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

INITIAL BRIEF OF THE CONSERVATION LAW FOUNDATION

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INTRODUCTION

Pursuant to the Hearing Officer's July 28, 2011 Memorandum, the Conservation Law Foundation ("CLF") submits this Initial Brief in the above-captioned proceeding.

Relying on the simplistic rubric that "bigger is better," electric and gas utilities NU and NSTAR would have the Department embrace a series of demonstrably implausible and unsubstantiated assertions that are belied by the evidence of record as it considers a proposed merger that would create one of the largest and most powerful utilities in the nation. Specifically:

• That the Department should take into account an alleged $784 million in benefits, even though no merger integration plans have been developed or proffered to support this figure, no allocation of costs and benefits as between shareholders and ratepayers has been established, and shareholders – not ratepayers – would be expected to secure the majority of any economic benefits.

• That all of the allegedly substantial greenhouse gas emissions reductions benefits associated with the Northern Pass Transmission (NPT) Project and 1,200 Megawatts (MW) of hydropower that would be delivered on that transmission line from HydroQuebec should be credited as a significant climate benefit in this proceeding even though (i) the project itself is speculative; (ii) NU and NSTAR have not shown how *the merger* would advance the project;[1] (iii) by their own admissions, the Companies seek to deliver power from the project to the regional wholesale markets or to New Hampshire, *not* to Massachusetts; and (iv) the Companies' own evidence shows that the project will *not* reduce emissions in the short-term (i.e., at least through 2020).

[1] Indeed, NSTAR claims that a *previous* merger (the BEC-CES merger) should be credited with advancing the NPT project, see pp. 5-6 infra, begging the question: just how many times should the alleged benefits of the NPT project be counted?

• That there is "no greener team in all of New England than [NU subsidiary] Public Service Company of New Hampshire, bar none," Tr. at 1588, even though PSNH continues to prop up its dirty, inefficient and uneconomic old coal-fired generation units on the backs of its ratepayers, and despite the facilities' disproportionate adverse environmental, public health and economic impacts.

• That the merged company will use its increased post-merger clout to influence energy and environmental policy only to promote objectives, such as greenhouse gas emissions reductions, that are consistent with the Commonwealth's simply because "it's the right thing to do," Tr. at 1598, notwithstanding opposite track records which include NU's ongoing commitment to life extension and ownership of uneconomic and dirty coal generation (through PSNH), and countervailing shareholder interests.

• That NU and NSTAR do not need to plan for the fundamentally transformative changes that will be required to nearly de-carbonize the electric and heating sectors by 2050 in order to meet the ambitious greenhouse gas reduction requirements that are required by Massachusetts law (and demanded by scientific consensus), even though the Companies admit that they can enter PPAs with lower-carbon resources and otherwise play a profoundly influential role in securing a less (or more) carbon-intensive energy supply.

In short, the merger case presented by NU and NSTAR rests on demonstrably implausible assertions – and there is substantial evidence that the merger, as proposed, would *not* be consistent with the public interest.

As detailed herein, the Department should decline to approve the proposed merger between NU and NSTAR because their petition is incomplete and rests on generalities –

in other words, the Companies have failed to lay out a *prima facie* case for approval of the merger as required under Massachusetts law. Additionally and in the alternative, the Department should reject the merger because its costs are likely to outweigh its benefits and it cannot be said to be "consistent with the public interest" absent substantial, enforceable conditions to ensure that net benefit would flow to ratepayers and the public.

I. BACKGROUND

This proceeding arises from a petition filed by 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, "Joint Petitioners") seeking approval by the Department of Public Utilities ("Department") pursuant to Mass. G.L. c. 164, § 96 to merge NSTAR and NU into a consolidated organization ("Proposed Merger").

NSTAR and NU are virtual monopolies in electric and gas supply in their respective territories, and the merged entity would service some 3.5 million customers in the New England region while enjoying substantial clout in the market and beyond. As noted in the testimony submitted in support of the Joint Petition, the combined entity would become "the largest utility company in New England, and one of the largest in the United States." Exhibit JP-1 at 6.

CLF filed a timely petition to intervene in the instant proceeding, and was granted status as a full intervening party on January 5, 2011.

A. <u>**Initial Petition.**</u> In their November 24, 2010 Petition in support of the Proposed Merger ("Initial Petition"), the Joint Petitioners introduced their very generalized rationales in support of the merger, including the following: (a) the critical importance of electricity and gas “to the economy, public safety and welfare;” (b) concerns regarding the “challenges of supporting substantially increased reliance on renewable energy while attempting to minimize price increases to customers,” (c) the supposed potential that the merger “will benefit customers, communities and shareholders alike.” Exh. JP-1 at 4-5. In addition to arguing that the merged company would become one of the largest in the country, the Joint Petitioners also described the proposed marriage of NU and NSTAR as a “merger of equals.” Id. Further, the Joint Petitioners claimed that the merger “will give the combined company a stronger regional voice in national energy policy discussions.” Id. at 7-8. In the Initial Petition, the Joint Petitioners also assert that the Proposed Merger meets a “no net harm” test and, “*in the long run*, will provide the *opportunity* for benefits that would not otherwise be achievable.” Exh. JP-1 at 13 (Emphasis added). The Initial Petition included no specific merger integration plan or quantification of alleged benefits and costs.

B. Interlocutory Order on Standard of Review. Seeking to resolve the appropriate standard of review as early as possible in this proceeding, in January 2011 the Department solicited comments from participants and non-participants alike. Interlocutory Order on Standard of Review (“Interlocutory Order”) (March 10, 2011) at 1-2. The Department considered those comments and the relevant, material changes adopted by the Massachusetts General Court in 2008 with respect to the principal statute that governs the Department’s review and approval of mergers and acquisitions, Massachusetts General Laws Chapter 164, § 96, as well as the contemporaneously enacted directives of the Massachusetts Global Warming Solutions Act ("GWSA").[2] Based on its reasoned analysis of the changes to the governing law, the Department found that its standard of review under Section 96 has evolved from a "no net harm" standard to a more protective "net benefits" standard. Id. at 26-27. In reaching this conclusion, the Department explicitly recognized that the GWSA requires the Department to consider the effect of the merger on greenhouse gas 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." Id. at 25-26.

C. Supplemental Petition. On April 8, 2010, the Joint Petitioners filed Supplemental Testimony and Net Benefits Analysis, ostensibly to address the standard of review as clarified by the Interlocutory Order and in an effort to somehow demonstrate that the merger entails "net benefits." Exh. JP-1(Supp.) The Supplemental Petition claims, without substantiation, that a $784 million benefit might be realized by the merger, but the Joint Petitioners were careful to claim only that "customers will benefit from" alleged enterprise-wide savings in the first ten years after the merger, not that these savings would actually flow to ratepayers or otherwise comprise a *public*, as opposed to private, benefit. Joint Petitioners also claim, without providing any meaningful quantification, that net environmental benefits will somehow flow from the Proposed Merger and advance clean-energy policies within the Commonwealth and the region. Id. at 4-5.

With respect to claimed merger-related savings, the Joint Petitioners rely extensively on the experience with the merger of BEC Energy and Commonwealth Energy Systems in 1999 (the "BEC-CES Merger"), and assert that the BEC-CES merger

[2] St. 2008, Chapter 298, codified in relevant part at G.L. c. 21N and G.L. c. 30, § 61.

"enabled NSTAR to advance important public policy goals relating to the reduction of greenhouse gas emissions," such as "[i]nvestment to support the construction of transmission to bring 1,200 megawatts of emissions-free, electric supply from Hydro Quebec into the New England region." Id. at 6-8. Indeed the Joint Petitioners go so far as to say, without any explanation, that "NSTAR could not have achieved these public-interest benefits in the absence of the BEC-CES Merger." Id. at 8.

In the Supplemental Petition, the Joint Petitioners suggest that there are "two types of net benefits" that they claim are likely to result from the Proposed Merger in relation to the Commonwealth's greenhouse gas emissions standards: (1) those that ostensibly would arise naturally from the creation of a new mega-utility; and (2) "proactive" measures that somehow "would not be possible without the merger" but that the Joint Petitioners allegedly would pursue through the Merged Company. Id. at 28.

With respect to the first type, the Joint Petitioners specifically identify their collaboration with Hydro Quebec in connection with the Northern Pass Transmission ("NPT") project to build a transmission line in partnership with Hydro Quebec that will allow import of some 1,200 megawatts (MW) of hydro power from Canada into New England, claiming that "this would be the equivalent of taking 330,000 to 825,000 automobiles off the road." Id. at 29. This apparently is the same project that they claimed to have been enabled by the BEC-CES merger. Exh. JP-1 at 6-8.

With regard to the second type of asserted net benefits, i.e., those that the Merged Company "would actively pursue on a combined basis," the Joint Petitioners identify three areas:

• Energy Efficiency, including raising WMECO's energy efficiency savings targets – but only up to NSTAR Electric's levels, and seizing already-available low-hanging fruit by monetizing energy efficiency savings in the Forward Capacity Market (FCM); JP-1(Supp.) at 31-33;

• Solar Energy, in the form of contracts "up to five years in length" for 10 MW of Massachusetts qualified solar Renewable Energy Certificates "SRECs," as well as an initiative by WMECO to seek approval to construct, own and operate an additional 2 MW of solar generation – collectively amounting to little more than one-twentieth of one percent of the Merged Company's load even if fully realized; id. at 34-36; Exh. CLF-NU-2-11; and

• Electric Vehicles, in the form of a non-specific charging infrastructure pilot program in the urban Boston area in collaboration with DOER. Exh. JP-1(Supp.) at 36-39. The alleged net benefits that would result from these overly broad assertions are not quantified or subjected to any meaningful analysis.

