COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Joint Petition for Approval of Merger between NSTAR and Northeast Utilities, pursuant to G.L. c. 164, § 96.	)	D.P.U. 10-170

REPLY BRIEF OF THE CONSERVATION LAW FOUNDATION

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INTRODUCTION

Pursuant to the briefing schedule established by the Department of Public Utilities (the "Department") in this proceeding, the Conservation Law Foundation submits this Reply Brief in the above-captioned proceeding regarding the Petition of NSTAR Electric Company and NSTAR Gas Company (collectively, "NSTAR"), along with their holding company parent, NSTAR, and Western Massachusetts Electric Company, along with its holding company parent Northeast Utilities ("NU," collectively, "Joint Petitioners") seeking approval to merge pursuant to Massachusetts General laws Chapter 164, § 96.

I. Nothing in the Joint Petitioners' Initial Brief alters the conclusion that they have failed to make a *prima facie* case in support of the proposed merger

Joint Petitioners admit, as they must, that *long-term strategies* for ensuring reliable and cost-effective energy delivery must be taken into account as one of the four key statutory factors in a § 96 proceeding such as this. JP Initial Brief at 14. They also concede that, to avoid an adverse outcome, their case may not rest on generalities and instead must demonstrate – not speculate about – benefits that justify the costs. Id. at 15. Yet Joint Petitioneres' Initial Brief serves to firmly reinforce the conclusion that they have failed to make a *prima facie* case in support of the proposed merger because, *inter alia*, (1) they have utterly failed to address long-term strategies for ensuring reliable and cost-effective energy delivery consistent with the Commonwealth's comprehensive clean energy and GHG reduction requirements; and (2) their case rests predominantly on generalities without demonstrating benefits that outweigh the proposed merger's costs.

A. Joint Petitioners fail to address long-term strategies for ensuring a reliable and cost-effective energy delivery system, as required.

In our Initial Brief, CLF discussed at length the statutory underpinnings of the requirement to consider a proposed merger in light of the long-term strategies that will assure a reliable and cost-effective energy delivery system, and we highlighted both the Joint Petitioners' refusal to embrace such long-term strategies and their intransigence with respect to informing the Department (as opposed to the media and shareholders) of the very limited realm of long-term strategies that they apparently have contemplated. See e.g., Initial Brief of the Conservation Law Foundation ("CLF Initial Brief") at 23-28 (filed September 28, 2011).

Given that consideration of such long-term strategies is one of only four statutorily enumerated criteria for § 96 review, and that it is the *Joint Petitioners'* burden to come forward with a *prima facie* case demonstrating the proposed merger's alleged compliance with § 96, it is striking that Joint Petitioners devote less than one page to this subject out of their 122-page Initial Brief. Initiate Brief of the Joint Petitioners ("JP Initial Brief") at 36-37 (filed October 12, 2011). Joint Petitioners vaguely point to alleged improvements in financial strength and potential transmission and distribution infrastructure investments over the next five years that ostensibly would arise from the proposed merger, id. at 36, but these "benefits," even if realized, neither are tantamount to *long-term strategies* nor will they provide any guarantee of advancing long-term strategies for reliable and cost-effective supply consistent with the Commonwealth's clean energy and climate mandates. In the end, their near-silence on the subject of long-term strategies speaks volumes. It is evident that there is a gaping hole in Joint Petitioners' merger case.

Faced with this glaring void, the Department should either (a) grant DOER's Motion for Stay and order the Joint Petitioners to come forward with evidence relevant to the core statutory criteria related to long-term strategies; (b) reject the merger outright; or (c) impose conditions, as discussed in CLF's Initial Brief and further elucidated below, that would help ensure the merger's consistency with the public interest in light of long-term strategies for ensuring cost-effective and reliable energy delivery.

B. Joint Petitioners' merger case rests on generalities that are insufficient to support a merger pursuant to § 96.

As CLF and other Intervening Parties pointed out in Initial Briefs (see CLF Initial Brief at 16-17), one of the basic tenets of § 96 review is that petitioners cannot rest on generalities and instead must demonstrate benefits that outweigh the costs. Moreover, costs and benefits must be quantified to the extent feasible. Id. (citing D.T.E. 99-47 at 18; D.T.E. 06-40 at 16-17; D.T.E. 99-19 at 12; D.T.E 98-128 at 6; Mergers and Acquisitions at 7).

