The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 10-170 March 10, 2011

Joint Petition for Approval of Merger between NSTAR and Northeast Utilities, pursuant to G.L. c. 164, § 96.

INTERLOCUTORY ORDER ON STANDARD OF REVIEW

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I. INTRODUCTION AND BACKGROUND

On November 24, 2010, NSTAR Electric Company ("NSTAR Electric") and NSTAR Gas Company ("NSTAR Gas"), along with their parent holding company NSTAR, and Western Massachusetts Electric Company ("WMECo"), along with its parent holding company Northeast Utilities ("NU") (collectively, "Companies") filed a joint petition ("Joint Petition") with the Department of Public Utilities ("Department") seeking approval, pursuant to G.L. c. 164, § 96 ("§ 96"), to merge NSTAR and NU into a consolidated organization ("NSTAR/NU Merger" or "Proposed Merger"). The Department docketed the Joint Petition as D.P.U. 10-170.

On January 5, 2011, the Department conducted a public hearing and procedural conference at which it allowed 15 petitions for leave to intervene as a full party and three petitions for limited participant status; the Attorney General of the Commonwealth ("Attorney General") had already given notice of intervention in the proceeding. On January 6, 2011, the Department issued a procedural schedule.

In its initial comments on the Proposed Merger, the Department of Energy Resources ("DOER") requested that the Department modify its § 96 standard of review in this proceeding "to determine whether the proposed merger will provide a substantial net benefit to the public interest, including the advancement of clean energy goals established by the Green Communities Act" ("GCA"), St. 2008, c. 169, "and the Global Warming Solutions Act" ("GWSA"), St. 2008, c. 298 ("DOER Comments" at 6-7). Seeking to resolve the standard of review issue as early as possible in this proceeding, on January 21, 2011, the Department

solicited comments from all participants in this proceeding as well as non-participants to address specific issues relating to a change in the § 96 standard of review.[1]

The Department received comments from the following parties to this proceeding: the Companies ("Companies Comments"); the Attorney General; the Cape Light Compact ("Compact Comments"); Cape Wind Associates, LLC ("Cape Wind Comments"); the Conservation Law Foundation and Environment Northeast ("CLF/ENE Comments"); New England Gas Workers Association ("NEGWA Comments"); and New England Power Generators Association, Inc. ("NEPGA Comments"). The Department also received comments from the following: Bay State Gas Company d/b/a Columbia Gas of Massachusetts ("Columbia Gas Comments"); Community Labor United and the Green Justice Coalition ("CLU Comments"); and Environmental Entrepreneurs ("E2 Comments").[2] The Department received reply comments from the Companies ("Companies Reply Comments") and CLF/ENE ("CLF/ENE Reply Comments").

On February 15, 2011, the Department suspended the procedural schedule pending a determination on the standard of review.

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[1] On January 21, 2011, the Department issued a Request for Comments soliciting comments to address six specific issues related to the standard of review. The Department directed comments to be filed on January 31, 2011, and reply comments to be filed on February 7, 2011. The Department issued this request not only to the parties to the proceeding but also to an extensive mailing list of gas and electric distribution companies, gas and electricity brokers, competitive suppliers, retail agents, and other entities interested in gas or electric power proceedings before the Department.

[2] While these three entities have commented on the standard of review, their comments do not make them parties or formal participants in this proceeding.

II. MERGER TRANSACTION

NSTAR Electric is a Massachusetts electric distribution company, pursuant to G.L. c. 164, § 1, with a principal office in Boston, Massachusetts. NSTAR Electric provides electric distribution service to approximately 1.1 million retail customers in Boston and Cambridge, as well as 80 surrounding cities and towns, including those on Cape Cod and Martha's Vineyard.

NSTAR Gas is a Massachusetts natural gas local distribution company, pursuant to G.L. c. 164, § 1, with a principal office in Boston, Massachusetts. NSTAR Gas purchases, distributes, and sells natural gas to approximately 300,000 retail customers in 51 communities in central and eastern Massachusetts, including Cambridge, Framingham, Plymouth, New Bedford, Worcester, and an area within Boston.

NSTAR is a Massachusetts business trust and a public utility holding company with its principal office in Boston, Massachusetts. NSTAR is engaged primarily in the energy delivery business through its two wholly owned regulated utility subsidiaries in Massachusetts.

WMECo is a Massachusetts electric distribution company, pursuant to G.L. c. 164, § 1, with a principal office in Springfield, Massachusetts. WMECo provides electric distribution service to approximately 210,000 retail customers in 59 cities and towns in western Massachusetts.

NU is a Massachusetts business trust and public utility holding company with its principal office in Springfield, Massachusetts. NU's corporate offices are located in Hartford,

Connecticut. NU is engaged primarily in the energy delivery business through its four wholly owned regulated utility subsidiaries in Connecticut, Massachusetts, and New Hampshire.

