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August 7, 2012

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

RE: Investigation by the Department of Public Utilities on its Own Motion into the Preparation and Response of NSTAR Electric Company to Tropical Storm Irene and the October 29, 2011 snowstorm; D.P.U. 11-85-B/11-119-B

Dear Secretary Marini:

Enclosed please find the Attorney General's Reply Brief along with a Certificate of Service for filing with the Department in the above-referenced proceeding.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Charlynn R. Hull".

Charlynn R. Hull
Assistant Attorney General

Enclosures

cc: Kathy Sedor, Hearing Officer, Department of Public Utilities
Joan Foster Evans, Senior Counsel, Department of Public Utilities
Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities)
on its Own Motion into the Preparation and Response) D.P.U. 11-85-B;
of NSTAR Electric to Tropical Storm Irene and) D.P.U. 11-119-B
the October 29, 2011 snowstorm)
)

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing documents upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of 220 C.M.R. 1.05(1). Dated at Boston this 7th day of August, 2012.



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**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES**

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NSTAR Electric Company)	D.P.U. 11-85-B;
_____)	D.P.U. 11-119-B
_____)	

**REPLY BRIEF
OF THE ATTORNEY GENERAL**

**MARTHA COAKLEY
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**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES**

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NSTAR Electric Company)	D.P.U. 11-85-B;
)	D.P.U. 11-119-B
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REPLY BRIEF OF THE ATTORNEY GENERAL

I. INTRODUCTION

Pursuant to the briefing schedule established by the Department of Public Utilities (the “Department”) in D.P.U. 11-85-A/11-119-A, the Attorney General submits her Reply Brief¹ responding to the arguments made by NSTAR Electric Company (“NSTAR” or “Company”) in its Initial Brief, dated July 31, 2012 (“Company Initial Brief”). At issue is whether the Company’s restoration efforts complied with its ERP, with 220 C.M.R. § 19.00 *et seq.*, and with the requirement that service be restored in a safe and reasonably prompt manner. They did not. Further, the Department must take action by penalizing the Company and directing it to improve its emergency response planning to ensure that an investigation of electric distribution companies is not required each time severe weather occurs in Massachusetts. The Department should also consider remedial action to improve the Company’s storm response, such as requiring the Company to harden its system through an enhanced vegetation management program. At a

¹ This brief is not intended to respond to every argument made or position taken by the Company. Rather, this Reply Brief is intended to respond only to the extent necessary to assist the Department in its deliberations. Silence by the Attorney General with respect to any issue addressed in the Company’s Initial Brief cannot be construed as assent to its position.

minimum, the Department must ensure that NSTAR implements each of its “lessons learned” included in its December 20, 2011 Technical Session Report to improve its emergency response and restoration. Exh. NSTAR-4.

The Office of the Attorney General (“AGO”) recommends that in addition to examining the Company’s adherence to its ERP during each of these storm events, the Department should also consider reassessing the standards mandated by NSTAR’s ERP. That is, even if the Department finds that NSTAR complied with each ERP standard, the Department may find that NSTAR’s ERP is not meeting the public’s need for reliable restoration of service.

II. DEPARTMENT’S PENALTY AUTHORITY ON STORM RESPONSE

In its initial brief, the Company argues that Section 1J of Chapter 164 must be interpreted narrowly. Co. Br. at 59-60. This position implies that the Department must explicitly prescribe the Company’s storm response in detail rather than through the regulations, Orders, and guidelines already provided by the Department before the Department may exercise the authority placed on it by the Legislature. As the Company is well aware, the Department has general supervisory powers over all utility companies pursuant to G.L. c. 164, § 76. Nevertheless, the Company argues that the Department has not sufficiently directed it how to prepare for and respond to a storm by arguing that a “penalty can only be justified where the Department has determined that the electric company did [sic] not ‘adequately and sufficiently prepared’ to restore service.” *Id.* The Company states that it has not been provided a sufficient definition of “what is ‘adequately and sufficiently prepared.’” *Id.* NSTAR should be reminded that it is not the Department’s job to step into the company management’s shoes. Rather, it is the Company that initially determines the prudence of its actions, which here fell far short of what is expected by customers, the AGO, and the Department.

The Department has provided the Company with sufficient guidance on how to adequately and sufficiently prepare for an emergency event through 220 C.M.R. § 19.00 *et. seq.*, promulgated in Order Adopting Final Regulations, D.P.U. 10-01-A (April 16, 2010) and other Orders laying out what the Companies must do in a storm. For example, D.P.U. 91-228, issued in response to the Department’s investigation into the utilities’ response to Hurricane Bob, provides directives that the utilities must follow in order to prepare and to respond to a severe weather event and an outage. In D.P.U. 91-228, the Department described what is needed to be part of an ERP. *Id.* For example, the Order required comprehensive monitoring of tree growth along power lines. D.P.U. 91-228 also mandated company contacts and restoration coordination with local officials. D.P.U. 91-228, at 14-15. Procedures to prepare for an emergency event are not new or unclear nor is the Department required to painstakingly set forth exactly what, when, and how the Company should prepare for a storm event in order for a penalty to be warranted. *See also Hurricane Gloria Investigation*, D.P.U. 85-232 (1986); *WMECO Summer Storm Investigation*, D.P.U. 95-86 (1996). The Department should take this opportunity to remind the Company that it has a fiduciary duty to maintain, and stay abreast of, Department precedent. *Plymouth Water Company*, D.P.U. 07-66, at 11 (2008) (“A utility’s management has a fiduciary duty to comply with all applicable statutes and regulations. D.T.E. 03-81, at 6.”).