In response, Joint Petitioners proffer an ill-conceived argument, grounded in a misreading of the Department's Mergers and Acquisitions decision, that the admonition against reliance on generalities somehow does not apply here. JP Initial Brief at 23-24. Indeed, Joint Petitioners bluntly assert that "reliance on the principle of 'generalities' is misplaced." Id. at 23. Citing no authority for the flawed proposition that Joint Petitioners somehow are *exempt* in this proceeding from the principle against reliance on mere generalities, Joint Petitioners go on to quote a passage from the Department's Mergers & Acquisitions decision regarding the importance of quantifying costs and benefits to the extent possible, especially – but *not* exclusively – in cases where an acquisition premium is sought. Id. at 24. Indeed, contrary to what the Joint Petitioners

would have the Department believe, the Mergers and Acquisitions decision actually reinforces the admonition against reliance on mere generalities. Mergers and Acquisitions at 7.

Notwithstanding Joint Petitioners' suggestions otherwise, CLF does not argue that the Joint Petitioners must demonstrate merger-related costs and savings to a fine degree of calculated precision. However, the kind of integration planning that the Joint Petitioners plan to undertake *after* any merger is approved ought instead to be done, and shared with the Department, *prior* to any approval. And whether or not quantifiable, evidence of long-term strategies to assure reliable and cost-effective energy delivery ought to be introduced by the Joint Petitioners pursuant to Section 96. Mere generalities are not sufficient.

II. The greenhouse gas reduction benefits asserted by the Joint Petitioners are illusory and fail to demonstrate "net benefits"

A. Contrary to the Joint Petitioners' assertions, CLF is not seeking to impose a "substantial net benefits" test on the merger with regard to climate impacts.

As discussed at length in CLF's Initial Brief, the GHG reduction measures that the Joint Petitioners assert will arise from the merger are illusory and cannot form the basis of a finding of "net benefits." CLF Initial Brief at 29-36. In response, Joint Petitioners attempt to mislead the Department regarding the arguments advanced by CLF (and others) addressing the climate impacts of the proposed merger. Lacking record evidence to demonstrate that their asserted GHG-related merger benefits are somehow both real and more substantial than merger-related negative impacts, so as to result in "net benefit," Joint Petitioners resort to creating a strawman argument that is easy to tear down. As Joint Petitioners would have it, Intervening Parties including CLF somehow

conceded that the merger would entail net benefits vis-à-vis GHG emissions, but that, unsatisfied, we are seeking more – i.e., "substantial net benefits." It is demonstrably inaccurate to say that CLF either has suggested the merger will entail net GHG benefits or that CLF is calling for a merger standard requiring "*substantial* clean energy" benefits, as Joint Petitioners assert. JP Initial Brief at 75-76 ("[T]he Department established… that the Joint Petitioners were required to demonstrate net benefits, but not *substantial* net benefits, which is exactly what the Intervenors are requesting of the Department on brief") .[1] What CLF in fact argued was that the merger should be rejected because the Joint Petitioners have not demonstrated that it will be consistent with the public interest and, in the alternative, that "substantial clean energy, climate and ratepayer-protection conditions would be necessary to ensure that a merger between the Companies would entail net benefits." CLF Initial Brief at 17-18. CLF's Initial Brief repeatedly emphasizes the "net benefits" standard, not a "substantial net benefits" standard as the Joint Petitioners would have the Department believe. True, substantial conditions would be necessary to ensure that *this* merger, based on this record, would entail "net benefit." But even a cursory reading of CLF's Initial Brief plainly reveals that CLF neither concedes any merger-related net GHG benefits have been shown nor seeks to impose a standard that is inconsistent with the Department's clearly enunciated Interlocutory Standard of Review.

[1] Emphasis in original. Also on page 75 of their Initial Brief, Joint Petitioners demonstrably misrepresent CLF's argument regarding the EV pilot program that forms part of the merger-related "package" of ostensible GHG reduction measures, claiming that CLF finds the program to be "laudable" when in fact CLF characterized only *NU's existing EV pilot* as such. See CLF's Initial Brief at 33 ("While NU's ongoing involvement in piloting EF charging infrastructure may be laudable…"). CLF continues to maintain that the EV pilot program identified in the Supplemental Petition does not present real, verifiable commitments to reduce GHG emissions and, in any event, reflects an effort that should be undertaken whether or not the proposed merger goes forward.

B. Joint Petitioners have failed to demonstrate that the merger would entail net benefit with respect to reducing GHG emissions.

