The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 15-37 October 2, 2015

Investigation by the Department of Public Utilities on its own Motion into the means by which new natural gas delivery capacity may be added to the New England Market, including actions to be taken by the electric distribution companies.

ORDER DETERMINING DEPARTMENT AUTHORITY
UNDER G.L. C. 164, § 94A

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I. INTRODUCTION

On April 2, 2015, the Department of Energy Resources ("DOER") filed a petition with the Department of Public Utilities ("Department") requesting that the Department open an investigation into the means by which new natural gas capacity[1] may be added to the New England market, including actions that may be taken by the Massachusetts electric distribution companies ("EDCs") ("Petition"). On April 27, 2015, the Department issued an Order opening an investigation into whether: (1) there is an "innovative mechanism" for EDCs or other parties to secure new natural gas capacity into the region to benefit electric ratepayers; (2) it is appropriate for the Department to review for cost-recovery EDC contracts for natural gas capacity under G.L. c. 164, § 94A ("Section 94A"); and (3) the Department's established standard of review under Section 94A should be different for these contracts. See Investigation by the Department of Public Utilities on its own Motion into the means by which new natural gas delivery capacity may be added to the New England market, including actions to be taken by the electric distribution companies, D.P.U. 15-37, Order Opening Investigation (April 27, 2015) ("Order Opening Investigation"). The Department docketed this matter as D.P.U. 15-37.

As part of its Order Opening Investigation, the Department presented the questions posed by DOER in its Petition as well as additional questions developed by the Department. See Appendix A for all questions included in the Order Opening Investigation. The

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[1] Throughout this Order, the Department uses the terms "natural gas capacity," "gas capacity," and "pipeline capacity" interchangeably.

Department requested that interested persons address the questions and further encouraged individuals and stakeholders to submit relevant information even if not specifically requested in one of the questions. See Order Opening Investigation at 3. The Department provided for submission of initial comments by May 26, 2015, and reply comments by June 9, 2015. See Order Opening Investigation at 6. On May 6, 2015, the Department granted the Office of the Attorney General's ("Attorney General") request for an extension of time to file initial and reply comments. Accordingly, initial comments were due on June 15, 2015 and reply comments were due on July 6, 2015.

The Department received initial and reply comments from various individuals, customer groups, governmental entities, environmental organizations, EDCs, consumer interest groups, and interested industry entities. See Appendix B for list of individuals and stakeholders who filed initial and reply comments. The Department appreciates the thorough and thoughtful comments the participants submitted.[2]

In this Order, the Department determines its legal authority to review and approve contracts filed by EDCs for pipeline capacity, establishes a standard of review for such contracts, and sets forth filing requirements.

II. DOER PROPOSAL

In its Petition, DOER highlights industry stakeholders' widespread conclusion that high winter electricity costs in Massachusetts are attributable to natural gas capacity constraints

[2] The Department has given all comments relating to the DOER Petition and associated issues full consideration even though not all comments are specifically addressed herein.

(Petition at 1). DOER asserts that new, creative solutions are needed to reduce natural gas capacity congestion and to make sufficient pipeline capacity available for electricity generation during peak demand periods (Petition at 1).[3] DOER further asserts that gains from additional natural gas capacity can reduce ratepayer costs, diversify the energy mix, and secure electric system reliability (Petition at 3).

DOER states that local gas distribution companies ("LDCs") contract for gas capacity to serve their customers and that the LDCs receive assurance of cost recovery in regulated rates for those contracts (Petition at 3). DOER explains that electricity generators with gas-fired power plants sell their output into a wholesale power market that is not price regulated and are unwilling or unable to commit to long-term gas capacity contracts to secure firm gas supply, because the generators cannot be reasonably assured of cost recovery (Petition at 3). Thus, DOER asserts that the LDCs' customers do not experience market volatility and higher winter prices as severely as electric distribution customers (Petition at 3).[4] For example, DOER cites to the 60 percent to 96 percent increase in electric basic service rates during the winter of 2014-2015, when compared to the prior year period, due to constraints on gas capacity, thereby increasing forward prices for natural gas and electricity (Petition at 3). Moreover, DOER claims that despite the increasing demand for natural gas for heating and

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[3] DOER cites several recent studies to support the view that New England needs additional natural gas capacity to reduce regional gas prices (Petition at 2, n.1).

[4] Power to serve retail electric customers is procured through the wholesale power market. Generally, changes in wholesale electricity prices are reflected in retail electricity prices.

fuel for electric power generation in Massachusetts and New England,[5] gas pipeline companies are not willing to build new gas capacity without long-term contractual agreements for the new capacity (Petition at 3-4). DOER argues that the absence of long-term contracts needed to stimulate necessary gas pipeline expansion and the unwillingness of gas-fired generators to supply those contracts are the problem (Petition at 4).

To address this problem, DOER proposes that the Department consider authorizing EDCs to contract for new natural gas capacity, enabling gas-fired electric generators to secure firm capacity and thereby serving the electric generation needs of the EDCs' customers (Petition at 4-5). According to DOER, the EDCs would seek Department approval of such contracts pursuant to Section 94A (Petition at 4). DOER maintains that the EDCs will have the burden of proof to demonstrate that such contracts meet the Department's standard of review, which requires that the contracts are consistent with the public interest, and provide a benefit to ratepayers (Petition at 4). According to DOER, such contracts will be consistent with the public interest if the economic and other measurable benefits[6] are materially higher than the underlying costs (Petition at 5). DOER suggests that the Department determine the application of the public interest standard to any filed contract (Petition at 5).

DOER argues that pre-approval under Section 94A is the appropriate regulatory vehicle for EDCs to obtain assurance that the costs of any contractual arrangement will be included in

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5 Refer to Section III for a discussion of market conditions.

6 DOER suggests that benefits could include reduced electric rate volatility, lower overall winter electric prices, and enhanced system reliability, as well as the revenue from capacity sales into the market (Petition at 5).

electric distribution rates (Petition at 4). DOER proposes that the EDCs will reconcile the net annual cost or savings of such contracts through electric distribution rates (Petition at 5).

DOER concludes by requesting that the Department investigate the means by which the EDCs can contract for gas capacity to the benefit of electric ratepayers, including a determination of the Department's authority pursuant to Section 94A to review and approve such contracts (Petition at 5).

III. MARKET CONDITIONS

A. Summary of Comments

1. DOER

DOER argues that natural gas capacity constraints result in scarcity driven gas price spikes and corresponding electricity price spikes, particularly during seasonal peaking times (DOER Comments at 22). DOER points to the 99 percent positive correlation between regional average monthly gas and electricity prices in the winter months to support its view that electricity prices in the winter of 2013-2014 reached unprecedented high levels as a result of the gas price spikes (DOER Comments at 4, 22; DOER Reply Comments at 3, 15).[7]

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[7] Correlation refers to the degree of relationship between two variables (e.g., in this case, the movement of regional average monthly natural gas prices and regional average monthly electricity prices). The correlation statistic ranges from +1.0 to -1.0, with a value of 0.0 (no correlation) indicating that the relationship in the movement between the two variables is perfectly random, a value of 1.0 (perfect correlation) indicating that the two variables move exactly together, and the sign indicating that the variables move together in the same direction (positive) or in opposite directions (negative). Hence, a correlation of "99 percent" indicates that there is a strong positive relationship in the movement of regional average monthly natural gas and regional average monthly electricity prices.

DOER highlights the price differential for wholesale natural gas prices in New England versus the PJM Interconnection ("PJM")[8] during 2014, noting that the same volume of gas that New England generators used would have cost $600 million less in PJM due to lower gas prices (Petition at 2; DOER Comments at 22). DOER reports that in Pennsylvania, natural gas has averaged $7.21/MMBtu for the last three winters,[9] while in New England the average cost during the same period was $14.04/MMBtu (DOER Reply Comments at 3). Further, DOER claims that both the New York Independent System Operator ("NYISO")[10] and PJM have more adequate gas supplies than New England, and thus have experienced significantly lower electricity prices during the winter months (DOER Reply Comments at 18).

For the winter of 2014-2015, DOER lists three factors that mitigated regional gas capacity deficiency: (1) the implementation of the ISO New England Inc. ("ISO-NE")[11]

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8 PJM Interconnection is a regional transmission organization ("RTO") that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. See http://www.pjm.com/about-pjm/who-we-are.aspx.

9 MMBTU is a standard measurement for natural gas. One MMBTU is equal to one million British Thermal Units ("BTU"). One BTU is the amount of heat required to increase the temperature of a pint of water by one degree Fahrenheit.

10 NYISO coordinates the movement of wholesale electricity in New York State.

11 ISO-NE is a not-for-profit, private corporation that has responsibility for the management of the New England region's electric bulk power generation and transmission systems and for administering the region's open access transmission tariff, pursuant to approvals granted by the FERC. D.P.U. 12-77, at n.1 (2013).

winter reliability program;[12] (2) low world-wide oil prices; and (3) the availability of a "short supply" of liquefied natural gas ("LNG") (Petition at 2). DOER cautions, however, that these factors do not provide a long-term solution for alleviating the regional gas capacity constraints that it maintains result in escalating electric prices facing New England (Petition at 2).