NSTAR and NU entered into an Agreement and Plan of Merger dated October 16, 2010, as amended on November 1, 2010 ("Merger Agreement"). Pursuant to the Merger Agreement, consideration for the Proposed Merger would be primarily equity in the form of NU common shares, with cash paid in lieu of fractional shares. At the closing of the Proposed Merger, each holder of an NSTAR common share would be entitled to receive 1.312 shares of NU common shares. Following the merger's closing, existing NSTAR shareholders would own approximately 44 percent of the equity in the post-merger NU, while existing NU shareholders would own the remaining 56 percent.

The Companies state that the Proposed Merger is consistent with the public interest under G.L. c. 164, § 96, including each of the factors that the Department considers in reviewing a proposed transaction under G.L. c. 164, § 96 and its impact on Massachusetts customers. The Companies further state that the Proposed Merger does not involve the consolidation of NSTAR Electric, NSTAR Gas, or WMECo. According to the Companies, upon the closing of the merger, each of these entities would remain a separate company, independently subject to the Department's jurisdiction under G.L. c. 164 (Joint Petition at 6).

III. SECTION 96

Section 96, as amended by the GCA, provides in pertinent part:

> Companies . . . subject to this chapter and their holding companies may . . . consolidate or merge with one another, or may sell and convey their properties to another of such companies . . . and such other company may purchase such properties if . . . the [D]epartment, after notice and a public hearing, has

> determined that such purchase and sale or consolidation or merger, and the terms thereof, are consistent with the public interest; provided, however, that in making such a determination the [D]epartment shall at a minimum consider: proposed rate changes, if any; the long term strategies that will assure a reliable, cost effective energy delivery system; any anticipated interruptions in service; or other factors which may negatively impact customer service.[3]

The core words of § 96, "consistent with the public interest," date back to 1908. St. 1908, c. 529, § 2.

In 2008, the Legislature enacted the GCA which, among other things, amended § 96 (the language provided immediately above reflects the amendment) to expressly require the Department to consider, at a minimum, the following four factors: (1) proposed rate changes at the time of the transaction, if any; (2) long-term strategies that will assure a reliable, cost-effective energy delivery system; (3) any anticipated interruptions in service; and (4) other factors that may negatively impact customer service. GCA § 69. The GCA also added the language "and their holding companies," thereby extending the Department's jurisdiction to mergers involving holding companies of companies subject to G.L. c. 164. See National Grid plc/KeySpan Merger, D.P.U. 07-30, at 1 n.2 (2010).

IV. CURRENT STANDARD OF REVIEW

Pursuant to § 96, the Department may approve only those consolidations, mergers, or acquisitions that it determines to be "consistent with the public interest." The Department currently interprets this standard as a "no net harm" standard, meaning that the public interest would be at least as well served by approval of a proposal as by its denial. Boston Edison

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[3] In addition to gas and electric companies, § 96 also applies to water companies through G.L. c. 165, § 2.

Company, D.P.U. 850, at 7-8 (1983); NEES/EUA Merger, D.T.E. 99-47, at 16-17 (2000). To make this determination, the Department balances the costs and benefits attendant on the proposed transaction. D.P.U. 850, at 6-8.

The Department considers various factors in balancing the costs and benefits. Prior to the amendment of § 96, the Department considered the following factors that were established in Guidelines and Standards for Acquisitions and Mergers of Utilities, D.P.U. 93-167-A (1994) ("Mergers and Acquisitions"): (1) effect on rates; (2) effect on the quality of service; (3) resulting net savings; (4) effect on competition; (5) financial integrity of the post-merger entity; (6) fairness of the distribution of resulting benefits between shareholders and ratepayers; (7) societal costs; (8) effect on economic development; and (9) alternatives to the merger or acquisition. Mergers and Acquisitions at 7-9. The Department has held that this list of factors is illustrative and not exhaustive, and that the Department may consider other factors, or a subset of these factors, when evaluating a § 96 proposal. D.T.E. 99-47, at 17-18; BECo/ComEnergy Acquisition, D.T.E. 99-19, at 12 (1999), aff'd sub nom. Attorney General v. Department of Telecommunications and Energy, 438 Mass. 256 (2002); Eastern/Colonial Acquisition, D.T.E. 98-128, at 6 (1999).

Of the four factors specified by the recent amendment to § 96 by the GCA, the second factor, regarding long-term strategies, is the only one not previously addressed in the so-called "nine-factor test" established in Mergers and Acquisitions.[4] Although § 96 now mandates that

4 The three remaining statutory factors correspond to factors established in Mergers and Acquisitions. Specifically, the first factor in § 96 is subsumed by the first factor established in Mergers and Acquisitions, the effect of the proposed transaction on rates.

the Department consider the specific factors delineated in the statute, the Department is not foreclosed from considering the other factors, or a subset of those factors, established in Mergers and Acquisitions. Furthermore, depending on the nature of the transaction, the Department may consider additional factors not delineated in the statute or established in Mergers and Acquisitions. D.T.E. 99-47, at 18; D.T.E. 99-19, at 12.