D. Further Proceedings. The Joint Petitioners' vague and general testimony in support of the Proposed Merger triggered hundreds of discovery requests seeking details about the merger and its likely impacts. Direct testimony from more than a dozen witnesses was filed, and nine days of evidentiary hearings were held.

On June 10, 2011, DOER filed a Motion to Compel and Stay the Proceedings ("Motion to Compel/Stay") seeking substantive responses to discovery requests regarding greenhouse gas emissions and climate impacts of the merger, and on June 15, 2011, CLF filed a response in support of that Motion, highlighting further examples of the Joint Petitioners' evasive and materially inadequate responses to discovery regarding GHG analysis and climate impacts of the Proposed Merger. After further discovery and evidentiary hearings, DOER filed a Renewed Motion to Compel/Stay on July 14, and CLF and other intervening parties filed supportive responses on July 21. No decision has yet been made on DOER's Motion to Compel/Stay, and oral argument has been scheduled for November 4, 2011. CLF continues to believe that the Joint Petitioners did not provide in the Petition, and have have not been forthcoming with essential details regarding the Proposed merger, including its climate impacts and effects.

E. Additional Factual Background.

CLF and other intervening parties introduced substantial direct testimony in this proceeding. Principally through the testimony of CLF's witnesses Douglas Hurley and Jonathan Buonocore, as well as various discovery responses, the following evidence has been introduced in this proceeding:

NU is the only utility in New England that continues to own and operate coal-fired power plants, through its wholly-owned subsidiary PSNH.[3] See Exh. CLF-NU-1-7. PSNH's 546 MWs of coal-fired capacity consist of:

1) Merrimack Station in Bow New Hampshire

- Unit 1 – coal, 112.5 MW (summer capacity) in service, 1960
- Unit 2 – coal, 338.37 MW (summer capacity) in service, 1968

2) Schiller Station in Portsmouth New Hampshire[4]

- Unit 4- coal/oil, 47.5 MW (summer capacity) in service, 1952
- Unit 6- coal/oil, 47.9 MW (summer capacity) in service, 1957

[3] NStar does not own or operate any electric generating facilities – not even solar generation that it is permitted to own pursuant to the Green Communities Act. Exh. CLF-NU-1-5.

[4] Schiller Station Unit 5, a biomass-fired unit, reported 567,175 tons CO_2 emissions in 2009. CLF-DH-1 at 3.

Exh. CLF-DH-1 at 3. Merrimack station is the single largest emitter of carbon dioxide (CO2) in New Hampshire and one of the largest in New England. In 2009, PSNH reported more than 2.5 million tons of CO2 emissions from Merrimack Station. For Schiller units 4 and 6, PSNH reported 633 thousand tons of CO2 emissions in 2009[5]. CLF-DH-1 at 2-3.

The coal-fired electric generation that is owned by NU, like all coal-fired power that is distributed by both NU and NSTAR to their customers, results in substantial negative public health impacts such as premature mortality, respiratory illnesses, hospitalizations, heart arrhythmias, low birth weights, mental retardation and increased exposure to carcinogens. Exh. CLF-JB-1 at 2. Such coal-fired electric generation also produces vast quantities of greenhouse gas (GHG) emissions and heat-trapping particulate matter that contribute to climate impacts such as sea level rise, warming ocean waters, altered weather patterns and accelerating impacts on public health. Id. The public health impacts and climate impacts of coal-fired generation can be quantified and monetized, including for individual facilities. Id.; see also, Exh. CLF-JB-3, Epstein, P, J. Buonocore et al., 2011, "Full cost accounting for the life cycle of coal," Ann. N.Y. Acad. Sci. 1219:73-98. Public health impacts of coal-fired generation, exclusive of climate-related public health impacts, are in the range of 3.2¢/kWh to 9.3¢/kWh. Exh. CLF-JB-1 at 5. Conservatively estimated, the additional public cost of coal-fired generation is in the range of 9¢/kWh to 26.89¢/kWh. Id. at 6.

[5] 1980-2010 Unit Level Emissions data available at the U.S. Environmental Protection Agency Clean Air Markets Data (EPA CAMD) website.

For the fossil fuel-fired generation owned and operated by NU subsidiary PSNH, the annual public health impacts have been conservatively quantified and monetized as follows:

Table 1:

Health Impact	Schiller (values in $1000s)	Merrimack (values in $1000s)
Mortality	6 ($44,972.2)	3 ($22,140.2)
Acute Bronchitis	8 ($3.6)	4 ($1.8)
Heart Attacks	11 ($1209.2)	6 ($605.5)
Asthma Attacks	96 ($5.0)	47 ($2.5)
Chronic Bronchitis	4 ($1667.5)	2 ($827.9)
Asthma ER	4 ($1.5)	2 ($0.7)
Cardio Hospital Visit	3 ($93.6)	2 ($46.6)
Respiratory Visit	2 ($22.1)	1 ($11.0)

Id. at 9. In addition, the carbon dioxide (CO_2) emissions alone from these facilities carry a cost in the range of $47 million to $470 million per year. Id. at 9-10.

PSNH's Merrimack and Schiller Station generating resources are uneconomic, with costs that are substantially higher than revenues. See e.g. Tr. at 766. PSNH's consequent above-market rates have triggered increasing customer migration away from PSNH and to competitive suppliers, leaving it with a diminishing customer base across which to spread these costs. CLF-DH-1 at 6-7. PSNH's resulting "death spiral" is not sustainable. CLF-DH-1 at 6-7; NEPGA-ST-1 at 42-43. The New Hampshire Public Utilities Commission, in a July 26, 2011 Order, rejected PSNH's request to spread the costs across its distribution base through a non-bypassable charge, and found that "[t]he one proposal that does address the underlying cause [of PSNH's financial predicament associated with customer migration] is divestiture of PSNH's hydro and fossil assets." Order 25,256, July 26, 2011 Order Following Hearing, PSNH: Investigation into the Effects of Customer Migration, DE 10-160 at 39.

In addition to having the highest carbon intensity of any New England utility, NU subsidiary PSNH imposes the highest rates of any investor owned utility in New Hampshire. CLF-DH-1 at 5. Notwithstanding the extent to which PSNH's coal-fired generating assets are uneconomic, PSNH continues to invest in substantial capital expenditures for life extension projects, apparently with the belief that it will be awarded cost recovery for such investments by the New Hampshire Public Utilities Commission. Id. at 6. PSNH is currently in the midst of a $450 million flue gas desulfurization (i.e., scrubber) installation at Merrimack Station which will add an estimated 1.1 cents per kwh to its energy services rate and further render the facility uneconomic in comparison to the market. Id.

Beyond serving its own utility load with power from its high-emitting coal-fired resources, NU's subsidiary PSNH sells coal-fired output into the wholesale market at times when the output from its units is greater than its utility load. Id. at 4. PSNH operates these plants for large periods of time when they are not economic in comparison to locational marginal prices. Id. This results not only in excess and unnecessary CO_2 emissions, but also unaccrued liability exposure to PSNH, which adversely impacts the economic prospects of its parent company. Id. at 4. If the merger is approved, PSNH's parent company would be the merged company.

Although the Joint Petitioners have touted the supposed benefits of the merger in facilitating the Northern Pass project to diminish the region's reliance on fossil-fuel fired electricity, they have not in any way addressed the effects that Northern Pass will – or will not – have on the fleet of old coal-fired power plants owned by NU and PSNH, or any other coal-fired generation in Massachusetts or the region, for that matter. See e.g., id. at 4. And despite having touted various merger-related plans to the news media and shareholders – e.g., regarding their interest in increasing market share for natural gas (see e.g., Exh. CLF-1 at 9) – NU and NSTAR have not affirmatively laid out those plans in this proceeding. Nor have the Companies developed or introduced *long-term* plans to ensure a reliable and cost-effective energy delivery system. See Tr. at 1532, 1591 (indicating that the Companies have focused on a five-year planning horizon).

II. STANDARD OF REVIEW

In accordance with Massachusetts General Laws chapter 164, § 96, the Proposed Merger may only occur if the Department determines that it is "consistent with the public interest." As discussed below, this determination *must* take into account important factors including the Companies' long-term strategies for ensuring reliable and cost-effective energy delivery, as well as the climate impacts and effects of the proposed merger.

A. Section 96 Requires a Finding of "Consistency with the Public Interest."

Section 96 requires an affirmative determination of consistency with the public interest before a merger may be approved by the Department, and explicitly lays out some of the considerations that must be taken into account. The relevant language reads as follows:

> Companies … subject to this chapter and their holding companies may, notwithstanding any other provisions of this chapter or of any general or special law, consolidate or merge with one another, or may sell and convey their properties to another of such companies or to a wholesale generation company and such other company may purchase such properties if … the department, 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 department 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.

