

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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**Beyond Nuclear**

**New Hampshire Sierra Club**

**Seacoast Anti-Pollution League**

**Petitioners,**

**v.**

**U.S. Nuclear Regulatory Commission**

**United States of America**

**Respondents,**

**and**

**Massachusetts Municipal Wholesale**

**Electric Company, et al.**

**Applicants for Intervention**

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**Case No. 12-1561**

**MOTION FOR INTERVENTION**

**I. Introductory Statement**

Pursuant to 28 U.S.C. § 2348 and Federal Rule of Appellate Procedure 15(d), the Massachusetts Municipal Wholesale Electric Company (“MMWEC”), the Taunton Municipal Lighting Plant (“Taunton”), and the Hudson Light & Power Department (“Hudson”) (collectively, the “Joint Intervenors”) hereby file this Motion for Intervention as a Party-Respondent in the above-captioned matter.

## II. Background

### A. MMWEC

1. MMWEC is a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts. St. 1975, c. 775, § 2.<sup>1</sup> The exercise of MMWEC's powers is deemed to be an essential public function. *Id.*

2. Between 1976 and 1981, MMWEC exercised its statutory authority to acquire an approximately 11.5934% ownership interest in Seabrook Unit No. 1 ("Seabrook"), a single unit nuclear power plant located in Seabrook, New Hampshire.

3. MMWEC has entered into power sales agreements pursuant to which it sells its ownership share of the power generated by Seabrook to twenty-eight (28) Massachusetts cities and towns having municipal electric departments.

### B. Taunton

4. Pursuant to G.L. c. 164A, the City of Taunton, Taunton Municipal Lighting Plant, exercised its statutory authority to acquire an approximately 0.10034% ownership interest in Seabrook.<sup>2</sup>

5. Taunton oversees, operates, maintains, and pays for the 0.10034% ownership interest in Seabrook pursuant to its authority under G.L. c. 164A, and

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<sup>1</sup> A conformed copy of St. 1975 c. 775, § 1, *et seq.*, as amended (MMWEC's Enabling Act), is attached hereto as Exhibit 1.

<sup>2</sup> A copy of G.L. c. 164A, §1, *et seq.*, is attached hereto as Exhibit 2.

G.L. c. 164. Taunton is a duly organized Massachusetts municipal lighting plant operating in accordance with G.L. c. 164, §§ 34 – 69.<sup>3</sup>

C. Hudson

6. Pursuant to G.L. c. 164A, the Town of Hudson exercised its statutory authority to acquire an approximately 0.07737% ownership interest in Seabrook.

7. Hudson oversees, operates, maintains, and pays for the 0.07737% ownership interest in Seabrook pursuant to its authority under G.L. c. 164A, and G.L. c. 164. Hudson is a duly organized Massachusetts municipal lighting plant operating in accordance with G.L. c. 164, §§ 34 – 69.

8. As municipal lighting plants, Taunton and Hudson are obligated to provide electricity to the customers located in their respective service territories. G.L. c. 164, § 34.

D. Seabrook Ownership

9. MMWEC, Taunton, and Hudson own their respective ownership interests in Seabrook in fee simple absolute.

10. NextEra Energy Seabrook, LLC (“NextEra”) owns the remaining approximate 88.22889% ownership interest in Seabrook in fee simple absolute.

11. MMWEC, Taunton, Hudson, and NextEra (collectively, the “Joint Owners”) own Seabrook as tenants in common.

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<sup>3</sup> A copy of G.L. c. 164, §§ 34 – 69, is attached hereto as Exhibit 3.

E. The Joint Ownership Agreement

12. The Agreement for the Joint Ownership, Construction and Operating of New Hampshire Nuclear Units (“Joint Ownership Agreement”) sets forth the rights and obligations with respect to the ownership, construction, and operation of Seabrook.<sup>4</sup>

13. Pursuant to the Joint Ownership Agreement, NextEra is solely responsible for, and authorized to act as agent for the other Joint Owners, with respect to, among other things, obtaining all approvals or permits from regulatory agencies required for the construction and operation of Seabrook. *Joint Ownership Agreement*, § 21. All Joint Owners are required to cooperate as reasonably requested by NextEra with regard to securing such approvals or permits from regulatory agencies. *See id.*

14. Also, the Joint Ownership Agreement provides, among other things, that the Joint Owners shall share in the expenses of operating and maintaining Seabrook, in accordance with their ownership shares. *Id.*, § 13.

15. Expenses that are shared among the Joint Owners include all costs and expenses with respect to Seabrook “reasonably incurred and properly chargeable to” Seabrook. *Id.* Accordingly, those costs and expenses associated with the license renewal for Seabrook are shared among the Joint Owners in accordance

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<sup>4</sup> A composite copy of the Joint Ownership Agreement, as amended, is attached hereto as Exhibit 4.



with their respective ownership interests. In other words, NextEra is responsible for 88.22889%, MMWEC is responsible for 11.5934%, Taunton is responsible for 0.10034%, and Hudson is responsible for 0.07737% of such costs and expenses.

F. Seabrook Licensing

16. On March 15, 1990, the United States Nuclear Regulatory Commission (“NRC”) issued Facility Operating License No. NPF-86 (“License”), which is set to expire on March 15, 2030. *See Seabrook Station Unit No. 1 Facility Operating License.*<sup>5</sup> Pursuant to the License, NextEra, MMWEC, Taunton, and Hudson are NRC-licensed owners of Seabrook. *See id.*

17. The License provides that NextEra is the licensed operator and is authorized to act as agent for the other Joint Owners, and has the exclusive responsibility and control over the physical construction, operation, and maintenance of Seabrook. *See id.*

18. By letter dated May 25, 2010, NextEra filed an application with the NRC, on behalf of itself, MMWEC, Taunton, and Hudson, to extend the operating license for Seabrook for a twenty (20) year period.

G. Procedural History

19. Two groups filed separate requests for public hearings and petitions to intervene before the NRC’s Atomic Safety and Licensing Board (“Board”) with

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<sup>5</sup> A copy of License No. NPF-86, Seabrook Station Unit No. 1 Facility Operating License (without appendices), is attached hereto as Exhibit 5.

regard to the license renewal process for Seabrook. The first group is Beyond Nuclear, the Seacoast Anti-Pollution League and the New Hampshire Sierra Club (collectively, the “Petitioners”). The second group is Friends of the Cost and the New England Coalition (collectively, “Friends/NEC”).

20. The Petitioners and Friends/NEC each sought to raise a number of contentions with regard to the application submitted by NextEra on behalf of the Joint Owners.

21. NextEra, on behalf of itself and the other Joint Owners, participated in the proceeding before the Board opposing the proposed contentions.

22. On February 15, 2011, the Board issued its decision, finding that the Petitioners and Friends/NEC had demonstrated standing, and also admitted the contention raised by the Petitioners, two contentions raised by Friends/NEC, including part of a third contention raised by Friends/NEC.

23. NextEra, on behalf of itself and the other Joint Owners, appealed the Board’s decision to the NRC. On March 8, 2012, the NRC issued its Memorandum and Order (“NRC Decision”).<sup>6</sup>

24. In the NRC Decision, the NRC affirmed the Board’s decision in part and reversed in part.

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<sup>6</sup> The NRC’s Memorandum and Order, dated March 8, 2012, is attached hereto as Exhibit 6.

25. The NRC reversed the Board's decision to admit the contention raised by the Petitioners.

26. The Petitioners had raised the contention that "NextEra's Environmental Report failed to evaluate the potential for renewable energy to offset the loss of energy production from the Seabrook nuclear power plant and to make the requested license renewal action for 2030 unnecessary." *NRC Decision*, p. 47.

27. The Board had admitted the Petitioner's contention, but limited the contention only to wind power generation. *Id.* at 48. The NRC concluded that the Board had erred in admitting the Petitioners' contention, even in limited form. *Id.* at 51.

28. On May 7, 2012, the Petitioners filed a Petition for Judicial Review of the NRC Decision to Dismiss Contention from Operating License Renewal Case and Praecipe for Service upon the NRC with this court (the "Appeal"). The Appeal names the NRC and the United States of America as Respondents.

### **III. Intervention as of Right**

29. Pursuant to 28 U.S.C. § 2348, a "party in interest" in a proceeding has the right to intervene.<sup>7</sup> Specifically, § 2348 provides that:

any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or

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<sup>7</sup> 28 U.S.C. § 2348 is attached hereto as Exhibit 7.

suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. 28 U.S.C. § 2348.

30. The Joint Intervenors are Joint Owners of Seabrook.

31. By virtue of being Joint Owners of Seabrook, the Joint Intervenors' interests clearly will be affected if the NRC Decision is set aside.

32. Specifically, if this court reverses the NRC's Decision, the Petitioners' contention will be admitted, and the Environmental Report associated with the license renewal application may need to be supplemented or otherwise amended.

33. If this court reverses the NRC's Decision, the Joint Intervenors will be specifically obligated to comply with the court's order as it relates to their respective ownership interests in Seabrook and, in addition, to pay for any costs associated with the Environmental Report as may be requested by NextEra. *See Joint Ownership Agreement*, §§ 13, 21. Accordingly, the outcome of this proceeding has a direct and substantial impact on the Joint Intervenors.

34. MMWEC relies on the capacity provided and the energy generated by Seabrook to fulfill its statutory purpose and provide reliable, relatively low-cost energy to the Massachusetts cities and towns with which it has entered into power sales agreements. *See* St. 1975, c. 775, § 1.

35. Hudson and Taunton rely on the capacity provided and the energy generated by Seabrook to fulfill their statutory obligation to serve the customers located within their respective service territories. *See* G.L. c. 164, § 34.

36. Consequently, this Appeal, which relates to the continued operation of Seabrook, directly affects the Joint Intervenors and their respective customers.

37. While the Joint Intervenors did not participate directly in the proceeding below, NextEra represented their interests as agent, as authorized by the Joint Ownership Agreement and by the License.

38. NextEra acted as the Joint Intervenors' agent: (1) when NextEra submitted the May 25, 2010 license renewal application to the NRC; (2) when NextEra participated in the hearing before the Board opposing the Petitioners' proposed contention; and (3) when NextEra petitioned the NRC to review the Board's decision as to the Petitioners' contention and hearing request.

39. Accordingly, by and through this agency relationship, the Joint Intervenors are parties in interest to the proceeding now on review. The Joint Intervenors should be given the opportunity to participate in the appeal of a proceeding to which they were parties.

#### **IV. Permissible Intervention**

40. In the alternative, the Joint Intervenors seek permissible intervention pursuant to 28 U.S.C. § 2348.

41. Section 2348 of the U.S.C. allows certain entities who are not “parties in interest in the proceeding” to intervene provided that their “interests are affected by the order of the agency . . .”. 28 U.S.C. § 2348.

42. The Joint Intervenors’ interests are clearly affected by the NRC Decision because: (1) the Joint Intervenors are Joint Owners of Seabrook; (2) the Joint Intervenors are responsible for their proportionate share of all costs associated with the license renewal application and proceeding (*See Joint Ownership Agreement*, § 21); and (3) if the NRC Decision is vacated, the Petitioners’ contention will be admitted into the license renewal proceeding, which may adversely affect the license renewal application, resulting in delay, or causing the Joint Owners to incur further costs and expenses with regard to the license renewal process (*See id.*, § 13).

43. Further, the Joint Intervenors have constitutional standing under Article III of the United States Constitution (“Article III standing”) to seek permissible intervention. *See City of Cleveland, Ohio v. Nuclear Regulatory Commission*, 17 F.3d 1515, 1517-1518 (D.C. Cir. 1994).<sup>8</sup>

44. There are three requirements for such standing: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a

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<sup>8</sup> The case of *City of Cleveland, Ohio v. Nuclear Regulatory Commission*, 17 F.3d 1515 (D.C. Cir. 1994), is attached hereto as Exhibit 8.

causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).<sup>9</sup>

45. The Joint Intervenors' respective ownership interests in Seabrook are legally protected interests that would be adversely affected by admission of the Petitioners' contention in the license renewal process. A decision upholding the NRC's Decision would provide a remedy to the Joint Owners. Thus, the Joint Owners meet Article III's standing requirements.

## **V. Conclusion**

WHEREFORE, for the reasons set forth above, the Joint Intervenors respectfully request that the court grant this Motion for Intervention.

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<sup>9</sup> The case of *Lujan, Jr. v. Defenders of Wildlife, et. al*, 112 S. Ct. 2130 (1992), is attached hereto as Exhibit 9.