The Department has also stated that its determination whether a merger or acquisition meets the requirements of § 96 must rest on a record that quantifies costs and benefits to the extent that such quantification can be made. D.T.E. 99-47, at 18; D.T.E. 99-19, at 12; D.T.E. 98-128, at 6; NIPSCO/Bay State Acquisition, D.T.E. 98-31, at 11 (1998); Eastern/Essex Acquisition, D.T.E. 98-27, at 10 (1998). Furthermore, a § 96 petition that expects to avoid an adverse result cannot rest on generalities, but must instead demonstrate benefits that justify the costs. D.T.E. 99-47, at 18; D.T.E. 99-19, at 12; D.T.E. 98-128, at 6; D.T.E. 98-31, at 11; D.T.E. 98-27, at 10; Mergers and Acquisitions at 7.

V. COMMENTS

A. Commenters Favoring a Change to the Standard of Review

1. DOER

In its initial comments on the filing, DOER recommends that the Department change the standard of review applied to mergers, specifically requiring the Companies to demonstrate that the merger will result in a substantial net benefit to the public (DOER Comments at 1). According to DOER, among the factors that the Department should consider in assessing the

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The third and fourth factors delineated in § 96 correspond to the second factor established in Mergers and Acquisitions, the effect on the quality of service.

net benefit are whether the merger will advance the Commonwealth's clean energy goals established by the GCA and GWSA (DOER Comments at 1). DOER contends that the "no net harm" standard is no longer adequate for mergers of utility companies, which provide a vital service to Massachusetts residents through a statutorily mandated monopoly (DOER Comments at 3). DOER states that the "no net harm" standard likely offers benefits to shareholders but does not assure benefits to the public, and that benefits to ratepayers are speculative at best (DOER Comments at 3). DOER highlights both the GCA and the GWSA as mandating a change to the § 96 standard of review (DOER Comments at 4, citing Bay State Gas Company, D.P.U. 08-43-A (2008); G.L. c. 30, § 61). In addition, DOER emphasizes the responsibility of the electricity generating sector in reducing greenhouse gas emissions, and argues that the Department's standard of review must recognize this new reality (DOER Comments at 5). DOER asserts that the Department's current standard of review and list of factors do not comply with this new statutory mandate, and that the Department must take greenhouse gas impacts into account in its standard of review (DOER Comments at 5).

According to DOER, the Department has the discretion to change its standard of review in this proceeding, giving parties sufficient notice and a reasonable opportunity to prepare and present evidence and argument (DOER Comments at 5-6, citing Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45 (2006)). Thus, DOER recommends that the Department adopt a "substantial net benefit" test before the start of evidentiary hearings, taking into account how a merged NSTAR/NU entity would contribute to the Commonwealth's clean energy goals (DOER Comments at 5). DOER also proposes additional

factors for the Department to include in its assessment of the proposed merger (DOER Comments at 6).

2. Cape Light Compact

The Compact supports a "re-analysis and updating" of the applicable standard of review (Compact Comments at 2). The Compact contends that a "no net harm" test is insufficient to ensure that the interests of the public are promoted, and should be changed to a "substantial net benefit" test (Compact Comments at 2-3, 5). The Compact states that the economies of scale that stem from a merger may be beneficial to shareholders but provide little if any reassurance to ratepayers (Compact Comments at 3). Thus, the Compact argues that, before approving the merger, the Department should require the Companies to show that a meaningful level of benefit will flow to ratepayers (Compact Comments at 3).

The Compact argues that some level of harm to the competitive market can be presumed from a merger, and that the proponents must be required to overcome this presumption and show that the merger will deliver tangible, quantifiable benefits to affected consumers (Compact Comments at 3-4). Moreover, the Compact argues, a new standard of review would be consistent with the 1997 Electric Restructuring Act,[5] whose underlying objective is to promote competition, increase retail choice, and thereby reduce prices (Compact Comments at 4). The Compact further argues that the Department must take into account the more recent transformative changes in the energy industry, particularly those regarding clean energy and energy efficiency (Compact Comments at 5). According to the Compact, the

[5] An Act Relative to Restructuring the Electric Utility Industry, St. 1997, c. 164.

"substantial net benefit" test should require: (1) that ratepayers receive positive benefits, and (2) that all mergers be conditioned on the imposition of certain consumer safeguards to prevent harm (Compact Comments at 6, 7-8). The Compact suggests that merger applicants provide evidence to address the merger's impact on the competitive market, labor forces, service quality, and reliability, as well as to demonstrate a continued commitment to clean energy goals (Compact Comments at 7-8). Finally, the Compact recognizes that it would be impractical to have a bright-line test for "substantial" net benefits, but that "substantial" could be based on a totality of the facts and circumstances in each case (Compact Comments at 8).

3. Cape Wind Associates

Cape Wind argues that, upon notice to the parties, the Department is permitted to revise a regulatory standard of review during an adjudicatory proceeding, and may even do so after fully developing the record and receiving briefs from the interested parties (Cape Wind Comments at 1-2, citing Alliance, 448 Mass. at 52). Cape Wind further argues that the Department should adopt DOER's recommended standard of review of "substantial net benefits" (Cape Wind Comments at 2). Cape Wind states that this is the first opportunity for the Department to consider a merger of electric utilities since the Legislature enacted the GCA and GWSA (Cape Wind Comments at 2). Thus, according to Cape Wind, this case presents issues of initial and precedential concern to the electric industry that warrant modification of the previously stated standard (Cape Wind Comments at 2, citing Attorney General v. Department of Telecommunications and Energy, et al., 438 Mass. 256, 264 (2002)).