G.L. c. 164, § 96. (emphasis added). Thus, Section 96 requires the Department, at a minimum, to consider 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 which may negatively impact customer service. Of the four factors specified in Section 96, only the factor regarding long-term strategies was not previously addressed in the Department's "nine-factor test" established in Guidelines and Standards for Acquisitions and Mergers of Utilities, D.P.U. 93-167-A (1994)("Mergers and Acquisitions"). See Interlocutory Order on Standard of Review at 6.

Importantly, analysis of factors such as long-term strategies to assure a reliable and cost-effective energy delivery system must take into account Massachusetts' sweeping requirements for promoting clean energy alternatives and reducing greenhouse gas emissions as set forth in the GWSA and Green Communities Act (GCA). The intersection with the GWSA is addressed more specifically below. With respect to the GCA, this includes (a) the procurement of all cost-effective energy efficiency and other demand reduction resources,[6] (b) meeting the requirements of the Commonwealth's revamped RPS, including a 1% increase per year in the amount of eligible new renewable energy that must be supplied to customers,[7] (c) meeting the requirements of the new

[6] G.L. c. 25, §§ 19-22.
[7] G.L. c. c. 25, § 11F.

alternative energy portfolio standard;[8] (d) promoting increased deployment of new distributed renewable energy generation through net metering;[9] and (e) facilitating the financing of new renewable energy development through the use of long-term contracts.[10]

Prior to the 2008 changes to Section 96, the Department considered nine, non-exhaustive factors as set forth in Mergers and Acquisitions. See DPU 93-167-A at 7-9. See Boston Gas, D.P.U. 09-139 at 15; Bay State Gas, D.P.U. 08-43-A at 26-27. Since the 2008 amendment, the Department has concluded that it is not foreclosed from considering the nine Merger and Acquisitions factors. Bay State Gas at 27, Boston Gas at 16. These factors are: (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, D.P.U. 93-167-A at 7-9. This list of factors is instructive but not exhaustive. D.T.E. 99-47 at 17-18; BEC/ComEnergy Acquisition, D.T.E. 99-19 at 12 (1999), aff'd sub nom. Attorney General v. Department of Telecomm. and Energy, 438 Mass. 256 (2002).

Apart from the factors required to be considered under § 96, the Department may consider the factors identified above as well as any other factor appropriate to the nature of the transaction or other laws and policy within and beyond the statutory mandate of the commission's authority, if that criterion is relevant to the public interest. Boston Gas, DPU 09-139 at 16 (2010); Interlocutory Order at 22, n. 7. The factors to be considered by the Department are grounded in statute, past practice and the Commonwealth's

[8] G.L. c. 25, § 11F½.
[9] G.L. c. 164, §§ 138-140.
[10] St. 2008, c. 169, § 83.

overarching energy policy. Here, the size of the proposed merged company – the largest utility in New England and one of the largest in the nation – demands a probing review that applies a broad set of factors.

B. <u>The Massachusetts GWSA Requires Consideration of Climate Impacts and Effects.</u>

Consistent with the Interlocutory Order and the Massachusetts Global Warming Solutions Act, the Department also must consider the climate change impacts and effects of the proposed merger:

> In considering and issuing … administrative approvals and decisions, the respective agency, department, board, commission or authority *shall* also consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise.

G.L. c. 30, § 61 (as amended by St. 2008, c. 2008, § 7) (emphasis added). As the Department recognized in the Interlocutory Order, such analysis of climate impacts and effects carries special significance in the context of a merger, like this, between companies operating in the electric sector:

> *[The Department] must also consider the effect of the merger on [greenhouse gas] 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.***

Interlocutory Order at 26 (emphasis added). Accordingly, merger considerations such as the "long term strategies that will assure a reliable, cost effective energy delivery system," must be viewed through the lens of the GWSA's short and long-term greenhouse gas reduction requirements – i.e., a 25% reduction below 1990 levels by 2020 and a reduction of at least 80% below 1990 levels by 2050.

C. <u>The Department Must Evaluate the Proposed Merger in Light of the Balance of Costs and Benefits Before Determining Whether a "Net Benefit" Has Been Demonstrated.</u>

It is well established that 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. In considering a particular merger, the "Department evaluates potential gains or losses in a proposed merger and acquisition to determine whether the proposed transaction is consistent with the public interest, considering the special factors surrounding an individual proposal." Bay State Gas, D.P.U. 08-43-A, at 26 (internal citations omitted). It is important to note that the Department's calculus is not limited to the costs and benefits vis-à-vis company ratepayers; rather, the standard is based on the broader "public interest" which requires the Department to look beyond rates, service quality and reliability to larger societal costs and benefits.[11]

A determination of 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, as well as 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; D.T.E. 99-19 at 12; D.T.E.

[11] Public Utility Commissions in other jurisdictions have been rebuked by reviewing courts when they have not considered all relevant criteria. In Gulf States Utilities Company v. Federal Power Corporation, the court rejected the commission's decision to ignore anti-trust issues in its decision to approve applications for bonds by electric utilities. The court ruled that anti-trust issues were indeed a factor that the commission must consider, and instructed the commission to look beyond its statute to the 'fundamental national economic policy expressed in the anti-trust laws.' Gulf States Utilities Company v. Federal Power Corporation, 411 U.S. 747 at 759-760 (1973). See also Eric Filipink, Serving the "Public Interest"-Traditional vs. Expansive Utility Regulation, Harrison Institute for Public Law, Georgetown Law at 30-33 (2009); available at http://www.nrri.org/pubs/multiutility/NRRI_filipink_public_interest_jan10-02.pdf.

98-128 at 6; Mergers and Acquisitions at 7.

As set forth in the Interlocutory Order on Standard of Review, the Department "will explicitly require that the benefits of a § 96 transaction outweigh the costs." Interlocutory Order at 22. In other words, the proposed merger will be evaluated pursuant to a "net benefit" standard, and in order for the proposed merger to be approved the Joint Petitioners must demonstrate – not speculate – that the proposed transaction provides benefits that outweigh the costs. Id. at 27. Only in the event that an affirmative determination is made, based on analysis of the criteria identified above, may the merger be allowed to proceed.

III. ARGUMENT

As discussed below, the Joint Petitioners have failed to make a *prima facie* case in support of the Proposed Merger because – despite the illusion of specificity in terms of the alleged monetary savings from the merger – their case inappropriately rests on generalities. The savings they allege are not supported by evidence of record; the Companies have failed to provide evidence that the merger is consistent with long term plans to ensure reliable and cost-effective energy delivery; and the Companies improperly have sought to shield relevant post-merger plans from scrutiny by the Department. Even if these fundamental flaws could be set aside, which they cannot, the Proposed Merger still cannot be found to be "consistent with the public interest," as required, because the purported merger-related savings are speculative; the merger will entail substantial costs; and the costs of the merger, as proposed, are likely to exceed its benefits. Additionally, and in the alternative, substantial clean energy, climate and ratepayer-protection conditions would be necessary to ensure that a merger between the

Companies would entail net benefits and be consistent with the public interest.

A. <u>The Department Should Reject the Proposed Merger Because the Joint Petitioners Have Failed to Make a *Prima Facie* Case.</u>

It is elementary that parties seeking approval of a merger or acquisition pursuant to Massachusetts General Laws Chapter 164, § 96 cannot rest on generalities and must quantify the costs and benefits of the transaction to the extent feasible. <u>Eastern-Colonial Acquisition</u>, DTE 98-128 at 7 (1999); <u>NIPSCO-Bay State Acquisition</u>, D.T.E. 98-31 at 11 (1998); <u>Eastern-Essex Acquisition</u>, D.T.E. 98-27 at 10 (1998); <u>Mergers & Acquisitions</u>, D.P.U. 93-167-A at 7. In this proceeding, NU and NSTAR fail to meet this most basic requirement – and the Department should reject the Proposed Merger – based on factors including the following: (1) the Companies have not yet even undertaken a merger integration analysis or developed a specific integration plan; (2) the Joint Petitioners have not, and cannot even at this late stage, provide a reasonable estimated quantification of the impacts of the merger, or any certainty regarding which costs and benefits would be directed toward ratepayers as opposed to shareholders; (3) Joint Petitioners have not developed or disclosed long-term plans for ensuring a reliable and cost-effective energy delivery system; and (4) Joint Petitioners have failed to come forward in this proceeding with information about the post-merger plans that they have shared, instead, with news media and shareholders – in other words, the Companies may have some specific post-merger plans but they have endeavored to selectively preclude inquiries regarding those plans by the Department and intervening parties. These issues are discussed seriatim below.

1. The Joint Petitioners' "Quantification" of Costs and Benefits is Speculative, At Best.

While the precise impacts of a merger between the Joint Petitioners cannot reasonably be determined with exactitude prior to an actual merger, the Joint Petition (inclusive of both the Initial and Supplemental Petitions) is at the *far* opposite end of the spectrum of certainty – despite the illusion of precision created by the Petition's reference to an ostensibly specific figure of $784 million in alleged savings. The record reveals that the Joint Petitioners are seeking to postpone true quantitative merger integration analysis, grounded in the specific facts and circumstances of *this* merger, until *after* the merger is approved and launched. While this may be convenient for the Joint Petitioners, it falls far short of meeting the threshold requirement of G.L. c. 164, § 96.