In arguing that the Proposed Merger somehow would promote reductions in GHG emissions (see e.g., JP Initial Brief at 37-43), the Joint Petitioners improperly rely on vague assertions and generalities, ignore the speculative nature of their "commitments," and employ a contorted logic that simply does not hold up.

For example, in touting the GHG-reduction benefits of the Northern Pass Transmission Project, the Joint Petitioners fail to take into account (i) the considerable permitting and other obstacles to the Project's deployment;[2] (ii) the fact that their own data show the Project will not reduce emissions until after 2020, at best; (iii) the tremendous lack of certainty regarding where the Project's power will flow and what sources of electricity, if any, it will displace. See CLF's Initial Brief at 11-12, 30-33 (citing to evidence of record on each of these points). Joint Petitioners also admit that the NPT project is "currently" underway through a pre-existing joint venture between NU and NSTAR, JP Initial Brief at 39, thereby undermining any claim that the merger can be credited with any GHG reduction benefit that should ever materialize from the NPT project. Moreover, in trying to argue that the merger somehow will make the NPT project less uncertain, Joint Petitioners inadvertently emphasize just how uncertain it is – with or without the merger. See id. at 40.

Joint Petitioners vaguely claim that the Merged Company would be better suited to pursue other ostensible GHG-reducing transmission and/or distribution projects, but these are even more speculative than the NPT project. Joint Petitioners muster only a

[2] JP Initial brief at 40. Joint Petitioners admit that "there are numerous obstacles to planning, financing, acquiring rights-of-way and successfully constructing the project that are yet to be solved."

suggestion that the post-merger entity "may" build such additional transmission to import cost-effective on-shore wind energy.[3]

Further, notwithstanding Joint Petitioners' repeated characterization of the identified energy efficiency ("EE"), solar, and electric vehicle ("EV") ideas as "commitments to address GHG reductions," id. at 41, they fail to demonstrate that the ideas will go forward, that they would not occur but / for the merger, that they should not be happening anyway (in the absence of the merger), and / or that they will produce measurable GHG reductions – all as discussed in CLF's Initial Brief. CLF Initial Brief at 33-35; JP Initial Brief at 41-43. Given the Commonwealth's statutory mandates to procure all cost-effective energy efficiency and conservation resources, as well as a minimum amount of renewable energy each year, Joint Petitioners fail to demonstrate how the EE and solar programs would reduce GHG emissions as compared to business-as-usual. Further, the EV pilot, for its part, includes no specific deadlines or metrics and, given NU's EV pilot in Connecticut, is an idea the Joint Petitioners should be pursuing in Massachusetts in any event.[4]

In short, Joint Petitioners fail – in their Initial Brief, Supplemental Petition and / or throughout the record of this proceeding – to demonstrate that the Proposed Merger somehow would entail net benefits with respect to GHG emissions.

[3] Considering that (i) Section 96 explicitly demands consideration of long-term strategies for assuring reliable and cost-effective supply; (ii) the Department recently determined that offshore wind is necessary for meeting the Commonwealth's clean energy and climate mandates; and (iii) the Joint Petitioners, unlike their peer National Grid, have not stepped up to the plate to secure offshore wind through a long-term Power Purchase Agreement, the Joint Petitioners' *exclusive* focus here on *on-shore* wind may be revealing of a long-term strategy that is at odds with reliable and cost-effective long-term delivery of energy that comports with the Massachusetts RPS and GWSA.

[4] It is equally plausible that the Joint Petitioners planned to pursue an EV pilot program in Massachusetts *anyway*, yet decided to withhold that endeavor specifically in order to claim it as a merger-related GHG benefit – albeit still with impacts that would be speculative and, at best, extremely modest.

III. It is at their peril that the Joint Petitioners ignore evidence of negative merger impacts marshaled by Intervenors, including CLF

Confronted by substantial evidence of record regarding negative impacts of the Proposed Merger, particularly with respect to climate impacts, it is telling that Joint Petitioners seek to ignore rather than confront it. Notwithstanding the evidence and arguments explicitly marshaled by CLF (and others), Joint Petitioners have the temerity to assert that "[t]here is [] no claim by these parties that the Proposed Merger will have a *negative* impact on efforts to reduce greenhouse gas emissions, nor is there any record evidence to that effect." JP Initial Brief at 3. While the Joint Petitioners understandably might wish it were otherwise, their assertion is patently untrue.