Cape Wind further states that § 96 sets forth a broad and discretionary review standard that includes several factors that the Department must consider at a minimum, and leaves additional factors to the Department's discretion based on the specific issues in the proceeding (Cape Wind Comments at 2 & n.1). Moreover, according to Cape Wind, the GWSA adds the requirement that the Department consider reasonably foreseeable climate change impacts in connection with its decision (Cape Wind Comments at 2). Thus, Cape Wind urges the Department to apply a substantial net benefits test and consider, among other things, whether the merger would advance the development of the Commonwealth's solar and offshore wind resources (Cape Wind Comments at 2).

4. Community Labor United

CLU argues that the Department should require the Companies to demonstrate that the merger provides a substantial net benefit to the public interest that ensures an equitable distribution of utility program benefits (CLU Comments at 1). According to CLU, the scale of this merger -- creating the largest utility company in New England and one of the largest in the country -- dictates that the benefits for ratepayers and the economy must be substantial (CLU Comments at 5). CLU also argues that the public interest demands measures to ensure that the Commonwealth can meet its carbon emissions reduction and energy efficiency goals, as mandated by the GCA, and to ensure that the Companies set long-term strategies consistent with the GWSA (CLU Comments at 2). Thus, CLU asserts that the Department should consider the factors written into § 96 in 2008, but under a new standard of review (CLU Comments at 2-3).

5. Conservation Law Foundation/Environment Northeast

CLF/ENE jointly concur with DOER that the standard of review needs to be changed to ensure consistency with the public interest in light of transformative changes in the basic rules regarding energy (CLF/ENE Comments at 1). CLF/ENE argue that the current standard of review is insufficient to ensure consistency with the public interest because maintaining the status quo would impede evolution of the Commonwealth's energy supply paradigm (CLF/ENE Comments at 1). According to CLF/ENE, the Department must consider the GCA and GWSA irrespective of the standard of review, but a substantial net benefits test is more appropriate for ensuring consistency with the public interest (CLF/ENE Comments at 1-2). CLF/ENE state that the "no net harm" interpretation oversimplifies the Department's precedent in D.P.U. 850 because the thrust of the Department's analysis in that case was that a merger or acquisition could entail some negative impacts and still survive review so long as sufficient countervailing benefits were shown (CLF/ENE Comments at 5). Thus, CLF/ENE assert that the "no net harm" test fails to capture the balancing test and the consideration of benefits that were central to the Department's ultimate decision in D.P.U. 850 (CLF/ENE Comments at 5).

CLF/ENE contend that the Department has the discretion to interpret "consistent with the public interest" as a "substantial net benefit" test, and has the authority to change the standard of review in this proceeding (CLF/ENE Comments at 4, 5-6, citing Alliance, 448 Mass. at 51; Wolf v. Department of Public Utilities, 407 Mass. 363, 370 (1990); Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 312-313 (1981); Massachusetts Electric

Company v. Department of Public Utilities, 383 Mass. 675, 679 (1981); CLF/ENE Reply Comments at 2-3, 4). CLF/ENE note that the Department has applied a de facto net benefits test to date and argue that, at a minimum, the transactions approved by the Department apparently would have met such a standard (CLF/ENE Reply Comments at 11). Moreover, CLF/ENE argue that the "sweeping mandates" of the GCA and the "ambitious requirements" of the GWSA provide justification for the Department to review and reconsider the standard of review, and recalibrate it as a substantial net benefits test (CLF/ENE Comments at 7-9; CLF/ENE Reply Comments at 6-8).

In arguing for more than mere net benefits, CLF/ENE state that requiring material or substantial net benefits would provide some measure of protection against risks from the merger, particularly because long-term strategies, one of the four factors written into § 96 in 2008, are inherently qualitative and uncertain (CLF/ENE Comments at 10). CLF/ENE note that other jurisdictions have adopted similar tests to ensure protection of the public (CLF/ENE Comments at 10, citing 66 Pa. C.S. § 1103(a); York v. Pennsylvania Public Utilities Commission, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972)). CLF/ENE contend that the Department should quantify positive and negative impacts where feasible, and undertake a more qualitative analysis of those aspects that are hard to measure, to establish that the benefits exceed costs by a demonstrable margin (CLF/ENE Comments at 10). CLF/ENE also assert that substantiality should be viewed in light of the scale of the merger at issue so as not to preclude those transactions in which benefits are small (CLF/ENE Reply Comments at 12).

CLF/ENE further argue that the Department must weigh a broad range of factors, including those derived from the GCA and GWSA, and that the factors may vary based on the individual nature of the proposal (CLF/ENE Comments at 10-11). Finally, CLF/ENE state that the merger proponents must provide detailed information to show that the benefits justify the costs, and cannot rest on generalities (CLF/ENE Comments at 16).