The first sentence of Section 1J has been accomplished through the Department’s promulgation of 220 C.M.R. § 19.00 *et. seq.*: “[t]he department shall promulgate rules and regulations to establish standards of acceptable performance for emergency preparation and restoration of service for electric and gas distribution companies doing business in the commonwealth.” The regulations contain specific substantive provisions that must be contained in the ERP, modeled after the statutory language of Section 85B of Chapter 164, as well as

certain procedural requirements related to the annual filing of the ERP. *Id.* at § 19.04. These regulations were promulgated with the active participation of NSTAR Electric and other utilities. *Investigation Commencing a Rulemaking Establishing 220 C.M.R. § 19.00*, D.P.U. 10-01, Joint Comments on behalf of Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid, NSTAR Electric Company, Fitchburg Gas and Electric Light Company d/b/a Unitil and Western Massachusetts Electric Company in response to the Department’s February 2, 2010 Notice of Public Hearing and Request for Comments at 4 (March 12, 2010) (“The Electric Companies generally support and concur in the approach taken by the Department to base the rules on a relatively objective benchmark of “acceptable” utility conduct in gauging whether a company has met the statutory requirement to achieve the “reasonable and prompt restoration of service.”). NSTAR Electric also participated in the Department’s March 8, 2010 Technical Session in D.P.U. 10-02. NSTAR Electric’s full participation in the promulgation of 220 C.M.R. § 19.00 *et seq.* gave it adequate opportunity to raise the issue of whether the Department had clearly defined “what is ‘adequately and sufficiently prepared,’” and it did not do so. *See Co. Br.* at 60.

The second sentence of Section 1J directs the Department to levy a penalty through the use of the word “shall”: “The department *shall* levy a penalty not to exceed \$250,000 for each violation for each day that the violation of the department’s standards persists; provided, however, that the maximum penalty shall not exceed \$20,000,000 for any related series of violations” (emphasis added). Upon a finding of a violation, the Department must impose fines, because the statute, construed according to its plain meaning, directs that the Department “shall” levy a penalty. The word “shall” indicates that the issuance of penalties is not optional but mandatory. *Cf. Swift v. Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932), citing

Cheney v. Coughlin, 201 Mass. 204, 206 (1909) (discussing that the statutory use of the word “shall” confers both mandatory and discretionary jurisdiction upon an innkeeper in granting him a liquor license).

The third sentence of Section 1J, “[t]he department shall open a full investigation, upon its own initiative, or upon petition of the attorney general or by the city council in an affected city or by the board of selectmen in an affected town, regarding a violation of the department’s standards of acceptable performance to determine whether the electric or gas distribution company violated such standards; provided, however, that said petition shall be filed with the department not later than 90 days after the violation has been remedied,” is not doubted by the Company and has clearly been met. On November 8, 2011, the AGO requested an investigation into NSTAR Electric’s response to the October Snowstorm. On September 15, 2011, the Department opened an investigation on its own motion into NSTAR Electric’s preparation and response to Tropical Storm Irene pursuant to G.L. c. 164, § 1J, 220 C.M.R. § 19.00 *et. seq.* On September 2, 2011, the Harwich Board of Selectmen requested an investigation into NSTAR’s performance during Tropical Storm Irene. On September 6, 2011, the New Bedford City Council adopted a motion requesting that Massachusetts Attorney General Martha Coakley, provide the New Bedford City Council with a copy of the findings from her office’s investigation into the State’s four investor-owned utilities companies, which includes NSTAR, on how they prepared for and handled the damaged and resulting power outages caused by Tropical Storm Irene. On November 2, 2011, Newton Mayor Setti Warren requested an investigation into NSTAR’s responses to Tropical Storm Irene and the October Snowstorm.

In addition, even if there were any ambiguity requiring interpretation of legislative intent, which there is not, the Company’s interpretation of Section 1J ignores the history that preceded

the statute. That history, from which the legislative intent is to be gleaned, cannot be ignored by the Department. In its Order in Unital, D.P.U. 09-01-A, the Department determined that it did not have the authority to penalize companies for their failures to prepare for and respond to a storm. Unital, D.P.U. 09-01-A, at xiii (November 2, 2009) (“[T]he Department does not have the authority to impose a direct penalty on the Company at this time.”).

Section 1J was signed into law by Governor Patrick on November 12, 2009 through St. 2009, c. 133 (“Chapter 133”) following the Department’s determination, 10 days earlier, that it could not penalize Unital. Prior to enactment of Chapter 133, the Department maintained that it lacked authority to impose fines or penalties outside of its established service-quality guidelines, which are not specifically related to emergency service restoration. The new legislative changes explicitly addressed this omission. Through Chapter 133, the Legislature demanded more focused and detailed substantive attention by the Department and the electric companies to the preparation and restoration of service during emergency events. To achieve that objective, the legislation established new enforcement mechanisms in the form of significant monetary fines or penalties and, in certain instances, the loss of corporate financial and operating control through court appointment of a receiver. Chapter 133 also created new rights for the Attorney General and affected city councils and town boards of selectmen to initiate proceedings seeking an investigation. Section 1J directs the Department to promulgate rules “to establish standards of acceptable performance for emergency restoration of service for electric and gas distribution companies doing business in the commonwealth.” Section 1J also requires the Department to assess a penalty on companies found to be in violation of such standards. Chapter 133 also added a new provision, Section 85B, requiring electric companies to annually file emergency response plans “designed for the reasonably prompt restoration of service in the case of an

emergency event,” which Section 85B defines as “an event where widespread outages have occurred ... due to storms or other causes beyond the control of the company.” This is the first time that the Department has been called upon to use its penalty authority under Section 1J. Despite the fact that the Department has not yet exercised its penalty authority, the Legislature has once again revisited the statute. On August 3, 2012, Governor Patrick signed into law a provision that directs any penalties imposed pursuant to Section 1J to be returned to customers through Section 1K of G.L. c. 164.

A “[s]tatute must be interpreted according to legislative intent ascertained from all its words, construed according to approved usage and in connection with the main object the statute was intended to accomplish.” *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). The second sentence of Section 1J states that the Department shall levy penalties for violations of its standards. The Company ignores this precedent and the entirety of Section 1J and instead vaguely promises that it will appeal any Department Order that penalizes it. *See* Co. Br. at 3 (penalties will not withstand judicial review), 59 (law will not support the imposition of a penalty), 61 (legal standards that will apply to the assessment of penalties under Section 1J have not been met), 62 (no legal basis for assessing penalties under Section 1J), 64, (would constitute legal error) 85 (will not withstand judicial review). The Department, not NSTAR, will determine if penalties are required based upon the facts and the law. In fact, the Department has warned companies in the past that utilities should not take litigation postures that ignore their public service obligations. *Western Massachusetts Electric Company*, D.T.E. 04-40/04-109/05-10 at 6 (2006), citing *Boston Edison Company*, D.P.U. 86-71, at 15-16 (1986) (“WMECo makes the unique assertion that ‘any finding that current litigation expenses cannot be recovered, meaning also that future litigation expenses will not be subject to recovery, is a powerful incentive for

WMECo and other electric companies to discontinue to fight for customer's [sic] interests (Company Brief at 14).' The Department rejects the Company's argument because WMECo, as the incumbent distribution company, has a public service obligation to represent the best interest of ratepayers.'")