DOER references a number of studies that indicate the need for additional gas capacity in order to reduce the differential between the wholesale price of natural gas in New England and in neighboring regions (Petition at 2, n.1). DOER also cites ISO-NE support for DOER's assertion that solving natural gas capacity bottlenecks will enable access to lower priced gas from neighboring regions (DOER Comments at 4, 13; DOER Reply Comments at 4). DOER concludes that the Commonwealth should not take a "wait and see" approach to addressing the gas capacity constraints that create gas price volatility, because sufficient access to low-cost gas supply is needed now (DOER Reply Comments at 5).

2. Other Parties

The pipeline companies, EDCs, and several other commenters support DOER's view that the there is a lack of sufficient natural gas infrastructure and constrained pipeline capacity that result in higher electric prices (Spectra Comments at 2, 10; Tennessee Comments at 2, 18; ANGA Comments at 5; CLEC Comments at 2; Eversource Comments at 2; National Grid Comments at 3; Dynegy Comments at 2; MMWEC Comments at 2). Eversource Energy ("Eversource") asserts that reliability concerns and high retail electricity prices will not be

[12] ISO-NE's winter reliability program provides out–of-market payments to generators to ensure reliable winter operations.

alleviated until existing constraints on pipeline capacity are eliminated (Eversource Comments at 2). National Grid reports that typical residential customer electric rates effective November 1, 2014 were almost 50 percent higher than rates for October 2014 and approximately 37 percent higher than rates in effect November 1, 2013 (National Grid Comments at 3). Algonquin Spectra ("Spectra") states that New England increasingly is relying on gas-fired generation as the marginal unit and that natural gas-fired generators typically rely on interruptible and released gas capacity to supply their facilities (Spectra Comments at 10). Spectra notes that, for four to five years, it has operated on essentially a 100 percent load factor through the Southeast, New York and Cromwell, Connecticut compressor stations downstream of the gas generators on its system (Spectra Comments at 8). Spectra asserts that these operating conditions mean that it does not have spare capacity to supply electric generators (Spectra Comments at 8). Spectra also reports that competition for the scarce interruptible pipeline capacity places upward pressure on spot prices for natural gas and the higher natural gas spot market prices result in higher power costs, especially on natural gas pipeline peak days (Spectra Comments at 10).

Tennessee Gas Pipeline ("Tennessee") indicates that it receives requests nearly every day of the year for transportation service to or within New England that greatly exceed its operating capacity (Tennessee Comments at 13). In addition, according to Tennessee, on each day in the winter months, it has to restrict shippers' requested volumes for non-firm service (Tennessee Comments at 13). According to Tennessee, the extent of these restrictions over the

past three winters ranges from an average low of approximately 0.7 Bcf/d,[13] to an average high of 1.4 Bcf/d, with sustained periods of significantly greater restrictions (e.g., restricting up to 2.6 Bcf/d of shipper requests during the winter 2014 -2015) (Tennessee Comments at 13). Tennessee states that Massachusetts and New England are experiencing the highest electricity and natural gas prices in the continental United States (Tennessee Comments at 2).

Other commenters disagree with various aspects of DOER's market view. The Conservation Law Foundation ("CLF") asserts that DOER is incorrect in concluding that "high winter electricity costs in Massachusetts are attributable to natural gas capacity constraints" given that wholesale energy markets did not experience the same level of seasonal price increase in 2014-2015 as occurred the prior year (CLF Comments at 2, 9; CLF Reply Comments at 2). Several commenters point out that wholesale electricity prices for 2015 declined in the range of 40-45 percent from the previous year and that prices in the spring of 2015 continued to decrease (CLF Comments at 10; EDF Comments at 17; NEPGA Comments at 24, 25). The Acadia Center cautions that high electricity prices are not necessarily linked to gas constraints, and that it would be reasonable to conclude that high winter prices are attributable to an inadequate supply of any resource that produces electricity or reduces electricity demand (Acadia Center Comments at 2).

With regard to current market conditions, the Attorney General requests that the Department undertake a full and careful analysis of the cause of high winter electricity prices

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[13] Bcf is a measurement of natural gas in cubic feet equating to one billion cubic feet. Bcf/d represents one billion cubic feet per day.

and the need for potential solutions (Attorney General Comments at 1). The Attorney General and other commenters argue that the studies DOER cites regarding market conditions are flawed, as they rely in part on flawed price suppression metrics and that the studies fail to adequately explain assumptions and evaluate alternatives (Attorney General Comments at 16-17; NEPGA Comments at 17; Berkshire Photovoltaic Services Comments at 1). Further, both the Attorney General and Repsol note that natural gas price spikes only occur a few dozen days during the winter season (Attorney General Comments at 3; Repsol Comments at 3).

Other commenters observe that the market conditions witnessed in 2013-2014 were exceptional, and emphasize that both the wholesale market and energy policymakers are responding appropriately to address the concerns identified by DOER and others advocating for EDC gas capacity contracts (NEPGA Comments at 24, 25; GDF Suez Comments at 15-20; CLF Comments at 28-29; Acadia Center Comments at 5-7). GDF Suez states that LNG imports in winter 2014-2015 were double those in winter 2013-2014, and that increased LNG imports can mitigate the basis differential and relieve price volatility (GDF Suez Comments at 18). Various commenters note that LNG is being offered into the New England market at prices competitive with domestic gas supply options during cold winter months (Repsol Comments at 4,5; CLF Comments at 20, 23-26; GDF Suez Reply Comments at 13, 14).

B. Analysis

In its Petition, DOER points to industry stakeholders' widespread conclusion that high winter electricity costs in Massachusetts are attributable to pipeline capacity constraints.

DOER asserts that new means are needed to reduce pipeline capacity congestion and to make sufficient gas capacity available for electricity generation during peak demand periods (Petition at 1). Specifically, DOER asks the Department to consider authorizing EDCs to contract for new pipeline capacity and recover the costs through electric distribution rates (Petition at 4). DOER requests that the Department investigate the means by which the EDCs can contract for pipeline capacity to the benefit of electric ratepayers, including the applicability of Section 94A (Petition at 4-5).

DOER premises its Petition on several fundamental assumptions regarding New England's wholesale natural gas and electricity markets: (1) winter regional pipeline capacity constraints have been increasing and are expected to increase further; (2) pipeline capacity constraints have caused recent wholesale gas prices to rise above historical levels; (3) regional wholesale gas and power prices are near perfectly correlated and thus high wholesale gas prices have resulted in high wholesale electricity prices relative to historical levels; and (4) regional power generators lack sufficient financial incentives to contract for new gas capacity. DOER and some commenters point to industry studies and other information as support for DOER's market view and its conclusion that increasing regional gas capacity will lead to lower wholesale gas and electricity prices. Other commenters challenge DOER's market view, its conclusion regarding the need for EDCs to contract for gas capacity to lower regional wholesale electricity prices, and/or the form of gas capacity arrangements that would best accomplish this objective.

On balance, the Department finds that DOER and other parties to this proceeding have provided sufficient information to support DOER's assessment of current New England wholesale market conditions and to arrive at the conclusion that increasing regional gas capacity will lead to lower wholesale gas and electricity prices. While not making a finding in this Order that voices a preference for any particular project for gas pipeline infrastructure development over any other potential capacity constraint solution, the Department finds in this Order that innovative solutions and a menu of options are required to alleviate capacity constraints and the associated downstream market price impact experienced by Massachusetts ratepayers. Therefore, the Department will proceed to evaluate whether it has the requisite authority to approve EDC contracts for acquisition of new natural gas capacity and recover the costs through electric distribution rates, including the applicability of Section 94A. Accordingly, we undertake this evaluation below.

IV. LEGAL AUTHORITY

A. Section 94A

1. Introduction

As a threshold matter in its review of the questions posed by DOER in its Petition and in consideration of the questions presented by the Department, the Department must determine whether it has the statutory authority to review and approve contracts entered into by EDCs for pipeline capacity. Section 94A provides, in relevant part, as follows:

> No gas or electric company shall hereafter enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the department . . . .

Several commenters argue that the plain language of Section 94A provides the Department with the authority to approve contracts entered into by EDCs for pipeline capacity. Other commenters contend that Section 94A, when interpreted using established canons of statutory construction, and when considered in light of the statute's legislative history, should not be construed as allowing the Department to review and approve such contracts.

Below, the Department (1) summarizes the comments addressing these topics and (2) determines that it has the authority, pursuant to Section 94A, to review and approve EDC gas capacity contracts. On the basis of that review, the Department then takes the opportunity to address other issues commenters raise in this proceeding associated with the Electric Restructuring Act of 1997 (St. 1997, c. 164), federal preemption, what standard of review should be applied, and what filing requirements should be required to warrant further review and approvals.

