforts to address the inherent contradictions between the DOER Proposal and the Restructuring Act. In fact, supporting comments frequently suggested that the DOER Proposal is necessary in order to overcome some of the same processes and procedures that the Restructuring Act intentionally established specifically for ratepayers' protection.

For instance, in its effort to justify granting EDCs "appropriate financial remuneration in order to enter into long-term pipeline capacity contracts" National Grid identified several factors that may contribute to the attendant financial risks of EDCs undertaking such a role. Primary among the factors identified by National Grid was the concern that "[c]ontracting for pipeline capacity required to reliably and efficiently fuel electric generators is outside of the EDC's typical business and operations." (National Grid Comments at 27.) Curiously, National Grid appears not to recognize that what it classifies as a "risk" that needs to be mitigated is actually a deliberate feature of the Restructuring Act, which intentionally sought to keep costs associated with contracting for generator fuel outside the EDC's "typical business and operations." The issue is not, as National Grid would have it, that EDCs will merely need to acquire business and operational expertise in pipeline capacity matters in order to make the DOER Proposal successful. The real issue is that the Restructuring Act was expressly designed to prevent EDCs from being in that position in the first place: EDCs divested of their prior gas-fired generation and pipeline expertise to implement the Restructuring Act. Nothing in the Restructuring Act contemplates, much less invites, such a return to even partial vertical re-integration.[2]

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[2] EDC affiliates of National Grid's predecessor (the New England Electric System ("NEES")) supplied EDC customers with gas-fired generation owned by the NEES affiliate the New England Power Company ("NEPCO") and associated pipeline transportation. In the divestiture process implementing the Restructuring Act, both sets of

Similarly, Algonquin Gas declares that "Access Northeast would not result in a distortion of the electric wholesale market because not one penny of these costs go into that market unless a generator decides to participate." (Algonquin Gas Comments at 16.) Algonquin Gas appears to be confusing the issue here: it is not the willingness of generators to purchase this new gas delivery capacity (at a discount to the fully-embedded cost of the transportation), but the fact that under the DOER Proposal, ratepayers would be required to pay for the new capacity regardless of whether generators elect to purchase it or not.[3] As NEPGA noted in its initial comments, the DPU reiterated in DPU 12-77 that one main purpose of the Restructuring Act was to avoid shifting "the risks associated with generation development from developers, who are best positioned to manage such risks, back to consumers." (NEPGA Comments at 10.) The failure of commenters to acknowledge that the DOER Proposal must be read through the lens of the Restructuring Act renders assertions like Algonquin's — that there will be no distortion of market pricing — both confusing and misleading for the consumer.

Finally, NEPGA would highlight an important recognition from DOER: that while the DOER Proposal seeks to compel ratepayers to fund an expansion of fuel delivery capacity with the goal of lowering electricity prices, the DPU "has no authority to direct suppliers . . . to act." (DOER Comments at 20.) NEPGA made this precise point in its initial comments, noting that "neither the DPU nor DOER has the legal authority to require generators to purchase capacity from the ratepayer-funded pipeline," particularly if generators find it more cost-effective to purchase fuel from other sources. (NEPGA Comments at 13.) The Legislature has declared "the

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assets were sold. Pipeline expertise was only retained by LDC affiliates consistent with Section 94A language limiting gas purchases to LDCs.

[3] Indeed, ratepayers would be liable for any unrecovered fixed costs even if generators elected to purchase the new capacity.

interests of consumers can be best served by . . . the functional separation of generation services from transmission and distribution services." 1997 Acts c. 164, § 1(m). Yet the "essential problem" the DOER Proposal claims to address is the asserted lack of "willingness and/or ability of gas-fired generators to supply [long-term pipeline expansion] commitments." (DOER Petition at 4.) NEPGA submits that for the DPU to endorse a solution where the "essential problem" — the independence of generators — is actually a central and intentional element of the legislative design would be to disregard the basic tenets of the Restructuring Act.

IV. Federal Law Contemplates Non-Discriminatory Access to Pipeline Capacity

A wide range of commenters, including NEPGA, used their initial comments to emphasize a major flaw in the DOER Proposal: the proposal that upon obtaining new gas delivery capacity, EDCs would be entitled to reserve that capacity for the exclusive use of generators serving the EDCs' ratepayers. As NEPGA and others pointed out, the federal Natural Gas Act and FERC regulations require pipelines to "allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of release." 18 C.F.R. § 284.8(e). (NEPGA Comments at 13.) Given that the ability to discriminate between wholesale electric generators and other willing purchasers of the new gas delivery capacity is the lynchpin of the DOER Proposal,[4] the legal inability to do so suggests serious doubts about the viability of the Proposal as a whole, even if the Proposal were otherwise consistent with and legal under the Restructuring Act.