III. THE AGO'S RESPONSE TO NSTAR'S INITIAL BRIEF

A. Deficiency of the Company's Outage Management System

The AGO asserts that the Company's Outage Management System (OMS) puts NSTAR at a significant disadvantage in handling storms, such as Tropical Storm Irene and the October Snowstorm, because it requires a manual process for grouping individual outage calls so as to identify the most likely interrupting device, *e.g.*, the nearest upstream fuse or sectionalizing device. The Company does not dispute that its process requires just such a manual grouping. Rather, the Company tries to deny its system's disadvantage by confusing the issue with misdirection. Specifically, the AGO offers the following point-by-point refutations to the Company's assertions at Co. Br. at 65-70, items 1-10 (Company assertions *italicized* below, with response to each):

- *The Company performed volume testing of its OMS system, and in any event, there are no standards as to what volume testing was necessary. Id. at 65-66. This is not the issue. Instead, the issue is that because the OMS requires calls to be manually grouped to identify interrupting devices, it is inherently slow and cumbersome, and therefore, likely to lead to delays in high volume situations like these two storms. Exh. DEO-3 at 13; Tr. 4 at 906-908.*
- *The OMS captured all calls and recorded the reported outages. Co. Br. at 66. Again, this is not the issue. At issue is the speed with which it did so, the resources required to*

get it to do so in a timely way, and the Company's own admission that the Outage Reporting Procedures "did not work well in a period where there [was] so much happening on the distribution system..." Exh. NSTAR-2 at 95.

- *The slowdown which occurred in the first 24 hours of TS Irene was due to an easily fixed refresh frequency parameter.* Co. Br. at 66. Again, this is not the issue. The difficulty in reporting according to the Department's Outage Reporting Process was not due to the refresh frequency parameter, but due to the amount of users and volume on the system. See Exh. AG-3-9. Therefore, the OMS was unavailable to collect survey and damage assessment information during the first 24 hours of Tropical Storm Irene, which required the Company to use a workaround for the first time during that storm. Exh. AG-5-2.
- *OMS was not the primary tool during the first 24 hours of Tropical Storm Irene anyway.* This is not a valid argument, because, while the Company's distribution automation does give valuable insight into feeder outages, the OMS is essential to see the extent of outages to any devices that are not part of distribution automation, including thousands of fuses.
- *The system was usable for the duration of the storm response.* The fact that the system could be used during the storm response was not the issue; rather, the issue was that it was inherently slow and cumbersome, as Mr. O'Neill testified. Exh. DEO-3 at 13; Tr. 4 at 906-908.
- *That SCADA was more useful in Tropical Storm Irene than in the October Snowstorm reflects the difference in the storms, not a flaw in the system.* Although true, this also shows how necessary it was that the OMS be efficient when the distribution automation

(SCADA) is not as extensively used in initial restoration, as in October. *See* Tr. 2 at 269-270; Tr. 4 at 905-908; Exh. NSTAR-3 at 4-5.

- *Restoration was not slowed by a lack of GPS in each vehicle, because decentralization and “one job, one crew” facilitates dispatch.* Co. Br. at 67; Tr. 4 at 799. This is arguable. The inclusion of GPS in each vehicle would have been helpful, even if not essential. Despite the fact that “we all got around fine without GPS in the past”, GPS is collectively very useful now, and to some, it is essential. *See* Tr. 4 at 905.
- *There is “no evidence” that, as Mr. O’Neill claims, an OMS that uses a connectivity model is better than one that requires manual grouping based on graphics; and he admits it would need human judgment, anyway.* The Company’s assertions here are patently false. Mr. O’Neill’s expert opinion is evidence in itself, and his statement that even an OMS with a connectivity model should be complemented by human judgment does not refute the benefit of having the OMS suggest the most likely devices, versus requiring manual intervention to even locate devices. Exh. DEO-3 at 13; Tr. 4 at 906-908.
- *There is no evidence that crews waited to be dispatched to their next job. The “one job, one crew” practice “completely negates” any such concern.* There is no evidence that crews did not wait to be dispatched, and there is substantial evidence that full restoration took a very long time. *See, e.g.,* Exh. DPU-2-7; Tr. 1 at 178-215; Therefore, the “one job, one crew” practice offers absolutely no assurance that crews were efficiently dispatched based on accurate, timely knowledge of all pending outages.
- *There is “no record evidence that OMS is cumbersome” in handling outage tickets.* Co. Br. at 69. Again, the Company’s assertions here are patently false. Mr. O’Neill asserted that the OMS uses a manual grouping of calls based on a graphical interface, and the

Company confirmed in cross-examination that such was the case, despite some unrelated recent upgrades. *See* Tr. 4 at 901-905; Exh. NSTAR-2 at 95; Tr. 1 at 176; Tr. 5 at 1036.

B. Mobilization & Response to Wires Down

The Company claims that the AGO failed to adequately explain why the Company's response to wires down was inadequate and based its explanation "primarily on the testimony of Chief Robinson of Marshfield." Co. Br. at 72. To the contrary, examination of Mr. O'Neill's pre-filed testimony shows that the argument includes:

- Data from the events reports for TS Irene and the October Snowstorm;
- Data from the Company's Service Quality reports;
- Testimony of Kevin Robinson, Fire Chief of Marshfield;
- Testimony of Kevin Nord, Fire Chief of Duxbury;
- Testimony of William Quinn, Fire Chief of Orleans; and
- Comments from the Technical Session (December 20, 2011).

Exh. AG-DO-1 at 15-20. Furthermore, in its surrebuttal of the Company's rebuttal testimony, the AGO cited a Federal Emergency Management Agency ("FEMA") report on the need for coordination with municipal officials. Exh. AG-DEO-3 at 16-17.