On cross-examination about the status of plans to integrate the two companies, the Joint Petitioners admitted that "the vast majority" of the requisite analysis will be done *after* the merger should close:

> A. [McHale] . . . We have not gotten to the point yet where each team fully appreciates how we do business; so given that, we are not at the point where we can begin yet to identify the best practice and how we would move to a future state. That work will take place subsequently.
>
> Q. Will that be subsequent to the expected October day one [of merger closing]?
>
> A. [McHale] I would say the vast majority of that work will be done post-close – some months later, some potentially years later.

Tr. at 37. This testimony is consistent with substantial evidence of record, all of which ought to lead to the conclusion that DOER's pending Motion to Compel/Stay, which asks the Department to compel the Joint Petitioners to come forward with, *inter alia*, an actual merger integration plan, should be granted. Alternatively, the Joint Petitioners' inappropriate reliance on generalities rather than specifics is grounds for rejection of the merger petition. Eastern-Colonial Acquisition, D.T.E. 98-128 at 7; NIPSCO-Bay State Acquisition, D.T.E. 98-31 at 11; Eastern-Essex Acquisition, D.T.E. 98-27 at 10; Mergers & Acquisitions, D.P.U. 93-167-A at 7.

Although the Supplemental Petition introduces some seemingly specific numbers regarding alleged savings that would result from the merger, as well as a handful of discreet projects that allegedly would introduce net environmental benefits, in reality the Supplemental Petition's thin veneer of supposed specificity is not substantiated by evidence of record.

Joint Petitioners admit that their Initial Petition did not meet the requirement of setting forth, and quantifying, the costs and benefits of the proposed merger, and claim that this deficiency somehow was corrected in the Supplemental Petition:

> In [the Initial Petition], the Joint Petitioners *did not quantify* the expected savings impact of the[] operational efficiencies [allegedly attributable to the merger].
>
> However, to satisfy the Department's new standard of review under G.L. c. 164, § 96, the Joint Petitioners have developed the NSTAR/NU Net Benefits Analysis to quantify and present the net benefits that are forecast to result from the Proposed Merger.

Exh. JP-1 (Supp.) at 9.[12]

The Joint Petitioners' vague and general testimony regarded allegedly beneficial effects of the Proposed Merger is reflected in their claims that the merger "will have a positive impact," that the merger provides an "*opportunity* to adopt best practices," and

[12] The updating of the Standard of Review did nothing to change the essential requirement that costs and benefits must be quantified to the extent feasible, a requirement long in existence. See p. 16 supra. The Initial Petition failed to meet this basic requirement, as even the Joint Petitioners subsequently have admitted. And notwithstanding Joint Petitioners' suggestions to the contrary, the Supplemental Petition fails to correct this fundamental flaw.

that the merger "will have the effect of strengthening financial integrity and increasing investment capability." Id. at 15-16 (Emphasis added).

As underscored by witness Ramas on behalf of the Attorney General, the Joint Petitioners' Supplemental Petition likewise fails to provide meaningful evidence of costs and benefits, including quantification thereof. Witness Ramas testified that she does not have any confidence that the long term costs savings presented in the Net Benefits Analysis are accurate or highly likely to occur. Rather, she found that:

> The NSTAR/NU Net Benefits Analysis presented by the Joint Petitioners incorporates very high level assumptions that are largely based on a merger analysis provided to the Department in DTE 99-19 which related to the merger of BEC Energy and Commonwealth Energy System ("BEC-CES Merger"). Most of the assumptions in the Net Benefit Analysis are based on the BEC-CES Merger and not specific to the Joint Petitioners or their operations… One must question how applicable a study that was conducted over ten years ago would be to current NSTAR/NU operations.

Exh. AG-DR-1 at 7. Witness Ramas highlighted the fact that the Joint Petitioners have not completed an assessment of the post-merger IT environment, applications or infrastructure; have not identified specific projects to consolidate the IT functions; and have not undertaken any detailed analysis of possible cost savings from the supply chain, employee benefits or administration or personnel reductions. Based on the foregoing, Ramas concludes as follows:

> The projected savings presented by the Joint Petitioners in the supplemental filing are speculative and for the most part not based on a review of the actual current operations at NSTAR and NU. While cost savings may result from the proposed merger, and there should be opportunities to achieve efficiencies as a result of the proposed consolidation, the level of savings has not been supported and should not be given much weight by the Department in making its decision regarding the proposed merger.

Exh. AG-DR-1 at 8.

The Joint Petitioners' assertion that the merger will advance the NPT Project also is demonstrably vague and general. For example, Joint Petitioners assert that

> without the Proposed Merger, the interests of NSTAR and NU may not always be aligned from a business perspective and this could create obstacles along the way to prolong development. Thus, there is no doubt that the ultimate completion of the project will be made more certain and subject to fewer risks if the combined strength of a unified company with a single, common interest is supporting that effort.

Exh. JP-1 (Supp.) at 30. Given factors such as (i) the Companies' contractual Joint Transmission Agreement (JTA), (ii) the NPT Project's planned financing by HydroQuebec, and (iii) the inability of the Joint Petitioners to provide detailed responses to queries regarding how the merger proceeding's outcome is likely to affect the advancement of the NPT Project, the Supplemental Petition's vague assertions that the merger will somehow boost the "alignment" of the Companies vis-à-vis the NPT Project are neither credible nor compelling. Surely the Joint Petitioners do not expect anyone to believe that a denial of the Proposed Merger is likely to result in a breach of the JTA, for example.[13]

In a similar vein, the Joint Petitioners have failed to provide any specific information regarding the allocation of alleged clean energy and/or monetary benefits to Massachusetts as opposed to other states from the NPT Project.[14] See pp. 32-33, infra. These examples are emblematic of the Joint Petitioners' approach in this proceeding, and of their failure to present a *prima facie* case that is grounded in anything more than generalities and speculation.

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[13] Moreover, as set forth in greater detail below, Petitioners suggestion of so-called benefits from the NPT Projects is thoroughly misstated and / or exaggerated. See p. 30-33 infra.

[14] See e.g., Exh. CLF-2 at 3 ("We continue to believe the [NPT] project offers significant benefits to both the *State of New Hampshire and to New England*.")(Emphasis added). Notably absent is any mention of Massachusetts.

2. *Joint Petitioners Have Failed to Demonstrate that the Proposed Merger is Somehow Consistent with the Public Interest in Light of Long-term Plans for Ensuring a Reliable and Cost-effective Energy Delivery System.*

One particularly striking example of the Joint Petitioners' failure to introduce requisite evidence in support of the merger is in connection with the Section 96 criterion requiring consideration of "the long-term strategies for ensuring a reliable, cost-effective energy delivery system." G.L. c. 164, § 96. While the absence of consideration of long-term strategies might have been acceptable under the old merger review standard, the Massachusetts General Court made clear in 2008 that consideration of long-term strategies is essential. Id. Indeed, the requirement to consider long-term strategies was the *only* new factor added to Section 96 review as part of the reforms embraced in the Green Communities Act.

Section 96 explicitly provides that, in determining whether a proposed merger is "consistent with the public interest," "the department *shall* at a minimum consider…the long term strategies that will assure a reliable, cost effective energy delivery system." G.L. c. 164, § 96. Unlike the other three factors listed in Section 96, consideration of long term strategies is *always* a consideration that must be taken into account. The other factors must be considered *if* they have been put forward: i.e., "proposed rate changes, *if any*" or "*any* anticipated interruptions in service." By contrast, Section 96 does *not* say "long term strategies, if any." Thus, consideration of long term strategies to ensure reliable, cost effective energy delivery is not optional or contingent – it is required. Comm'r of Corr. v. Superior Court Dep't of the Trial Court, 446 Mass. 123, 124 (2006) ("Statutory language should be given effect consistent with its plain meaning. Where, as here, that language is clear and unambiguous, it is conclusive as to the intent of the

Legislature."); see also Commonwealth v. Vega, 449 Mass. 227, 231 (2007) ("Any reading of the statute that ignored [a term] would violate the canon that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.")

The Companies accordingly should have disclosed their long-term strategies for ensuring reliable and cost effective energy delivery. Yet as is readily evident on the face of the Joint Petition and Supplemental Joint Petition, and by the Companies' witnesses' unequivocal admissions, the companies neither engage in long-term planning nor have put forward any such strategies for the Department to review here. See e.g., Tr. at 1532, 1591.

The five-year planning horizon utilized by the Joint Petitioners in some instances cannot reasonably be viewed as "long-term" within the meaning of Section 96 – particularly in light of (i) the Commonwealth's long-term renewable energy contracting statute, which (like the revisions to Section 96) is set forth in the Green Communities Act and defines "long-term" as 10 to 15 years,[15] as well as (ii) the GWSA, which sets both short-term (i.e., 2020) and long-term (i.e., 2050) GHG reduction requirements.[16] It is noteworthy that independently from the Joint Petition, NU, through its subsidiary PSNH, has demonstrated at least *some* minimal pursuit of long-term strategies for ensuring energy supply *for New Hampshire*, as reflected in PSNH chief executive Gary Long's public assertion earlier this year that PSNH is negotiating a *40-year* PPA to deliver HQ's power via the NPT Project to New Hampshire customers. Exh. CLF-5; Tr. at 1581, 1583-85. No similar assertions or information are provided in the record of this

[15] St. 2008, c. 169, § 83.
[16] St. 2008, c. 298.

proceeding. Joint Petitioners have completely failed to supply evidence with respect to long term strategies to assure reliable and cost-effective energy delivery in *Massachusetts*.