6. Environmental Entrepreneurs

E2 supports DOER's initial comments regarding "substantial net benefits" (E2 Comments at 1). E2 states that it has been a strong supporter of the GCA and GWSA, and argues that the intent of these laws should be factored into every decision made by the Commonwealth regarding energy supply (E2 Comments at 1). According to E2, the analysis of long-term strategies for ensuring reliable and cost-effective energy delivery cannot be separated from the GWSA and GCA (E2 Comments at 1). Thus, E2 argues, even under the existing standard of review, the Department must take the GCA and GWSA into account in considering whether the merger is "consistent with the public interest" (E2 Comments at 1-2). E2 further argues that the GWSA and GCA provide ample justification for changing the standard of review and requiring more than a "no net harm" showing for a standard of review that should evolve as related laws evolve (E2 Comments at 2).

7. New England Gas Workers Association

NEGWA supports DOER's position that the Department should adopt a "substantial net benefits" standard of review (NEGWA Comments at 1). NEGWA's comments are primarily concerned with service quality, reliability, and safety (NEGWA Comments at 1). According

to NEGWA, the Department already maintains service quality and reliability indices by which to measure net benefits, and any substantial net benefits could be set at a level (such as ten percent) above the Department's minimum standard (NEGWA Comments at 1).

B. Commenters Favoring Retention of the Current Standard of Review

1. Companies

The Companies argue that the Department should not make any change to the current standard of review because the current standard is sound public policy, has been consistently applied for at least 60 years, and has served as a reasonable and workable foundation for reviewing proposed mergers (Companies Comments at 1-2, 12-14). The Companies argue that requiring net benefits or substantial net benefits will create a standard that is inherently ambiguous and difficult to evaluate, will inevitably stifle potential business combinations and preclude transactions that would otherwise improve utility operations, and will be contrary to the interests of customers in the long run (Companies Comments at 2). Further, the Companies assert that a change in the standard of review would unlawfully constrain mergers that are otherwise consistent with the public interest and have the potential for long-term benefits to customers (Companies Comments at 14; Companies Reply Comments at 14-15)

The Companies also argue that the Department does not have the authority to change the standard of review because, throughout its history, the Department has repeatedly defined "consistent with the public interest" as signifying a "no net harm" test (Companies Comments at 2-3, 10-11; Companies Reply Comments at 4-5). In addition, the Companies assert that the language of § 96 does not empower the Department to establish a "net benefits" standard

because there is no reasonable reading of § 96 that would provide a valid basis for a Department finding that "consistent with the public interest" is broad enough to encompass a "net benefits" requirement (Companies Comments at 6-7, 9-11). Thus, according to the Companies, it would be an error of law to construe the language of § 96 so as to give the Department discretion to deny a proposed merger where there is no net benefit (Companies Comments at 3). The Companies also contend that the Legislature amended § 96 in 2008 but made no change to the public interest standard (Companies Comments at 11, citing Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3, 458 Mass. 155, 162 (2010)). Thus, the Companies assert that modification of the standard in this proceeding would violate the reasoned consistency doctrine and constitute legal error (Companies Comments at 11-12, 15, citing Alliance, 448 Mass. at 56).

Finally, the Companies assert that the Department cannot reasonably construe the current standard of review as requiring a merger proponent to show a net benefit (Companies Comments at 3). The Companies argue that neither the GCA nor the GWSA grants authority to the Department to require any kind of environmental benefit beyond that which the GCA and GWSA specifically require of the utilities, even though the Department may consider additional factors not delineated in the statute or case law (Companies Comments at 3, 11, 16-18; Companies Reply Comments at 9-11, 13-14). According to the Companies, utilities are legally obligated to comply with the provisions of the GCA and GWSA but there is no net benefit that the Department can properly require of them in relation to those statutes (Companies Comments at 3).

2. Attorney General

The Attorney General does not support a change to the standard of review. The Attorney General states that the Department long ago adopted a policy of encouraging mergers, concluding that cost-effective mergers are one way for utilities to achieve their obligation of reducing cost of service, improving service reliability, and enhancing financial strength (Attorney General Comments at 3-4, citing Mergers and Acquisitions at 4). The Attorney General asserts that, under the current standard of review, the Department can address DOER's concerns and incorporate all of the analysis sought by DOER (Attorney General Comments at 3, 4). The Attorney General contends that the Department has the discretion to consider any factor that affects the merging entities' ratepayers, and may consider additional factors not delineated in § 96 or the case law (Attorney General Comments at 3, 5). Thus, the Attorney General argues, the Department may consider the merger's impact on clean energy goals without changing the standard of review (Attorney General Comments at 5).