Moreover, in the evidentiary hearings, the AGO and the Department spent considerable time and effort in examining individual cases of NSTAR's protracted wire down response, referencing the Company's response to information request Exhibit DPU-2-7. At hearings, NSTAR's main thrust appeared to be an unsupported supposition that its response during the storm must have been better than the evidence reported in its response to information request Exhibit DPU-2-7, because its normal practice, it believes, would be to respond promptly to priority 1 calls. *See* Tr. 1 at 180-181, 185, 193-194. Further, the Company disputed some of the priority classifications that fire and police personnel made, despite acknowledging that these first responders are well trained to use this system. *See* Co. Br. at 74-75; Tr. 1 at 185. Nevertheless,

NSTAR acknowledged that in some localities, such as the Town of Kingston, the damage was so extensive that it made for very protracted response times. Tr. 1 at 201-204.

It is also noteworthy that, in its initial brief, NSTAR attempts to impugn the testimony and professional observations of Chief Robinson, a highly decorated fire chief with 34 years of experience in the Town of Marshfield. Co. Br. at 72, 75-76. In its initial brief, the Company states that:

There is no better example of the reasons that the Department cannot solely rely on the stated dissatisfaction of local fire chiefs and other public safety personnel as ‘proof’ of the Company’s alleged mishandling of the response and restoration than the case of the Town of Marshfield and Chief Robinson.

Id. at 75. NSTAR’s efforts to support this argument fail.

First, the Company states that because Chief Robinson “did not attend the municipal training session in 2011 conducted by the Company for the purpose of reviewing FPS-call procedures and associated prioritizations,” his eyewitness accounts and experience during Tropical Storm Irene should be given less credence. *Id.* This proposition is meritless and merely an attempt by NSTAR to deflect the real issue at hand. On the one hand, the AGO recognizes that any training opportunities offered to first responders (regardless of their rank) will benefit and enhance overall performance. On the other hand, pointing out the fact that Chief Robinson may have missed **one** of NSTAR’s training events – at year 33 of his career and regardless of what it was for – only demonstrates that the Company hopes to avoid any potential negative outcome in these proceedings.

NSTAR then attempts to discredit Chief Robinson by stating that “he was not the person designated within the Marshfield [ERP] as having responsibility for making FPS [Fire Police Standing by] reports” and he did not act in accordance with the town’s ICS guidelines. *Id.*

These assertions are futile because: (1) the Company's purported factual assertions are not supported with an accurate record citation in its brief; and (2) even if NSTAR could accurately cite to the evidentiary record to support those assertions, they are inconsequential to this investigation. Whether Chief Robinson was the specific individual responsible for making FPS reports does not undermine his involvement and eyewitness account of what he personally observed and the actions he undertook during Tropical Storm Irene, especially in his role as Fire Chief of the Town of Marshfield. The record is replete with Chief Robinson's testimony in this regard, including his personal observations and actions during the storm, as well as his direct interaction with the Company. *See* Tr. 5 at 1017-1109. He did not have to be the "FPS reporter" or fill every municipal role in the town to be capable of testifying as to what was happening in Marshfield; being the fire chief was more than sufficient qualification to testify, and for the Department to accord full weight to the facts that he attested to.

In his duties as fire chief, Chief Robinson's main concern during the storm event was – and always is – public safety. As such, NSTAR's criticism of Chief Robinson's personal knowledge of what constitutes a Priority 1, 2 or 3 call (and what the Company labels FPS 1, 2 and 3 calls) and that he "operated off his own list" distracts from the issues at hand and fails to augment its position. *Co. Br.* at 75. During the evidentiary hearing, Chief Robinson demonstrated that – other than a difference in FPS nomenclature – a Priority 1 call "is a life-threatening, true-life threatening emergency" which may include someone in a motor vehicle accident "with wires down on their car." Tr. 5 at 1029-1030. After describing Priority 2 and Priority 3 scenarios, the following exchange occurred:

Q. [MERRICK] Are you aware of how many priority levels NSTAR assigns to wires down or other calls that your fire department makes to them in an emergency event?

A. [ROBINSON] In the meetings that I've had with company officials, it's my understanding that they follow that Priority 1, 2, and 3 system as well. But I've never heard it called an FPS 1 in any of those meetings.

Q. [MERRICK] And anytime during the storm event, before the storm event, or after the storm event, did NSTAR communicate to you that it defines Priority 1 differently than you do or the fire departments do?

A. [ROBINSON] No, and I specifically had conversations, multiple conversations with our community rep, Dennis Galvam, and had a conversation about our priority on the 28th was to cut and clear, get our major roads open, because we had major sections of town that had significant detours because of downed wires.

Id. at 1030-1033. Chief Robinson went on to state that despite NSTAR's claims that its first priority at all times (and during storm events) is public safety, in his view, such a claim was "not accurate; . . . there was no emergency response, there was no assistance to public safety for more than 12 hours in the Town of Marshfield to address the number of down wires, including transformers." *Id.* at 1036. As the Company accurately points out in its brief – seemingly as a criticism of Chief Robinson – his concern was not NSTAR's restoration effort; instead, he needed the Company "to respond and make the situation safe by cut and clear" crews in the sole interest of public safety, and he thought that NSTAR's "response was less than adequate". *Id.* NSTAR's failure in this regard is precisely why Chief Robinson was forced to take the actions he did with respect to the one NSTAR truck and two line crews during the period of August 28-29; he determined he had no other choice to make his town safe. *See Co. Br.* at 75-76.

The AGO's concern about the public safety hazards related to downed wires is justified regardless of NSTAR's attempts to deflect the issue onto Chief Robinson or elsewhere. If nothing else, Chief Robinson's involvement in these proceedings clearly illustrates the overall direct impact of a utility's emergency response to communities within this Commonwealth

during a major storm event. Further, the issues the Chief faced during Tropical Storm Irene are not new, will continue to recur, and date back to discussions the town had with NSTAR in 2005. Tr. 5 at 1027. The AGO concedes that the dissatisfaction of one fire chief is not *per se* dispositive of whether NSTAR violated its ERP. Rather, the AGO has demonstrated NSTAR's violations of its ERP through the totality of the evidence provided by all eyewitness accounts of first responders and citizens within these communities as to their experiences during these storm events – good, bad, or indifferent. These accounts contrast sharply to the Company's self-congratulatory perspective on the events that unfolded.