Given that the GWSA and GCA require fundamentally transformative changes to de-carbonize energy supply across all sectors, including the electric and heating sectors, long-term strategies for ensuring cost-effective and reliable energy delivery must be *consistent with the sweeping mandates of these statutes*.[17] It is not acceptable for the Companies simply to take the position, essentially, that "it is not their problem" to deal with the sources or types of energy that they supply, and/or to decline to seriously

[17] As the Department recently noted in its decision in *National Grid – Petition for Approval of Long-Term Contracts,* DPU 10-54 (2010) ("NGrid/Cape Wind"), the GWSA's implications for the electric sector are expected to be large:

> We agree with DOER that *the electric sector is likely to play a proportionally larger role in achieving emissions reductions, relative to other sectors.* This is because the electric sector has opportunities to reduce emissions at lower cost than other sectors, by reducing: (1) electricity consumption through low-cost demand resources (e.g., energy efficiency, demand response, and distributed generation); and (2) the GHG emissions from electricity generation through low-carbon or carbon-free options…
>
> [T]he GWSA itself recognizes the importance of reducing GHG emissions in the electric sector, as evidenced by its requirement that GHG limits be established specifically for the electricity sector – the only sector to be singled out. See G.L. c. 21N, § 3(c). … For these reasons, *the Department concludes that GHG emission reductions from the electric sector will be vitally important – likely even more important than reductions from other sectors – in complying with the GWSA.*

NGrid/Cape Wind, DPU 10-54 at 176-77 (internal citations largely omitted, emphasis added). The long-term strategies that must be considered as part of Section 96 review must take into account the ambitious requirements of the GWSA, and this is especially true in the context of the electric sector.

The heating sector – including the Joint Petitioners' supply of natural gas – will be substantially affected as well. The GWSA's mandate to reduce greenhouse gas (GHG) emissions 25% below 1990 levels by 2020 and at least 80% below 1990 levels by 2050 will require not only swift action to eliminate widespread distribution pipeline leaks of natural gas (a potent greenhouse gas) but also a robust transition to low-carbon and no-carbon alternatives.

contemplate how they will supply clean energy sources in the future. See e.g., Tr. at 1502-03; 1506; 1532-33; 1539-40. Nor is it consistent with the public interest for the Joint Petitioners to essentially ignore the anticipated "gap" between supply and demand for eligible renewable energy that they have identified and acknowledged in connection with their statutory obligations to deliver an increasing amount of qualifying renewable energy to their customers each year.[18] The Companies admit that they can play a role in "de-carbonizing" Massachusetts and New England, see e.g. Tr. at 1535, yet they have failed to marshal evidence of long-term strategies for cost-effective and reliable energy delivery consistent with this critical statutory objective.

3. The Joint Petitioners Should Not Be Permitted to Shield Their Post-Merger Long-Term Plans From the Department's Scrutiny.

The record includes *some* limited evidence that the Companies may have some long-term plans for energy delivery – e.g., a potentially significant natural gas infrastructure build-out – yet the Companies have declined to affirmatively reveal those plans to the Department through their Initial or Supplemental Petitions and appear to have been more forthcoming with the news media and shareholders regarding those plans than they have been in response to discovery in this proceeding. See e.g., Tr. at 1486, 1488, 1521-24, 1529-30. For example, in a joint NU/NSTAR financial conference in November 2010, NU touted a Yankee Gas strategy entailing investment of more than half a billion dollars to "leverag[e] natural gas as 'the fuel of choice.'" Att. DPU-NU-4-1(a)

[18] Tr. at 1550-51; Exh. JP-4 at pp. 23-24, 29, 82, 86-87; see also, "Closing Statement of Public Service Company of New Hampshire," filed by PSNH before the New Hampshire Public Utilities Commission, Docket No. DE 10-195 (Identifying statutory renewable energy supply requirements, and noting that "[w]e also know that virtually nothing is being built to meet this increasing demand. ISO-NE predicts that even if 40% of the projects in the ISO queue are developed, the region's need for RECs will outstrip supply by 2013. There is no evidence that disputes this ISO prediction.")(filed February 14, 2011).

at 25. NU also has boasted of the opportunity it sees in conversions from heating oil to natural gas in order to tap into a potential 53% increase in rate base over the next five years alone. Exh. CLF-1 at 9. NSTAR CEO Tom May, who would lead the newly merged company, similarly touted the anticipated post-merger clout in promoting expansion of natural gas supply, saying "[o]ur policymakers really have the ability to put the thumb on the scale and really move us toward natural gas." Exh. CLF-NU-1-22(Att., "The Acquirer: After merger, NU to pursue aggressive expansion strategy").

However, by refusing to put such plans squarely before the Department in this § 96 merger proceeding, the Joint Petitioners inappropriately seek to shield those plans from critical scrutiny. Moreover, evidence of record reflects that the Companies are well aware that their post-merger natural gas expansion plans entail considerable risks that go directly to the issue of reliable and cost-effective energy delivery. For example, a consultant hired by NU (through its subsidiary PSNH) admitted in a published opinion piece that, in connection with natural gas,

> Supply shocks can reduce availability of supply. In addition, if some existing generating resources are retired, this will exacerbate the constraints on the local gas infrastructure system in New England and would require switching to oil generation with increasing frequency…

CLF Exh.-3 (also referring to potential "game-changing" events such as a shortage of natural gas or gas delivery constraints and resulting spikes in prices). Similarly, in touting the reliability and fuel diversity benefits of the NPT Project, the Companies' consultants at Charles River Associates underscored the risks posed by the region's already extensive reliance on natural gas "particularly during high gas demand periods in the winter months" (Attachment AG-2-1(a) at 657) – i.e., when heating demand is greatest, even before further fuel switching should occur and increase reliance on a single energy commodity that already is widely used for both electric generation and heating.

Further, although natural gas typically produces lower GHG emissions than heating oil, it is still a carbon-intensive fossil fuel resource. Thus, while natural gas for heating may be compatible with the GWSA's *2020* emission reduction requirements, it is unlikely that a significant expansion of natural gas infrastructure is compatible with the steep emissions reductions required by *2050* – particularly given the availability of low and no-emissions alternatives such as geothermal and solar thermal energy. See e.g., Tr. at 1524, 1529. This is especially true if the Merged Company devotes its finite capital to expansion of natural gas infrastructure rather than toward increased repairs of its existing natural gas infrastructure that is responsible for considerable leakage of methane[19] to the atmosphere – with over one billion cubic feet per year leaking from NSTAR's pipelines alone. Tr. at 1484, 1488, 1498-1500; NEGWA-NU-2-29(BB).

In light of Joint Petitioners' intransigence with respect to putting plans like these before the Department in this proceeding, the record remains incomplete. Even though such plans are at the core of statutory factors, including the Proposed Merger's climate impacts and effects as well as long-term strategies for ensuring reliable and cost-effective energy delivery, the Joint Petitioners objected repeatedly to discovery directed at probing these topics. See e.g., Tr. at 1523-29. The appropriate remedy, at this point, is either to reject the proposed merger or require the Joint Petitioners to come forward with the relevant information now and re-open the record for related discovery.

[19] Methane is a much more potent greenhouse gas than CO2, with a global warming potential of approximately 24 times that of the CO2 released from power plant smokestacks.

B. <u>The Department Should Reject the Proposed Merger Because Its Costs Are Expected to Be Very Large And Exceed Any Benefits.</u>

Joint Petitioners' fundamentally unsubstantiated and unreliable allegation of $784 million in merger-related savings requires that those purported savings be given very little, if any, weight in the event the Department proceeds with the exercise of trying to weigh the costs and benefits of the proposed merger. The same is true for the alleged benefits of the NPT Project. Moreover, the "environmental projects" that the Joint Petitioners supposedly will proactively pursue if the merger is approved are miniscule, equivocal, and/or reflect measures the Companies should be pursuing anyway. In addition, the Proposed Merger will entail considerable costs that would have to be weighed in the balance, including anticipated harm to NSTAR's credit rating, the liability exposure from NU's aging and dirty generating units, and significant risks posed by the specter of the Merged Company enjoying enhanced clout to influence energy and environmental policy.

1. *The Claimed "Net Benefits" Are Illusory or Highly Uncertain.*

As discussed above, the alleged $784 million in purported merger-related savings may appear alluring on the surface, but is speculative in several respects. First, the cost-savings figure is based on speculation rather than actual merger integration analysis. Thus, in contrast to the well-defined golden parachutes that have been identified for key corporate officers,[20] the alleged cost-savings figure is far from being any kind of guarantee or even a reasonable expectation for ratepayers.