Respectfully Submitted,

**MASSACHUSETTS MUNICIPAL  
WHOLESALE ELCECTRIC  
COMPANY,**

**TAUNTON MUNICIPAL  
LIGHTING PLANT,**

**HUDSON LIGHT & POWER  
DEPARTMENT,**

By their attorney,

s/ Nicholas J. Scobbo, Jr.

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Dated: June 5, 2012

#### CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF System: United States Nuclear Regulatory Commission, Beyond Nuclear, Seacoast Anti-Pollution League, Sierra Club of New Hampshire, and NextEra Energy Seabrook, LLC.

s/ Nicholas J. Scobbo, Jr.



# **EXHIBIT**

# **1**

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## APPENDIX TO CHAPTER 164

### MASSACHUSETTS WHOLESALE ELECTRIC COMPANY

#### Section

- 1-1. Definitions.
- 1-2. Corporate Status.
- 1-3. Municipal membership in corporation.
- 1-4. Board of directors, appointment; election; term; vote; removal; vacancies; expenses and compensation; officers.
- 1-5. Rights and powers of corporation.
- 1-6. Contracts to sell energy; computing borrowing capacities of cities and towns; fees and charges.
- 1-7. Eminent Domain.
- 1-8. Tax exemptions.
- 1-9. Bonds; terms and conditions; signature; interim receipts.
- 1-10. Bond security; trust agreement or resolution; fees and charges; disposition of proceeds.
- 1-11. Refunding bonds.
- 1-12. Debt of commonwealth, cities or towns.
- 1-13. Trust funds.
- 1-14. Enforcement of bondholders' rights.
- 1-15. Legal investment in bonds.
- 1-16. Bonds; investment securities.
- 1-17. Amount of bonds; approval; hearing.
- 1-18. Bonds issued without obtaining consent.
- 1-19. Law applicable.
- 1-20. Annual Report.
- 1-21. Termination or dissolution; vesting of assets.
- 1-22. Priority of act.
- 1-23. Liberal construction.
- 1-24. Severability.
- 1-25. Termination.

St. 1975, c. 775, §§ 1 to 25, enacted the provisions set out as §§ 1-1 to 1-25 of this appendix.

#### **§ 1-1. Definitions**

The following words as used in this act shall, unless the context otherwise requires, have the following meanings:

“Alternative energy facilities”, shall include but not be limited to facilities powered in whole or in part by the sun, wind, water, biomass, refuse, alcohol, wood or any renewable non-depletable fuel, and cogeneration.

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“Bonds” or “bond”, bonds, notes and other evidence of indebtedness of the corporation issued under the provisions of this act.

“Corporation”, the Massachusetts Municipal Wholesale Electric Company, heretofore organized under chapter one hundred and sixty-four of the General Laws.

“Department”, the department of public utilities.

“Energy”, electricity, electric power, electric capacity, electric energy, natural gas, liquefied natural gas, liquefied petroleum air gas, propane air, synthetic natural gas, oil, steam, coal, water, wind, solar, battery, or any by-products, derivatives, services, ancillary products or ancillary services derived therefrom, including, but not limited to, reactive power or voltage control, loss compensation, scheduling and dispatch, load following, system protection services and energy imbalance services, emissions allowances or the transmission, transportation, storage, purchase, sale, exchange or interchange of energy capacity, either electric or other, distribution, disposal, decommissioning thereof, or the transmission, transportation, storage, disposal, decommissioning or distribution of any by-products thereof.

“Energy facility”, an electric power facility, or a system or facility, or an interest in or right to the use of services derived from the facility or system or a part of thereof, including an energy conservation system, system for the production of renewable energy or alternative energy facility for the manufacture, generation, transmission, distribution, transformation, transportation, storage, purchase, sale, exchange or interchange or conservation of energy or any by-products or ancillary products thereof or services derived therefrom by any means, including, but not limited to, vehicles, personal or real property and a facility for processing refuse or other materials into fuel with or without other by-products, or facilities and property for the acquisition, extraction, conversion, transportation, storage, reprocessing or disposal of fuel and other materials of any kind for any of these purposes, as necessary to carry out the purposes of this act.

“Energy conservation systems”, any projects, systems, programs and measures to promote or implement energy conservation, and as authorized in clause (p 1/2 ) of section five.

“Majority vote”, majority vote as defined in section one of chapter forty-four of the General Laws.

“Municipal light board”, the municipal light board or commission, municipal gas and electric commission or similar body of a city or town having a municipal electric department established under chapter one hundred and sixty-four of the General Laws or a special act; the mayor or city manager, as the case may be, of such a city having no such body; or the selectmen of such a town having no such body. Such a city or town may exercise any of its power or authority contained in this act through its municipal light board.

St.1975, c. 775, § 1. Amended by St.1988, c. 129, §§ 1, 2; St.2008, c. 535, § 1, eff. April 16, 2009.

## **§ 1-2. Corporate status**

The corporation is hereby made a body politic and corporate and a political subdivision of the commonwealth. Said corporation is constituted a public instrumentality and the exercise of the

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powers conferred by this act shall be deemed and held to be the performance of an essential public function.

St.1975, c. 775, § 2.

### **§ 1-3. Municipal membership of corporation**

(a) Each city or town which is entitled to nominate a director of the corporation immediately prior to the effective date of this act and which is authorized to become a member of the corporation by majority vote of such city or town shall be a member of the corporation. Any other city or town having a municipal electric department, established under the provisions of chapter one hundred and sixty-four of the General Laws or a special act, and which is authorized to become a member by majority vote of such city or town may become a member by applying for admission to the corporation and agreeing to comply with such reasonable terms and conditions of membership as the by-laws may fix from time to time. Membership may be terminated pursuant to such reasonable terms and conditions as the by-laws may fix from time to time, provided that liabilities under contracts in force at the time of such termination shall not be affected except as provided in such contracts.

(b) The member cities and towns, voting at a meeting or by written instrument, shall have the power to adopt, amend or repeal the by-laws and to elect directors of the corporation. Each member city or town shall from time to time designate, by a writing filed with the corporation, its manager of municipal lighting or a member of its municipal light board to vote and execute such written instruments on its behalf. Each member city or town shall have one equal vote, except that the election of the directors of the corporation shall be carried out according to the procedure set forth in clause (a) of section four. A majority of the votes shall be necessary for action by the member cities and towns.

(c) The general expenses of the corporation which are not provided from other sources may be provided by the member cities and towns as may be agreed upon with the corporation.

St.1975, c. 775, § 3.

### **§ 1-4. Board of directors, appointment; election; term; vote; removal; vacancies; expenses and compensation; officers**

(a) Except as otherwise provided in this act, the powers of the corporation shall be exercised by a board of nine directors. The governor shall appoint two directors who shall serve at the pleasure of said governor. The member cities and towns shall elect seven directors from among their respective managers of municipal lighting and members of their municipal light boards. Four of the elected seven directors shall be elected by the member cities and towns each of whom shall have a vote which shall be given weight in the same proportion which its annual kilowatt hour sales, as most recently reported to the department under chapter 164 of the General Laws or as otherwise determined or estimated in accordance with the by-laws, bears to the total of such sales by all member cities and towns. Three of the elected seven directors shall be elected by the member cities and towns each of whom shall have one equal vote. Of the directors elected at the annual meeting in 1999, two of the four directors elected by weighted vote shall serve for a term of three years and two shall serve for a term of two years. One of the directors elected by equal vote shall serve for a term of three years, one shall serve for a term of two years, and one shall serve for a term of one year. Thereafter, all seven elected directors shall be elected as their

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respective terms expire in the manner prescribed in this section and each shall serve for a term of three years and until their successors are chosen and qualified. An elected director may be removed at any time by the member cities and towns with or without cause or for cause by the board. The member cities and towns shall elect a successor to fill any vacancy among the elected directors for the respective unexpired term. No vacancy in the membership of the board shall impair the right of a quorum to exercise the powers of the board. A majority of the full membership of the board shall constitute a quorum and a majority of such quorum shall be necessary for any action by the board. The directors shall not be entitled to compensation for their services as such but shall be reimbursed for actual expenses necessarily incurred in the performance of their duties.

(a 1/2 ) Notwithstanding the provisions of subsection (a), one representative each from the towns of Ludlow, Hampden and Wilbraham shall be entitled to serve as an additional member of the board of directors, to attend the meetings of said board, and to vote on any matters before the board that affect the town represented by said member; provided, that each such additional member shall be elected by a vote of, and serve at the pleasure of, the board of selectmen of the applicable town.

(b) The board shall annually choose a chairman, a secretary and a treasurer, and such other officers as the board may determine. Two or more offices may be held by the same person, and except in the case of the chairman, an officer need not be a director. Each officer shall serve until his successor is chosen and qualified unless sooner removed by the board, with or without cause. In the event of a vacancy in any office, the board shall fill the vacancy for the unexpired term. If a director serves as secretary or treasurer or both, he may be compensated by the corporation for his services as such, otherwise a director shall not be compensated by the corporation for his services as an officer, but he shall be reimbursed for his actual expenses necessarily incurred in the performance of his duties.

(c) A director or officer of the corporation who is also an officer or employee of the commonwealth or of a member city or town or other public body shall not thereby be precluded from voting or acting on behalf of the corporation on a matter involving the commonwealth or the city or town or other public body.

St.1975, c. 775, § 4. Amended by St.1997, c. 43, § 148; St.1998, c. 194, § 249.

### **§ 1-5. Rights and powers of corporation**

The corporation shall have all the rights and powers necessary or convenient to carry out and effectuate the purposes and provisions of this act, including, but without limiting the generality of the foregoing, the rights and powers:

- (a) to adopt by-laws for the regulation of the affairs and the conduct of its business, and to prescribe rules, regulations and policies in connection with the performance of its functions and duties;
- (b) to adopt an official seal and alter the same at pleasure;
- (c) to maintain an office at such place or places as it may determine;
- (d) to adopt a fiscal year and alter the same at pleasure;

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- (e) to sue and be sued;
- (f) to receive, administer and comply with the conditions and requirements respecting any gift, grant, donation or appropriation of any property or money;
- (g) to acquire by purchase, lease, gift, or otherwise, or to obtain options for the acquisition of, any property, real or personal, improved or unimproved, tangible or intangible, including an interest in land less than the fee thereof;
- (h) to sell, lease, mortgage, exchange, transfer or otherwise dispose of, or to grant options for any such purposes with respect to any real or personal property or interest therein, upon the term and conditions as the corporation shall determine, with or without consideration and notwithstanding whether the real or personal property shall be needed by or useful to the corporation;
- (i) to pledge or assign any money, fees, charges or other revenue of the agency, or any real or personal property and any proceeds derived by the corporation from the sale of energy or property or any insurance or condemnation awards;
- (j) to employ personnel who shall serve at the pleasure of the directors, provided, however, that the corporation may bind itself by contract to employ a general manager for a period not exceeding five years;
- (k) to borrow money and issue its bonds as provided in this act and to provide a pooled loan program on behalf of and for the benefit of its members, to make loans to its members and to enter into leases on behalf of its members, both as lessee or lessor;
- (l) to purchase energy, including, but not limited to, all or a portion of the capacity and output of energy facilities and steam, whether or not produced by an energy facility;
- (m) to sell energy and other products of energy facilities to member and non-member cities and towns having municipal electric departments established under chapter one hundred and sixty-four of the General Laws or a special act and to other utilities, public and private, within and without the commonwealth; such cities and towns are hereby authorized to purchase energy sold by the corporation, provided, however, that nothing in this act shall be construed to authorize resale of energy so purchased except as otherwise authorized by law;
- (n) to contract for the use of transmission and distribution facilities owned by others for the delivery to purchasers of electric power and energy sold by the corporation, any such owner is hereby authorized to enter into such contracts with the corporation;
- (o) to contract with respect to the purchase, sale, delivery, exchange, interchange, wheeling, pooling, transmission or use of electric power and energy and to otherwise participate in intrastate, interstate and international arrangements with respect thereto, including a New England power pool as defined by section one of chapter one hundred and sixty-four A of the General Laws;
- (p) jointly or separately to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of, own, lease, sell, dispose of or otherwise participate in energy facilities or portions thereof or research and development relating thereto within or without the commonwealth and to enter into and perform contracts with respect thereto if the corporation acquires or owns an interest as a tenant in common with others in any energy facilities within the



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commonwealth, the surrender or waiver by any such owner of such property of its right to partition such property for a period not exceeding the period for which the property is used or useful for electric utility purposes shall not be invalid and unenforceable by reason of length of such period, or as unduly restricting the alienation of such property;