The Attorney General states that she has long advocated for ratepayer benefits in connection with merger proceedings, even under the current standard of review, and has consistently sought lower rates, increased service quality, and other benefits (Attorney General Comments at 6, citing D.T.E. 99-47). The Attorney General asserts that, in approving these prior mergers, the Department has consistently found -- and the merging companies have been able to show -- ratepayer benefits even under the "no net harm" test (Attorney General Comments at 6, citing Boston Gas Company and Essex Gas Company, D.P.U. 09-139, at 21 (2010); D.P.U. 08-43-A, at 44-45, 48; Boston Edison Company/Cambridge Electric Light

Company/Commonwealth Electric Company/Canal Electric Company, D.T.E. 06-40 at 16-17 (2006); D.T.E. 99-19, at 63-67; D.T.E. 98-128; D.T.E. 98-27; D.T.E. 98-31). The Attorney General contends that she will advocate for customer benefits in this case, including a showing that the merging Companies will be more efficient, will lower costs, and will lessen the burden of distribution rates (Attorney General Comments at 7). As for how to account for the GCA and GWSA, the Attorney General states that the Department already addressed that issue in the two previous merger cases, D.P.U. 08-43-A and D.P.U. 09-139 (Attorney General Comments at 10).

The Attorney General contends that, while the Department may adopt policies in an adjudicatory proceeding, such a significant change should be considered in the context of a broader proceeding (Attorney General Comments at 7). The Attorney General notes that the Department last reviewed its merger and acquisition policy in a generic proceeding, with input from all interested parties in a thoughtful process (Attorney General Comments at 7, citing Mergers and Acquisitions). The Attorney General argues that a broader review would also enable the Department to consider the impact of a new standard of review on other potential mergers and to fully weigh the pros and cons, especially because a new standard of review might have precluded some recent transactions for lack of substantial savings (Attorney General Comments at 8). In addition, the Attorney General argues that the Supreme Judicial Court may not give the same deference to a new standard of review developed in an adjudicatory proceeding rather than in a generic proceeding (Attorney General Comments at 9, citing Andrew Rosing v. Teachers' Retirement System, 458 Mass. 283, 290 (2010)). Finally,

the Attorney General argues that if the Department changes the standard of review, the schedule should be changed to allow the Companies to refile the petition or, at a minimum, file supplemental testimony to address the new standard (Attorney General Comments at 9). The Attorney General asserts that the intervenors to the proceeding should be afforded a reasonable opportunity to prepare and present evidence regarding the new standard and any new filing or testimony by the Companies (Attorney General Comments at 9).

3. Columbia Gas

Columbia Gas argues that the Department should not adopt a new standard of review because a new standard would constitute an inappropriate and unwarranted restriction on the use of investment capital (Columbia Gas Comments at 1). According to Columbia Gas, utilities must be able to attract the capital necessary to conduct operations and must be able to compete with alternative investments, including those in the private sector (Columbia Gas Comments at 1). Columbia Gas contends that a new standard of review would lead investors to avoid investing in Massachusetts utilities or demand higher returns, either of which would result in an increased cost of capital and increased cost of service (Columbia Gas Comments at 1-2).

Columbia Gas also argues that the Department's authority is limited and statutorily prescribed by § 96, and that a new standard of review would contradict the express statutory language (Columbia Gas Comments at 2). According to Columbia Gas, the Department's long-standing interpretation of the standard of review confirms that "consistent with the public interest" equals a "no net harm test" (Columbia Gas Comments at 2). Moreover, Columbia

Gas contends that the Department said as much in D.P.U. 08-43-A where, according to Columbia Gas, the Attorney General had "urged the Department to consider whether the 'no net harm' standard survived the amendment of the statute in 2008" and "conten[ded] that the 'no net harm' test did not survive" (Columbia Gas Comments at 2). According to Columbia Gas, the Department rejected the Attorney General's contention and held that it "will continue to employ the 'no net harm' test" (Columbia Gas Comments at 2, citing D.P.U. 08-43-A at 26). Thus, Columbia Gas argues that a decision to change the standard of review without a legislative change to § 96 would be contrary to Massachusetts law (Columbia Gas Comments at 2).

4. New England Power Generators Association

NEPGA argues that there should be no change to the current standard of review (NEPGA Comments at 1). NEPGA states that the current standard of review dates back to at least 1983, and that the recent promulgation of the GCA and GWSA does not change the § 96 standard or require a change in the Department's long-standing application of § 96 (NEPGA Comments at 3, citing D.P.U. 850). According to NEPGA, the GCA provided "narrowly crafted 2008 amendments" to § 96 that do not require a change to the standard of review itself and are fully consistent with the long-standing legal standard (NEPGA Comments at 3-4). Finally, NEPGA argues that if the Legislature had intended to change the standard of review, then the 2008 amendments to § 96 would have reflected that intent and modified the statute accordingly (NEPGA Comments at 4).

VI. ANALYSIS AND FINDINGS

A. Introduction

Section 96 requires the Department to determine whether a consolidation or merger of companies, or their holding companies, is "consistent with the public interest." Nowhere does the statute itself take the further step of defining "consistent with the public interest" as equivalent to "no net harm." As the Department stated in D.T.E. 06-40, at 8-9, our task lies in applying a broad statute first written in 1908 -- at the beginning of the 20th century, drawing on late 19th century experience -- in a 21st-century context, and this is no small task considering the state of the world in general or regulatory practices in particular.

For the first time in over 25 years, a party has specifically asked the Department to review its standard for analyzing whether a consolidation or merger is "consistent with the public interest" under § 96. Various intervenors have commented that the Department should modify its standard of review under § 96 to adopt a "substantial net benefit" standard and jettison its "no net harm" evaluation.