Indeed, negative merger impacts claimed by CLF alone, supported by evidence of record and discussed in CLF's Initial Brief, include:

- Enablement of NU/PSNH to unduly prolong the lives of aging, dirty, carbon-intensive coal-fired power plants; see e.g., CLF Initial Brief at 8-11, 38;
- Risks and costs of the Merged Companies' increased political clout vis-à-vis energy and environmental policy, especially given NU's parochial interests with respect to the coal-fired units it owns; id. at 38-40;
- Risks and costs of the Merged Companies' post-merger natural gas expansion plans; id. at 12, 25 (n. 17), 26-28, 40;
- The NPT Project's potential to directly increase GHG emissions, especially through 2020 and thereafter, and to displace clean renewable energy in New England; id. at 30-33 and
- Risks and costs posed by the Companies' lack of long-term strategies to ensure reliable and cost-effective energy delivery consistent with the Green Communities Act and Global Warming Solutions Act ("GWSA"). See e.g., id. at 25-28.

CLF also raised the issue of NSTAR's anticipated post-merger increased cost of capital, based on NU's inferior credit rating and PSNH-related liabilities, which, in turn,

can be expected to reduce capacity for clean energy/transmission investments. See e.g., CLF Initial Brief at 36-37; see also AG's Initial Brief at 31-34.[5] In short, not only have the Joint Petitioners failed to establish a *prima facie* case in support of the merger, as discussed at pp. 1-4 supra, they also err in disregarding the merger's anticipated negative impacts[6] as elucidated, in part, by CLF. Even if the Department should somehow conclude that the Joint Petitioners have made a *prima facie* case warranting the Department's further consideration of the Proposed Merger, these negative impacts as well as all others should be taken into account by the Department as it weighs the costs and benefits of the merger.

IV. The Department indisputably has authority to impose conditions on the proposed merger

Notwithstanding the Joint Petitioners' extensive, strained protests to the contrary, the Department also clearly has authority to impose conditions to ensure consistency with the public interest pursuant to § 96. The Joint Petitioners ultimately concede as much (JP Initial brief at 47), yet they still devote substantial ink – roughly two-thirds of their 122-page brief – toward their misplaced effort to unlawfully constrain the Department's authority and in opposition to virtually every condition proposed by the Intervening Parties.

It is settled law in the Commonwealth of Massachusetts that an administrative body with the delegated power to approve or deny the requested relief may also exercise

[5] Although the Joint Petitioners responded in part to this latter issue, their principal response boils down to little more than a reiteration of the mantra that "bigger is better." JP Initial Brief at 28. They also continue to rely on outdated credit rating information in the Supplemental Petition. Id. at 29. Moreover, that NSTAR currently has a high rating, id., is beside the point if a merger-related credit-rating downgrade actually has the effect of increasing NSTAR's cost of capital. It still would be a negative impact of the merger that must be taken into account as the Department weighs the costs and benefits of the merger.

[6] Having failed to respond to these arguments in their Initial Brief, Joint Petitioners should be precluded from responding now, on reply.

the "lesser authority" of imposing conditions. See, e.g., Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 448 Mass. 45, 52 (2006) (conditions may be imposed on a permit by administrative body with power to approve or deny the permit); Mello v. License Comm'n of Revere, 435 Mass. 532, 534 (2001) (license commission's statutory authority to approve or deny liquor licenses includes authority to impose conditions on licenses); Fragopoulos v. Rent Control Bd. of Cambridge, 408 Mass. 302, 304 (1990) (unless statute granting permit approval and denial power explicitly states that approved permits be unconditional, power of administrative body to impose conditions exists); Goodwin v. Department of Pub. Utils., 351 Mass. 25, 26 (1966) (DPU authorized to impose conditions on a charter service permit granted under a "consistent with the public interest" statutory standard).

After stating and restating the truism that an administrative body has only the powers granted to it by the legislature, the Joint Petitioners misleadingly attempt to separate the Department's "legal authority to impose conditions" from its authority under § 96. In doing so, Joint Petitioners rely on two cases standing for the proposition that an administrative body "may not do indirectly what it is prohibited by the Legislature from doing directly." Id. at 46. However, in the present proceeding, the Department has the authority to disapprove the merger directly under § 96, as well as the "lesser authority" to impose conditions, as discussed above. Thus, both of the cases relied upon by the Joint Petitioners are inapposite to the issue of the Department's authority to impose conditions here.