(p 1/2 ) in addition to and not in derogation of any other authority previously granted under this act, jointly or separately to plan, finance, operate, use, share costs of, sponsor, publicize or otherwise participate in projects, systems, programs or measures to promote or implement energy conservation and load management including but not limited to energy-conserving or load reducing modifications of the maintenance and operating procedures of a building or facility or in the installation therein; energy-conserving modifications to windows and doors; caulking and weatherstripping; insulation; automatic energy control systems; load management systems; hot water systems; equipment required to operate variable steam, hydraulic and ventilating systems; plant and distribution system modifications, including replacement of burners, furnaces or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; replacement or modifications of lighting fixtures; energy recovery and recycling systems; and cogeneration systems or portions thereof; or research and development relating thereto within or without the commonwealth and to enter into and perform contracts with respect thereto if the corporation acquires or owns an interest as a tenant in common with others in any energy conservation system within the commonwealth the surrender or waiver by any such owner of such property of its right to partition such property for a period not exceeding the period for which the property is used or useful for electric utility purposes shall not be invalid and unenforceable by reason of length of such period, or as unduly restricting the alienation of such property;

(q) to apply to the appropriate agencies of the commonwealth, other states, the United States, and to any other proper agency for such permits, licenses, certificates or approvals as may be necessary, and to construct, maintain and operate energy facilities in accordance with such licenses, permits, certificates or approvals;

(r) to apply and contract for and to expend assistance from the United States or other sources, whether in form of a grant or loan or otherwise;

(s) to make and execute all contracts and agreements and other instruments necessary or convenient in the exercise of the powers and functions of the corporation under this act;

(t) to enter into contracts determined by the corporation to be necessary or for the prudent management of its assets, funds, debts or fuels, including, without limitation, interest rate swaps, option contracts, future contracts, forward purchase contracts, hedging contracts, leases or other risk management instruments;

(u) to exercise and perform all or a part of its powers and functions through wholly-owned or partly-owned corporations or other entities; and

(v) to do all things necessary, convenient or desirable to carry out the purposes of this act or the powers expressly granted or necessarily implied in this act.

Contracts entered into by the corporation pursuant to this section (i) may be for the life of a facility or other term or for an indefinite period, (ii) may provide for the payment of unconditional obligations imposed without regard to whether a facility is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or

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curtailment of the output of a facility and (iii) may contain provisions for prepayment, non-unanimous amendment, arbitration, delegation and other matters deemed necessary or desirable to carry out their purposes.

St.1975, c. 775, § 5. Amended by St.1988, c. 129, § 3; St.2008, c. 535, §§ 2 to 9, eff. April 16, 2009.

**§ 1-6. Contracts to sell energy; computing borrowing capacities of cities or towns; fees and charges**

(a) The corporation may contract to sell, and member and non-member cities and towns having municipal electric departments established under chapter one hundred and sixty-four of the General Laws or by a special act and other utilities, public or private, may contract to purchase all or a portion of the capacity and output of one or more specific energy facilities including, without limiting the generality of the foregoing, contracts providing for planning, engineering, design, acquiring sites or options for sites and expenses preliminary or incidental to such facilities. Any such contract (i) may be for the life of a facility or other term or for an indefinite period, (ii) may provide for the payment of unconditional obligations imposed without regard to whether a facility is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a facility and (iii) may contain provisions for prepayment, non-unanimous amendment, arbitration, delegation and other matters deemed necessary or desirable to carry out its purposes. Any such contract may also provide, in the event of default by any party thereto in the performance of its obligations thereunder, for other parties to assume the obligations and succeed to the rights and interests of the defaulting party, pro rata or otherwise as may be agreed upon in the contract.

(b) Neither the obligations of the corporation nor the obligations of any member or non-member cities and towns under any energy contracts hereunder shall be included in computing the borrowing capacities of the cities and towns. The obligations of cities and towns with municipal electric departments established under chapter 164 of the General Laws or by a special act shall be treated as expenses of operating their electric plants and shall constitute special obligations of the cities and towns, payable solely from the revenues and other moneys derived by the cities and towns from their electric departments or systems. The liability of those cities and towns from other funds shall be limited to obligations undertaken by them to pay for the energy used by them.

(c) A city or town shall be obligated to fix, revise and collect fees and charges for energy and other services, facilities and commodities furnished or supplied through its electric department or systems at least sufficient to provide revenues adequate to meet its obligations under any contracts with the corporation and to pay any and all other amounts payable from or constituting a charge and lien upon the revenues, including amounts sufficient to pay the principal of and interest on all bonds issued by the city or town for energy-related purposes.

St.1975, c. 775, § 6. Amended by St.2008, c. 535, §§ 10, 11, eff. April 16, 2009.

**§ 1-7. Eminent domain**

Subject to those provisions of chapter one hundred and sixty-four of the General Laws which are made applicable by section nineteen hereof, the corporation may acquire real property, or any interest therein, by eminent domain in accordance with the provisions of chapter seventy-nine or chapter eighty A; provided, however, that (i) no property already appropriated to public use shall be so taken except to the extent and for the purposes permitted by said provisions of said chapter



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one hundred and sixty-four and (ii) no facility for the generation, transmission or distribution of electric power and energy owned by any person shall be so taken except for the purpose of acquiring property or rights therein to permit the crossing of existing transmission or distribution facilities. Any taking under chapter seventy-nine of the General Laws shall be governed by the provisions of said chapter which are applicable to public corporations or authorities. Before a taking is made or injury inflicted by the corporation for which damages may be recovered under chapters seventy-nine or eighty A of the General Laws, the corporation shall file with the department of public utilities security to the satisfaction of the department for the payment of all damages and costs which may be awarded for the property taken or injured; and if, upon petition of the owner and notice to the corporation, any security taken appears to the department to have become insufficient, the department shall require the corporation to give further security to the satisfaction of the department.

St.1975, c. 775, § 7.

### **§ 1-8. Tax exemptions**

(a) The corporation shall not be required to pay any taxes upon its income, existence or franchise, and the bonds issued by the corporation, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be exempt from taxation within the commonwealth.

(b) Real and personal property, situated within the commonwealth and owned by the corporation shall be exempt from property taxation, provided, however, that the corporation shall, in lieu of property taxes, pay to any governmental body authorized to levy local property taxes the amount which would be assessable as local property taxes on the real and tangible personal property if such property were the property of a corporation defined as an "electric company" in section one of chapter one hundred and sixty-four of the General Laws. Such payments shall be due, and bear interest if unpaid, as in the case of taxes on the property of such an "electric company". For purposes of such payments in lieu of taxes, the assessors of the taxing authority shall make a valuation and assessment of the property and determine the tax that would be assessable if such property were owned by a corporation as defined as an "electric company". Payments in lieu of taxes made hereunder shall be treated in the same manner as taxes for purposes of all procedural and substantive provisions of law, including appeals, now and hereinafter in effect applicable to assessment and taxation of real and personal property, collection and abatement of such taxes and the raising of public revenues.

St.1975, c. 775, § 8.

### **§ 1-9. Bonds; terms and conditions; signature; interim receipts**

(a) The corporation may, subject to the approval of the department under this act, borrow money by the issue of its bonds for any of its corporate purposes. Bonds may be issued hereunder as mortgage bonds, as general obligations of the corporation or as special obligations payable solely from particular funds. Without limiting the generality of the foregoing, these bonds may be issued for project costs, prepayment of fuel, transmission or transportation of fuel, or for the corporation's share of project costs of energy facilities or long-term purchases of rights to use energy facilities which may include interest before and during the carrying out of any project and for a reasonable period after that time, prepayments under contracts for the purchase of energy or services related thereto, stranded investment costs, early termination costs of any energy project,

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5/22/2012

decommissioning costs, reserves for debt service or other capital or current expenses that may be required by a trust agreement or resolution securing bonds, and all other expenses incidental to the determination of the feasibility of any project or to the carrying out of the project or to the placing of the project in operation.

(b) The bonds of each issue shall be dated, shall bear interest at such rate or rates, shall mature at such time or times, as may be determined by the corporation, and may be made redeemable before maturity at the option of the corporation at such price or prices and under such terms and conditions as may be fixed by the corporation prior to the issue of the bonds. The corporation shall determine the form of the bonds, including interest coupons to be attached thereto, and the manner of execution of the bonds, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the commonwealth.

(c) In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until after such delivery. The corporation may also provide for authentication of bonds by a trustee or fiscal agent.

(d) The bonds may be issued in coupon or in registered form, or both, as the corporation may determine and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The corporation may sell its bonds in such manner, either at public or private sale, and for such price, as it may determine will best effect the purposes of this act.

(e) The corporation may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The corporation may also provide for the replacement of any bonds which shall have become mutilated or shall have been destroyed or lost.

St.1975, c. 775, § 9. Amended by St.2008, c. 535, § 12, eff. April 16, 2009.

#### **§ 1-10. Bond security; trust agreement or resolution; fees and charges; disposition of proceeds**

(a) In the discretion of the corporation, but subject to the terms of the department's approval, any bonds issued under this act may be secured by a resolution of the board or by a trust agreement between the corporation and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the commonwealth. This trust agreement shall be in a form and executed in a manner that may be determined by the corporation. The trust agreement or resolution may pledge or assign, in whole or in part, the revenues and other moneys held or to be received by the corporation, including the revenues from any facilities existing when the pledge or assignment is made, and any contract or other rights to receive the same, whether then existing or later coming into existence and whether then held or later acquired by the corporation, and the proceeds thereof. Such trust agreement or resolution may contain such provisions for protecting and enforcing the rights, security and remedies of the bondholders as may be reasonable and proper and not in violation of law, including, without limiting the generality of the foregoing, provisions defining defaults and providing for remedies in the event

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5/22/2012

thereof which may include (i) the acceleration of maturities and covenants setting forth duties of, and limitations on, the corporation in relation to the acquisition, construction, improvement, enlargement, alteration, equipping, furnishing, maintenance, use, operation, repair, insurance and disposition of property, the custody, safeguarding, investment and application of moneys, the issue of additional bonds, the fixing, revision and collection of fees and charges, the use of any surplus bond proceeds, the establishment of reserves, and the making and amending of contracts and (ii) provision for the trustee under such a trust agreement to take possession and control of the business and properties of the corporation, to operate and maintain the same, to make any necessary repairs, renewals and replacements in respect thereof, and to fix, revise and collect fees and charges.

(b) The corporation is authorized to fix, revise and collect fees and charges for energy and other services, facilities and commodities furnished or supplied by it. Such fees and charges shall not be subject to supervision or regulation by any commission, board, bureau or agency of the commonwealth or any municipality or other political subdivision of the commonwealth, but such fees and charges shall be subject to the terms of any applicable contracts. For as long as any bonds of the corporation are outstanding and unpaid, such fees and charges shall be so fixed so as to provide revenues at least sufficient to pay all costs and expenses in connection with the operation and maintenance of energy facilities and all necessary repairs, replacements and renewals thereof, to pay when due the principal of, premium if any, and interest on all bonds of the corporation, to create and maintain reserves as may be required by any trust agreement or resolution securing bonds, and to pay any and all amounts which the corporation may be obligated to pay by law or contract.

(c) It shall be lawful for any bank or trust company to act as a depository or trustee of the proceeds of bonds or of revenues or other moneys under any such trust agreement or resolution and to furnish such indemnifying bonds or to pledge such securities as may be required by the corporation. Any such trust agreement or resolution may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the corporation may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as current operating expenses. The pledge by any such trust agreement or resolution shall be valid and binding and shall be deemed continuously perfected for the purposes of the Uniform Commercial Code [FN1] from the time when the pledge is made; the revenues, moneys, rights and proceeds so pledged and then held or thereafter acquired or received by the corporation shall immediately be subject to the lien of such pledge without any physical delivery or segregation thereof or further act; and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the corporation, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the corporation, and no filing need be made under the Uniform Commercial Code.

St.1975, c. 775, § 10. Amended by St.2008, c. 535, §§ 13 to 15, eff. April 16, 2009.

## **§ 1-11. Refunding bonds**

The corporation may issue refunding bonds for the purpose of paying any of its bonds at maturity or upon acceleration or redemption, subject to the approval of the department under this act. The refunding bonds may be issued at such time prior to the maturity or redemption of the refunded bonds as the corporation deems to be in the public interest. The refunding bonds may be issued in

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5/22/2012

sufficient amounts to pay or provide the principal of the bonds being refunded, together with any redemption premium thereon, any interest accrued or to accrue to the date of payment of such bonds, the expenses of issue of the refunding bonds, the expenses of redeeming the bonds being refunded, and such reserves for debt service or other capital or current expenses from the proceeds of such refunding bonds as may be required by a trust agreement or resolution securing bonds. The issue of refunding bonds, the maturities and other details thereof, the security therefor, the rights of the holders thereof, and the rights, duties and obligations of the corporation in respect of the same shall be governed by the provisions of this act relating to the issue of bonds other than refunding bonds insofar as the same may be applicable.