The Company further asserts that the AGO “omitted any positive testimony that was offered at the public hearings” and that “[t]hus, the magnitude of the municipal dissatisfaction with NSTAR Electric must be viewed in the context of the overall service territory and scale of the event.” Co. Br. at 77. The AGO does not have a duty to commend the Company on what it did well, although Mr. O'Neill did that in certain instances where he deemed it appropriate. The AGO instead represents the interests of ratepayers and municipalities that were aggrieved by the Company's poor preparation for and response to these storms, so that no customer or town is “left behind” in the Company management's rush to take credit for the hard work of its field employees during the storms. In the context of an investigation that was initiated by the Department as a response to public concern over storm performance, it is ludicrous to assert that the Department should simultaneously ignore serious instances of poor performance that violate the Department's standards because not every customer or town suffered the same impact.

Finally, the Company ends its discussion of its wires down performance with the statement: “In that regard, there is no demonstration that the Company systematically and pervasively fell short of its obligations to municipalities in terms of communication and

responsiveness.” But this proceeding does not require proof of a systematic and pervasive failure. Rather, the evidentiary record sufficiently demonstrates that the Company failed significantly in its obligations under the Department’s standards to those customers and communities most severely impacted by these storms.

C. Mobilization of Crews

The Company asserts in its Initial Brief that the AGO’s complaint that the Company did not mobilize resources in a sufficient and timely way is presented only as a “generalized claim.” Co. Br. at 77. An examination of Mr. O’Neill’s pre-filed testimony shows that the AGO’s complaint is supported by specific evidence with over seven pages of testimony that included: examination of the number of jobs, the number of crews at various stages of restoration in each storm, the ratio of crews per job, and the performance of other utilities. Exh. AG-DO-1 at 20-27. This issue was also addressed at length in the AGO’s rebuttal testimony, where her witness refuted the Company’s severe mischaracterization of Mr. O’Neill’s testimony. Specifically – and notably missing from the Company’s Initial Brief – the AGO affirmatively refuted the notion that Mr. O’Neill suggested that the Company “blindly hire any and all crews” and act “without thought for the mix of resources” or regard for the cost, when, instead, Mr. O’Neill’s point was that the Company made an exaggerated calculation of the cost of a proper mobilization. Exh. AG-DO-3 at 17-20. Furthermore, the Company’s argument in its Initial Brief in defense of its mobilization can be refuted point-by-point as follows:

- “NSTAR secured the requisite number of crews for each event.” Co. Br. at 77. The Company made no demonstration as to what the “requisite” number of crews should be, nor did it have a systematic way to know what that number would be, since it eschewed

any attempt to quantify damages and resources required for restoration. Exh. AG-DO-3 at 17-20.

- “As a result, there is no basis for the conclusion that the Company did not mobilize for anything greater than a Level 5 event. This conclusion is manufactured by the Attorney General.” Co. Br. at 78-79. The Company mobilized resources that were only a fraction larger than the threshold for a Level 5 event, despite the fact that the number of customers interrupted was 2.5 to 5 times the threshold number of customers. Exh. NSTAR-2 at 1-2; Exh. NSTAR-3 at 7, Table 1.
- “There is no damage prediction model that is recognized by the electric utility industry as a ‘successful’ model for large-scale Level 5 events and the Attorney General has produced no evidence that there is.” Co. Br. at 79. The AGO’s expert witness, Mr. O’Neill, asserted from his direct experience with clients and also from his knowledge of the industry that a number of utilities in the industry have developed such models. Exh. RR-NSTAR-AG-4; Tr. 5 at 971-972; Exh. AG-DO-1 at 12-13. The Company produced no witness with comparable knowledge, but only confessed ignorance or skepticism. Tr. 3 at 526-538.
- “Mr. Hallstrom testified that NSTAR Electric employs an emergency preparedness consultant ...[who] has indicated that both Florida Power and Light and ConEdison have been working on models for a long time and the models are not as successful as they had hoped.” Co. Br. at 79-80. However, the Company did not produce this consultant. Mr. O’Neill asserted that he has worked directly with ConEdison and IBM on the Deep Thunder model (Tr. 5 at 972), and he cited a paper by FP&L expressing its satisfaction with its efforts. Exh. RR-NSTAR-AG-4 (“These models have been useful in evaluating

the total potential risk and in developing specific response plans for individual storms.”) As the Company states, both companies have been working with these models for a long time. Co. Br. at 80. They continue to refine them. Tr. 5 at 970-973. Mr. O’Neill also mentioned the collaborative initiative done by the Electric Power Research Institute (EPRI). *Id.*

D. Vegetation Management

The Company’s claims about its vegetation management and storm hardening programs in its initial brief are wholly unsupported in the record evidence and are, therefore, meritless. For example, during cross-examination by the AGO and the Department, NSTAR’s vegetation management witness, Stephen T. Sullivan, repeatedly testified that the Company’s vegetation management program was “not a cycle-based program”. Tr. 1 at 98-99, 103; Tr. 4 at 755. Instead, NSTAR examines the tree-related outages on a particular circuit, targets the worst-performing circuits, and prunes those over time for better reliability on those circuits. Tr. 1 at 98-99, 103. Mr. Sullivan also made it crystal clear that NSTAR does not have a separate storm hardening program. Tr. 1 at 111. As such, there was nothing for Mr. O’Neill to “not understand” because the additional storm hardening program was non-existent by the Company’s own admission through Mr. Sullivan. *See id.*; Co. Br. at 83. Therefore, the Company’s claims that “there is no basis for the [AGO’s] conclusion that the program is ‘a reactive and outage chasing pruning program’” is without merit. Co. Br. at 82.