2. Summary of Comments

a. Commenters in Support of Section 94A As Providing Authority

DOER, the EDCs, and several other commenters argue that the plain language of Section 94A provides the Department with the statutory authority to approve pipeline capacity contracts entered into by EDCs (DOER Comments at 6-7; Eversource Comments at 3-4; National Grid Comments at 10-11).[14] To support this argument, these commenters highlight the first sentence of Section 94A – providing that "[n]o gas or electric company shall hereafter enter into a contract for the purchase of gas or electricity . . . ." (emphasis added) - and argue

[14] Two EDCs filed comments in this matter: Eversource and National Grid.

that the statute plainly permits either gas or electric companies to enter into contracts for the purchase of gas capacity (DOER Comments at 6; Eversource Comments at 3-4; National Grid Comments at 10-11).[15] Several commenters point to the familiar maxim that when statutory language is clear and unambiguous, it must be given its ordinary meaning (see, e.g., Eversource Reply Comments at 15, citing Providence & Worcester R.R. v. Energy Facilities Siting Bd., 453 Mass. 135, 141 (2009); National Grid Reply Comments at 16; Spectra Reply Comments at 9).

A number of commenters also argue that because Section 94A clearly and unambiguously permits the Department to review contracts for the purchase of gas capacity entered into by EDCs, there is no need to consider the statute's legislative history to determine whether the Legislature intended for this to be the case (see, e.g., Tennessee Reply Comments at 16; CLEC Reply Comments at 4; Spectra Comments at 2). For the same reason, several commenters contend that, despite comments raised in opposition, there is no need to refer to or rely upon canons of statutory construction to determine Section 94A's plain meaning (see, e.g., Tennessee Reply Comments at 16-17; ANGA Comments at 2; Spectra Comments at 2).

Finally, several commenters contend that Section 94A must be read in the context of the Department's overarching regulatory authority, as well as the Department's reasoning and

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[15] DOER further argues that the words "or" and "and" contained in the first sentence of Section 94A "are generally interchangeable and 'one may be substituted for the other, if consistent with the legislative intent'" (DOER Comments at 6, n.5, quoting Holyoke Water Power Co. v. FERC, 799 F. 2d 755, 761 (1986)). According to DOER, substituting the word "and" for "or" reinforces the fact that an EDC can enter into a gas contract, if approved by the Department (DOER Reply Comments at 11).

justification for taking action to approve EDC contracts (see, e.g., Eversource Reply Comments at 11; National Grid Reply Comments at 12-13).[16] Specifically, these commenters cite to the Department's broad authority to: (1) supervise all gas and electric companies, pursuant to G.L. c. 164, §§ 76, 94, 94A; (2) allow cost recovery of EDC contracts where it is consistent with the public interest to do so, pursuant to G.L. c. 164, § 94 and Section 94A; and (3) take steps to ensure a necessary energy supply at a reasonable cost, pursuant to G.L. c. 164, § 69*I* (Eversource Reply Comments at 12-13; National Grid Reply Comments at 12-14; DOER Reply Comments at 6-7).

b. Commenters in Opposition to Section 94A As Providing Authority

Conversely, a number of other commenters argue that Section 94A does not provide the Department with legal authority to authorize EDCs to contract for natural gas capacity (see, e.g., Attorney General Comments at 21; CLF Comments at 4-5; GDF Suez Comments at 3; NEPGA Comments at 4). In support of their position, these commenters rely upon: (1) canons of statutory construction; and (2) Section 94A's legislative history (Attorney General Comments at 21-23; CLF Comments at 4-5; GDF Suez Comments at 3-5; NEPGA Comments at 4-5).

[16] DOER and other commenters suggest that if Section 94A did not exist, there are other means by which an EDC could seek Department approval of pipeline capacity contracts (e.g., pursuant G.L. c. 164, § 76, the Department's general supervisory authority over EDCs; under G.L. c. 164, §§ 93, 94, the Department's authority to set rates) (DOER Reply Comments at 10). For the reasons stated below and based on the findings in this Order, the Department need not address those other means here.

The Attorney General, GDF Suez, and several other commenters contend that Section 94A should be interpreted using the statutory construction maxim reddenda singula singulis, which provides that "[w]here a sentence contains several antecedents and several consequents they are to be read distributively . . . [and] . . . [t]he words are to be applied to the subjects that seem most properly related by context and applicability" (GDF Suez Comments at 4, quoting Sutherland Statutory Construction § 47:25; Attorney General Comments at 22, citing Commonwealth v. Barber, 143 Mass. 560, 562 (1887); 2A Sutherland Statutory Construction § 47.26 (7th ed.)). GDF Suez argues that "[a]pplied here, the parallel uses of the word 'or' in the first sentence of Section 94A can only be read in a manner that authorizes the DPU to approve electric company contracts for the purchase of electricity, and gas company contracts for the purchase of gas" (GDF Suez Comments at 4). GDF Suez and other commenters contend that the Department "cannot mix and match among the antecedents and consequents in this clause of Section 94A" (GDF Suez Comments at 4; Attorney General Comments at 22).

A number of commenters also argue that Section 94A's legislative history demonstrates that the Legislature did not intend to permit the Department to review and approve EDC gas capacity contracts (see, e.g., Attorney General Comments at 22; Compact Comments at 9; GDF Suez Comments at 4-5). Several commenters note that when Section 94A was originally enacted, the statute addressed only the purchase of electricity by electric companies and made no reference to gas companies or gas contracts (see, e.g., GDF Suez Comments at 4-5, citing St. 1926, c. 298; NEPGA Comments at 4-6; Attorney General Comments at 22). Although

the Legislature later amended Section 94A to include, inter alia, references to gas companies and gas contracts, GDF Suez notes that '[t]he Supreme Judicial Court has held that when interpreting an amended statute, the 'provisions of [an] amendatory act [are] to be considered together with the provision of [the] original act.'" (GDF Suez Comments at 4-5, quoting Foster v. Group Health Inc., 444 Mass. 668, 673-674 (2005)).

3. Analysis and Findings

a. Introduction

It is axiomatic that in order to define the scope of our authority under Section 94A, we must first consider the plain language of the statute. When interpreting a statute, the "statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Welch v. Sudbury Youth Soccer Assoc., Inc., 453 Mass. 352, 354-355 (2009), quoting Sullivan v. Brookline, 435 Mass. 353, 360 (2001). The Supreme Judicial Court has also stated:

> None of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature.

Bolster v. Commissioner of Corps. and Taxation, 319 Mass. 81, 84-85 (1946); see also International Org. of Masters, Mates and Pilots, Atlantic and Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard and Nantucket S.S. Authority, 392 Mass. 811, 813 (1984). Where ambiguities exist, the Court will interpret a statute:

> according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in

> connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

Commonwealth v. Welch, 444 Mass. 80, 85 (2005), quoting Commonwealth v. Galvin, 388 Mass. 326,328 (1983), quoting Board of Education v. Assessor of Worcester, 368 Mass. 511, 513 (1975); see also Sperounes v. Farese, 449 Mass. 800, 804 (2007), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934).

Therefore, in our review in this Order, the Department must first look to the plain language of the statute itself to determine if the intent can be ascertained from all its words construed by the ordinary and approved usage of the language. The Department's statutory review is detailed below.

b. The Department's Authority To Review Contracts Under Section 94A

Section 94A authorizes the Department to review and approve contracts for "the purchase of gas or electricity" by "gas or electric companies." Specifically, Section 94A provides, in relevant part, as follows:

> No gas or electric company shall hereafter enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the department . . . . (emphasis added)

As some commenters have noted, Section 94A, in its original form, did not mention gas companies or the purchase of gas capacity. See St. 1926, c. 298 ("No electric company shall hereafter enter into a contract for the purchase of electricity covering a period in excess of three years without the approval of the department . . . ."). The Legislature later amended

Section 94A to add, inter alia, language regarding gas. See St. 1930, c. 342 (adding gas companies and gas contracts to first sentence of statute).

"[A] statute is to be construed as written, in keeping with its plain meaning." eVineyard Retail Sales-Mass., Inc. v. Alcoholic Beverages Control Comm'n, 450 Mass. 825, 831 (2008). In this instance, the plain language of Section 94A provides the Department with its authority to review and approve "the purchase of gas or electricity" by "gas or electric companies." The use of the word "or" here is used to list the entities (gas and electric companies) and the products (gas and electric purchases) and does not limit one type of company or one type of product. Consistent with the overall structure of Chapter 164, the Legislature provides the Department with authority over both electric and gas distribution companies, and without direct limiting language. Accordingly, taken in the context of the words in their ordinary and approved usage, we find that the plain language of Section 94A provides the Department with the statutory authority to approve gas capacity contracts entered into by EDCs. Contrary to arguments raised by the Attorney General, GDF Suez, and others, the words of the statute are clear as to their plain meaning in the statute itself. As such, there is no need for the Department to consider the legislative history or doctrines of statutory construction to derive the meaning of the statute.