St.1975, c. 775, § 11.

### **§ 1-12. Debt of commonwealth, cities or towns**

Bonds issued under the provisions of this act shall not be deemed to be a debt of the commonwealth or of any city or town or a pledge of the faith and credit of the commonwealth or of any city or town. All bonds shall contain on the face thereof that neither the commonwealth nor any city or town shall be obligated to pay the same and that neither the faith and credit nor the taxing power of the commonwealth or of any city or town is pledged to the payment of the principal of or interest on the bonds. Every bond shall also recite whether it is a general obligation of the corporation or a special obligation thereof payable solely from particular funds pledged to its payment.

St.1975, c. 775, § 12.

### **§ 1-13. Trust funds**

All moneys received pursuant to the provisions of this act, whether as proceeds from the sale of bonds or notes or as revenues or otherwise, shall be deemed to be trust funds to be held and applied solely as provided in this act.

St.1975, c. 775, § 13.

### **§ 1-14. Enforcement of bondholders' rights**

Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under a trust agreement or resolution securing the same, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may bring suit upon the bonds or coupons and may, either at law or in equity, by suit, action, mandamus, or other proceedings which may include appointment of a receiver to take possession and control of the business and properties of the corporation, to operate and maintain the same, to make any necessary repairs, renewals and replacements in respect thereof, and to fix, revise and collect fees and charges, protect and enforce any and all rights under the laws of the commonwealth or granted hereunder or under such trust agreement or resolution, and may enforce and compel the performance of all duties required by this act or by such trust agreement or resolution to be performed by the corporation or by any officer thereof.

St.1975, c. 775, § 14.



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5/22/2012**§ 1-15. Legal investment in bonds**

Bonds issued under the provisions of this act are hereby made securities in which all public officers and public bodies of the commonwealth and its political subdivisions, all insurance companies, trust companies in their commercial departments, savings banks, co-operative banks, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the commonwealth for any purpose for which the deposit of bonds or obligations of the commonwealth is now or may hereafter be authorized by law.

St.1975, c. 775, § 15.

**§ 1-16. Bonds; investment securities**

Notwithstanding any of the provisions of this act or any recitals in any bonds issued under this act, all such bonds shall be deemed to be investment securities under the Uniform Commercial Code.

St.1975, c. 775, § 16.

**§ 1-17. Amount of bonds; approval; hearing**

The corporation shall issue only such amount of bonds as the department may from time to time vote is reasonably necessary for the proposed purpose of such issue, and such approval shall be subject to such reasonable terms and conditions as the department may determine to be in the public interest; provided, however, that where such bonds are payable at periods of not more than one year after the date of issue, approval of such issuance by the department shall not be required. The department shall render a decision upon an application for such issue, after notice and hearing, within thirty days after the final hearing thereon. The decision shall be in writing, shall assign the reasons therefor, shall, if approving such issue, specify the principal amount of bonds which are approved to be issued and shall, within seven days after it has been rendered, be filed in the office of the department.

St.1975, c. 775, § 17. Amended by St.1981, c. 105.

**§ 1-18. Bonds issued without obtaining consent**

Bonds may be issued under this act without obtaining the consent of any department, division, commission, board, bureau or agency of the state, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required therefor by this act, and the validity of and security for any bonds issued by the corporation shall not be affected by the existence or non-existence of any such consent or other proceedings, conditions or things.

St.1975, c. 775, § 18.

**§ 1-19. Law applicable**

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5/22/2012

(a) Section eleven A 1/2 of chapter thirty A and section twenty-three C of chapter thirty-nine of the General Laws, relating to meetings of public boards, and section ten of chapter sixty-six relating to the availability of public records as defined in clause twenty-sixth of section seven of chapter four of the General Laws shall apply to the corporation, provided, however, that the corporation shall not be obligated to disclose trade secrets or commercial or financial information if the corporation determines that such disclosure would adversely affect its ability to conduct business in relation to other suppliers of electric power and energy.

(b) Sections sixty-one and sixty-two of chapter thirty of the General Laws relating to the environmental impact of works, projects or activities conducted by authorities of the commonwealth shall apply to the corporation.

(c) Sections sixty-nine G to sixty-nine R, inclusive, seventy-one to seventy-five, inclusive, seventy-nine, one hundred and twenty-five A and one hundred and twenty-seven of chapter one hundred and sixty-four and sections twenty-one to twenty-two N, inclusive, and twenty-five to forty-one, inclusive, of chapter one hundred and sixty-six of the General Laws shall apply to the corporation, to the extent the provisions of the same are apt, in the same manner and to the same extent as if it were a corporation defined as an "electric company" in section one of chapter one hundred and sixty-four of the General Laws. Sections fifty-six D and ninety-four A of said chapter one hundred and sixty-four shall not apply to contracts for the purchase of energy or capacity and output of one or more specific energy facilities entered into with the corporation by a city or town having a municipal electric department established under said chapter one hundred and sixty-four or a special act or by an "electric company" as defined in section one of said chapter one hundred and sixty-four. Except as otherwise expressly provided in this act, the provisions of said chapter one hundred and sixty-four shall not apply to the corporation.

(d) The corporation may take such action as it deems appropriate to enable its employees to come within the provisions and obtain the benefits of the federal social security act. If the employees of the corporation shall come within the provisions of said social security act, their employment shall be included in the term "employment" as used in sections one to seven, inclusive, of chapter one hundred and fifty-one A of the General Laws.

(e) The corporation shall have the authority to bargain collectively with labor organizations representing employees of the corporation and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances, and the submission of grievances and disputes to arbitration. Chapters one hundred and fifty A, one hundred and fifty B and one hundred and fifty C of the General Laws shall apply to the corporation, to the extent the provisions of the same are apt, in the same manner and to the same extent as a private corporation. The employees of the corporation shall be exempt from the operation of chapter thirty-one of the General Laws.

(f) Wherever the corporation has primary responsibility for the construction or operation of any energy facility within the commonwealth, no contract for construction, reconstruction, alteration, remodeling, repair or demolition of the facility or equipment, supplies or materials for the facility, except in cases of special emergency involving the health, safety or welfare of the people or their property, shall be awarded unless proposals for the same have been invited by advertisement in a newspaper published in the city of Boston, such publication to be at least one week before the time specified for the opening of said proposals. Such advertisement shall state the time and place for opening the proposals in answer to said advertisement, and shall reserve to the corporation the right to reject any and all such proposals. All such proposals shall be opened in public. No bid or contract shall be split or divided for the purpose of evading these requirements.

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Sections twenty-six to twenty-nine, inclusive, and sections forty-four A to forty-four L, inclusive, of chapter one hundred and forty-nine and sections thirty-nine F to thirty-nine M, inclusive, of chapter thirty of the General Laws shall not apply to the corporation.

(g) Legislative consent is hereby given to the application to the corporation of the laws of other states with respect to taxation, payments in lieu of taxes, and the assessment thereof and to the application of regulatory and other laws of other states and of the United States in relation to the acquisition, ownership and operation by the corporation of energy facilities situated without the commonwealth pursuant to the authority granted in this act.

St.1975, c. 775, § 19. Amended by St.1979, c. 115; St.2008, c. 535, §§ 16 to 19, eff. April 16, 2009.

### **§ 1-20. Annual report**

The corporation shall submit an annual report in writing concerning its operation to the member cities and towns, the department, the governor and the general court within ninety days following the close of its fiscal year.

St.1975, c. 775, § 20.

### **§ 1-21. Termination or dissolution; vesting of assets**

Upon termination or dissolution of the corporation, the title to all funds and other properties owned by it which remain after payment or the making of provision for payment of all bonds and other obligations of the corporation shall vest in the member cities and towns as provided in this act and the by-laws of the corporation.

St.1975, c. 775, § 21.

### **§ 1-22. Priority of act**

The provisions of this act shall be deemed to provide an additional, alternative and complete method for the doing of the things authorized hereby and shall be deemed and construed to be supplemental and additional to, and not in derogation of, powers conferred upon the corporation, member and non-member cities and towns and others by law, provided, however, that insofar as the provisions of this act are inconsistent with the provisions of any general or special law, administrative order or regulation or any limitation imposed by a corporate or municipal charter, the provisions of this act shall be controlling.

St.1975, c. 775, § 22.

### **§ 1-23. Liberal construction**

This act, being necessary for the welfare of the commonwealth and its inhabitants, shall be liberally construed to effect the purposes hereof.

St.1975, c. 775, § 23.

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5/22/2012

**§ 1-24. Severability**

The provisions of this act are severable, and if any provision hereof shall be held invalid in any circumstances, such invalidity shall not affect any other provisions or circumstances. This act shall be construed in all respects so as to meet all constitutional requirements. In carrying out the purposes and provisions of this act, all steps shall be taken which are necessary to meet constitutional requirements whether or not such steps are required by statute.

St.1975, c. 775, § 24.

**§ 1-25. Termination**

The Massachusetts Municipal Wholesale Electric Company shall continue its existence as organized under the provisions of chapter one hundred and sixty-four of the General Laws until the board of nine directors are elected and appointed as provided in section four (a ) of this act, and thereupon, upon acceptance of this act by the trustees of the Massachusetts Municipal Wholesale Electric Company Trust and by vote of the then board of directors of the corporation elected in accordance with the provisions of chapter one hundred and sixty-four of the General Laws, the trust shall terminate and all shares of capital stock in the corporation shall be deemed to have been redeemed and cancelled, and no shares shall thereafter be issued or reissued by the corporation.

St.1975, c. 775, § 25.



# **EXHIBIT**

# **2**

Massachusetts General Laws Annotated Currentness

## Part I. Administration of the Government (Ch. 1-182)

## ■ Title XXII. Corporations (Ch. 155-182)

## → Chapter 164A. New England Power Pool (Refs &amp; Annos)

## → § 1. Definitions

The following words as used in this chapter shall, unless the context otherwise requires, have the following meanings:

“Department”, the department of public utilities.

“Domestic electric utility”, an electric utility organized under the laws of, or having its principal place of business in the commonwealth, including the Massachusetts Bay Transportation Authority for the purposes specified in chapter one hundred and sixty-one A.

“Electric power facilities”, or “electric power facility”, generating units rated twenty-five megawatts or above and transmission facilities rated sixty-nine kilovolts or above which have been designated in writing as pool or pool-planned facilities under the New England power pool agreement, when provision is made for such designation in said agreement, and which, if to be financed in whole or in part under the provisions of sections eleven to twenty-two, inclusive, are approved by the department, after notice and opportunity for hearing, as consistent with the power needs of the commonwealth. A copy of the designation shall be placed on file with the department.

“Electric utility”, any individual or entity or subdivision thereof, private, governmental or other, including a municipal electric department, wherever resident or organized, primarily engaged in the generation and sale or the purchase and sale of electricity, or the transmission thereof, for ultimate consumption by the public.

“Foreign electric utility”, any electric utility other than a domestic electric utility.

“Member of the New England power pool”, an electric utility which is a participant in the New England power pool created by a New England power pool agreement.

“Municipal electric department”, an electric department or lighting plant of a city or town of the commonwealth, which department or plant is subject to the provisions of chapter one hundred sixty-four. Except where otherwise specifically provided, a municipal electric department may exercise any of its powers or authority contained in this chapter through its municipal light board. Before such a municipal electric department exercises any power under this chapter, this chapter shall be accepted by a majority vote, as defined in section one of chapter forty-four of the municipality.

“Municipal light board”, the municipal light board or commission, municipal gas and electric commission or similar body; the mayor or city manager, as the case may be, of a city having no such body; or the selectmen of a town having no such body.

“New England power pool agreement”, a contractual agreement between electric utilities which is open to all electric utilities operating in New England, which provides for cooperation and joint participation in developing and implementing a regional bulk power supply of electricity, which constitutes the central dispatching and primary

pooling arrangement for electric utilities in the New England states, which has been signed by eligible electric utilities whose annual peak loads in the year preceding the year in which the agreement is executed aggregate more than seventy-five per cent of the annual peak loads for all of New England, and which has been placed on file with the department for informational purposes and permitted to become effective under the Federal Power Act [FN1] by the Federal Power Commission.

“New England power pool”, the relationship or organization created by a New England power pool agreement.

[FN1] 16 U.S.C.A. § 791a et seq.