The first case cited by the Joint Petitioners is Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663 (2010). In Alliance, the

petitioners asserted that the Massachusetts Energy Facilities Siting Board ("Board") was required to consider the in-state impacts of out-of-state (and thus non-jurisdictional) elements of the Cape Wind project as the Board determined whether to approve a jurisdictional transmission line that would be connected to the wind project. 457 Mass. at 682. The wind farm project itself, located in federal ocean waters, was beyond the authority of the Board and instead rested in federal jurisdiction – invoking federal preemption issues in the event the state board should endeavor to regulate it. No such federal preemption issue is implicated here. Moreover, in an earlier decision, the Massachusetts Supreme Judicial Court held that the Board was allowed to impose conditions on an approval regarding the Cape Wind project, and this decision has not been disturbed. Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 448 Mass. 45, 52 (2006) (conditioning approval on Cape Wind securing all permits necessary for the wind farm before beginning construction on the transmission lines under the Board's jurisdiction).

The second case cited by the Joint Petitioners, New England Legal Found. v. Massachusetts Port Auth. ("NELF"), 883 F.2d 157 (1st Cir. 1989), addressed a similar situation. In NELF, Massport had attempted to levy an aircraft landing fee at Logan Airport, a flat fee that imposed a significant burden on small aircraft that could ill afford the same fee charged to large commercial jetliners. 883 F.3d at 159. The First Circuit held that the fee appeared to be an attempt to modify the conduct of small planes, an area of regulation preempted by Federal Aviation Administration authority. Id. at 173-74. Again, no such federal preemption issue is implicated in the present merger proceeding.

Moreover, it cannot reasonably be disputed that the Department has the authority under § 96 to decline to approve mergers that are not in the public interest. Where, as here, the merger proponents have failed to demonstrate that the merger, as proposed, is consistent with the public interest, the Department may either reject the proposed merger outright or approve it subject to conditions that would ensure consistency with the public interest.

A. Evidentiary Basis for Conditions:

The Joint Petitioners also attempt to inflate the evidentiary standard for any proposed merger conditions. JP Initial Brief at 47. Joint Petitioners begin by arguing that 1) DPU can only consider conditions after finding, based on the record, that the public interest would not be served; 2) the conditions must meet the standard of "reasonable and necessary to 'cure' the inadequacy" of the merger under the public interest standard, and 3) the condition must be narrowly tailored to cure the inadequacy. JP Brief at 47. To this end, Joint Petitioners argue that "[a]ny condition that the Department would require the Joint Petitioners to accept in order to gain approval for the Proposed Merger must be supported by a preponderance of the record evidence as an action reasonably necessary for the Proposed Merger to meet the statutory standard established in G.L. c. 164, § 96." Id.

Joint Petitioners cite two cases for the proposition that the Department cannot impose a condition without a "sound evidentiary basis" that the merger would have a "direct impact that needs to be addressed through the imposition of a condition." JP Initial Brief at 47. The first, Massachusetts Inst. of Tech. v. Department of Pub. Utils., merely stands for the proposition that the Department is required by G.L. c. 30A, § 14(7)

to develop a sufficient evidentiary record for an appellate court to decide the merits of a petitioner's appeal, and that the Department cannot make a decision that is unwarranted by the facts found on the record. 425 Mass. 856, 867–68 (1997). The second, Martorano v. Department of Pub. Utils., also states the § 14(7) standard and notes that to pass appellate muster, a Department decision must be based on "substantial evidence"—evidence "which a reasonable mind might accept as adequate to support a conclusion." 401 Mass. 257, 261 (1987) (internal quotation marks omitted) (quoting G.L. c. 30A, § 1(6) (1986 ed.). In other words, these cases do not support Joint Petitioners' asserted requirement that, to be approved, a condition must directly address a specific shortcoming or impact of the merger – nor does the "net benefit" standard countenance such a straight-jacketed "one-for-one" metric. What is relevant is whether a merger's positive and negative impacts, taken together with Department-imposed conditions, collectively amount to a showing of consistency with the public interest through demonstrable net benefits.

Accordingly – and setting aside the irony in Joint Petitioners' efforts to set a higher bar for the imposition of merger conditions than for approval or denial of the merger itself – it is apparent that Joint Petitioners' proposed "decisional framework" for addressing recommended merger conditions is unhinged from both the law and the record. The decision whether to disallow the merger, or allow it to proceed subject to appropriate conditions, is for the Department to make pursuant to its § 96 authority.