To the extent that commenters argue that the Department lacks authority to approve such contracts, commenters rely on inapplicable canons of statutory construction and strained assumptions from Section 94's legislative history. For example, the Attorney General, GDF Suez, and others rely on the canon of statutory construction known as reddenda singula

singulis. But this canon of statutory construction is used in circumstances where textual construction would not make sense if the words of the statute were construed literally. This is not the case here. Additionally, to the extent commenters argue that the Legislature did not intend to alter or expand the meaning of Section 94A when it amended the statute to cover gas companies and gas contracts, these commenters overlook the fact that the very point of the amendment was to expand the scope of the Department's authority. In any event, where the statutory language is clear and unambiguous, as is the case for Section 94A, we need not consider extrinsic information to ascertain the Legislature's intent, as the intent is clear from the words of the statute. See Pyle v. School Committee of South Hadley, 423 Mass. 283, 285-286 (1996) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent."), citing Boston Neighborhood Taxi Ass'n v. Department of Pub. Utils., 410 Mass. 686, 690 (1991); Bronstein v. Prudential Ins. Co., 390 Mass. 701, 704 (1984) ("When the use of the ordinary meaning of a term yields a workable result, there is no need to resort to extrinsic aids such as legislative history").

The Supreme Judicial Court has long recognized that the broad delegation of authority to the Department by the Legislature vests the Department with significant discretion to construe its enabling statutes. For example, the Court has found that where Chapter 164 does not define certain terms, "[t]he task of [statutory] interpretation is thus left to the discretionary authority and expertise of the department." City of Cambridge v. Department of Telecomm. & Energy, 449 Mass. 868, 875 (2007). The Court has elaborated that "[w]here, as here, the case involves interpretation of a complex statutory and regulatory framework, '[w]e give great

deference to the department's expertise in areas where the Legislature has delegated its decision making authority.'" City of Cambridge, 449 Mass. at 875, quoting MCI Telecomm. Corp. v. Department of Telecomm. & Energy, 435 Mass. 144, 150-151 (2001), quoting Stow Mun. Elec. Dept. v. Department of Pub. Utils., 426 Mass. 341, 344 (1997). Most significantly, the Court has consistently held that "[a]n agency's interpretation of its own regulation and statutory mandate will be disturbed only if the interpretation is patently wrong, unreasonable, arbitrary, whimsical or capricious." Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 416 (2001) (internal quotation marks omitted). As such, our interpretation here in this regard is appropriate and well within the discretionary authority and expertise of the Department. In sum, the plain language of Section 94A provides the Department with the statutory authority to approve gas capacity contracts entered into by EDCs. Because Section 94A is clear and unambiguous, there is neither the need for, nor legal justification to require, further analysis of the statute's legislative history or interpretation of the statute using canons of statutory construction. As such, the Department in the sections below will address the other issues raised by commenters in this proceeding, chiefly those associated with the Electric Restructuring Act of 1997 (St. 1997, c. 164), federal preemption, the standard of review, and filing requirements for further review and approvals.

B. Restructuring Act

1. Introduction

The Electric Restructuring Act of 1997 (St. 1997, c. 164)[17] ("Restructuring Act"), restructured the electric industry in the Commonwealth by providing incentives to investor-owned EDCs to divest their generating assets and by adopting a competitive market structure for the purchase of electricity. In order to provide "affordable service" to all consumers, the Restructuring Act removed the generation of electricity from state regulation and set the purchase of electricity in a competitive market, while leaving the distribution and transmission systems of the EDCs subject to public regulation. See St. 1997, c. 164 § 193; G.L. c. 164, § 1A(a)(e).

Several commenters maintain that the DOER Proposal is inconsistent with the policies and provisions of the Restructuring Act (see, e.g., Attorney General Comments at 18-21; CLF Comments at 5; GDF Suez Comments at 6; NEPGA Comments at 6). Other commenters, however, respond that the DOER Proposal is, in fact, consistent with the Restructuring Act, and that, in the general paradigm DOER presents, no obligations would be imposed on wholesale market participants (see, e.g., DOER Reply Comments at 8-9; Eversource Reply Comments at 10; Tennessee Reply Comments at 19-20). The Department addresses this issue below.

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[17] "An Act Relative To Restructuring The Electric Utility Industry In The Commonwealth, Regulating The Provision Of Electricity And Other Services, And Promoting Enhanced Consumer Protections Therein."

2. Summary of Comments

A number of commenters argue that allowing EDCs to enter into long-term contracts for natural gas capacity would violate the general purpose of the Restructuring Act. These commenters argue that the primary purpose of the Restructuring Act was to remove EDCs from the business of owning generation facilities, producing electricity, and buying fuel to produce electricity (see, e.g., Attorney General Comments at 18-19; GDF Suez Comments at 6; NEPGA Comments at 6; CLF Comments at 5). The Attorney General and others also argue that the Restructuring Act limits the Department's authority in regulating generation-related activities and shifts the risks of generation development from consumers to generators (Attorney General Comments at 19, citing Investigation by the Department of Public Utilities on its own motion into the need for additional capacity in NEMA/Boston within the next ten years, pursuant to Chapter 209, Section 40 of the Acts of 2012 and pursuant to G.L. c. 164, § 76, D.P.U. 12-77, at 30 (2013);[18] see also GDF Suez Comments at 7-8; NEPGA Comments at 9-10).

Several commenters maintain that approving the DOER Proposal is a reversal of established state policy that would expose ratepayers to another round of stranded costs as well as would produce unfair and anti-competitive distortions in the wholesale market (see, e.g.,

[18] As part of "An Act Relative to Competitively Priced Electricity in the Commonwealth," the Legislature directed the Department to "open a docket to investigate the need for additional [electric generating] capacity in the [Northeastern Massachusetts and Greater Boston ("NEMA/Boston")] region within the next 10 years." St. 2012, c. 209, § 40. On October 1, 2012, the Department issued an Order opening docket D.P.U. 12-77 for that purpose.

NEPGA Comments at 6; GDF Suez Comments at 7; CLF Comments at 5). Further, the Cape Light Compact ("Compact") argues that absent specific legislative authorization, the Department should not allow EDCs to enter into long-term pipeline capacity contracts in a restructured electric market (Compact Comments at 8).

In contrast, DOER, the EDCs, the gas pipelines, and others argue that allowing the DOER Proposal neither implicates nor violates the policies and provisions of the Restructuring Act (DOER Reply Comments at 8-9; National Grid Reply Comments at 18-19; Eversource Reply Comments at 10; Tennessee Reply Comments at 19-20). A number of commenters contend that in entering into long-term gas capacity contracts, the EDCs would not own, operate or control generation facilities or dictate the prices generators are bidding into the market in contravention of the Restructuring Act (DOER Reply Comments at 8-9; National Grid Reply Comments at 19; Eversource Reply Comments at 10).

Tennessee asserts that while the Restructuring Act required the EDCs to divest their non-nuclear generation assets, it did not remove either the EDCs' obligation to provide ratepayers reliable and least-cost service or the Department's oversight of that obligation (Tennessee Reply Comments at 19). Tennessee maintains that it is appropriate for EDCs, consistent with their obligation to provide least-cost service, to enter into long-term gas capacity contracts to lower or moderate ratepayer electricity costs, and for the Department to approve any such contract it finds is consistent with the public interest (Tennessee Reply Comments at 19).

In response to those commenters who assert that approving the DOER Proposal would be contrary to Department precedent in a post-Restructuring Act market, Tennessee notes that the Department has implemented a number of policy changes and associated ratemaking mechanisms for both gas and electric companies that could affect wholesale market prices (Tennessee Reply Comments at 19). For example, Tennessee states that the Department investigated and adopted ratemaking principles to "enhance the price-responsiveness of wholesale electricity markets" and to "moderate some of the impact of electricity and gas commodity price levels" in its decoupling ratemaking proceeding (Tennessee Reply Comments at 19, citing Revenue Decoupling, D.P.U. 07-50, at 1-2 (2007)). Tennessee contends it is "entirely appropriate" in this instance for the Department to review and approve EDC contracts for natural gas capacity in order to lower customer costs, if the Department finds such contracts are consistent with the public interest (Tennessee Reply Comments at 19).

DOER, the EDCs, and others argue that by increasing the availability of pipeline capacity to relieve pipeline constraints, and thereby improving reliability and decreasing price risk, DOER's proposal does not violate the Restructuring Act (DOER Comments at 3; DOER Reply Comments at 8-9; Eversource Reply Comments at 10-11; National Grid Reply Comments at 17-19; Tennessee Reply Comments at 19). Further, the EDCs contend that the DOER Proposal, as presented, will not cause EDCs to become engaged in producing, manufacturing, or generating electricity for sale at wholesale. Rather, proponents contend that the DOER Proposal affords the EDCs the opportunity to purchase gas capacity, not the actual commodity, which will then create the financial incentives needed to encourage additional

resources into the market that wholesale generators may or may not choose to purchase (Eversource Reply Comments at 10; National Grid Reply Comments at 18-19)

3. Analysis and Findings

In this Order, the Department has found that, on balance, increasing regional pipeline capacity will lead to lower gas and electric prices for Massachusetts ratepayers. Further, the Department has determined that it has the authority under Section 94A to review and approve a long-term contract for natural gas capacity filed by an EDC. In addition, for the reasons stated below, the Department finds that comments in opposition to DOER's proposal overstate what that proposal is attempting to accomplish, and, in the construct proposed by DOER and the framework established by the Department, the Restructuring Act does not present an impediment to EDCs' contracting for natural gas capacity subject to Department review and approval.