→ **§ 2. Agreement provisions authorized**

The New England power pool agreement may provide for, among other things:

- (a) the pooling of power;
- (b) coordination of planning, construction and operation and the manner of establishing and enforcing standards and other requirements;
- (c) delegation of authority to administrative committees;
- (d) amendments of the agreement by vote or other action of the participants or of committees in the manner specified therein, subject to the right of any participant to withdraw in the event of its nonconcurrence with an amendment;
- (e) appointment of representatives to act for one or more participants in regard to amendments and other matters;
- (f) the allocation of pool expenses among participants;
- (g) the provision of new, altered, improved or enlarged facilities by the participants subject to such proceedings as may be required by law for undertaking or financing any such project;
- (h) limitations on other actions by the participants which might be inconsistent with the agreement or might adversely affect its implementation;
- (i) arbitration; and
- (j) other matters deemed necessary or desirable in order to carry out the purpose of the agreement.

→ **§ 3. Additional powers of member domestic electric utilities**

Notwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities or any limitation imposed by a corporate or municipal charter, but subject to the conditions set forth in this chapter, a domestic electric utility which is a member of the New England power pool shall, in connection with its participation in such pool, have the following additional powers:

- (a) jointly or separately to plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within or without the

commonwealth or the product or service therefrom or securities issued in connection with the financing of electric power facilities or portions thereof; and

(b) to enter into and perform contracts for such joint or separate planning, financing, construction, purchase, operation, maintenance, use, sharing costs of, ownership, mortgaging, leasing, sale, disposal of or other participation in electric power facilities, or portions thereof, within or without the commonwealth, or the product or service therefrom, or securities issued in connection with the financing of electric power facilities or portions thereof, including, without limitation, contracts for the payment of obligations imposed without regard to the operational status of a facility or facilities and contracts with domestic or foreign electric utilities for the sale or purchase of electricity from an electric power facility or facilities for long or short periods of time or for the life of a specific electric generating unit or units; provided, however, that nothing in this section shall be construed to authorize a domestic electric utility to sell electricity at wholesale or retail within or without this commonwealth except (i) as otherwise authorized by or under its charter or the general or special laws of this commonwealth other than by this chapter; (ii) in connection with sales of economy, backup and other energy pursuant to a New England power pool agreement; and (iii) for any sale or sales of capacity and related energy from a specifically identified generating unit which is an electric power facility.

→ **§ 4. Additional powers of member foreign electric utilities**

Notwithstanding any contrary provision of any general or special law relating to the powers and authorities of foreign electric utilities, but subject to the conditions set forth in this chapter, a foreign electric utility which is a member of the New England power pool shall, in connection with its participation in such pool, have in addition the power jointly with one or more other electric utilities, including at least one domestic electric utility, to construct, purchase, operate, maintain, use, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within this commonwealth or the product or service therefrom; provided, however, that nothing in this section shall be construed to authorize a foreign electric utility to sell electricity at wholesale or retail within this commonwealth except (i) as otherwise authorized by or under the general or special laws of this commonwealth other than by this chapter; (ii) in connection with sales of economy, backup and other energy pursuant to a New England power pool agreement; and (iii) for any sale or sales of capacity and related energy from a specifically identified generating unit which is an electric power facility.

→ **§ 5. Acquisition or ownership of interests in electric power facilities; tenancy in common; surrender or waiver of right of partition; validity and enforceability**

If any domestic or foreign electric utility acquires or owns an interest as a tenant in common with one or more other domestic or foreign electric utilities in any electric power facilities in this commonwealth, the surrender or waiver by any such owner of such property of its right to partition such property for a period not exceeding the period for which the property is used or useful for electric utility purposes shall not be invalid or unenforceable by reason of the length of such period, or as unduly restricting the alienation of such property.

→ **§ 6. Contracts; term; effect of termination of pool or agreement; exclusion from municipal debt for borrowing purposes**

Contracts under sections three and four (i) may be for a term or for an indefinite period and shall, unless otherwise provided therein, not be deemed terminated or to have been unauthorized by reason of termination of the New England power pool or of any membership therein or invalidation of any of the provisions of the New England power pool agreement; (ii) may provide for the sale or other disposition of by-products of electric power facilities; and (iii) may contain provisions for arbitration, delegation and other matters deemed necessary or desirable to carry out their purposes. Any party, public or private, desiring to purchase or use by-products of electric power facilities may enter into contracts therefor for short or long terms. Subject to clause (i) of paragraph (1) of subsection (b) of

section nine, the obligation of a city or town under contracts referred to in this section shall not be included in the debt of the city or town for the purpose of ascertaining its borrowing capacity.

→ **§ 7. Assessment and taxation of foreign electric utilities**

(a) A foreign electric utility shall be subject to assessment and taxation in the same manner and to the same extent as is provided by law with respect to a corporation defined as an “electric company” in section one of chapter one hundred sixty-four; except that a foreign electric utility which is a governmental entity shall, with respect to payments for franchise taxes to the commonwealth plus any other taxes not covered by subsections (b) and (d) of section eight, make payments in lieu of such taxes in the manner provided by subsection (c) of said section eight.

(b) Any foreign electric utility other than a governmental entity which owns or operates any electric power facilities in this commonwealth shall, if a corporation, be considered a “utility corporation” as defined in section fifty-two A of chapter sixty-three and subject to taxation under that section notwithstanding the limitations of clause (ix) thereof.

→ **§ 8. Taxation of municipal electric departments owning interests in electric power facilities; definitions; exemptions; payments in lieu of taxes; application of other laws**

(a) Notwithstanding the definition of “electric power facilities” in section one, for the purposes of this section only, “electric power facilities” with respect to municipal electric departments shall mean generating units rated twenty-five megawatts or above and transmission facilities rated sixty-nine kilovolts or above which (i) have been designated as pool or pool-planned facilities under the New England power pool agreement or (ii) are financed in whole or in part under the provisions of sections eleven to twenty-two, inclusive, and with respect to foreign electric utilities which are governmental entities shall mean generating units rated twenty-five megawatts or above and transmission facilities rated sixty-nine kilovolts or above. For the purposes of this section no such designation under clause (i) shall be made except with the written consent, or upon written application, of the electric utility or utilities having primary responsibility for the construction or operation of the facility being so designated. The provisions of this section for payments in lieu of taxes shall not apply to electric power facilities constructed or substantially under construction by a municipal electric department prior to September thirtieth, nineteen hundred and seventy-three. Taxes and payments in lieu of taxes by municipal electric departments shall be treated as operating expenses except that taxes and payments in lieu of taxes with respect to the period prior to commercial operation of a facility may be treated by the municipal light board as construction costs.

(b)(i) Interests in electric power facilities, real and personal, situated within the commonwealth and owned by any municipal electric department shall be exempt from property taxation, provided, however, that a municipal electric department which owns or has an interest in such electric power facilities shall, in lieu of property taxes, pay to any governmental body authorized to levy property taxes the amount which would be assessable as taxes on the real and personal property if such property were the property of a corporation defined as an “electric company” in section one of chapter one hundred sixty-four. Such payments shall be due, and bear interest if unpaid, as in the case of taxes on the property of such an “electric company”. For purposes of such payments in lieu of taxes, the assessors of the taxing authority shall make a valuation and assessment of the property and determine the tax that would be assessable if such property were owned by a corporation so defined as an “electric company”. Where property in respect to which in lieu payments are to be made hereunder is situated in a municipality that owns said property, any ten inhabitants of said municipality may, within three months after said assessment and determination, appeal the same to the appellate tax board or, if said municipality fails to make an assessment or determination or otherwise to collect the tax, may petition the superior court in equity for declaratory or other appropriate relief for failure to act as aforesaid.

(ii) Payments in lieu of taxes made hereunder shall be treated in the same manner as taxes for purposes of all pro-



cedural and substantive provisions of law, including appeals, now and hereafter in effect applicable to assessment and taxation of real and personal property, collection and abatement of such taxes and the raising of public revenues.

(c) There is hereby imposed on each municipal electric department an annual payment in lieu of taxes equal to the then equalization percentage of (A) the original cost less depreciation of its direct ownership interest in electric power facilities located within the commonwealth, excluding any portion thereof represented by any investment by others as described in (B), and (B) in the event a municipal electric department has an interest other than direct ownership described in (A), the amount of its investment less any amortization thereof through ownership of securities, prepayment or similar arrangements in such facilities under this chapter, all as at the end of the municipal electric department's last fiscal year. The equalization percentage shall be determined by the commissioner of corporations and taxation on or prior to July first of each year and shall be the percentage resulting from the fraction, the numerator of which shall be the aggregate amount paid in the preceding calendar year by all domestic electric utilities which are not municipal electric departments for franchise taxes paid to the commonwealth, plus any other taxes not covered by subsections (b) or (d) of this section paid to the commonwealth or any subdivision thereof and the denominator of which shall consist of the aggregate amount of net utility plant, as of the end of the preceding calendar year, of all domestic electric utilities which are not municipal electric departments; the amount of said taxes and net utility plant to be obtained by the commissioner from the annual reports for said preceding calendar year filed with the department of telecommunications and energy by said domestic electric utilities. If such taxes are reported for a period other than the calendar year, or if such net utility plant is reported as of a date other than the end of a calendar year, the commissioner shall use such period or date as is reasonable and practicable with such adjustments as may be necessary to carry out the purposes of this section. In the event a municipal electric department uses a fiscal year longer or shorter than twelve months, the commissioner shall appropriately adjust the payment to be made under this section. Such payment is to be in lieu of a tax upon the franchise of the municipal electric department to own or operate directly or indirectly such electric power facilities and is to be in accordance with the following provisions:

(1) Every municipal electric department subject to this section shall annually, on or before the fifteenth day of the third month following the close of its fiscal year, make a return to the commissioner of corporations and taxation sworn to by its manager, a majority of its commissioners, or in their absence or incapacity by any other principal officer, in such form as said commissioner with the approval of the state tax commission shall prescribe, stating such information as said commissioner may require for the determination of the payment imposed by this subsection. Said payment shall be due and payable on or before the due date of the return.

(2) All provisions of chapter sixty-three relative to the assessment, collection, payment, abatement, verification and administration of taxes, including penalties, applicable to domestic business corporations, as defined in section thirty of chapter sixty-three, shall, so far as pertinent, be applicable to payments under this subsection.

(3) All revenue collected under the provisions of this section shall be credited to the General Fund.

(d) In connection with all sales, use, excise and other taxes imposed with respect to electric power facilities, materials included or to be included therein, or energy produced thereat and sold at wholesale therefrom under authority of this chapter, by any laws of the commonwealth and not covered by subsections (b) and (c), a municipal electric department participating in an electric power facility by ownership, prepayment or contract for purchase of capacity and related energy from a specifically identified generating unit shall be subject to payments in lieu of such taxes in the same manner and under the same procedures as a corporation defined as an "electric company" in section one of chapter one hundred sixty-four is subject to such taxes and shall be limited to only those exemptions as are available to such a corporation.

(e) Legislative consent is hereby given to the application of the laws of other states with respect to taxation, payments in lieu of taxes, and the assessment thereof to any domestic electric utility which has acquired or has an interest in an electric power facility, real or personal, situated without the commonwealth, or which is owning or

operating electric power facilities without the commonwealth pursuant to authority granted in this chapter.

→ **§ 9. Application of other laws to pool members; rate base factors**

(a) Except as otherwise expressly provided in this chapter, a domestic electric utility shall not be exempt from nor lose the benefits of any applicable laws of the commonwealth solely by reason of being a member of the New England power pool.