V. The merger conditions proposed by CLF would help ensure the merger, if allowed, would produce net benefits and be consistent with the public interest

Evidently aware of the fundamental shortcoming of their argument against Department authority to impose conditions, Joint Petitioners focus the bulk of their Initial

Brief on opposing virtually every condition proposed by the Intervening Parties. Contrary to Joint Petitioners' assertions, CLF has proposed reasonable conditions that would help ensure the Proposed Merger – which otherwise would not be consistent with the public interest – could meet the standard of Section 96.

A. Demonstrable commitment and plan to meet long-term renewable energy and GHG reduction requirements.

Particularly in light of the Joint Petitioners' failure to introduce credible evidence related to the core Section 96 statutory criterion regarding long-term strategies for ensuring reliable and cost-effective energy delivery, no merger should be allowed to proceed absent significant conditions that would ensure the Merged Companies' long-term strategies for reliable and cost-effective energy delivery are indeed consistent with the public interest. As described in more detail in CLF's Initial Brief, an essential element of such conditions would be a requirement to enter long-term PPAs with offshore wind energy, consistent with the Department's recent conclusion that offshore wind will be necessary to ensure compliance with the GWSA. See CLF Initial Brief at 41-43.

In response, the Joint Petitioners attempt to argue that the Department lacks the authority to require such a commitment. Id. at 77-80, 82. In doing so, the Joint Petitioners ignore the plain language of Green Communities Act Section 83, which is quoted prominently in CLF's Initial Brief – specifically the provision specifying that distribution companies may be required to enter long-term PPAs for more than three percent of their loads if the Department "finds that such contracts are in the best interest of customers." CLF Initial Brief at 42 (citing St. 2008, c. 169, § 83). Indeed, Joint Petitioners' claim that "the Department cannot require NSTAR Electric to procure more

than three percent of its load" is flatly contradicted by the plain language of Section 83. JP Initial Brief at 79. Additionally, given the Department's authority to require additional long-term renewable energy PPAs, it stands to reason that the Department also may specify the type of power that must be procured, particularly where, as here, the Department recently concluded that a specific type of resource is essential for meeting the Commonwealth's statutory climate and clean energy mandates. CLF Initial Brief at 42 (citing DPU 10-54 at 179). Further, and contrary to Joint Petitioners' claim that authority to require additional long-term PPAs does not exist "where there is … no evidence of any non-compliance with an applicable statutory requirement," JP Initial Brief at 79, the Joint Petitioners' own abject failure to meet the Section 96 requirement with respect to long-term strategies *necessitates* conditions such as those proposed by CLF here.

Nor is this conclusion altered in any way by the rather elaborate Commerce Clause strawman erected and torn down by Joint Petitioners in their brief. Id. at 80-83. Even if the Joint Petitioners' interpretations of Commerce Clause jurisprudence are taken at face value, they are of no consequence here. CLF has not advocated for any in-state limitation on its proposed merger condition pertaining to long-term PPAs for offshore wind. Moreover, the Cape Wind project, and all other offshore wind projects that are currently in the permitting and environmental review queue and potentially capable of selling output to the Joint Petitioners, would be built and operated not in Massachusetts but instead in federal waters – and, as such, are not "in-state" projects.

B. Maximize the extent to which any GHG benefits are actually realized and protect against the NPT project undermining Massachusetts renewable energy programs.

In our Initial Brief, CLF proposed merger conditions that are intended to ensure the claimed climate benefits of the Northern Pass Transmission project would be realized to the extent that they actually exist. CLF Initial Brief at 43-44. In light of the Joint Petitioners' claims regarding supposedly significant GHG reduction benefits of the merger through the advancedment of the NPT project, it is astonishing that they would now argue that "there is no demonstration as to how this condition is related to an impact of the Proposed Merger." JP Initial Brief at 86. It is the Joint Petitioners themselves who have claimed the NPT Project's ostensible GHG reduction benefits as a benefit of the Proposed Merger, and they should not now be heard to reject, on relevance grounds, conditions that are intended to create the possibility of actually realizing such benefits if they exist.