Further, NSTAR asserts that it “has the best electric reliability in the Commonwealth of Massachusetts and is ranked among the top performers outside of Massachusetts.” *Id.* The Department should give no weight to this subjective claim for several reasons. First and foremost, there is no evidentiary support whatsoever in the record for this statement, and the

Company cannot attempt to introduce new evidence into the record now that the record has closed. 220 C.M.R. § 1.11(8). Second, although the Department has broad authority and discretion to take administrative notice of other matters in making its ruling here (*e.g.*, NSTAR's service quality dockets), those matters were never introduced by the Company before the record closed and, therefore, are beyond the scope of this proceeding. *Id.* at § 1.10(3). Further, the Company's broad assertion in its brief that its electric reliability is the "best" fails to address other factors in addition to vegetation management that affect the reliability of a utility's electric system. For instance, NSTAR's use of distribution automation and the number of underground circuits that it has on its system are also critical factors in the analysis. The Department must see NSTAR's claim for what it really is: a circular argument stating that, "because the Company's system is reliable, NSTAR's vegetation management program must be aggressive and adequate during blue-sky days and storm events." Such a proposition simply is not supported by the evidence in this proceeding, and therefore, must be rejected.

Finally, on the basis of a response to a record request from the Department, NSTAR asserts that:

In the period 2004-2011, the Company trimmed 10,393 overhead circuit miles, with circuits most heavily affected by vegetation trimmed more than once. This equates to over 95 percent of the overhead circuit miles with at least one trim and the remainder of the miles equating to multiple trims on more heavily vegetated miles.

Co. Br. at 83-84; see also RR-DPU-NSTAR-16. These statements do not help the NSTAR's position with respect to vegetation management. Again, Mr. O'Neill opined that the storm damage to NSTAR's system likely would have been reduced had the Company implemented a four- to five-year, cycle-based pruning program, coupled with a hazard tree removal program to storm harden its system. Tr. 5 at 956-958. Mr. O'Neill never testified that an adequate cycle, in

his opinion, would have been anywhere close to a seven-to-eight year cycle as NSTAR suggests in its brief. Further, by its own admission, NSTAR concedes that in calculating the percentage of total circuit miles trimmed, the percentage includes circuits that have been trimmed more than once. *Id.*; *see also* Tr. 1 at 136-137, Tr. 4 at 755, Exh. AG-3 at 53, Exh. AG-4-11. Accordingly, the Department should reject the Company's assertions about the success of its vegetation management program in its final analysis of these proceedings, and should instead rely on the AGO's conclusions about the program.

E. Communications

In its initial brief, the AGO argued that NSTAR failed to communicate with its customers, first responders and municipal officials in accordance with its ERP and the ERP Guidelines established by the Department. AG In. Br. at 25-29; Exh. NSTAR-1, Section 3.25; D.P.U. 10-02-A, Appendix, at 8. In response, the Company argued that the AGO misstated the first-hand knowledge of Fire Chief Quinn and the statements of Newton CEO Robert Rooney. Co. Br. at 80-82. The Company left unrefuted the AGO's arguments with respect to customer communications.

1. NSTAR Failed to Communicate Effectively with Orleans Fire Chief Quinn

The Company argues that Chief Quinn wanted cut and clear crews on Sunday during the storm and that he wanted "his wire down situations resolved when they happened." *Id.* at 80-81. The AGO argued that Chief Quinn's testimony regarding a historical lack of ETAs showed that NSTAR did not communicate well with first responders. AG In. Br. at 26. Rather than discussing its ETAs, the Company accuses the AGO of mischaracterizing witness testimony. To be clear, Chief Quinn provided testimony regarding Tropical Storm Irene and the October Snowstorm by adopting his public hearing statement as sworn testimony filed by the AGO. Exh.

AG-WPQ-1. Although he did not provide live testimony, he was made available for cross-examination. Chief Quinn has served as a respected firefighter for 35 years, and is making an effort to improve the working relationship he has with NSTAR and the safety of his community by testifying in these proceedings. *See id.* at 2. Chief Quinn testified that, in the past, he had relationships with NSTAR's predecessors that allowed him to receive assistance more quickly than he is able to now from NSTAR. *Id.* During Tropical Storm Irene, Chief Quinn explained to his NSTAR contact that major roads in the town of Orleans were blocked, creating serious concerns among the Town's elderly population. *Id.* at 3.

While the Company is correct that Chief Quinn was predominantly concerned with cut and clear crews reaching Orleans as soon as possible to open roads, Chief Quinn was not unreasonable in this request, and NSTAR failed to communicate effectively with him. He recognized that it is not possible to have the Town's power restored immediately during certain storms even if the Town had 100 crews. *Id.* at 4. Chief Quinn's testimony shows communication problems existed between the town and NSTAR, because he could not receive an answer from the Company regarding the cut and clear crews he sought, despite that fact that he saw 25 NSTAR trucks on Monday morning. *Id.* at 3. Chief Quinn also complimented the Company on providing him with a quicker response during the October Snowstorm than it did during Tropical Storm Irene. *Id.* Chief Quinn's compliment recognizes NSTAR's efforts, but also amplifies the AGO's contention that the Company was not communicating with Chief Quinn properly during Tropical Storm Irene as to the timing of when NSTAR would clear the roads of wires in Orleans, so that he in turn could open them in the interests of public safety. *Id.* at 3. Chief Quinn further testified that there was some miscommunication during the October Snowstorm regarding whether a particular street had power or not, and, again, he was very

reasonable and understood that these things can happen. *Id.* Nevertheless, under its ERP, NSTAR is required to communicate with public safety officials, but failed to notify Chief Quinn when he could expect cut and clear crews to make his town safe during Tropical Storm Irene. Exh. NSTAR-1, Section CEP 3.2.3 at Attachment 7.1, 2.1 (“The Community Liaisons are responsible for the extraordinary two-way communication between local communities and NSTAR. Such information could contain but is not limited to: 2.1.1 Restoration Times; 2.1.2 Special operating conditions (plowing, tree damage, road block, etc.); 2.1.3 Special restoration needs (shelters, hospitals, nursing homes, public safety issue”). In addition, NSTAR is required to receive and process calls from local government officials and provide them with frequent and timely feedback. Guidelines for Electric Company Emergency Response Plans, D.P.U. 10-02, Appendix: ERP Guidelines and Attachments, at 8. In violation of its ERP and the Department’s Guidelines, NSTAR did not exercise extraordinary two-way communication with Chief Quinn regarding the road blocks and public safety issues that he struggled to notify them of on Sunday, nor did NSTAR provide Chief Quinn with frequent or timely feedback.