Second, any actual cost-savings benefits are likely to be prioritized for shareholders, not ratepayers. <u>See</u> Exh JP-1 at 20 (no specific delineation of allocation of

[20] Tr. at 26-51; Exh. AG-NU-4-14.

costs/benefits as between customers and shareholders); Reed Rebuttal, Exh JP-JJR-1 at 14 ("It is also appropriate public policy to permit some sharing of these net benefits between ratepayers and investors."). The Joint Petitioners go so far as to suggest that "a reasonable 'rule of thumb' regarding the allocation of net savings is that 40 percent of the total cost savings would inure to the benefit of Massachusetts customers." Exh. JP-1 (Supp.) at 21, 26. Thus, by the Joint Petitioners' own reasoning, the suggested $784 million in supposed net benefits, even if possibly realized, would deliver substantially less than that in savings to ratepayers – i.e., a best case scenario of $323 million over ten years, rather than $784 million. Even then, as noted above, the Joint Petitioners make no actual commitment to allocating any actual cost-saving benefits to ratepayers.

Third, the alleged environmental and climate benefits of the merger similarly are questionable, at best, as detailed below:

a. NPT Project: As an initial matter, it is not clear to what extent the *merger* will enable the NPT Project to proceed, as claimed. The strongest argument the Joint Petitioners have mustered is this:

> [W]ithout the Proposed Merger, the interests of NSTAR and NU may not always be aligned from a business perspective and this could create obstacles along the way to prolong development. Thus, there is no doubt that the ultimate completion of the project will be made more certain and subject to fewer risks if the combined strength of a unified company with a single, common interest is supporting that effort.

Exh. JP-1(Supp.) at 30. This assertion strains belief, even before one considers that the NPT Project previously was claimed as a benefit of the BEC/CES merger. See p. 5-6, supra.

Further, the Joint Petitioners admit that there is uncertainty regarding whether the NPT Project will ever actually be built. Tr. at 1560, 1566; Exh JP-1 (Supp.) at 30 (noting that NPT "is far from complete" and "will require years of permitting, financing and construction"); Exh. CLF-2 at 3 (discussing barriers to the project).

Moreover, the claimed GHG benefits by 2020 are demonstrably fictitious: at best, according to the analysis supplied by the Joint Petitioners themselves, the project will "break even" or increase emissions in its first six years of operation – i.e., through at least 2021. Exh. AG-2-1(a) at p. 420 (internally marked as p. 16 of a document entitled "Net Greenhouse Gas Emissions at Eastmain 1 Reservoir, Quebec, Canada"); Tr. at 1569-1572. This near-term increase in GHG emissions is anticipated in light of the NPT Project's expected reliance on hydropower from a newly created facility and its associated reservoir – i.e., the "Eastmain" facility – rather than an existing HydroQuebec reservoir with stable emissions. According to NU Witness McHale:

> We already know for a fact that the utility Hydro-Quebec has initiated the construction of dams, and we've already entered into the record a discussion about the Eastmain Water Reservoir that will provide the water source. So this is not speculative. They're building the dams and they will go into service; and that will be the primary source, if not the exclusive source, of energy that will flow over [the Northern Pass] line. . . . [T]hat is the full expectation.

Tr. at 1568. Thus, the Joint Petitioners' own submissions suggest that there are likely to be *no* short-term GHG reduction benefits of the NPT Project in Massachusetts or even in New England as a whole.

Although the Joint Petitioners claim that the effect of the imported hydropower "will be to displace marginal generation, all of which is from carbon producing fossil fueled plants," (Exh. JP-1(Supp.) at 29), without any power purchase agreement in hand the companies cannot provide any assurance that this actually would be the case. The Joint Petitioners admit that non-emitting nuclear power in their current supply portfolios, especially Vermont Yankee, may need to be replaced sooner rather than later (see e.g., Exh. CLF-2 at 11; Exh. CLF-3. They also admit that they do not know what power would be displaced by electricity delivered on the NPT line. Tr. at 1564; Exhs. CLF-NU-2-1; CLF-NU-1-16 As such, it is not credible for Witnesses Judge and McHale to assert that the introduction of the hydropower from HQ into the New England market via the NPT line "would be the equivalent of taking 330,000 to 825,000 automobiles off the road. It would be the single biggest carbon reduction project undertaken since the advent of the Green Communities Act, and its carbon reduction value would dwarf that of any other generation project currently being planned." Exh. JP-1(Supp.) at 29; see also, Exh. CLF-NU-2-6.

Further, Joint Petitioners cannot claim that any GHG benefits of the NPT Project, even if realized, can be counted toward the Massachusetts GWSA's GHG reduction mandates, given the lack of PPAs for delivery of power to Massachusetts customers and consequent inability to demonstrate displacement of more carbon-intensive power that otherwise would serve that load. The Joint Petitioners admit that the hydropower will not necessarily be delivered to Massachusetts customers, and the evidence reflects that they have not prioritized delivery of the power to meet demand in Massachusetts. See e.g., Exh JP-1 (Supp.) at 29, n.9 ("HQ will then, in turn, sell its power into the *New England* market")(Emphasis added); Tr. at 802-03 (reflecting the focus on selling the power into New Hampshire); see also Exh. CLF-4 at 10 (memorializing NU Chairman Chuck Shivery's admission that "We do expect to do something in New Hampshire around a PPA, but we don't have to have PPAs to take the full amount of the energy coming from Hydro-Quebec for us to move forward.") And Gary Long, chief executive of NU subsidiary PSNH, has publicly touted the NPT Project as one intended to benefit New Hampshire: "The Northern Pass transmission project to bring hydroelectric power from Canada into New Hampshire offers a golden opportunity to add jobs and tax dollars to our state's economy while also securing a long-term source of reliable, competitively priced clean energy." Long also has touted the NPT Project as "absolutely essential" to help New Hampshire meet its long-term clean energy goals, and declared that PSNH is negotiating a PPA with HQ "that would ensure PSNH and its customers receive additional value through the purchase of a portion of [the] power for the next 40 years…" Id. Exh. CLF-5; see also, Att. ENE-2-1(a).

The NPT Project is proceeding independently from the proposed merger. The scientifically-derived analysis of GHG emissions attributable to the NPT Project provided by Joint Petitioners, as amplified by their unwillingness to commit to replacing any of the Joint Petitioners' electricity supply portfolio with NPT-supplied power, undercuts the vague claim that the Project provides a cognizable benefit. In short, the evidence of record does *not* support a conclusion that any purported climate benefits of the NPT Project should be credited in connection with the Department's analysis of the costs and benefits of the Proposed Merger.

b. Electric Vehicles: Although the Joint Petitioners tout potential merger-related benefits with respect to EVs, Exh. JP-1(Supp.) at 36-39, their EV proposal is as-yet ill-defined and limited to a potential pilot project in the Boston area. As a result, it is unsurprising that the Joint Petitioners have not quantified, and cannot quantify, any associated GHG emissions reductions. While NU's ongoing involvement in piloting EV charging infrastructure may be laudable, the contrast with NSTAR serves to underscore that NSTAR has fallen behind in this area of clean energy development – even despite existing economic incentives. And although the Joint Petitioners suggest that NU will "bring its [EV] expertise to bear in a combined company to the benefit of customers in NSTAR's service territory and the Commonwealth in general," id. at 39, there is no assurance that it will not work the other way around – i.e., with NSTAR discouraging NU's work vis-à-vis EV deployment. The speculative nature of a potential EV-related pilot project and the failure to meaningfully quantify any GHG reductions that could reasonably result precludes consideration of the amorphous EV project touted by the Joint Petitioners as a prospective benefit of the merger.

c. Solar Energy: While the Supplemental Joint Petition includes a component on solar energy that is more specific than the EV element, and is portrayed as a commitment rather than mere possibility, the benefits would be expected to be tiny at best – amounting to only one-twentieth of one percent of the Merged Company's total load. Exh. CLF-NU-2-11. Since 2008, the Companies have been authorized by law to own up to 25 MW, and now up to 50 MW, of solar energy in Massachusetts.[21] NSTAR owns none. Exh. CLF-NU-1-5. NU, through its subsidiary WMECO, is far short of the allowed amount of solar energy ownership. Exh. CLF-NU-1-6.

Further, CLF is aware of no evidence of record suggesting that the issuance of Requests for Proposals for up to 10 MW of SRECs pursuant to contracts up to 5-years in duration, as proposed, would somehow uniquely make sense in the context of the Proposed Merger, as opposed to being something the Companies should be doing anyway in light of their obligations pursuant to the Massachusetts RPS and the RPS solar carve-out. G.L. c. 25A, §11F(e); 225 CMR § 14.07(2)(a). The same is true for the proposal for

[21] G.L. c. 164, § 1A(f); St. 2008, c. 169, §§ 58, 59.