After careful consideration of all the comments, and for the reasons stated below, we conclude that it is appropriate at this time to modify the standard for evaluating § 96 transactions and require that petitioners demonstrate that a consolidation, merger, or acquisition provide "net benefits" to satisfy the statutory requirement that such transactions be "consistent with the public interest." The Department has been moving towards a net benefit standard for some time, albeit without explicitly changing our standard of review. The enactment of the GCA and GWSA in 2008 expanded the Department's jurisdiction by

extending the application of § 96 to holding companies, adding a significant factor to our § 96 analysis, and directing the Department to consider greenhouse gas emissions in all decisions. We now seek both to clarify the migration of the Department's standard and to acknowledge the intent of the Legislature in enacting the GCA and GWSA.[6] Starting in this case, we will explicitly require that the benefits of a § 96 transaction outweigh the costs.[7]

B. Authority to Modify the Standard of Review

At the outset, there is no doubt that the Department has the authority to change the standard of review for interpreting "consistent with the public interest" in this adjudicatory proceeding. The Supreme Judicial Court has explicitly stated, "It is a recognized principle of

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[6] The Department has considered two § 96 cases under the "no net harm" standard of review since 2008. In D.P.U. 08-43-A, the proceeding involved the sale by a Massachusetts gas distribution company of its stock ownership in an out-of-state gas company to a separate holding company. In D.P.U. 09-139, the § 96 transaction was merely the final legal step in the integration and combination of the two companies that began with the Department's approval of the Eastern Enterprises-Essex Gas acquisition in D.T.E. 98-27. While the Department need not wait for a party to request reconsideration of a policy, in neither of those cases was the Department specifically asked to reconsider the § 96 standard of review. The Attorney General in D.P.U. 08-43 had stated that the Department should consider whether the "no net harm" standard had survived the GCA changes to § 96, but she merely raised the issue in a footnote in her initial comments on the filing for the Department's consideration, did not "urge" the Department to consider the issue or "contend" that the "no net harm" test did not survive, and did not pursue the issue further. See D.P.U. 08-43, Attorney General Preliminary Comments at 1 n.1 (September 5, 2008).

[7] While we agree with the Attorney General and the Companies that, under the existing standard of review, the Department has the discretion to consider any factor that affects the merging entities' ratepayers, and may consider additional factors not delineated in § 96 or the case law, by this Order the Department not only elucidates that such factors may be considered, but also provides context for the evaluation/examination of such factors (Attorney General Comments at 3, 5; Companies Reply Comments at 14).

administrative law that an agency may adopt policies through adjudication as well as through rulemaking."[8] Alliance, 448 Mass. at 51; see also Massachusetts Electric Co., 383 Mass. at 679. While there is a presumption in favor of a long-standing course of behavior, an agency may alter its long-standing interpretation of a statute so long as the new rule is consistent with the statute, applies to all litigants, and is supported by reasoned analysis. Torrington Extend-a-Care Employee Association v. National Labor Relations Board, 17 F.3d 580, 589 (2d Cir. 1994); Robinson v. Department of Public Utilities., 416 Mass. 668, 673 (1993) (requirement of reasoned consistency means "that any change from an established pattern of conduct must be explained"); see also Detroit/Wayne County Port Authority v. Interstate Commerce Commission, 59 F.3d 1314, 1317 (D.C. Cir. 1995) (agency's new interpretation of statute, which conflicted with prior decision, was not an unjustified departure from prior standard where ICC provided a reasoned analysis indicating that its prior policies and standards were being deliberately changed and not casually ignored).

In adopting policies in an adjudicatory proceeding, however, the Department must give all parties "sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1); see also Alliance, 448 Mass. at 52. Here, the Department specifically solicited comments from all interested persons (not just the parties to the proceeding) regarding a possible change to the standard of review under § 96. Moreover, we sought such comments prior to completing discovery and

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[8] Notably, the first time that the Department articulated the "no net harm" standard was in the context of an adjudicatory proceeding, D.P.U. 850.

commencing the evidentiary hearing, and we suspended the procedural schedule pending our determination so that the parties would, if necessary, have an opportunity to provide evidence pursuant to a revised standard of review. Finally, the Department is hereby establishing the modified standard before continuing with the proceeding. The parties have sufficient notice of the issues involved, have been given a chance to comment on the issues, and will be afforded a reasonable opportunity to prepare evidence and argument on the ultimate issue of whether the merger is consistent with the public interest, thus providing the necessary process due under the circumstances. Accord Massachusetts Electric Co., 383 Mass. at 680.

C. Development of the Current Standard of Review

One of the Department's earliest articulations of "consistent with the public interest" under § 96 as a "no net harm" test occurred in 1983 in D.P.U. 850. In reaching this interpretation of "consistent with the public interest," the Department even then acknowledged that there remained a broad area for the exercise of judgment that is made more difficult by strictly adhering to formulaic interpretations without considering the complexity and inherent uncertainties associated with implementing the standard. D.P.U. 850, at 6-7.