2. Communications with the City of Newton

The Company argues that the AGO failed to accurately describe the testimony of Newton CEO Robert R. Rooney. Co. Br. at 81. Mr. Rooney testified that NSTAR Electric lacked information and provided inaccurate ETRs. *Id.* at 81-82. The Company argues that Mr. Rooney makes allegations without specifics that are refuted by the Company’s responses to priority calls in Newton during Tropical Storm Irene and the October Snowstorm. *Id.* at 82. Mr. Rooney’s testimony includes examples of a lack of information sharing and coordination between the City of Newton and NSTAR with respect to downed wires and clearing streets. Exh. AG-RRR-1 at 6. Mr. Rooney testified that the City relies on NSTAR “to provide a consistent, responsive

communications plan with regular updates” in order to protect the public health and safety of its residents. *Id.* at 7.

Contrary to NSTAR’s allusions, Mr. Rooney never testified that NSTAR failed altogether to respond to priority calls and therefore his complaints are not unfounded. Co. Br. at 82. Mr. Rooney and Newton Mayor Setti Warren testified that the City was unable to receive accurate and timely information from NSTAR. Exh. AG-RRR-1 at 7-8 (“NSTAR’s communications quickly resorted to reactive rather than proactive posture during the storm, with information either incomplete or factually untrue. [. . .] The estimate of power restoration was repeatedly pushed back, causing confusion and distrust by the community of any information disseminated by NSTAR and by the local government for their planning purposes.”) Under its ERP, the Company is required to communicate with public safety officials, and the Company failed to notify the Chief Executive Officer and the Mayor of Newton of its communication plans and when they could expect power restoration. Exh. NSTAR-1, Section CEP 3.2.3 at Attachment 7.1, 2.1 (“The Community Liaisons are responsible for the extraordinary two-way communication between local communities and NSTAR. Such information could contain but is not limited to: 2.1.1 Restoration Times; 2.1.2 Special operating conditions (plowing, tree damage, road block, etc.); 2.1.3 Special restoration needs (shelters, hospitals, nursing homes, public safety issue”). In addition, NSTAR is required to receive and process calls from local government officials and provide them with frequent and timely feedback. Guidelines for Electric Company Emergency Response Plans, D.P.U. 10-02, Appendix: ERP Guidelines and Attachments, at 8. In violation of its ERP and the Department’s Guidelines, NSTAR did not exercise extraordinary two-way communication with the City of Newton. Instead, its estimated times of restoration to the City conflicted with the Company’s website messages and were

inaccurate. Exh. AG-RRR-1 at 8. As evidenced by the testimony of Mr. Rooney, NSTAR violated its ERP at CEP 3.2.3, Section 2.1, at page 1 of 3 by failing to provide timely and accurate information to municipal officials.

3. Communications with Customers

The Company's initial brief states that the Company's primary activities during the event include communications with customers and local public safety officials. Co. Br. at 34. In her initial brief, the AGO argued that the Company's communications with its customers was significantly flawed during Tropical Storm Irene and may have been constrained by the Company's OMS during the October Snowstorm. AG In. Br. at 28-29. The AGO argued that without an OMS system that can provide critical information, NSTAR's customer service function and ability to respond to customers is hampered. *Id.* at 29. "The Company uses its OMS system to assist in dispatch, scheduling and tracking jobs." Exh. DOER 1-12. The AGO postulates that if the Company's OMS system could provide critical information, the Company may have provided more accurate and timely information to its customers.

During an emergency event, NSTAR is required to communicate with its customers through public service announcements "to ensure unity of message regarding status of service outages, projections for service restoration, and other pertinent information." D.P.U. 10-02, Appendix: ERP Guidelines and Attachments, at 8. During evidentiary hearings, the Company testified that it did not communicate directly with customers through customer facing communications, but rather, reached customers only through the media and NSTAR's website. Tr. 2 at 321. The AGO outlined numerous complaints from customers and local officials in her initial brief evidencing the lack of communication exercised by NSTAR with its customers. AG In. Br. at 28-30. Despite the Company's efforts to minimize the complaints of customers and

local officials, without this testimony, the Company would be the only proponent of evidence regarding what happened during the storms. Co. Br. at 59.

F. Incident Command System

NSTAR denies that it failed to follow the intent of its Incident Command System (“ICS”) and maintains that incident command is a collaborative decision-making process. Co. Br. at 63. The AGO argued in its initial brief that Mr. Hallstrom’s testimony cannot be given the same weight that the Department would have given to Mr. Vaitkus, because Mr. Vaitkus was the incident commander, not Mr. Hallstrom. AG In. Br. at 24-25. Pursuant to NSTAR’s ERP, the Incident Commander has final responsibility for declaring the system level of response, is responsible for implementing this procedure once a system emergency is underway, and coordinates response efforts. Exh. NSTAR-1, OEP 2.2.2 at 2.1. Therefore, while the Incident Commander coordinates with section chiefs and coordinates response efforts, he or she alone is responsible for declaring the system level of response and implementing this procedure. Co. Br. at 63. Mr. Hallstrom served only as the Operations Section Chief, and as such, his testimony cannot hold the same weight as the purported Incident Commander. Exh. NSTAR-5-A; Tr. 1 at 32.

IV. SUMMARY AND RECOMMENDATIONS

Section 1J of Chapter 164 of the General Laws provides for penalties for a Company’s violation of standards. The penalty is \$250,000 for each violation for each day the violations exist, with a maximum penalty of \$20,000,000 for any related series of violations. G.L. c. 164, § 1J; Co. Br. at 7.

A. The AGO Recommends that NSTAR be Penalized \$5,675,000 for Violations Associated with Tropical Storm Irene and \$4,035,000 for Violations Associated with the October Snowstorm Pursuant to G.L. c. 164, § 1J and 220 C.M.R. § 19.03

The AGO recommends that the Department penalize NSTAR \$250,000 per ERP violation per day per storm for its failure to comply with its ERP requirements in four specific ways: (1) failure to identify prior to each storm the projected level of severity of the storm, and specifically the severity of the impact of an ERP Level 5 storm, which might be a multiple of the minimum impact level of that category; (2) failure to respond in each storm to priority wire down calls in accordance with its obligation; (3) failure to communicate with local public safety officials during each storm in accordance with its ERP; and (4) failure to ensure effective communications with customers during each storm in accordance with its ERP.