WMECO to expand its 6 MW solar project by 2 MW to a total of 8 MW in light of cost savings it already has achieved and its ability to complete such an expanded project within the original budget. The cost savings and enhanced capacity to expand the solar project is attributed by the Joint Petitioners to WMECO's program design and its collaboration with the solar industry. Exh. JP-1(Supp.) at 36. There is no indication that the merger would affect the merits or capacity for pursuing the additional 2 MW that are touted in the Supplemental Petition as a merger benefit. Further, in light of the *10-15* year minimum duration of the long-term renewable energy contracting requirements under GCA § 83, the Joint Petitioners' proposal to enter contracts for *"up to 5 years"* – and for only 10 MW in total – is extremely modest, and would not even qualify under § 83. In addition, as the Joint Petitioners admit, they cannot guarantee that they will receive "viable" bids that will result in actual contracts or in the development of 10 MWs of incremental new solar power. Exh. CLF-NU-2-11.

d. Energy Efficiency: The proposed energy efficiency programs described in the Supplemental Petition include a mix of elements that are either equivocal or merely consistent with existing statutory obligations. The proposed expansion of NSTAR's energy efficiency financing programs to WMECO, for example, is non-committal. Exh. JP-1(Supp.) at 32 (NSTAR Electric "could" extend its energy efficiency financing capability to WMECO; work "could" be undertaken, etc.). In addition, *the Companies already operate under a statutory mandate to procure all cost-effective energy efficiency and other demand resources.* G.L. c. 25, §§ 19-22. As such, they should be adopting best practices, and ought to be tapping into all available Forward Capacity Market compensation – without these basic proposals being made contingent on the approval of the Proposed Merger.

2. *The Proposed Merger Will Entail Substantial Costs.*

The Joint Petitioners concede, as they must, that the merger will entail "certain costs." See e.g., Exh. JP-1 (Supp.) at 19 ("Merger-related costs are an inherent component of any merger transaction. . . "). Yet they deny or ignore a number of significant merger-related costs that must be taken into account by the Department. And the Joint Petitioners' cavalier dismissal of the possibility of climate impacts – e.g., "there is *no* negative impact that *can* result in terms of climate change and the reduction of greenhouse gas emissions as a result of the Proposed Merger" (Exh. JP-1(Supp.) at 27) – is patently implausible and directly contradicted by evidence of record. The same is true with respect to the Joint Petitioners' assertion that "no action produced by the Proposed Merger would have the effect of . . . somehow causing an increase in greenhouse gas emissions," a claim manifestly belied by the Joint Petitioners' own evidence.

While far from an exhaustive list, costs of the Proposed Merger that should be taken into account include:

a. Exposure to PSNH's financial predicament and NU's inferior credit rating: As discussed at pp. 8-11, supra, PSNH's ownership of aging, uneconomic dirty fossil fuel-fired generation units and consequent inability to maintain competitive rates have led to an increasing problem of customer migration, leaving fewer remaining customers to cover PSNH's fixed costs. This situation aptly has been described as a "death spiral," creating significant issues for PSNH and its ratepayers, as was recently and unequivocally acknowledged by the New Hampshire Public Utilities Commission. Order 25,256, July 26, 2011, Order Following Hearing, PSNH: Investigation into the

Effects of Customer Migration, NHPUC Docket DE 10-160 at 39, ("As a result of that migration, PSNH's energy costs are being recovered from a shrinking customer base, primarily residential and small commercial customers, who incur a greater share of fixed costs as fewer of them are available to pay PSNH's actual, prudent, and reasonable costs of providing such power.") The situation is expected to worsen if/when the costs of PSNH's $430 million Merrimack Station scrubber project are passed along to ratepayers. Tr. at 781-82, 789-90. Moreover, because Joint Petitioners assert that the NPT Project will reduce wholesale market rates, the Project will increase the gap between the cost of market power and the increasing cost of PSNH's owned generation units, and thus worsen the financial and customer-migration predicament of NU subsidiary PSNH.

PSNH's financial quandary is reflected in its parent company's credit rating, which will be affected by the Proposed Merger. Despite the Companies' boast that this would be a "merger of equals," the credit rating agencies evidently see it differently and have placed NSTAR on "credit watch negative" – with NSTAR's A+ rating at risk in the face of its proposed marriage with the BBB-rated NU. See, e.g., DPU-NU-1-25, Att. 1-25(f) at 9-11. According to Standard & Poor's,

> The negative CreditWatch listing on NSTAR reflects that its ratings *will be lowered* once the [merger] transaction is completed, owing to the combination with an entity that has a weaker financial risk profile.

Id. (emphasis added); see also, Exh. AG-DR-1 at 13-14.[22] Moreover, based on NU's lower credit ratings and the likelihood that NSTAR's credit ratings will be lowered subsequent to any merger, NSTAR's debt costs will be higher in the future than they would have been without a merger. See Exh. AG-DR-1 at 14. This will have tangible

[22] The Joint Petitioners' suggestion that a credit downgrade is "speculative and unlikely" and would not result in net harm to customers, Exh. JP-1 (Supp.) at 22, simply is not credible in the face of such explicit indications from credit rating agencies.

impacts on ratepayers. Exh. AG-DR-1 at 14.

b. Enabling NU/PSNH to unnecessarily prolong the lives of its aging, dirty coal-fired power generation units: NU, through its subsidiary PSNH, owns and operates a fleet of coal fired electric generating units constructed in the 1950s and 1960s. Continued operation of these facilities by the merged company would result in impacts with respect to GHG emissions as well as negative financial impacts. Exh. CLF-DH-1 at 2. While other coal plants are retiring, PSNH is investing $430 million to prop up Merrimack Station for at least another 5 years and likely much longer – without any way to address the impacts of the disproportionately CO_2-intensive power generation from its coal-fired units. See e.g., Exh. CLF-1 at 7-8.   NU specifically identifies the "NU Generation Strategy" as focused on the PSNH Generation Business Plan, including:

- *Five-year strategy preserves existing 1,200 MW New Hampshire fleet*
- Completes the Merrimack Scrubber . . .

Att. DPU-NU-4-1(a) at 54.

In the words of NSTAR CFO James Judge, "What you have here is a cash-rich utility [i.e., NSTAR] coming together with a project-rich utility [i.e., NU]." Exh. CLF-1 at 11. To the extent the merger – with the benefit of NSTAR's more robust balance sheet – enables NU to prolong the lives of these dirty and uneconomic generating units, substantial costs would be borne by the public. See pp. 8-12 supra (regarding the considerable quantifiable and monetizable costs of continued operation of PSNH's coal-fired generating units).

c. Risks and Costs of Increased Political Clout Vis-à-vis Energy and Environmental Policy: The Joint Petitioners have emphasized the post-merger political clout, with respect to environmental policy development, they would enjoy as a supposed benefit of the merger. See e.g., CLF-NU-1-22 (Att.) at 2. Particularly given NU's and PSNH's track record and memorialized business strategy to preserve ownership of their coal-fired generating assets in New Hampshire – and the likelihood that PSNH's ongoing ownership of significant coal-fired capacity would factor into the Companies' posture on environmental and energy policies – the specter of such increased political clout is ominous, and inconsistent with the public interest as reflected in the Commonwealth's existing statutory clean energy and climate mandates.[23]

Joint Petitioners' increased policy clout also is of concern with respect to potential efforts to weaken Massachusetts' RPS to include large hydropower. Notwithstanding the non-binding statements the Joint Petitioners have made in the present proceeding to disavow such an approach, see e.g., ENE-NU-2-1, the fact remains that the Companies' leadership has explicitly indicated such an interest in the recent past, and that there is no prohibition on such policy advocacy by the Companies. See e.g., Exh. CLF-NU-1-22(Att.) ("'I would like Northern Pass to count toward our renewable energy goals,' [NSTAR CEO] May said."); Tr. at 832 (Witness McHale testifying that "This was an expression of Mr. May saying projects of this type, Northern Pass, would be more viable if in fact they had renewable energy revenue streams associated with them."). Tellingly, in urging the Department not to adopt Intervening Party NEPGA's proposal to guard against actions by the Merged Company to advocate for changes in laws or regulations that would allow renewable power delivered from Hydro Quebec to be eligible to qualify as a renewable resource under the Massachusetts RPS, rebuttal witness

[23] By way of just one example of NU's efforts to use its existing clout to influence, and weaken, Massachusetts energy policy in order to protect its business interests related to the generating units it owns, NU recently pressed Massachusetts DOER not to adopt stringent new standards for RPS incentives for biomass facilities, See e.g., Att. ENE-2-1(g)

Reed reveals the Joint Petitioners' view that RPS eligibility for such large hydropower "could be in the best interest of [the Merged Company's] customers and in the broader public interest." Exh. JP-JJR-1(Rebuttal) at 11.

Also concerning, in terms of potential climate impacts as well as reliability and economic risks, is the Companies' apparent post-merger plan to promote natural gas. CLF-NU-1-22(Att.) ("May said Northeast Utilities will use its post-merger clout to increase the standing of natural gas in regional and national energy policy."); Tr. at 828. Further, given that the Companies say it is "virtually impossible" or at least "daunting" for them to meet the GWSA's mandates via proportional reductions in GHGs, Tr. at 1532-35, this does not bode well for the consequences and results of enhancing the Companies' political clout given that the merged company would be better enabled to weaken, rather than promote, such public policy mandates.

d. Risks and Costs of Post-Merger Natural Gas Expansion Plans: As discussed above, the Joint Petitioners' post-merger plans to promote natural gas, including fuel switching from oil heat, entails risks and costs including the real prospect of investment in expanded natural gas infrastructure that is inconsistent with the GWSA's long-term GHG reduction requirements. Not only does investment in such expanded natural gas infrastructure risk considerable lost opportunities to embrace lower-emissions renewable fuels (e.g., solar thermal and geothermal), but it also risks diversion of precious resources away from the repair of leaking natural gas pipelines that currently release huge volumes of methane into the atmosphere. The Companies' merger-related plans vis-à-vis natural gas for heating are constrained solely to expansion of the market via fuel-switching, not any enhanced efforts to repair leaking pipelines that are costly in terms of climate impacts and the lost direct economic value of the unaccounted-for gas. Tr. at 1488.