By way of background, the Department is in complete agreement with commenters that the Restructuring Act was implemented to introduce competition in the retail electricity market with the overriding policy of providing affordable electric service to all Massachusetts consumers under reasonable terms and conditions. St. 1997, c. 164, § 1(b). Pursuant to the DOER Proposal, electric generators and others would have the option to acquire new incremental pipeline capacity from the EDCs, under oversight by the Federal Energy Regulatory Commission ("FERC"). Under this construct, ownership of generation facilities would remain with the merchant generators, and would not be shifted to the control of the EDCs. Further, as noted by several of the commenters, an EDC gas capacity contract under

this framework will simply put a resource into the market that could operate to mitigate higher peak-period price electric prices. Nothing is being required of the generators, nor is there any direct intervention into the wholesale market by the EDCs. Wholesale generators will be free to purchase pipeline capacity from the market, and, in fact, if EDC gas capacity contracts are found needed and warranting Department approval in future filings, wholesale generators will have the opportunity to take advantage of this pipeline capacity. This opportunity would afford generators additional supply options in the marketplace, with the intended result of lower energy prices. Accordingly, the Department finds that the DOER Proposal and the framework established by the Department would not result in the EDCs' reentry to producing, manufacturing or generating electricity for sale at wholesale, as contemplated by the Restructuring Act. See St. 1997, c.164, § 193.

With respect to the comments from the Attorney General and others that rely upon the Department's ruling in D.P.U. 12-77 as grounds to state that the Department's actions here are somehow inconsistent with precedent, the Department's decision in that Order does not contradict our actions here. The Department's investigation in D.P.U. 12-77 was based on a specific directive of the Legislature into the electricity generation capacity needs of a particular capacity zone in Massachusetts: NEMA/Boston.[19] As a result of its investigation, the

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[19] At the time of the Department's Order in D.P.U. 12-77, there were four capacity zones in New England: Connecticut, NEMA/Boston, Maine, and Rest of Pool. D.P.U. 12-77, at 5 (2013). Since that time, for the ninth Forward Capacity Market auction, the region was divided into four zones: Connecticut (CT); Northeast Massachusetts/Greater Boston (NEMA/Boston); Rest of Pool (ROP); and a new zone, Southeast Massachusetts/Rhode Island (SEMA/RI). The ROP zone includes western and central Massachusetts, Vermont, New Hampshire, and Maine. The CT, NEMA/Boston and

Department found a need for additional electric generating capacity in NEMA/Boston taking specific account, as required by the Legislature, the assessment of the capacity market in ISO-NE. D.P.U. 12-77, at 16-17. Regarding the issue of directing EDCs to solicit proposals for long-term generation resource contracts to meet this need, the Department declined, inter alia, to mandate the EDCs to solicit and enter into capacity generation contracts for the NEMA/Boston region. D.P.U. 12-77, at 29-31. The Department's actions by this instant Order are not inconsistent with our decision in D.P.U. 12-77. Consistent with the Department's decision in D.P.U. 12-77 not to mandate generation resource acquisition, by this Order the Department does not mandate that EDCs acquire pipeline capacity. Rather, the Department has established a framework for EDCs to enter into pipeline capacity contracts, subject to Department review and approval.

Furthermore, despite the efforts by some commenters to characterize it as such, the potential that an outcome of a Department action may have implications in the wholesale electricity market does not by itself render the action inconsistent with the Restructuring Act. Since the implementation of the Restructuring Act, the Department has initiated several investigations that have implications for wholesale electricity markets. See, e.g. Order Opening Investigation into Initiatives to Improve the Retail Electric Competitive Supply Market, D.P.U. 14-140 (2014); D.P.U. 07-50. The Department's review in this proceeding is

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SEMA/RI zones were created based on transmission limitations that restrict the level of power that can be imported into each area, as well as local resource levels and needs. See, http://www.iso-ne.com/static-assets/documents/2015/02/fca9_initialresults_final_02042015.pdf.

not inconsistent with its authority to undertake those previous reviews. In the instant case, the Department finds that establishing the framework set forth herein enables the Department to investigate the option of EDCs' entering into long-term pipeline capacity contracts as a means to moderate the recent volatility of retail electricity prices in Massachusetts and the region. Pertinent to our decision here is the Department's role pursuant to statute and precedent as the state entity responsible for the oversight of investor-owned electric companies and natural gas companies in the Commonwealth, and responsible for developing alternatives to traditional regulation and ensuring that utility consumers are provided with the most reliable service at the lowest possible cost. Based on this authority, the Department's review and conclusions regarding the applicability of the Restructuring Act to this proceeding are appropriate.

For the reasons stated above, the Department finds that an EDC contract for pipeline capacity would be consistent with the Restructuring Act if an EDC is able to demonstrate that entering into a contract would result in cost savings for EDC ratepayers and otherwise satisfies the standard of review for approving EDC gas capacity contracts set forth in Section V. C, below. Therefore, the Department finds that our actions by this Order do not violate the policies and provisions of the Restructuring Act.

C. Federal Preemption

1. Introduction

Pursuant to the Supremacy Clause of the United States Constitution,[20] federal preemption operates to invalidate any state action in a field of regulation that Congress intended the federal government to occupy exclusive jurisdiction or where a court determines that state action operates as an obstacle to achieving the objectives of the federal government. See, e.g., Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000) (even in the absence of an express preemption provision, however, state law is preempted "[w]hen Congress intends federal law to 'occupy the field'" or "to the extent of any conflict with a federal statute.") (citations omitted). Numerous commenters assert that the DOER Proposal for EDCs to purchase natural gas capacity is inconsistent with federal law and may be preempted by one of the following: (1) the Natural Gas Act, 15 U.S.C. § 717 et seq. ("Natural Gas Act") (see, e.g., CLF Comments at 6-7; Acadia Center Comments at 2); (2) the dormant Commerce Clause doctrine (see, e.g., Acadia Comments at 4; CLF Comments at 6-7); [21] and (3) the Federal Power Act, 16 U.S.C. § 824 et seq. ("Federal Power Act") (see, e.g., GDF Suez Comments at 12-15). The Department addresses each of these below.

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[20] U.S. CONST. art. VI, cl. 2.

[21] "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several Sates, and with Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

2. Natural Gas Act

a. Summary of Comments

Several commenters maintain that the DOER proposal to allow EDCs to contract for natural gas capacity may be preempted by the Natural Gas Act as an impermissible intrusion into the wholesale natural gas capacity release market that is within FERC's exclusive domain (see, e.g., CLF Comments at 6-7; Acadia Comments at 3-4; GDF Suez Reply Comments at 7; Compact Reply Comments at 3). NEPGA asserts that the Natural Gas Act and FERC regulations prohibit the EDCs and interstate pipeline companies from reserving pipeline capacity for the exclusive use of Massachusetts ratepayers (NEPGA Comments at 13). DOER also states that it is unclear how FERC would view any targeted offering of services involving interstate pipelines (DOER Comments at 28).

Eversource and National Grid argue that with no specific contract proposal before the Department, it is premature for the Department to determine that the DOER Proposal is preempted by federal regulation under the Natural Gas Act (Eversource Reply Comments at 20; National Grid Reply Comments at 6-8). Eversource, National Grid, and Tennessee also maintain that there are ways to structure a contract that would be compatible with FERC regulations, and the EDCs note that FERC has invited requests for waiver of its capacity release regulations (Eversource Reply Comments at 18-19; National Grid Reply Comments at 6-7; Tennessee Reply Comments at 11).

b. Analysis and Findings

In this Order, the Department has determined that it has authority under Section 94A to review and approve a long-term contract for natural gas capacity filed by an EDC. In establishing that authority and in setting the standard of review and filing requirements herein, the Department is not regulating (1) transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, or (3) natural gas companies so engaged, which are the purposes of the Natural Gas Act. 15 U.S.C. § 717(b). Therefore, the Department finds that our actions by this Order do not violate the Natural Gas Act.

3. Dormant Commerce Clause

a. Summary of Comments

The dormant Commerce Clause doctrine refers to the prohibition that is implied in the Commerce Clause of the U.S. Constitution that bars states from implementing policy or legislation that discriminates against or unduly burdens interstate commerce. See, e.g., Public Utilities Commission of Rhode Island. v. Attleboro Steam & Electric Company, 273 U.S. 83 (1927). Acadia and CLF raise concerns that any prospective state action, i.e., legislation that may be taken to restrict the DOER Proposal to intrastate markets would violate the dormant Commerce Clause of the U.S. Constitution (CLF Comments at 7; Acadia Center Comments at 4).