The Department next expounded on its guidelines and standards for acquisitions and mergers of utilities under § 96 in 1994, in the generic Mergers and Acquisitions proceeding. In that Order, the Department recognized that changes that were taking place in both electric and gas markets could provide additional opportunities for utilities to identify ways to achieve cost and rate reductions. Mergers and Acquisitions at 5. The Department recognized that in an "increasingly competitive market, mergers or acquisitions may represent one of many

measures that could achieve savings, efficiencies, increased reliability, and better quality of service for Massachusetts utilities." Id. The Department established nine factors to be considered in weighing the benefits and harms attendant on these transactions, which undertaking involves consideration of the special factors surrounding an individual proposal. Id. at 7-9. In applying the standard, the Department later stated that the list of factors is illustrative and not exhaustive, and that the Department may consider other factors, or a subset of these factors, when evaluating a § 96 proposal. See D.T.E. 99-47, at 17-18; D.T.E. 99-19, at 12; D.T.E. 98-128, at 6.

Mergers and Acquisitions established a multi-factor test that the Department has used to analyze such transactions, but § 96 itself never explicitly articulated any factors until 2008, when the Legislature enacted the GCA. The GCA amended § 96 by specifically delineating four factors for the Department to consider in reviewing a § 96 transaction, including one factor that was not among the nine Mergers and Acquisitions factors: "long-term strategies that will assure a reliable, cost-effective energy delivery system." The Department could have considered such a factor before, in light of the flexibility it had articulated as appropriate to its evaluation of these transactions. This amendment to the GCA, however, suggests even more attention to the benefits side of the balance.

The GWSA requires that we add one more consideration to the determination of whether the transaction is in the public interest. Pursuant to G.L. c. 30, § 61, as amended by GWSA, § 7, all Commonwealth agencies must "consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted

sea level rise," in considering and issuing administrative approvals and decisions. Thus, we must also consider the effect of the merger on these emissions, recognizing as well that the electric industry will bear a significant share of the Commonwealth's burden of attaining the GWSA's stringent greenhouse gas emissions reduction requirements.

In conducting § 96 reviews, the Department has long found evidence of public benefits and, even under the Department's "no net harm" standard, the Department has nearly always determined that the § 96 proponents' demonstrated benefits have outweighed the costs. E.g., D.P.U. 09-139, at 21-22 (no merger costs to ratepayers, but positive savings shown); D.P.U. 08-43-A, at 44-45 (no merger costs to ratepayers, but positive benefits in the form of potential synergy savings to customers); D.T.E. 06-40, at 16-17 (no merger costs to ratepayers, but positive savings shown); D.T.E. 99-19, at 83-85 (costs and savings quantified to show over $330 million in net benefits); see also D.T.E. 98-128; NIPSCO/Bay State Acquisition, D.T.E. 98-31 (1998); Eastern/Essex Acquisition, D.T.E. 98-27 (1998). Even in D.P.U. 850, at 7, the Department stated that a close reading of our precedent reveals a consistent search for and reliance upon benefits.

CLF/ENE state that, by virtually all accounts, the Department has applied a de facto net benefits test to date (CLF/ENE Reply Comments at 11). While this is not entirely accurate, the continued accretion of factors used to implement the "no net harm" standard (from the Mergers and Acquisitions enumeration, to the GCA's additional consideration of "long term strategies," to the directive of the GWSA), combined with the reality that the Department has in fact found net benefits under § 96 for some time, leads us to state explicitly

that our standard has evolved from a "no net harm" standard to the more protective "net benefits" standard.

The Companies contend that requiring net benefits will create a standard that is inherently ambiguous and difficult to evaluate (Companies Comments at 2). We disagree. A § 96 transaction requires the Department to quantify positive and negative impacts to the extent such quantification can be made, and undertake a more qualitative analysis of those aspects that are hard to measure. D.T.E. 99-47, at 18; D.T.E. 06-40, at 16-17; Mergers and Acquisitions at 7. The Department has previously conducted this evaluation pursuant to a "no net harm" standard, using the factors established by case law and statute, and we will continue to do so pursuant to a "net benefit" standard.

Nevertheless, the Department sees no need to require a "substantial net benefit" test. A showing of net benefits should suffice to protect ratepayer interests and to comply with the Department's other statutory mandates. Adopting a net benefit standard leaves the Department with an appropriate level of flexibility in reviewing a wide range of § 96 transactions.

Thus, from now on and as applied to the transaction before us, companies, including holding companies proposing a § 96 transaction, must demonstrate that the proposed transaction provides benefits that outweigh the costs. In determining whether the companies have shown net benefits, the Department will continue flexibly to apply the factors established by case law and § 96.

On February 15, 2011, the Department suspended the current schedule pending a determination on the standard of review. The Department will convene a procedural conference to establish a new schedule.

VII. ORDER

Accordingly, after notice, comment, and due consideration, it is hereby

ORDERED: That this and future G.L. c. 164, § 96 proposals shall be reviewed in a manner consistent with this Order.

By Order of the Department,

/s/

Ann G. Berwick, Chair

/s/

Jolette A. Westbrook, Commissioner