(b)(1) In addition to those sections of chapter one hundred sixty-four already applicable to a city or town owning or acquiring a municipal electric department, there shall be applicable to any municipal electric department which acquires or is acquiring or has any interest in an electric power facility, and so long as it retains such interest in such facility or has outstanding notes or bonds issued under this chapter, the following additional sections of said chapter: fourteen, seventeen A, seventy-one, seventy-two, seventy-two A, seventy-three, seventy-four, seventy-five, seventy-six, eighty-seven, eighty-eight, ninety and ninety-one; provided, however, that:

(i) section fourteen of chapter one hundred sixty-four shall be applicable only if the financing consists of revenue bonds or notes in anticipation thereof, issued pursuant to sections eleven to twenty-two, inclusive; except with respect to refunding bonds issued under section twenty-one, the department in rendering its decision shall, in addition to the other requirements of said section fourteen of said chapter one hundred sixty-four, approve only such issue as the department finds is appropriate to finance an electric power facility necessary to supply the load plus reserve requirements created by the municipal electric department's retail customers, and by such wholesale customers as may have existed on April first, nineteen hundred and seventy-three, said load plus reserve requirements to be forecast by the department at a time three years beyond the scheduled date for commencement of commercial operation of the facility; in evaluating the ability of the municipal electric department to supply its load plus reserve requirements at said time, the department shall deduct from these requirements all capacity in other generating units to which the municipal electric department will then be entitled by ownership or contract, including any contracts for the purchase of electricity to be in force at said time;

(ii) the provisions of sections forty to sixty-nine, inclusive, of chapter one hundred sixty-four shall continue to be applicable to any such municipal electric department except insofar as such provisions are inconsistent with other provisions of this chapter or of chapter one hundred sixty-four herein made applicable to such municipal electric department;

(iii) any law, municipal by-law or ordinance relating to contracts awarded by municipal electric departments for construction, reconstruction, alteration, remodeling, repair, demolition, equipment, supplies or materials shall not be applicable to contracts related to electric power facilities wherever the utility or utilities having primary responsibility for the construction or operation of the facility are not municipal electric departments;

(iv) the provisions of sections seventy-one to seventy-four, inclusive, seventy-six, eighty-seven, eighty-eight, ninety and ninety-one of chapter one hundred sixty-four shall be applicable to municipal electric departments only with respect to electric power facilities; provided, however, that under section seventy-two of said chapter one hundred sixty-four a municipal electric department shall be not authorized to take by eminent domain any lands or interest therein of another electric utility except to the same extent that an "electric company", as defined in section one of said chapter one hundred sixty-four, may have such authority; and

(v) the provisions of section seventy-five of chapter one hundred sixty-four shall be applicable to electric power facilities outside the retail territory of the municipal electric department only.

(2) Sections twenty-one to twenty-two N, inclusive, and twenty-five to forty-one, inclusive, of chapter one hundred sixty-six shall, to the extent not otherwise applicable to a municipal electric department, be applicable to such

electric department only with respect to electric power facilities.

(c) Legislative consent is hereby given to the application, pursuant to authority granted in this chapter, or regulatory and other laws of other states and of the United States to any domestic electric utility which owns or operates electric power facilities without the commonwealth.

(d) In addition to ownership, sole or joint, in electric power facilities, the department shall include in the rate base of a domestic electric utility any investments, including securities, prepayments, retained earnings or other investments, acquired by it in connection with its participation in an electric power facility.

**→ § 10. Foreign electric utilities; ownership or operation of electric power facilities in commonwealth; notice, annual report and information to department; financing; application of laws**

(a) Each foreign electric utility which is acting pursuant to authority granted in this chapter shall, before owning or operating any electric power facilities in this commonwealth, notify the department of the action to be taken by it; shall thereafter furnish to the department annually a copy of the annual report filed by it with the utility regulatory agency of the state of its domicile or principal locus; and shall furnish to the department from time to time such other information with respect to its activities in the commonwealth as the department may reasonable request.

(b) Any foreign electric utility which owns or operates any electric power facility in this commonwealth shall (1) be subject to sections three, three A and four of chapter one hundred eighty-one [FN1] as to matters arising out of such ownership or operation and (2) as to a foreign electric utility other than a governmental entity be further subject to the requirements of chapter one hundred sixty-four and other regulatory laws within the commonwealth with respect to any financing of its interest in such electric power facility, including any borrowing or the issuance of any notes, bonds or other evidence of indebtedness or securities of any nature, provided, however, that it shall be exempt from such further requirements of this clause (2) upon certification filed with the department by a regulatory commission of the state of domicile or principal locus of such foreign electric utility, or of the United States, that said commission has regulatory jurisdiction over financing of such foreign electric utility.

[FN1] Stricken out by St.1973, c. 844, § 1. See, now, c. 181, §§ 3, 4, 15.

**→ § 11. Revenue bonds for project costs; interim receipts or temporary bonds; issuance; agreement for consolidation of indebtedness by participating municipalities authorized**

(a) Any city or town which is a member of the New England power pool, acting by its municipal light board, when authorized by a two-thirds vote as defined in section one of chapter forty-four, may, subject to the approval of the department under this chapter, borrow money by the issue of its revenue bonds for project costs, or its share of project costs, of electric power facilities scheduled for commencement of commercial operation after January first, nineteen hundred and seventy-five. Such project costs may include all costs, whether incurred prior to or after the issue of bonds or notes hereunder, of acquisition, site development, construction, improvement, enlargement, reconstruction, alteration, machinery, equipment, furnishings, nuclear fuel, demolition or removal of existing buildings or structures, including the cost of acquiring any lands to which such buildings or structures may be moved, financing charges, interest prior to and during the carrying out of any project and for a reasonable period thereafter, planning, engineering, finance advisory and legal services, administrative expenses, prepayments under contracts made pursuant to section three or four, the funding of notes issued for project costs as hereinafter provided, such reserves for debt service or other capital or current expenses as may be required by a trust agreement or resolution securing notes or bonds, and all other expenses incidental to the determination of the feasibility of any project or to carrying out the project or to placing the project in operation.

(b) The bonds of each issue shall mature at a time or times not exceeding forty years from their dates of issue and



may be made redeemable before maturity with or without premiums. Subject to the provisions of this chapter and to the terms of the department's approval and of the authorizing vote, the board shall determine the date or dates of the bonds, their denomination or denominations, the place or places of payment of the principal and interest, which may be at any bank or trust company within or without the commonwealth, their interest rate or rates, maturity or maturities, redemption privileges, if any, and the form and other details of the bonds. The bonds shall be signed by the city or town treasurer, shall be countersigned by the mayor or city manager, as the case may be, of a city or by a majority of the selectmen of a town either manually or by facsimile, and shall bear the seal of the city or town or a facsimile thereof. Any coupons attached thereto shall bear the facsimile signature of the city or town treasurer.

(c) In case any officer whose signature or a facsimile of whose signature shall appear on any bonds, coupons or notes issued under this chapter shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until after such delivery.

(d) The bonds may be issued in coupon or in registered form, or both, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, for the reconversion into coupon bonds of bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. Subject to the provisions of this chapter and to the terms of the department's approval and of the authorizing vote, the board may sell the bonds in such manner, either at public or private sale, and for such price, as it may determine will best effect the purposes of this chapter.

(e) Prior to the preparation of definitive bonds, the city or town may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery.

(f) Upon the votes of two or more municipalities authorizing the issue of revenue bonds in conformity with the provisions of this chapter, including approval of the department as to each of said municipalities, or notes in anticipation thereof, for project costs of the same facilities, said municipalities may enter into an agreement for the consolidation of the indebtedness so authorized and the issuance of such revenue bonds, or notes in anticipation thereof, by one such municipality on behalf of itself and one or more others if the authorizing votes provide for such consolidation. The agreement for consolidation shall require the participating municipalities, severally and not jointly, to provide the funds necessary to pay their respective shares of the principal and interest on the bonds or notes so issued. Such obligation of each participating municipality shall be payable solely from the funds provided therefor under this chapter and may be secured in the same manner as bonds or notes issued separately by it under this chapter.

(g) Bonds or notes issued under this chapter by a member of the New England power pool shall not be deemed to have been unauthorized by reason of any invalidation of any of the provisions of the New England power pool agreement.

→ **§ 12. Borrowing in anticipation of bonds; temporary notes; issuance by city or town**

In anticipation of the authorization or issue of bonds under this chapter, and subject to the approval of the department under this chapter, a city or town subject to this chapter, acting by its municipal light board, when authorized by a two-thirds vote as defined in section one of chapter forty-four, may issue temporary notes. Subject to the terms of the department's approval and of the authorizing vote, the board may provide for the sale of the notes at public or private sale and may determine the interest rate or rates, maturity or maturities, redemption privileges, if any, form, denomination or denominations and place or places of payment or provide for the determination thereof by an officer or officers of the board or of the city or town. Temporary notes issued hereunder shall be executed in the manner provided herein for bonds and shall be payable within six years from their respective dates, but the principal

of and interest on notes issued for a shorter period may be renewed or paid from time to time by the issue of other notes under this chapter, provided the period from the date of issue of an original note to the maturity of any note issued to renew or pay the same debt or the interest thereon shall not exceed six years. Unless otherwise provided in the authorizing vote or in the approval of the department, the board may cause notes to be refunded to the extent provided in this chapter. To the extent of any borrowing in anticipation of bonds, the maximum maturity of an equivalent amount of the bonds shall be measured from the date of the anticipatory borrowing.

**→ § 13. Resolutions or trust agreements securing bonds or notes; provisions; limitations; deposit, investment and application of proceeds; pledges**

(a) In the discretion of the board, but subject to the terms of the department's approval and of the authorizing vote, any bonds or notes issued hereunder may be secured by a resolution of the board or by a trust agreement between the city or town and a corporate trustee, which may be any trust company or bank having the powers of a trust company within the commonwealth and such trust agreement shall be in such form and executed in such manner as may be determined by the board. Such trust agreement or resolution may pledge or assign, in whole or in part, the revenues and other moneys derived or to be derived by the city or town from its electric department or system and any contract or other rights to receive the same, whether then existing or thereafter coming into existence and whether then held or thereafter acquired by the city or town, and the proceeds thereof, but shall not convey or mortgage the plant or any part thereof. Such trust agreement or resolution may contain, with respect to the electric plant and its finances, such provisions for protecting and enforcing the rights, security and remedies of the bondholders or noteholders as may be reasonable and proper and not in violation of law, including without limiting the generality of the foregoing provisions defining defaults and providing for remedies in the event thereof which may include the acceleration of maturities and covenants setting forth duties of, and limitations on, the city or town in relation to the acquisition, construction, improvement, enlargement, alteration, equipping, furnishing, maintenance, use, operation, repair, insurance and disposition of property, the custody, safeguarding, investment and application of moneys, the issue of additional bonds or notes, the fixing, revision and collection of fees and charges, the obligations of the city or town to pay for electricity used by it, the use of any surplus bond or note proceeds, the establishment of reserves, and the replacement of bonds, notes or coupons which shall become mutilated or be destroyed or lost. Such trust agreement or resolution may provide for the payment of debt service on general obligation bonds and notes issued by the city or town for electric purposes from the revenues or other moneys so pledged, either on a parity with any or all bonds and notes issued hereunder or otherwise. Subject to the provisions of this chapter, moneys subject to the trust agreement or resolution shall be held, invested and applied as provided therein, provided that moneys not deposited in trust with a corporate trustee shall be in the custody of the city or town treasurer. Moneys to be applied pursuant to the trust agreement or resolution shall be deemed appropriated for the purposes to which they are to be so applied.

(b) It shall be lawful for any bank or trust company to act as a depository or trustee of the proceeds of bonds or notes or of revenues or other moneys under any such trust agreement or resolution and to furnish such indemnifying bonds or to pledge such securities as may be required by the trust agreement or resolution. Any such trust agreement or resolution may set forth the rights and remedies of the bondholders or noteholders and of the trustee, and may restrict the individual right of action by bondholders or noteholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as current operating expenses. Debt service on bonds and notes issued hereunder and sums required to be reserved from revenues pursuant to such trust agreement or resolution shall, to the extent not otherwise provided, be included in the requirements of the sinking fund or serial debt of the plant for the purposes of sections fifty-seven and fifty-eight of chapter one hundred sixty-four, provided that sums so reserved for renewals in excess of ordinary repairs, extensions, reconstruction, enlargements and additions shall be in lieu of an equivalent allowance for depreciation. The pledge by any such trust agreement or resolution shall be valid and binding and shall be deemed continuously perfected for the purposes of the Uniform Commercial Code [FN1] from the time when the pledge is made; the revenues, moneys, rights and proceeds so pledged and then held or thereafter acquired or received by the city or town shall immediately be subject to the lien of such pledge without any physical delivery or segregation thereof or further act; and the lien of any such pledge shall be valid and

binding as against all parties having claims of any kind in tort, contract or otherwise against the city or town, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the board, and no filing need be made under the Uniform Commercial Code.

[FN1] Chapter 106, § 1-101 et seq.

→ **§ 14. Proceeds of bonds or notes issued and moneys governed by trust agreement or resolution; deposit or investment**

Subject to the trust agreement or resolution, the proceeds of bonds or notes issued under this chapter and any other moneys governed by the trust agreement or resolution may be deposited or invested in demand deposits, time deposits or savings deposits in banks which are members of the Federal Deposit Insurance Corporation [FN1] or in obligations issued or guaranteed by the United States of America or by any agency or instrumentality thereof or as may be provided by any other applicable law.

[FN1] See 12 U.S.C.A. § 1811 et seq.