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[4] DOER Petition at 3 ("higher winter prices . . . may be alleviated if there were sufficient gas capacity for EDCs to purchase to serve the electric generation needs of their customers"). DOER, however, parts company with both its own Proposal and the comments of proponents, by asserting that the EDCs "should execute bundled sales and/or capacity releases in a manner that offers the greatest value to New England's electric market" (DOER Comments at 19) — suggesting that rather than releasing capacity preferentially to the generators, DOER believes the capacity should always be released to the highest bidder.

As such, NEPGA appreciates DOER's acknowledgement that the problems posed by federal law (raised by NEPGA and others) are both substantive and legitimate. DOER observes that

> it is unclear whether providing a preference to gas generators over other potential buyers would violate any other laws or regulations, or how the FERC would view any systematic preferential offering of services involving interstate pipeline capacity. This question is an important one that will require further investigation (emphases supplied). (DOER Comments at 28.)

NEPGA maintains that such investigation will ultimately reach the same conclusion that NEPGA and others have already reached: that the significant legal issues inherent in the DOER Proposal preclude the DPU from acting in the manner requested therein. To the extent the DPU believes that further investigation of the legal issues is nonetheless important, NEPGA encourages the DPU to undertake precisely the investigation proposed by DOER before reaching the economic and policy issues raised by the DOER Proposal.

NEPGA also appreciates that even proponents of the DOER Proposal appear to recognize that the federal Natural Gas Act and FERC regulations currently prohibit the owner of gas pipeline capacity (whether LDCs or EDCs) from releasing that capacity only to specific generators. Indeed, National Grid admitted that at minimum, it would need to "apply to FERC for either clarification or waiver of certain FERC regulations and policies" in order to discriminate in favor of some gas recipients over others, since otherwise the FERC would likely conclude that National Grid was "engaged in market manipulation in violation of Section 1c.1 of FERC's regulations." (National Grid Comments at 21.) Eversource similarly conceded that "a key component of FERC's regulatory oversight role" is enforcing the FERC regulations that provide that interstate pipelines "must treat all transmission customers . . . on a non-discriminatory basis . . . ." (Eversource Comments at 19.) NEPGA agrees with both National

Grid and Eversource that existing FERC regulations and the Natural Gas Act create major legal obstacles to the implementation of the DOER Proposal.

Several proponents nonetheless suggested that they could circumvent these federal non-discrimination provisions by establishing what they have called an "Electricity Reliability Program" that would "exempt certain releases from the posting and bidding requirement for capacity release." (Eversource Comments at 20, Algonquin Gas Comments at 14.) These proponents point to an obscure provision in FERC regulations — applicable exclusively to LDC procurement of gas delivery capacity — that creates a limited exception to the general rule. 18 C.F.R. 284.8(h)(1)(ii). NEPGA strongly disagrees that this provision is one upon which the EDCs can rely, either directly or by analogy. As Tennessee Gas Pipeline explained, this regulation was designed to "facilitate retail unbundling programs at the state level under which LDCs exited the business of selling natural gas and transferred this function to competitive energy suppliers." (Tennessee Gas Pipeline Comments at A-11.) That scenario is entirely distinct from the one being proposed here, where the proposed discriminatory release of capacity would — by design — obstruct market forces, not facilitate them.

V. Serious Legal Concerns Remain Regarding EDC-Affiliate Relationships Under the DOER Proposal

NEPGA continues to believe — and other commenters agree — that potential fundamental conflicts of interest between EDCs and their affiliates should be a cause of great concern for ratepayers and regulators under the DOER Proposal. As NEPGA highlighted in its initial comments, the DPU regulations on EDC-affiliate transactions at 220 CMR 12.00 establish a variety of important consumer protections that the DOER Proposal would potentially implicate. (NEPGA Comments at 11.) In reviewing the comments of proponents, NEPGA thus found noteworthy the absence of any discussion of the importance of (or in certain instances, even a recognition of the existence of) 220 CMR 12.00. Particularly where Algonquin admitted that it is already "conducting arms-length negotiations of precedent agreements as we speak with [EDCs including Eversource and National Grid]," (Algonquin Gas Comments at 6), the question of how EDC-affiliate relationships will be addressed in joint pipeline ventures is not a hypothetical one. Given such apparent ongoing negotiations, NEPGA would have expected proponents to have shared with the DPU their knowledge of and experience with the regulatory restrictions applicable to affiliate relationships and transactions — restrictions that were instituted to provide critical ratepayer protections.