National Grid and Eversource maintain that the DOER Proposal can be implemented in a manner that does not raise preemption concerns triggered by the dormant Commerce Clause

(National Grid Reply Comments at 8; Eversource Reply Comments at 20). National Grid and Eversource contend that no aspect of the DOER's Proposal suggests that an EDC contract to procure pipeline capacity would benefit in-state economic interests by burdening out-of-state competitors (National Grid Reply Comments at 8; Eversource Reply Comments at 21). National Grid also notes that the DOER Proposal, in fact, seeks solutions to obtain new pipeline capacity that would benefit electric ratepayers in the region (National Grid Reply Comments at 8). National Grid concludes that, at most, the Acadia and CLF comments could be useful in the event that an EDC submits a proposal with terms that differ from the parameters set forth in the DOER proposal (National Grid Reply Comments at 8).

b. Analysis and Findings

In this Order, the Department has determined that it has authority under Section 94A to review and approve a long-term contract for natural gas capacity filed by an EDC. For the reasons stated above, this determination does not discriminate against out-of-state interests or unduly burden the free flow of commerce among the states or otherwise regulate interstate commerce. Therefore, the Department finds that our actions by this Order do not violate the Commerce Clause or the dormant Commerce Clause doctrine.

4. Federal Power Act

a. Summary of Comments

GDF Suez, CLF and others state that Congress has granted FERC exclusive jurisdiction over wholesale electric markets, and that any state action with a direct effect on wholesale energy price is preempted by the Federal Power Act (see, e.g., GDF Suez Comments at 12-15;

CLF Comments at 3, 6-7; NEMA Comments at 5). GDF Suez asserts that there is a significant likelihood that the DOER Proposal would result in intervention in the wholesale electricity market that is preempted by the Federal Power Act (GDF Suez Comments at 12, citing PPL Energyplus, LLC v. Nazarian, 753 F.3d 476 (4th Circ. 2014) ("Nazarian") and PPL Energyplus, LLC v. Solomon. 766 F.3d 241, 253 (3d Cir. 2014) ("Solomon")).

DOER, Eversource, and National Grid assert that the cases that GDF Suez relies upon fail to support its contention that the DOER Proposal is preempted by the Federal Power Act (DOER Reply Comments at 12-14; Eversource Reply Comments at 21-24; National Grid Reply Comments at 9-12). Specifically, these commenters argue that unlike the Nazarian and Solomon cases, where the federal appeals courts found that the Maryland and New Jersey programs set a price level for a generator's participation in the wholesale market, an EDC contract for pipeline capacity would not set rates or compensation levels a generator may receive for energy or capacity at wholesale (DOER Reply Comments at 12-14; Eversource Reply Comments at 22-23; National Grid Reply Comments at 11). DOER further asserts that by permitting EDCs to enter into contracts for gas capacity, the Department is not intervening in the wholesale electricity market as certain commenters suggest (DOER Reply Comments at 13).

Eversource asserts that the fact that the availability of incremental pipeline capacity could have an indirect effect on wholesale rates by increasing the ability of generators to acquire additional pipeline capacity is insufficient to invoke federal preemption (Eversource Reply Comments at 22-23). Therefore, Eversource contends that the impact on any wholesale

energy market of an EDC contract to acquire pipeline capacity appears to be indirect and a legally permissible method of effectuating state policy without setting the wholesale price of energy (Eversource Reply Comments at 24).

b. Analysis and Findings

In this Order, the Department has determined that it has authority under Section 94A to review and approve a long-term contract for natural gas capacity filed by an EDC. As such, the Department is not regulating interstate electricity transmission or wholesale power sales, areas of federal regulation under the Federal Power Act. 16 U.S.C. § 824(b)(1). Therefore, the Department finds that our actions by this Order do not violate the Federal Power Act.

5. Conclusion

Electric and gas utilities and their operations are subject to regulation at both the federal and state level. In exercising its authority over EDCs and LDCs, the Department operates under this cooperative regulatory model.

Based on the DOER Proposal, the Department has established a framework for Massachusetts EDCs to procure new pipeline capacity to benefit electric ratepayers in Massachusetts. Pursuant to this Order, an EDC may file such a contract with details on the proposed transaction and the terms and conditions of the contract. At that time, depending on the specific details and terms, it may be necessary to consider the preemption issues and/or the federal statutory issues raised in this proceeding. It remains the burden of any petitioner submitting a pipeline capacity contract for Department review pursuant to Section 94A to structure a proposed contract that would overcome any federal preemption. Absent an actual

proposed contract that sets forth the rights and obligations of the signatories, it is premature for the Department to determine or to speculate whether the terms of any such contract would be inconsistent with federal laws and regulation and subject to federal preemption.

As stated above, the Department does not voice a preference for any particular project, nor for gas pipeline infrastructure development over any other potential capacity constraint solution. Rather, the Department finds in this Order that innovative solutions and a menu of options are required to alleviate capacity constraints and the associated downstream market price impact experienced by Massachusetts ratepayers.

V. STANDARD OF REVIEW AND FILING REQUIREMENTS

A. Introduction

Having determined through the Department's review of Section 94A and the Restructuring Act that the plain language of the statute supports the ability of EDCs to enter into long-term contracts to procure needed gas capacity, subject to Department review and approval, the question then becomes what level of review for these contracts is warranted to ensure that the resulting resource is, reliable, and least cost for ratepayers. The Department addresses this question in this section by: (1) summarizing the comments on the appropriate standard of review to evaluate an EDC's contract for pipeline capacity filed pursuant to Section 94A; (2) setting forth the Department's standard of review; and (3) establishing filing requirements for any such proposed contract.

B. Summary of Comments

1. DOER

DOER contends that the Department should apply the same public interest standard that it applies to the review of gas contracts filed by LDCs with the Department for approval under Section 94A (DOER Petition at 4). DOER asserts that the Department has discretion to apply the public interest standard as it deems appropriate, and recommends that the Department, in applying the standard to EDCs, require EDCs to show: (1) the need for additional pipeline capacity; (2) that the proposed contract is the best of reasonably available alternatives, based on an evaluation of price and non-price factors; (3) that the pipeline capacity contracted is sufficient to meet the need; and (4) that there is a material net benefit to electric customers (DOER Petition at 5).

DOER maintains that for an EDC gas contract to satisfy the public interest standard, the contracted resource must (1) compare favorably to the range of alternative options reasonably available in the regional wholesale electric market, and (2) be consistent with an EDC's resource objectives as described in a filing accompanying the proposed contract (DOER Comments at 10). DOER states that the range of alternative options reasonably available to an EDC may include gas pipeline construction, import LNG, energy efficiency initiatives, and ISO-NE's Pay for Performance ("PFP")[22] and winter reliability programs (DOER Comments

[22] ISO-NE's PFP links electricity capacity payments to actual generator performance, thus providing an incentive to generators to undertake investments to ensure that they can perform when the power grid is stressed. See ISO Newswire: http://isonewswire.com/updates/2014/1/22/spi-news-iso-ne-submits-proposal-to-strengthen-performance-i.html

at 13). DOER maintains that the Department's assessment of alternatives should include both price and non-price factors (DOER Comments at 13). DOER recommends that an EDC must demonstrate that the new gas capacity will reduce regional electricity prices and that the dollar benefits for an EDC's ratepayers, including both the revenue generated from release of gas capacity and the impact the capacity has on price spikes driven by regional gas capacity constraints, will substantially exceed the cost of the gas capacity (DOER Comments at 13-15). DOER suggests that non-price factors could include electric grid reliability, greenhouse gas reduction, or other environmental benefits (DOER Comments at 13).

Regarding an EDC's resource objectives, DOER asserts that an EDC has an obligation to take any action within its control, as allowed by statute, to maintain the reliability of supply to its customers at least cost, including soliciting and entering into contracts that would reduce price spikes driven by gas capacity constraints (DOER Comments at 11). DOER suggests that an EDC should seek the support of ISO-NE in demonstrating the need for incremental gas capacity in the region (DOER Comments at 16, 17). Finally, DOER recommends that an EDC include in a filing for review and approval of a contract for gas capacity an implementation plan that demonstrates how an EDC will secure the benefits attributable to the contract (DOER Comments at 16).

2. Other Commenters

Eversource and National Grid concur with DOER that the Department has a level of discretion in determining whether an EDC gas capacity contract satisfies the Section 94A public interest standard (Eversource Comments at 6, 7; National Grid Comments at 18). The

EDCs assert that the Department should approve such contracts where an EDC is able to demonstrate that the electric reliability and supply pricing benefits generated by relief of capacity constraints warrant expenditure of the costs for gas capacity (Eversource Comments at 7; National Grid Comments at 19). As suppliers of last resort for all basic service customers, the EDCs argue that they have a responsibility to design resource portfolios that ensure reliable and least-cost supply for these customers (Eversource Comments at 8; National Grid Comments at 20). Thus, the EDCs conclude that the Department should approve a proposed gas contract where an EDC is able to demonstrate that (1) such contract compares favorably to the alternative options reasonably available to it at the time of the acquisition, including that the price is competitive, and (2) the contract satisfies non-price objectives for basic service supply such as reliability, feasibility, expected availability and minimal environmental impact (Eversource Comments at 8, 9; Eversource Reply Comments at 25; National Grid Comments at 20). Eversource further specifies that the EDCs would need to demonstrate that: (1) the proposed contract is the product of a fair and reasonable procurement solicitation process; (2) shareholder interests are not placed ahead of ratepayer interests, and (3) that the transaction is consistent with affiliate transaction rules (Eversource Reply Comments at 26).