→ **§ 15. Bonds and notes issued; payment; liability of city or town limited; exclusion from municipal debt for borrowing purposes**

The bonds and notes issued under this chapter shall be payable solely from the funds provided therefor under this chapter, the liability of the city or town from other funds being limited to obligations undertaken by it to pay for the electricity used by it, and a statement to this effect shall be included on the face of such bonds and notes. Subject to the provisions of clause (i) of paragraph (1) of subsection (b) of section nine, the bonds and notes and such obligations shall not at any time be included in the debt of the city or town for the purpose of ascertaining its borrowing capacity.

→ **§ 16. Receipts of city or town under this chapter to be held and applied in trust**

All moneys received by the city or town under this chapter shall be deemed to be trust funds to be held and applied solely as provided in this chapter.

→ **§ 17. Actions and proceedings upon bonds and notes**

Any holder of bonds or notes issued under this chapter, or of any of the coupons appertaining thereto, and the trustee under a trust agreement or resolution securing the same, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may bring suit upon the bonds, notes or coupons and may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce any and all rights under the laws of the commonwealth or granted under this chapter or under such trust agreement or resolution, and may enforce and compel the performance of all duties required by this chapter or by such trust agreement or resolution to be performed by the city or town or by any officer thereof.

→ **§ 18. Bonds and notes issued as legal investments**

Bonds and notes issued under this chapter are hereby made securities in which all public officers and public bodies of the commonwealth and its political subdivisions, all insurance companies, trust companies in their commercial departments, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them, and such bonds and notes are hereby made

obligations which may properly and legally be made eligible for the investment of savings deposits and the income therefrom in the manner provided by paragraph two of section fifty of chapter one hundred sixty-eight. Such bonds and notes are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the commonwealth for any purpose for which the deposit of bonds or obligations of the commonwealth is now or may hereafter be authorized by law.

→ **§ 19. Bonds and notes deemed investment securities**

Notwithstanding any of the provisions of this chapter or any recitals in any bonds and notes issued under this chapter, all such bonds and notes shall be deemed to be investment securities under the Uniform Commercial Code. [FN1]

[FN1] Chapter 106, § 1-101 et seq.

→ **§ 20. Bonds and notes issued; transfer, income or profit; tax exemption**

The bonds and notes issued under this chapter, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation within the commonwealth.

→ **§ 21. Refunding bonds; issuance authorized; restrictions**

Any city or town having bonds outstanding under this chapter, acting by its municipal light board, when authorized by a two-thirds vote as defined in section one of chapter forty-four, may issue refunding bonds for the purpose of paying bonds issued by it or on its behalf under sections eleven to twenty-two, inclusive, at maturity or upon acceleration or redemption, subject to the approval of the department under this chapter. The refunding bonds may be issued in sufficient amounts to pay or provide the principal of the bonds being refunded, together with any redemption premium thereon, any interest accrued or to accrue to the date of payment of such bonds, the expenses of issue of the refunding bonds, the expenses of redeeming the bonds being refunded, and such reserves for debt service or other capital or current expenses from the proceeds of such refunding bonds as may be required by a trust agreement or resolution securing bonds or notes. The refunding bonds may be issued not more than five years prior to the maturity or redemption date of bonds being refunded. The issue of refunding bonds, the maturities and other details thereof, the security therefor, the rights of the holders thereof, and the rights, duties and obligations of the city or town in respect of the same shall be governed by the provisions of this chapter relating to the issue of bonds other than refunding bonds insofar as the same may be applicable, but no bonds shall be refunded to a date later than the refunded bonds could have matured hereunder.

→ **§ 22. Bonds and notes; issuance authorized**

Bonds and notes may be issued under this chapter without the consent of any department, division, commission or agency of the commonwealth or of any political subdivision thereof and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required therefor by this chapter. The provisions of this chapter authorizing the issue of bonds and notes shall not be deemed to preclude the issue of bonds and notes under any other authority.

→ **§ 23. Zoning regulations; exemption of facilities used by electric utilities**

For the purposes of section ten of chapter forty A, an electric power facility located within the commonwealth and used or to be used by one or more domestic or foreign electric utilities pursuant to authority set forth in this chapter shall be considered a building, structure or land used or to be used by a public service corporation and each such



utility shall be considered a public service corporation.

→ **§ 24. Transmission lines of electric utilities; petition for authority to construct, use or take rights of way by eminent domain authorized**

Lines for transmission of electricity which are electric power facilities, as defined in section one, shall, irrespective of the destination of the electricity to be transmitted thereover, be lines for the transmission of electricity for which an electric utility may petition under section seventy-two of chapter one hundred sixty-four for authority to construct and use, or continue to use, or to take by eminent domain under chapter seventy-nine lands, or rights-of-way or widenings thereof.

→ **§ 25. Ownership or control of domestic electric utilities by foreign corporations; applicability of corporation law**

A domestic electric utility shall not be subject to the provisions of section ten of chapter one hundred eight-one [FN1] in the event a foreign corporation, as defined in said chapter, owns or controls a majority of the capital stock of said domestic electric utility, provided such ownership or control results from action pursuant to authority granted by this chapter.

[FN1] Stricken out by St.1973, c. 844, § 1.

→ **§ 26. Municipal electric departments; application of chapter**

With respect to municipal electric departments, this chapter shall be applicable only to such municipal electric departments as were in existence on January first, nineteen hundred and seventy-three, and to such additional municipal electric departments created after that date which comply with the following provisions:

(a) Such an additional municipal electric department shall first acquire or construct a plant for the generation, transmission or distribution of electricity only after the department, after notice and opportunity for hearing, shall have found that such acquisition or construction and the terms thereof to be consistent with the public interest and that the facilities for furnishing and distributing electricity in the territory to be served by such municipal electric department would not be diminished thereby; and

(b) The two votes required by section thirty-five or thirty-six of chapter one hundred sixty-four shall have been at meetings held not less than twelve months apart nor more than twenty-four months apart.

→ **§ 27. Construction of chapter**

This chapter shall be construed in all respects so as to meet all constitutional requirements. Except as expressly provided herein, the provisions of this chapter shall not affect the interpretation of other laws. If any provision of this chapter shall be held unconstitutional, such unconstitutionality shall not affect any other provisions, except as hereinafter set forth in this section. In the event it is finally determined by a court of competent jurisdiction that a municipal electric department is not subject, with respect to any electric power facilities financed under sections eleven to twenty-two, inclusive, to payments in lieu of taxes under paragraphs (b), (c) or (d) of section eight by reason of the unconstitutionality of any of said paragraphs, or that the borrowing limitation set forth in clause (i) of paragraph (1) of subsection (b) of section nine is unconstitutional, the municipal electric department involved shall, and any person may, file written notice of such decision with the department. Such notice shall include a statement that it is filed pursuant to this section. After such a filing the department shall not have any further authority to approve the issue of bonds under this chapter except (i) where it finds that any electric utility has, prior to such

filing, undertaken substantial expense or liability in expectation of such bond financing, or (ii) where notes have been issued, prior to such a filing, under sections eleven to twenty-two, inclusive, in anticipation of revenue bonds.

END OF DOCUMENT

# **EXHIBIT**

# **3**

**C****Effective:[See Text Amendments]**

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

**→→ § 34. Town's authority to operate gas or electric plant or community antenna television sys- tem**

A town may, in accordance with this chapter, construct, purchase or lease, and maintain within its limits, one or more plants for the manufacture or distribution of gas or electricity or for the operation of a community antenna television system for municipal use or for the use of its inhabitants. Such plants may include suitable land, structures and machinery and other apparatus and appliances for operating a community antenna television system or for manufacturing, using and distributing gas or electricity for said purposes. A town, engaged in the business of operating a community antenna television system, or of distributing gas or electricity, may, as a part of such business if an appropriation is made therefor, rent, lease, or sell for cash or credit at prevailing retail prices, install and service, within the territory served by such business, merchandise, equipment, utensils and chattels of any description, incidental or auxiliary to the operation of a community antenna television system, or to the use of gas or electricity distributed to its consumers or necessary or expedient in the protection or management of its property used in such business. Wherever apt, the provisions of this chapter and chapter forty-four which apply to the operation and maintenance of a municipal light plant shall apply also to the operation and maintenance of a community antenna television system.

CREDIT(S)

Amended by St.1937, c. 235, § 1; St.1966, c. 146; St.1973, c. 933, § 1.

Current through Chapter 102 of the 2012 2nd Annual Session

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Effective:[See Text Amendments]

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

■ Title XXII. Corporations (Ch. 155-182)

■ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 34A. Municipal street lighting service

(a) Any city or town receiving street lighting service from an electric company pursuant to a tariff which provides for the use by such municipality of lighting equipment owned by the electric company, such as lighting ballasts, fixtures, and other equipment necessary for the conversion of electric energy into street lighting service, shall have the rights with respect to such lighting equipment as set forth in this section. Such rights shall apply in the event that such municipality does not establish a municipal lighting plant in accordance with this chapter or such lighting plant is established but ownership and control of the distribution facilities needed to deliver electric energy to such lighting equipment is held and retained by the electric company serving the municipality prior to the establishment of the lighting plant. A municipality subject to the provisions of this section, at its option, upon 60 days notice to the electric company and to the department, and subject to the provisions of subsections (b) to (e), inclusive, may:

(i) convert its street lighting service from the subject tariff to an alternative tariff approved by the department providing for delivery service by the electric company of electric energy, whether supplied by the electric company or any other person, over distribution facilities and wires owned by the electric company to lighting equipment owned or leased by the municipality, and further providing for the use by such municipality of the space on any pole, lamp post, or other mounting surface previously used by the electric company for the mounting of the lighting equipment of the electric company;

(ii) purchase electric energy for use in such municipal lighting equipment from the electric company or any other person allowed by law to provide electric energy; and

(iii) acquire, or compensate the electric company for, the lighting equipment of the electric company in the municipality in accordance with subsection (b).

(b) Any municipality exercising the option to convert its street lighting service pursuant to subsection (a) shall be required to compensate the electric company for its unamortized investment, net of any salvage value obtained by the electric company under the circumstances, in the lighting equipment owned by the electric company in the municipality as of the date the electric company receives notice of such exercise pursuant to subsection (a). In meeting this requirement, the municipality may acquire all or any part of such lighting equipment of the electric company upon the payment of the unamortized investment allocable to such acquired equipment.

Upon such payment, the municipality shall have the right to use, alter, remove, or replace such acquired equipment in any way the municipality deems appropriate. In addition, the municipality may request that the electric company remove any unacquired part of such lighting equipment. Thereupon, the municipality shall pay to the electric company the cost of removal by the electric company, along with the unamortized investment allocable to such unacquired part, net of any salvage value attributable to the removed equipment.

(c) In connection with the exercise by any municipality of the option to convert its street lighting service pursuant to subsection (a), any person other than the electric company controlling the right to use space on any pole, lamp post, or other mounting surface previously used by the electric company in such municipality shall allow the municipality to assume the rights and obligations of the electric company with respect to such space for the unexpired term of any lease or other agreement under which the electric company used such space; provided, however, that in the assumption of the rights and obligations of the electric company by such a municipality, such municipality shall in no way or form restrict, impede, or prohibit universal access for the provision of electric and other services.

(d) In connection with the exercise by any municipality of the option to convert its street lighting service pursuant to subsection (a), any dispute concerning the terms of the alternative tariff, the compensation to be paid the electric company, or any other matter arising in connection with such exercise, including, but not limited to, the terms on which space is to be provided to the municipality in accordance with subsection (c), shall be resolved by the department within 60 days of any request for such resolution by the municipality or any person involved in such dispute.

(e) Notwithstanding any general or special law, rule, or regulation to the contrary, any affiliate of any electric company whose street lighting service is converted by any municipality in accordance with the provisions of this section may solicit and compete for the business of any such municipality for the provision of lighting equipment or any other service such as equipment maintenance in connection therewith.

#### CREDIT(S)

Added by St.1997, c. 164, § 196.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 34B. Replacement of existing poles**

A distribution company or a telephone company engaging in the removal of an existing pole and the installation of a new pole in place thereof shall complete the transfer of wires, all repairs, and the removal of the existing pole from the site within 90 days from the date of installation of the new pole; provided, however, that for any approved commercial or industrial construction project, the completion of which is expected to take longer than one year, said company shall be required to remove such pole within six months from the date of installation of the new pole. The owner of such pole shall notify all other users of the starting date of such removal and installation work at least 48 hours prior to the commencement of such work, and said owner shall require all other users to remove their wiring and other attachments from the poles in a timely manner.

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Added by St.1997, c. 164, § 196.