In addition, contrary to the Joint Petitioners' bald assertion that it is "undisputed that the energy from Hydro Quebec that will flow through the NPT project will cause the single biggest carbon reduction since the advent of the GCA and will dwarf any other renewable generation project currently being planned," id. at 87, the Joint Petitioners' own evidence shows that the project is expected to *increase* emissions through at least 2020 even if it comes to fruition in the next few years as originally planned. See e.g., CLF Initial Brief at 31; Exh. AG-2-1(a) at 420. In order to ensure that some GHG reduction benefits would be gained by Massachusetts in the event the project goes forward, Massachusetts would require a *long-term* commitment for the delivery of power in light of the fact that the project is not expected to deliver any GHG emission reduction

benefits over the short term. Id. Joint Petitioners have admitted that such long-term PPAs not only are possible but are, or have been, pursued in connection with the NPT Project for the benefit of New Hampshire customers (see CLF Initial Brief at 32-33), begging the question: why not for Massachusetts customers too?

Joint Petitioners' protestations against any condition that would limit future RPS eligibility for hydropower delivered on the NPT line likewise are revealing, coming in concert with Joint Petitioners' vague assertions that they have no "current" plans to seek such eligibility that would put large hydropower in competition with other, smaller renewables, id. at 87, as well as their far-from-reassuring assertions that any such discussion about RPS eligibility should occur in an "appropriate forum open to all stakeholders." Id. at 116. Considering that any long-term PPA for the power delivered via the NPT Project would be likely to promote, not hinder, the project's advancement, presumably it is the proposed restriction on RPS eligibility that is the basis for Joint Petitioners' argument that such conditions "could affect [the NPT Project's] completion," id. at 87, thereby again underscoring the risk that the Joint Petitioners would use their enhanced post-merger clout to seek RPS eligibility for large hydropower delivered via the project, to the detriment of other renewable energy projects in Massachusetts and the region.

In short, Joint Petitioners proffer no credible evidence or argument to dispel the concerns raised by CLF and others vis-à-vis the NPT Project and its association with the Proposed Merger, and indeed their protestations only underscore the need for the NPT-related merger conditions we have proposed if the merger is allowed to go forward.

C. Prioritization of repairing leaking natural gas pipes over expansion.

In our Initial Brief, CLF also highlighted record evidence of the Joint Petitioners' merger-related plans for expansion of natural gas infrastructure – plans that were revealed to the media and shareholders but not even mentioned in the original or Supplemental Merger Petition – and we requested a merger condition that would protect against negative climate impacts from such expansion. See e.g., CLF Initial Brief at 12, 25 (n. 17), 26-28, 40, 44. Joint Petitioners now object that "there is no demonstration as to how this condition is related to an impact of the Proposed Merger." JP Initial Brief at 87. But Joint Petitioners' protestations ring hollow given that they publicly touted the merger's potential benefits vis-à-vis expansion of natural gas infrastructure. See e.g., CLF-NU-1-22 (Att.); Att. DPU-NU-4-1(a) . Moreover, Joint Petitioners' claims regarding the supposed alacrity with which they are attending to their leaking natural gas pipelines are undercut considerably by record evidence demonstrating that over one billion cubic feet of natural gas is leaking from NSTAR's pipes each year. Tr. at 1484, 1488, 1498-1500; NEGWA-NU-2-29(BB). Particularly given the climate and energy reliability risks over the long term with respect to such contemplated merger-related expansion of natural gas infrastructure, it is reasonable to consider appropriate conditions to mitigate such risks – e.g., by prioritizing repairs of existing leaking infrastructure over expansion, as CLF has proposed.

D. NSTAR rate case with implementation of decoupling.

As discussed in the Initial Briefs of CLF and many other Intervening Parties – and despite the Joint Petitioners' claims to the contrary (JP Initial Brief at 88) – record evidence demonstrates that the Proposed Merger entails significant risks and anticipated

negative impacts that would be borne by the Merged Companies' ratepayers. See e.g., CLF Initial Brief at 36-38, 44-45. These risks are exacerbated by NSTAR's skewed incentives given that its shareholders (but not ratepayers, public health or the climate) currently benefit from increased sales. As the Department weighs measures to protect against such negative impacts and considers a host of rate-related conditions proposed by the parties (e.g. a potential rate freeze), the Department should impose reasonable conditions that require NSTAR Electric to implement rate decoupling without further delay.