C. <u>In the Alternative, the Department Should Require the Companies to Meet Certain Key Conditions Before Merging.</u>

As discussed above, there is substantial basis in the record for the Department to either reject the Proposed Merger outright or to grant DOER's Motion to Compel/Stay and require the Joint Petitioners to undertake an actual merger integration plan, somehow demonstrate the merger's consistency with long-term strategies for reliable and cost-effective energy delivery that comports with the requirements of the GCA and GWSA, etc. Alternatively, the Department may be able to define and set sufficiently robust conditions for the merger to ensure its consistency with the public interest, with demonstrated net benefit. Following are recommended conditions that would help provide such assurances:

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

As discussed above, the Joint Petitioners have acknowledged a "gap" between supply and demand for renewable energy resources that are (or will be) eligible under state RPS mandates in the New England region. In order to ensure the merged company's long-term strategies for reliable and cost-effective energy delivery are consistent with the public interest, including through achievement of the objectives of the Massachusetts GCA and GWSA, the Department ought to establish a merger condition that would require the Joint Petitioners to commit to concrete, timely action to facilitate the closure of that gap between supply and demand for renewables while also ensuring consistency with the GWSA's steep GHG-reduction requirements.

In accordance with GCA § 83, the Department can require distribution companies to enter long-term PPAs for more than 3 percent of their loads if this would be "in the public interest:"

> As long as the electric distribution company has entered into long term contracts in compliance with this section, it shall not be required by regulation or order to enter into contracts with terms of more than 3 years in meeting its applicable annual RPS requirements set forth in said section 11F of said chapter 25A, *unless the department of public utilities finds that such contracts are in the best interest of customers*…")

St. 2008, c. 169, § 83 (Emphasis added).

In NSTAR Green, D.P.U. 07-64, the Department found that a long-term PPA does not need to be the lowest cost alternative in order to be in the public interest, but instead such a showing can be made based on reliability, clean energy and other benefits. D.P.U. 07-64-A ("We have previously stated that a contract may be in the public interest if, among other things, it would provide an improved diversification of energy sources and reduced dependence on fossil-fuel generation.")

In DPU 10-54, in approving a long-term PPA between National Grid and Cape Wind, the Department made the following important finding:

> It is also clear that there are limits to the amount of land-based wind that can be developed in New England and adjoining areas due to siting difficulties and transmission constraints, particularly in the near- to mid-term future (Exh. NG-SFT at 60-68). In contrast, it is widely expected that wind power will play a key role in reducing GHG emissions from electricity generation (Tr. 8, at 1774). *The Department concludes that offshore wind will be necessary to comply with the aggressive reduction targets of the GWSA.*

D.P.U. 10-54 at 179 (emphasis added). Accordingly, as a condition of the merger, the Joint Petitioners should be required to enter long-term contract(s) to meaningfully facilitate the financing of offshore wind energy. Such contract(s) would be subject to further approval by the Department, pursuant to GCA Section 83, and the Joint

Petitioners should be required to secure a Department-approved method and timetable for solicitation of such contracts prior to merger closing.

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

Given the Joint Petitioners' extensive claims regarding the supposed GHG reduction benefits of the NPT project, any approval of the Proposed Merger should be conditioned on a requirement that would serve to realize those benefits, to the extent they exist, to meet the Commonwealth's clean energy and climate mandates. In this regard, the Department should require that the Joint Petitioners, through PPAs or other appropriate mechanisms, ensure that power delivered by the NPT project will displace dirty, uneconomic coal and oil-fired generation in the region's current energy portfolio. It is particularly important that Joint Petitioners provide a technically sound demonstration of GHG reductions, taking into account the undisputed substantial GHG emissions from large hydropower facilities in Canada that are intended to provide power for delivery to New England through the NPT project.

The Joint Petitioners have conveyed conflicting messages about their intentions with respect to seeking renewable energy incentives for the large hydropower that would be delivered by the NPT project, and no existing policy or requirement stands in the way of the companies seeking a modification to the Massachusetts RPS to serve this purpose. See e.g., Tr. at 838. Accordingly, the Department should require the Joint Petitioners to make a binding commitment that neither they nor any of their partners or affiliates shall be permitted to satisfy any Class I Massachusetts RPS obligation or sell RECs into the market for electricity produced by any large hydropower facility that is delivered via the NPT line.

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

The record reflects that the Joint Petitioners have plans to pursue significant expansion into the natural gas heating market by promoting more fuel switching and building out natural gas infrastructure if/when the merger should be approved. At the same time, the Joint Petitioners admit that they still own extensive leaking natural gas pipeline infrastructure that is being replaced slowly, resulting in significant economic and climate impacts – including through the release to the atmosphere of approximately 1 billion cubic feet of methane per year just from NSTAR's pipeline infrastructure alone. Joint Petitioners also admit that they do not have the resources to pursue unlimited pipeline repairs while also pursuing expansion. Moreover, it is questionable, at best, whether new investments in natural gas infrastructure are consistent with the aggressive GHG reduction requirements of the GWSA. Accordingly, as a condition of the merger, the Joint Petitioners should be required, at a minimum, to prioritize fixes to leaking gas pipes over expansion of natural gas infrastructure.

4. NSTAR rate case with implementation of decoupling.

NSTAR repeatedly has touted its 25-year avoidance of a litigated rate case. See e.g., Att. DPU-NU-4-1(a) at 36; Exh. CLF-1 at 12. In addition, NSTAR is the only electric utility in Massachusetts that still has a perverse incentive to increase sales to its customers because it has not gone through a rate decoupling proceeding. See e.g., Att. DPU-NU-4-1(a) at 43 (reflecting that higher electric sales translated into greater shareholder returns, with investment in O&M having the opposite effect). NSTAR also boasts of "outperforming the industry" in terms of total shareholder return; indeed, NSTAR claims to be the only company in <u>any</u> industry to deliver 13 consecutive years of positive total shareholder return. Att. DPU-NU-4-1(a) at 40; <u>see also</u>, Exh. CLF-1 at 5-6. While the financial success of a utility delivering a critical commodity is laudable, this success ought to inure to the benefit of ratepayers through lower rates. Accordingly, as a condition of the merger, the Department should require that an NSTAR rate case, with full decoupling, be initiated by the end of 2012, and an equitable proportion of any merger-related savings should be quantified and returned to ratepayers.

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

While the EV, solar and EE "initiatives" identified in the Joint Petition are extremely modest programs, they should at least be made concrete, with binding commitments, timelines, and metrics for measuring any actual success.[24]

6. Divestiture of PSNH fossil generation assets.

It is evident that PSNH's economically ailing and environmentally damaging fossil fuel-fired generating assets pose economic and climate liabilities for NU and the proposed merged company. The merger is likely to enable Merrimack and Schiller Stations to take advantage of the crutch of NSTAR's healthy balance sheet and strong credit rating, thereby prolonging these economic and environmental harms contrary to the public interest. While a merger condition proposed by the AG's witness Ramas would protect against ratepayer impacts of NSTAR's likely credit downgrade, <u>see</u> Exh. AG-DR-1 at 16-17, it is insufficient because it does not address climate and other environmental

[24] As noted above, the energy efficiency and solar programs should be pursued by the Companies *anyway*, even in the absence of the proposed merger.

impacts. By contrast, divestiture of these assets would significantly reduce the GHG and other environmental impacts of NU's, and the merged company's, operations. Divestiture is also likely to reduce the Companies' parochial interest in using their post-merger enhanced political clout to protect dirty and uneconomic generating assets and to oppose salutary environmental policies that would impose further costs on such units (e.g., GHG-reduction regulations under the federal Clean Air Act). Moreover, as the New Hampshire PUC recently recognized, divestiture is the only solution proffered to date that would materially address the stark and escalating problem that PSNH has with customer migration – and the ensuing "death spiral" as PSNH increasingly is unable to spread sunk costs across a diminishing rate base.

While the Department does not have authority to order NU or its subsidiary PSNH to divest any generating assets, there is no reason why the Department cannot establish such a requirement as a condition of the Proposed Merger. Indeed, a divestiture condition would help protect against the economic and environmental risks posed by PSNH's dirty fleet, reduce the risks to NSTAR's credit rating, and better enable achievement of the GWSA's goals.

Conclusion

By relying on generalities rather than specific identification and quantification of merger costs and benefits, and by failing to come forward with the Companies' actual post-merger plans, the Joint Petitioners have failed to demonstrate that the Proposed Merger would be consistent with the public interest in accordance with Chapter 164, § 96. Further, even if the Department could set aside the fundamental shortcomings in the Joint Petitioners' Initial and Supplemental Petitions, the record reflects that the merger would entail substantial costs that are likely to outweigh any benefits – in other words, it is not expected to produce net benefits. Accordingly, the Department should decline to approve the merger.

At a minimum, substantial conditions would be needed to ensure that the merger would entail a net benefit with respect to ratepayers and climate impacts. Accordingly, in the event the Department is inclined to allow the merger to proceed, it should establish specific conditions that will protect against the considerable merger impacts and risks delineated above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing "Initial 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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