Pipeline companies offer additional perspectives on the appropriate standard of review for EDC gas contracts. Spectra advises the Department to approve contracts that actually ensure gas delivery to gas-fired power generators during peak demand periods (Spectra Comments at 4). Tennessee urges the Department to: (1) require the EDCs to issue a request

for proposals ("RFP") for additional pipeline capacity; (2) ensure that the EDCs' solicitation, evaluation, and negotiation of contracts reflect a competitive and fair process that does not give undue preference to an EDC's affiliates; and (3) evaluate contracts according to both price and non-price factors (e.g., flexibility, supply diversity, service offerings, ability to serve gas-fired generation) (Tennessee Reply Comments at 10). Portland Natural Gas Transmission System ("PNGTS") also cautions the Department to ensure that whatever contracts are filed for approval result from a transparent competitive process in order to alleviate concerns related to affiliate relationships between EDCs and potential bidders (PNGTS Comments at 2). The Coalition to Lower Energy Costs ("CLEC") similarly urges the Department to determine that a fair, open, and transparent competitive solicitation process is integral to meeting the public interest standard (CLEC Reply Comments at 43, 44).

Acadia urges the Department to interpret the Section 94A public interest standard to require EDCs to demonstrate that any proposed gas contract compares favorably to the range of alternative options available at the time of acquisition (Acadia Comments at 7). Acadia asserts that an analysis of alternative options should include a comparison of the benefits, costs, and risks of an EDC's proposed purchase and sale of pipeline capacity to the benefits, costs, and risks of other viable pathways that the Commonwealth could pursue, including energy efficiency, energy storage, renewable energy, hydroelectric imports, and other resources (Acadia Comments at 7). According to Acadia, the Department must then determine which option is most cost effective, reliable, and compatible with other public policy objectives such as environmental goals and protection of consumers (Acadia Comments at 7). Acadia

further advises that the Department's Section 94A review should consider risks associated with self-dealing (Acadia Comments at 10).

Finally, GDF Suez asserts that if the Department determines that it has authority to review EDC gas contracts under Section 94A, the public interest standard must encompass Department review of all potentially relevant elements of the proposed gas capacity arrangement "simultaneously, rather than permitting the elements to come before the DPU seriatim over the course of multiple proceedings over multiple years." (GDF Suez Comments at 23). GDF Suez cautions that the Department will not be able to assess the true costs to ratepayers if it does not review the "full contractual scheme over the entire lifetime of the proposed rate" (GDF Suez Comments at 23). GDF Suez further urges the Department to interpret the Section 94A public interest standard applicable to its review of EDC gas contracts in a manner consistent with its interpretation of the public interest as articulated in D.P.U. 12-77 (2013) (GDF Suez Reply Comments at 5, 6).

C. Standard of Review

The Department seeks to define the standard of review it would apply for gas capacity contracts filed by EDCs. In establishing a standard of review to apply to the Department's evaluation of an EDC's pipeline capacity contract, the Department first examines our well-established standard for approving LDC contracts under Section 94A.

> In evaluating a gas utility's resource options for the acquisition of commodity resources as well as for the acquisition of capacity under G.L. c. 164, § 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. Commonwealth Gas Company, D.P.U. 94-174-A at 27 (1996). In order to demonstrate that the proposed acquisition of a resource that provides commodity and/or incremental resources

> is consistent with the public interest, a local distribution [gas] company ("LDC") must show that the acquisition (1) is consistent with the company's portfolio objectives, and (2) compares favorably to the range of alternative options reasonably available to the company at the time of the acquisition or contract renegotiation. D.P.U. 94-174-A at 27.
>
> In establishing that a resource is consistent with the company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved forecast and supply plan or in a recent review of supply contracts under G.L. c. 164, § 94A, or may describe its objectives in the filing accompanying the proposed resource. D.P.U. 94-174-A at 27-28. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. D.P.U. 94-174-A at 28. As part of the review of relevant price and non-price attributes, the Department considers whether the pricing terms are competitive with those for the broad range of capacity, storage, and commodity options that were available to the LDC at the time of the acquisition, as well as with those opportunities that were available to other LDCs in the region. D.P.U. 94-174A at 28. In addition, the Department determines whether the acquisition satisfies the LDC's non-price objectives including, but not limited to, flexibility of nominations and reliability and diversity of supplies. D.P.U. 94-174-A at 28-29. In making these determinations, the Department considers whether the LDC used a competitive solicitation process that was fair, open, and transparent. The Berkshire Gas Company, D.T.E. 02-56, at 10 (2002); Bay State Gas Company, D.T.E. 02-52, at 8 (2002); KeySpan Energy Delivery New England, D.T.E. 02-54, at 9 (2002); The Berkshire Gas Company, D.T.E. 02-19, at 11 (2002).

In summary, the Department's standard of review for LDC gas contracts under Section 94A involves a consideration of whether a contract is consistent with the public interest. To demonstrate that a proposed acquisition of a resource is consistent with the public interest, an LDC must show that the acquisition (1) is consistent with an LDC's portfolio objectives demonstrated in a recently approved supply plan or as described in a filing, and (2) compares favorably to a range of alternative options reasonably available to the company at the time of acquisition or contract (re)negotiation. See, e.g. NSTAR Gas Company,

D.P.U. 13-159, at 3 (2014). The Department finds that its standard of review for gas contracts entered into by LDCs provides an appropriate model for similarly reviewing gas contracts entered into by EDCs and submitted to the Department for review and approval under Section 94A. However, because of the different regulatory treatment of LDCs and EDCs, particularly regarding the approval of a forecast and supply plan pursuant to G.L. c. 164, § 69*I*,[23] the Department finds that some modifications to the existing standard of review under section 94A are necessary for review of an EDC gas capacity contract.

Under the modified standard of review, in order to determine that an EDC gas capacity contract filed pursuant to Section 94A is consistent with the public interest, an EDC must demonstrate that the proposed contract (1) results in net benefits for the Massachusetts EDCs' customers at a reasonable cost,[24] and (2) compares favorably to the range of alternative options reasonably available to the EDC at the time of acquisition of the resource or contract negotiation (e.g., pipeline capacity, local storage, electric transmission). An EDC must show that the price of the resource is competitive and that the contract satisfies other non-price

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[23] Pursuant to G.L. c. 164, § 69*I*, an LDC must file for approval by the Department a biennial forecast and supply plan consisting of projected gas sendout and projected available resources for the ensuing five-year period. EDCs are exempt from the forecast and supply plan requirements of G.L. c. 164, § 69*I*. See In Re: (1) Rescinding 220 C.M.R. § 10.00 et seq. and (2) Exempting Electric Companies From Provisions of G.L. c. 164, § 69*I*, D.T.E. 98-84/EFSB 98-5 (August 8, 2003).

[24] Under typical market conditions, lower retail electricity prices follow lower wholesale electricity prices.

factors such as reliability of service and diversity of supply.[25] In any such filing, the EDC will bear the burden of satisfying the standard of review, including providing appropriate and sufficient supporting information.

D. Filing Requirements

In satisfying the public interest standard set forth above, an EDC seeking Department review and approval of a gas contract must include with its filing materials that demonstrate a competitive and transparent procurement, that avoid conflicts of interest, and that allow for consideration of procurement by entities other than EDCs. So doing will ensure the conduct of a competitive, transparent procurement process that avoids conflicts of interest and further ensures the management of any procured capacity that achieves the goals stated above, for the benefit of ratepayers. In the event that an EDC chooses not to use a competitive solicitation process, it must justify its reasoning behind the decision. An EDC shall include in any filing for Department review and approval, at a minimum:

1. a complete description of and justification for the type, size, and timing of the contracted resource(s);

2. a complete description of the contract, including the following information:

    a. contracting parties;

    b. type of resource (e.g., pipeline capacity, local storage, electric transmission);

    c. type of service (e.g., firm, peak shaving);

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[25] Increased natural gas availability can improve the performance of gas-fired generators during periods of both high electric demand and high heating requirements. Improved performance could produce lower electricity prices.

d. quantity (e.g., daily, seasonal, annual);

e. price (e.g., variable, demand, expected total annual cost);

f. commencement date and term;

g. receipt and delivery points;

h. evergreen/renewal terms;

i. performance, force majeure;

j. ability to serve electric generators; and

k. any other terms that are considered "industry-standard" for the type of proposed transaction.

In addition, in its filing an EDC must demonstrate that the proposed contract is the product of a fair and reasonable procurement process, such as a competitive solicitation.