NSTAR failed to identify prior to each storm the projected level of severity of the storm. In violation of its ERP, NSTAR did not scale its mobilization appropriately in either storm for the expected severity of the storm. Instead, the Company mobilized resources that were only a fraction above the minimum threshold required for a Level 5 storm, even though the number of customers impacted was a multiple of 2.5 to 5 times the minimum threshold for a Level 5 storm, and such severity was foreseeable in advance. The AGO recommends the maximum penalty amount under G.L. c. 164, § 1J of \$250,000 per violation per day per storm. This failure impacted the restoration for the duration of the restoration in each storm, which was 6 days for Tropical Storm Irene and 5 days for the October Snowstorm. Co. Br. at 20, Table 1. Therefore, the recommended penalty is: \$1,500,000 for Tropical Storm Irene, which represents \$250,000 per day of restoration multiplied by 6 days; and \$1,250,000 for the October Snowstorm, which represents \$250,000 per day of restoration multiplied by 5 days.

NSTAR failed to respond to priority wire down calls in accordance with its obligation to restore power in a safe and reasonably prompt manner per 220 C.M.R. § 19.03(1). A wire down can represent a very serious public safety hazard. Tr. 1 at 179-180 (Priority 1 is a life-threatening situation; Priority 2 is defined as hindering emergency operations; and Priority 3 is a wire down that is guarded until NSTAR is reached.). All wires down have to be treated as live until the electric company attends to it and determines whether it is live or dead and removes it. Tr. 2 at 230-231. Until that time, wires down can block roads preventing first responders from reaching people in emergencies. Tr. 1 at 179-180. The AGO recommends penalizing the Company \$5,000 for each priority wire down call (a wire down call made by police and fire personnel) that was not dispatched in a timely manner. Priority 1 is defined as a life-threatening situation, Priority 2 is defined as an incident that NSTAR needs to respond to but is not life threatening, and priority 3 defines all other wire down calls from public safety officials. *Id.*

During Tropical Storm Irene, there were 1,085 priority wire down calls. Co. Br. at 44. The distribution of those calls by duration of time between when the call was received and when it was dispatched (not even when someone showed up, which was presumably about a half-hour later) shows that 235 calls were not responded to in a reasonable timeframe. The AGO believes it is reasonable to conclude that the Company should be fined \$5,000 for each call that was not dispatched within a reasonable time, which, given the exigency of priority wire down calls, the AGO is defining here as 24 hours. As the basis therefor, the AGO considers the inherently dangerous nature of wires down and the severe risk that it poses to public safety. Among other things, wires down situations: (1) deprive access to critical roadways; (2) force fire and police personnel to delay responding to other critical, life threatening calls; and (3) put the public at significant risk of electrocution, because any person who comes into contact with a downed wire

should assume the wire is energized. These examples illustrate the overall disruption, and potential panic, that downed wires present to Massachusetts communities; therefore, the AGO believes that a 24-hour dispatch period for the utility to address downed wires is more than reasonable.

Therefore, the recommended penalty is \$1,175,000, which represents the calculation of 235 delinquent wire down calls multiplied by \$5,000 per call for NSTAR's failure to respond to priority wire down calls in a timely manner during this emergency event. 220 C.M.R. § 19.03(1). During the October Snowstorm, there were 747 priority wire down calls. Co. Br. at 20, Table 1. Of those, there were 57 priority wire down calls that were not responded to within 24 hours. Co. Br. at 45.

The AGO recommends that the Company be fined \$5,000 for each priority wire down call that was not dispatched within a reasonable time, defined here as 24 hours. Using the same formula, the recommended penalty in this storm is \$285,000, which represents the calculation of 57 delinquent wire down calls multiplied by \$5,000 per call.

NSTAR failed to communicate with local public safety officials during each storm in violation of its ERP. For its failure to communicate properly with local officials during Tropical Storm Irene, the AGO recommends a penalty of \$1,500,000, which represents \$250,000 for each day of restoration multiplied by 6 days. For its failure to communicate properly with local officials during the October Snowstorm, the AGO recommends a penalty of \$1,250,000, which represents \$250,000 for each day of restoration multiplied by 5 days.

NSTAR failed to communicate with customers per its ERP. For its failure to communicate properly with customers during Tropical Storm Irene, the AGO recommends a penalty of \$1,500,000, which represents \$250,000 for each day of restoration multiplied by 6

days. For its failure to communicate properly with customers during the October Snowstorm, the AGO recommends a penalty of \$1,250,000, which represents \$250,000 for each day of restoration multiplied by 5 days.

In sum, the AGO recommends a total penalty of \$9,710,000 for violations associated with both storm events, which represents \$5,675,000 for violations associated with Tropical Storm Irene and \$4,035,000 for violations associated with the October Snowstorm.

B. Recommended Changes to Information to be Filed with the Department

The AGO makes the following additional recommendations to the Department that it can take to improve NSTAR's emergency planning and restoration efforts. First, with respect to NSTAR's Emergency Response Plan, the Department should focus on whether NSTAR fully complied with its ERP, Department precedent, and 220 C.M.R., § 19.00 *et. seq.* If the Department determines that NSTAR has complied with its plan, yet tens of thousands of customers remained without power and heat for significant periods of time, it seems prudent to explore ways in which the ERP can be improved. The issue of ERP reform should be addressed in the Department's existing ERP docket for NSTAR, D.P.U. 12-ERP-10. In particular, the Department should, if necessary, examine the ERP's requirements with respect to the Company's communication with customers, municipal officials and public safety officials.

Finally, the Company should be required to implement all of the lessons learned described in its December 20, 2011 Technical Session Report. NSTAR-4. In addition, NSTAR's recordkeeping for priority calls may deserve an investigation itself and, at the least, some remedial action from the Department to ensure that NSTAR's recordkeeping is adequate.

Respectfully submitted,
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