To the extent proponents addressed the affiliate issue at all, most simply noted that FERC has promulgated regulations governing EDC-affiliate transactions, thus implying that there is little need for the DPU to focus on this issue. (Eversource Comments at 10 & 19, National Grid Comments at 20-21; ANGA Comments at 3; Algonquin Gas Comments at 5.) Of course, merely acknowledging the fact that federal (or state) regulations exist is not the same as explaining how the DOER Proposal will — or can — meet those regulatory obligations in practice. The failure of proponents to offer an explanation in this regard underscores the importance of close scrutiny by the DPU of the legal implications of EDC-affiliate relationships under the DOER Proposal.

Furthermore, in their brief discussion of the affiliate issue, neither of the electric companies referenced their affirmative burden under G. L. c. 164, § 85: "establishing and proving the reasonableness" of an EDC-affiliate transaction to the DPU. Indeed, Eversource appeared dismissive of the reasonable inquiries posed by both DOER and the DPU concerning affiliates, insisting that "[t]he alleged issues surrounding the 'affiliate relationship' should not be overstated or misconstrued." (Eversource Comments at 9.) Eversource conceded that while the pipeline development venture may indeed entail a "combine[d] effort" involving EDC-affiliate transactions, this fact was of no legal consequence for the DPU because FERC's affiliate standards will apply, and "[o]nce this initial agreement is in place . . . there is no valid concern that arises in relation to an 'affiliate relationship.'" (Eversource Comments at 9-10.) Such a cursory response illustrates why NEPGA remains deeply concerned about the nuances of EDC-affiliate relationships under the DOER Proposal. Indeed, in its initial comments, NEPGA expressly highlighted the importance of investigating whether adequate safeguards can be implemented to prevent joint venture participants from colluding in ways that inure to their own mutual benefits, rather than to those of the ratepayers. (NEPGA Comments at 11-13.) Detailed information about the specific proposed EDC-affiliate relationships will be essential to the DPU evaluation of whether the DOER Proposal is consistent not only with 220 CMR 12.00, but the intent and purpose of the Restructuring Act: to dismantle vertical market power and ensure strong ratepayer protections.

To this end, NEPGA applauds DOER's recognition of the need to be vigilant regarding the potential for EDC-affiliate conflicts, and DOER's suggestion that the DPU consider developing "additional protections . . . for preserving ratepayer and market participant protections in the case of affiliate transactions . . . so that resulting contracts are not unduly preferential to an affiliate." (DOER Comments at 18.) While NEPGA remains highly skeptical that <u>any</u> such safeguards would be sufficient given the extensive intertwining between EDCs and affiliates that proponents suggest will be required to implement the DOER Proposal, NEPGA agrees that the DPU should give serious and critical attention to this issue.

VI. Conclusion

NEPGA elected to file these reply comments only after having closely reviewed each of the more than fifty comments submitted to the DPU. NEPGA found nothing in that review to alter the position articulated in its initial comments: that the DPU is precluded from authorizing EDC contracts for gas delivery capacity as a matter of law because of (i) the limitations on the DPU's authority under Section 94A to approve gas contracts for electric companies; (ii) the restrictions contained in the Restructuring Act regarding the authority of EDCs to participate in the generation business; (iii) the prohibition under federal law of allowing gas pipeline capacity to be reserved for the exclusive benefit of a limited group of bidders, and (iv) the myriad potential conflicts involving affiliate relationships and transactions.

The keystone of the DOER Proposal is this: that the DPU should authorize EDCs to contract for gas pipeline capacity in order to "enable generators to secure capacity needs, with net benefits being captured in electric rates for all distribution customers." (DOER Petition at 5). Yet regardless of whether the generators purchase the new gas pipeline capacity or not, the DOER Proposal faces fundamental legal problems. If the generators do purchase the new gas pipeline capacity (to which they may or may not be granted preferential access), the DPU will have authorized precisely the type of wholesale market intervention and access discrimination that FERC precludes. And if the generators do not purchase the gas pipeline capacity — or are willing to purchase only at a price below the EDC contracted price — the DPU will have authorized potentially significant stranded costs for which the ratepayers will be solely responsible. Neither outcome accords with the legal authority delegated to the DPU by the Legislature.

NEPGA remains convinced that for the reasons both stated in its initial comments and above in reply, the most effective step that the DPU can take at this time is to allow the wholesale fuel supply markets to work. Alternatively, to the extent the DPU believes that its investigation should remain open, NEPGA formally requests that the DPU bifurcate this proceeding so as to resolve the outstanding questions as to legal jurisdiction and other legal barriers before turning to questions of economic policy and obstacles to implementation.

NEPGA appreciates this opportunity to provide reply comments to the DPU, and looks forward to continuing to work closely with the DPU and DOER to ensure adherence to the principles endorsed by the Legislature in the Restructuring Act for the benefit of all Massachusetts ratepayers.

Respectfully submitted,

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Dated: July 6, 2015