Further, in the filing, an EDC must demonstrate that the proposed agreement compares favorably to the range of alternative reliable and least-cost resource options reasonably available to it at the time of acquisition or contract renegotiation. Such alternative options include all energy resources reasonably available in the market that have the potential to address the objective providing electricity at a reasonable cost and that compare favorably in terms of price and non-price factors. An EDC must demonstrate that its analysis evaluated all options using the same methodology and standards, with detail for all assumptions.

A filing must also include the EDC's strategy for maximizing ratepayer benefits associated with the acquisition and use of contracted gas capacity, including but not limited to, any capacity release activities. Such strategy should include a detailed explanation of how the EDC expects to trade all of the acquired gas capacity. A filing must also explain how the

strategy for maximizing ratepayer benefits associated with the acquisition and use of any such contracted capacity complies with the Department's regulations in 220 C.M.R § 12.00 et seq., which govern affiliate transactions.

Further, the filing must demonstrate that the electric pricing benefits associated with the contract warrant expenditure of the contract costs. Such demonstration should be based on a quantitative analysis of the benefits and costs associated with the contracted resource(s) to the maximum extent practicable.

Finally, a filing must include a description of the method of ratemaking the EDC proposes for recovery of costs that it will incur under the proposed contract and, if applicable, the crediting of revenues that it will accrue pursuant to any capacity use/release strategy. A filing must also include a description of efforts that the EDC has undertaken or will undertake to recover contract costs regionally.

The Department puts EDCs on notice that they must make a complete and accurate filing to allow for a thorough, substantive examination by the Department. In its filing, an EDC must address any other filings or approvals that would be needed to make its proposal viable. The Department seeks to avoid expending resources on the review of a proposal that is not feasible. Further, EDCs and interested parties are on notice that in examining an EDC filing, the Department anticipates requiring time for a full adjudicatory process (e.g., direct prefiled testimony, intervenor prefiled testimony, discovery, evidentiary hearings (including any required interlocutory rulings), and briefing) and for deliberation. In this Order, the Department does not establish a specific schedule or timetable for its examination, but will

address the particular review timeframes based on the complexity and novelty of the relevant issues.

VI. ORDER

Accordingly, after opportunity for comment and due consideration, the Department

FINDS: That the Department has authority pursuant to G.L. c. 164, § 94A to review and approve contracts for natural gas pipeline capacity filed by electric companies; and it is

ORDERED: That any electric company filing a contract for natural gas capacity with the Department for review and approval pursuant to G.L. c. 164, § 94A shall comply with all directives contained in this Order.

By Order of the Department,

/s/
Angela M. O'Connor, Chairman

/s/
Jolette A. Westbrook, Commissioner

/s/
Robert E. Hayden, Commissioner

I. DOER QUESTIONS

1. Is there any legal impediment to the Department accepting and considering natural gas capacity contracts by EDCs under Section 94A and, if approved, providing reasonable assurance of cost recovery?

2. Is there an alternative mechanism available for EDCs or other parties to secure new gas delivery capacity for the region?

3. What would be the standard of review for such contracts?

4. How should affiliate relationships among EDCs and potential bidders be addressed?

5. What financial risk will be borne by ratepayers and EDCs? What mitigation tools are available to offset these risks?

6. Since the effects of any capacity contracts would have a regional impact, should any approvals be conditioned upon some or all New England states sharing in the contracting obligation?

7. How will the contracted-for capacity be made available to the market such that the benefits accrue to Massachusetts ratepayers?

8. Should there be a third party managing the sale of the capacity in the market?

9. If a contract is approved, how should costs be allocated in distribution rates?

II. ADDITIONAL QUESTIONS

1. What specific natural gas delivery capacity constraints are causing high regional electricity prices? Please identify and characterize constraints with respect to geographic location, time of year and/or market condition when constraint is or will be binding, and the degree to which the constraint impacts local versus regional natural gas delivery capability.

2. What specific natural gas resources and/or commercial mechanisms could potentially alleviate each of the natural gas delivery capacity constraints identified above? What is the estimated cost and timing required to implement each potential resource/commercial mechanism?

3. What rules or standards should apply to any affiliate relationships among EDCs, potential bidders, and buyers of the natural gas capacity?

a) Please respond with regard to relationships between EDCs and affiliates who are, or may potentially be, partners in interstate pipeline projects; and

b) Address any other affiliate relationship conflicts not identified above that may affect the proposed contracts and bidding dynamic.

4. Apart from issues pertaining to Section 94A, are there any legal impediments to the contractual and cost recovery arrangements discussed by DOER?

5. How will EDCs acquire natural gas capacity and how will the amount of new natural gas capacity for each EDC be determined?

6. How will EDCs determine the length of contracts for natural gas capacity?

7. How will EDCs release or otherwise sell the natural gas capacity?

8. Could there be restrictions placed on the release of natural gas capacity so that the released capacity only can be acquired by electric generators serving the ISO New England market?

9. Please indicate the types of natural gas capacity that the EDCs would acquire.

10. If a contract is approved, will total contract costs collected from ratepayers be capped at a specific amount or threshold? If so, at what level should the cap be set? Over what time period will EDCs collect total contract costs through rates?

11. Should the EDCs collect costs through base distribution rates or through a separate reconciling mechanism? Discuss the benefits and disadvantages of each approach.

12. If costs are recovered through an annual reconciling mechanism:

a) Section 51 of An Act Relative to Competitively Priced Electricity in the Commonwealth, St. 2012, c. 209 requires that reconciliation factors recover costs from each rate class on cost-based criteria. If a contract is approved, what are the cost-based criteria?

b) Would the EDCs include such annual reconciliations in their annual retail rate adjustment filings for transition costs, transmission costs, etc. (e.g., D.P.U. 13-05)? If not, what process would be appropriate?

c) Would annual rate changes from such contracts be capped, and, if so, at what amount?

13. If the Department approves the costs, will the costs collected from ratepayers include only the costs of the contract, or will total costs include administrative costs associated with managing the contracts?

14. How are future changes in the gas market to be addressed if the EDC contract proposal is implemented? Specifically, is this mechanism designed to be a permanent or interim measure? How is this mechanism to be re-evaluated if energy alternatives are successful?

15. Are there regions or states with existing financial structures/regulations in place for electric distribution companies to contract for firm natural gas capacity? Please provide any information on how these regions or states implement and manage these contract arrangements.

16. If EDCs contract for new natural gas delivery capacity, how should they manage the capacity to best achieve policy objectives of making such capacity available for electricity generators and reducing electricity market costs for Massachusetts distribution ratepayers? How should the benefits associated with any such contracts be measured? How can the value embedded in any such contracts be monetized and captured for Massachusetts ratepayers?

I. CITIZEN COMMENTS

John Berkowitz
Julia Blyth
Leslie Breeding
Nathalie Bridegam
James Carvalho
Barry De Jasu
Clifford Dornbusch
Darcy DuMont
Natani Hume
Katherine Keenum
Mark McDonald
Marty Nathan
John Nelson
Alisa Pearson
Rutilious B. Perkins, III
Arnold Piacentini
David Roitman
Carolyn Sellars
Rosemary Wessel

350 Massachusetts for a Better Future (including approximately 350 citizen comments)
Food and Water Watch (including approximately 225 individual comments and approximately 918 signatures)

II. OTHER PARTICIPANTS

Acadia Center (et al.) ("Acadia Center")
Algonquin Gas Transmission, LLC and Spectra Energy Partners, LP ("Spectra")
America's Natural Gas Alliance ("ANGA")
Berkshire Photovoltaic Services
Cape Light Compact ("Compact")
Coalition to Lower Energy Costs ("CLEC")
Conservation Law Foundation ("CLF")
Direct Energy Services, LLC
Dynegy Inc. ("Dynegy")
Entergy Nuclear Power Marketing, LLC
Environmental Defense Fund ("EDF")
Environmental Entrepreneurs (E2)
Environmental League of Massachusetts
Essential Power Massachusetts, LLC

Gailanne M. Cariddi, State Representative
GDF Suez Gas NA LLC ("GDF Suez")
Low-Income Weatherization of Fuel Assistance Program Network
Mass Energy Consumers Alliance
Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid ("National Grid")
Massachusetts Department of Energy Resources ("DOER")
Massachusetts Municipal Wholesale Electric Company ("MMWEC")
Massachusetts Office of the Attorney General ("Attorney General")
National Energy Marketers Association ("NEMA")
New England Power Generators Association, Inc. ("NEPGA")
Northeast Energy Solution, Inc.
Northeast Municipal Gas Pipeline Coalition
NSTAR Electric Company and Western Massachusetts Electric Company each d/b/a Eversource Energy ("Eversource")
Portland Natural Gas Transmission System ("PNGTS")
RENEW Northeast, Inc.
Repsol Energy North America Corporation ("Repsol")
Stop the West Roxbury Lateral
Tennessee Gas Pipeline Company, LLC. ("Tennessee")
Town of Warwick, Buildings & Energy Committee
Town of Northfield Board of Selectman
Wal-Mart Stores East, LP and Sam's East Inc.