E. Ensure that merger-related environmental programs go forward.

CLF also has proposed that the merger-related environmental programs touted by the Joint Petitioners in their Supplemental Petition, regardless of their shortcomings, should at least be made real through the establishment of concrete, binding commitments, timelines and metrics. CLF Initial Brief at 33-36, 45. Is it therefore baffling that Joint Petitioners would now assert, as they do, that "there is no demonstration as to how [these] condition[s are] related to an impact of the Proposed Merger." JP Initial Brief at 84, 85, 87. Indeed, Joint Petitioners' resistance to any concrete commitments serves to underscore the illusory nature of the claimed benefits, as discussed in CLF's Initial Brief. At a minimum, the Department should not credit any claimed merger-related benefit associated with these initiatives absent conditions designed to ensure the proposed programs actually would be realized.

F. Divestiture of PSNH fossil generation assets.

CLF recognizes that the condition it has proposed regarding divestiture of NU/PSNH's fossil fuel-fired generation assets is extraordinary. It is important to keep in

mind, however, that there are many significant problems inherent in the prospect of the Merged Company potentially holding onto these aging, inefficient and pollution-intensive coal plants – including risk to the Merged Companies' balance sheets and their cost of capital, the prospect of unduly propping up NU/PSNH's aging generating units (together with their consequent air emissions and corresponding public health and climate impacts) based on NSTAR's healthier balance sheet, the parochial interests that would be likely to drive the Merged Companies' use of at least some of their enhanced political clout to thwart climate and clean energy policy that might threaten NU/PSNH's generating units, etc.

Although the Joint Petitioners seek to disregard the significant evidence of record regarding the foregoing, it cannot reasonably be said that these issues are "irrelevant" to this proceeding, as the Joint Petitioners assert. JP Initial Brief at 91. Among other flaws in the Joint Petitioners' position is the basic illogic in their argument that, on the one hand, the supposed GHG reduction benefits of the NPT project ought to be taken into account in this proceeding irrespective of whether some or all of the power is delivered not to Massachusetts but instead to New Hampshire or elsewhere in the region (if the project is ever realized) whereas, on the other hand, emissions from plants owned by NU's subsidiary in New Hampshire somehow cannot be taken into account. Id.[7] Moreover, ongoing developments in pending regulatory proceedings continue to call into serious question PSNH's supposed ability to recover all costs associated with massive

[7] Notwithstanding NU CFO McHale's professed ignorance, under oath, the fact is that the much-touted Merrimack Station "wet scrubber" project will not do anything to reduce GHG emissions. See e.g., Exh. CLF-1 (11/1/2010 NU/EEI Call Transcript) at p. 7. In light of witness McHale's lack of even basic knowledge regarding GHG emissions and the ability – or not – of his company's nearly half billion dollar emissions control project to make any impact on those emissions (Tr. at 1585-86, 1589), it is particularly ironic that the Joint Petitioners should attempt (JP Initial Brief at 91, n. 17) to discredit CLF's witnesses based on questions that were outside the focus of their direct testimony and expertise – direct testimony that remains unrebutted.

ongoing investments in its aging coal plants while experiencing ever-greater customer migration – continuing the "death spiral" demonstrated by record evidence introduced by both CLF and NEPGA. CLF Initial Brief at 10, 36-37; CLF-DH-1 at 6-7; NEPGA-ST-1 at 42-43.[8] Further, in light of the foregoing, Joint Petitioners lack credibility in arguing that "all the evidence is to the contrary" of CLF's proposed merger condition, and that "PSNH is a financially health company." JP Initial Brief at 93.

In light of the risks and harms identified by CLF and substantiated by record evidence, the Attorney General's proposal to hold NSTAR's ratepayers harmless against any increased cost of capital, for example, is insufficient to protect against all of the risks and harms that would arise from the Merged Company continuing to own Merrimack and Schiller Stations. Accordingly, a condition more in line with that requested by CLF would be warranted and potentially necessary to avoid substantial harm to the public interest.

[8] See also, New Hampshire Public Utilities Commission Docket DE 11-215, PSNH Petition to Set 2012 Energy Service Rate, Testimony of Robert Baumann and William Smagula dated 10/14/11 (proposing a rate increase of 1.18 cents per kwh to cover costs of new wet flue gas desulferization project at Merrimack Station) (available at http://puc.nh.gov/Regulatory/Docketbk/2011/11-215.html).

Conclusion

Wherefore, in light of the foregoing, the Department should decline to approve the merger or, at a minimum, should attached significant conditions to ensure that the merger would entail net benefits, including with respect to climate impacts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing "Reply Brief of the Conservation Law Foundation" on the Service List in docket D.P.U. 10-170 in accordance with 220 CMR §§ 1.00 et seq.

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