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▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 35. Vote of city to acquire plant**

A city shall not acquire such a plant until authorized by a two thirds vote of its city council, or of a majority of the commissioners if the city government consists of a commission, passed in each of two consecutive municipal years and thereafter ratified by a majority of the voters at an annual or special city election. If such a vote is not ratified, no similar vote shall be submitted for ratification within one year thereafter.

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M.G.L.A. 164 § 36

Page 1

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 36. Vote of town to acquire plant**

A town shall not acquire such a plant until authorized by a two thirds vote, taken by ballot with the use of the voting list, at each of two town meetings called therefor and held at intervals of not less than two nor more than thirteen months. If the first of such votes is favorable and the second unfavorable, or if both such votes are unfavorable, no similar vote shall be passed within two years thereafter.

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▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 37. Certification of vote of city or town to department

After a city or town has voted under section thirty-five or thirty-six, the city or town clerk shall forthwith transmit to the department a certified copy of so much of the records of the city council or of the town as relates to the result of the vote.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 38. Certification of subsequent votes**

If a city or town which has authorized the acquisition of such a plant subsequently votes to establish, purchase, reconstruct, extend or enlarge a plant, or to issue bonds, notes or certificates of indebtedness on account thereof, or to regulate the management or conduct thereof, or to adopt an ordinance or by-law relative thereto, the city or town clerk shall, within ten days after such vote, transmit to the department a certified copy thereof.

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M.G.L.A. 164 § 39

Page 1

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 39. Failure to certify vote; penalty**

A city or town clerk failing to comply with any provision of the two preceding sections shall forfeit not more than twenty-five dollars.

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Page 1

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 40. Debt incurred for establishing, purchasing, extending, etc., light plant**

A city or town which has duly voted to acquire a municipal lighting plant may incur debt as provided in section eight of chapter forty-four for establishing, purchasing, extending, enlarging, reconstructing or making extraordinary repairs to such plant within the limits of the territory within which such plant is authorized to distribute its products.

CREDIT(S)

Amended by St.1963, c. 347, § 2.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 41. Enlargement of plant**

A city or town owning such a plant shall not, except by a vote taken in the manner prescribed in section eight of chapter forty-four, reconstruct, enlarge or extend such plant. This section shall not apply to expenditures for ordinary maintenance, repair or replacement, or for new equipment necessary to generate or distribute gas or electricity to new consumers.

CREDIT(S)

Amended by St.1965, c. 180.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 42. Purchase of existing plant**

If, when a town votes to establish a municipal lighting plant, any person or municipality was, at the time of the first vote required by section thirty-five or thirty-six, engaged in generating or distributing gas or electricity for sale for lighting purposes in such town, the town may purchase of him or it, at such price and on such terms as may be agreed upon, such portion of his or its plant and property within the limits of such town as such town desires for its use and as can be agreed upon, provided, however, that no such purchase shall be consummated by a city unless approved by vote of its city council, or of its commissioners if the city government consists of a commission, or by a town unless ratified by the voters at a town meeting.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→→ **§ 43. Determination by department of purchase price; tender of deed; acquisition upon failure to tender**

If a town which votes to establish a municipal lighting plant fails, within one hundred and fifty days from the passage of the final vote required by section thirty-five or thirty-six, to agree, as to price or as to the property to be included in the purchase, with any person or municipality engaged at the time of the first vote required by said section thirty-five or thirty-six in generating or distributing gas or electricity for sale for lighting purposes in such town and electing to sell, either such town or such person or municipality may apply to the department within thirty days after the expiration of said one hundred and fifty days for a determination as to what property ought in the public interest to be included in the purchase and what price should be paid, having in view the cost of the property less a reasonable allowance for depreciation and obsolescence, and any other element which may enter into a determination of a fair value of the property so purchased, but such value shall be estimated without enhancement on account of future earning capacity or good will, or of exclusive privileges derived from rights in the public ways; and thereupon the department, after notice to the parties, shall give a hearing thereon and make the determination aforesaid. Such property shall include such portion of the property of such person or municipality within the limits of such town as is suitable for, and used in connection with, the generation or distribution of gas or electricity within such limits; provided, that such purchase shall include both a gas and electric lighting plant only if a single corporation owns or operates both such plants. Such price shall include damages, if any, which the department finds would be caused by the severance of the property proposed to be included in the purchase from other property of the owner. If any such property is subject to any mortgages, liens or other encumbrances, the department in making its determination shall provide for the deduction or withholding from the purchase price, pending discharge, of such sum or sums as it deems proper.

If within thirty days after such determination shall have been made by the department, the owner shall notify the town of its acceptance of the determination as made by the department, and within a further period of thirty days shall tender a good and sufficient deed of conveyance to the city or town clerk of the property required by the department to be purchased, and shall then place said deed in escrow, the town shall have sixty days in which to accept or reject said tender, and if it accepts shall have a further period of sixty days in which to pay to the owner the price determined as hereinbefore provided. Such acceptance or rejection in case of a city shall be by vote of its city council, or its commissioners if its government consists of a commission, and in case of a town shall be by vote at a town meeting. A rejection of the tender shall operate as a rescission of all votes theretofore passed for the establishment of a municipal lighting plant.

Should the owner not file such acceptance and tender within the time so limited, the town may proceed to construct or otherwise acquire a municipal plant without further attempt to acquire the plant of such owner or any part thereof, provided, however, that in case of a city such action is authorized by vote of its city council, or of its commissioners if its government consists of a commission, and that in case of a town such action is authorized by vote at a town meeting.

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☞ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 44. Repealed, 1929, 379, Sec. 3

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▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 45. Purchase of property in adjoining town**

If a town purchases a gas or electric lighting plant having mains, poles, wires or other distributing apparatus in an adjoining town where there is no private gas or electric lighting company, it may also purchase such mains, poles, wires or other distributing apparatus therein, subject to sections forty-two and forty-three.

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▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 46. Distribution to adjoining town**

A town which has acquired, as hereinbefore provided, mains, poles, wires or other distributing apparatus in an adjoining town may thereafter manufacture, sell and distribute gas or electricity to said adjoining town or to its inhabitants, and shall thereafter have therein the same rights and franchises and be subject to the same limitations and obligations as the vendor from whom such outlying plant was purchased would have had or to which he would have been subject had such purchase not been made.

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▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 47. Extension of services to adjoining town

The department may, after notice and a public hearing, authorize a town which has acquired a municipal lighting plant to extend its mains or lines into an adjoining town in order to distribute and sell gas or electricity therein, if such town or a private corporation therein is not then supplying such town with gas or electricity, as the case may be. Such authorization shall be upon such terms and with such limitations and restrictions as the department deems for the public interest. A town so authorized shall thereafter have in such adjoining town the same rights and privileges, and be subject to the same limitations and obligations, as it has within its own territorial limits.

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Part I. Administration of the Government (Ch. 1-182)

☐ Title XXII. Corporations (Ch. 155-182)

☐ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 47A. Exemption from requirements allowing competitive choice of generation supply; prohibition of retail sales by nonmunicipal suppliers and electric companies within municipal service territory; sale of electricity at wholesale; sale of electricity in adjoining service territory; restrictions on service to present customers of municipal lighting plants; referendum on competitive choice of generation supply

(a) Any municipal lighting plant established pursuant to the provisions of this chapter or special law shall be exempt from the requirements to allow competitive choice of generation supply, unless and until such lighting plant is dissolved pursuant to existing statutory procedures.

(b) A municipal lighting plant established pursuant to the provisions of this chapter or special law may prohibit retail sales by suppliers and electric companies to customers within the service territory of said lighting plant; provided, however, that a municipal lighting plant may supply generation service outside its own service territory for retail purposes only if outside suppliers may provide generation service within the service territory of said municipal lighting plant by mutual agreement with said lighting plant. Such agreement, upon execution, shall be submitted to the department and shall detail the manner in which any such supplier shall conduct business within the service territory of said lighting plant.

(c) A municipal lighting plant may sell electricity at wholesale, for resale, to aggregators, or other entities in bulk and shall not, in doing so, be deemed to be supplying generation services outside its own service territory for the purposes of subsection (b).

(d) A municipal lighting plant may sell electricity at retail, by mutual agreement or by order of the department as provided pursuant to section 47 or section 60 of this chapter, in the service territory of an adjoining electric company or a municipal lighting plant, and such sale shall not be deemed to be supplying generation service outside its own service territory for the purposes of subsection (b). Such mutual agreement shall be between the municipal lighting plant selling such electricity at retail and the adjoining electric company or other municipal lighting plant.

(e) No municipality, private corporation, or other entity selling or distributing electricity shall use existing lines or extend its lines except by mutual agreement with a municipal lighting plant or by order of the department as provided pursuant to section 47 or section 60 of this chapter in order to distribute or sell electricity to customers

presently served by such municipal lighting plant.

(f) If a municipal lighting plant has not allowed retail customers served by it competitive choice of generation supply by March 1, 2003, the governing body for each city or town with such municipal lighting plant shall conduct a study, which shall include the holding of public hearings, and may make recommendations which may include, but shall not be limited to, conducting a referendum relative to competitive choice of generation supply for the customers of such municipal lighting plant.

CREDIT(S)

Added by St.1997, c. 164, § 197.

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▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 47B. Facilities and equipment located outside municipal limits**

Any municipality acting by and through its municipal light board may construct, purchase, operate, own, lease, rent, maintain, dispose of, share costs of, or otherwise have the right to the use, or portions thereof, of subtransmission, transmission, distribution, and generation facilities and equipment located outside of the municipality's limits. All such subtransmission, transmission, distribution, and generation facilities and equipment, or portions thereof, referred to in this section so constructed, purchased, owned, leased, rented, operated, maintained, or otherwise having the right to be used by any municipality shall hereafter be considered "plant" under the provisions of sections 34, 40, and 57 of this chapter. Any municipality acting by and through its municipal light board is hereby authorized to pay for the construction, purchase, lease, rent, or the right to use, or portions thereof, of the subtransmission, transmission, distribution, and generation facilities and equipment referred to in this section from those amounts accumulated for depreciation.

CREDIT(S)

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■ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→ → § 47C. Municipal lighting plant cooperatives

(a) Any municipal lighting plant created in a manner provided for in this chapter shall be allowed to form cooperative public corporations for the purpose of furnishing efficient, low cost, and reliable electric power and energy-related services and cable television services as provided in this section.

(b) A municipal lighting plant cooperative established pursuant to the provisions of this section shall constitute a body politic and corporate and is constituted a public instrumentality, and the exercise of the powers conferred by this section shall be deemed and held to be the performance of an essential public function.

(c) Any number of municipal lighting plants may associate themselves together and with other public corporations, established under the laws of the commonwealth or any other state or the federal government, as a municipal lighting plant cooperative, with or without capital stock, for the transaction of any lawful business associated with the purchase, acquisition, distribution, sale, resale, supply, and disposition of energy or energy-related services to wholesale or retail customers, subject to federal and state laws and regulations or the provision of cable television services subject to the same federal and state laws and regulations applicable to municipal lighting plants or other public entities that provide those services.

(d) A municipal lighting plant cooperative may be formed for any purpose stated in subsection (c) which may lawfully be carried out by any other corporation; provided, that a municipal lighting plant cooperative shall be organized and shall conduct its business primarily for the mutual benefit of its members as patrons of the cooperative. A municipal lighting plant cooperative shall have all of the powers of a natural person, including the power to participate with others in any partnership, joint venture or other association, transaction, or arrangement of any kind. In addition, each municipal lighting plant cooperative shall have the following powers:

(i) To have perpetual succession by its corporate name unless a limited period of duration is stated in the articles of incorporation;

(ii) To sue and be sued, complain, and defend its corporate name;

(iii) To have and use a corporate seal;

(iv) To purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use, and deal in and with real or personal property or any interest therein, wherever situated;

(v) To sell, convey, mortgage, pledge, lease, exchange, transfer, or otherwise dispose of all or any part of its property and assets;

(vi) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, use, and deal in and with shares or other interest in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of the United States or any other government, state, territory, governmental district, or municipality, or any instrumentality thereof;

(vii) To make contracts and incur liabilities, borrow money at rates of interest the cooperative may determine, issue notes, bonds, certificates of indebtedness, and other obligations, receive funds from members and pay interest thereon, issue capital stock and certificates representing equity interests in assets, allocate earnings and losses at the times and in the manner the articles of incorporation or bylaws or other contract specify, create book credits, capital funds, and reserves, and secure obligations by mortgage or pledge of any of its property, franchises, and income;

(viii) To lend money for corporate purposes, invest and reinvest funds, and take and hold real and personal property as security for the payment of funds loaned or invested;

(ix) To conduct business, carry on operations, have offices, and exercise the powers granted by this subsection, within or without this commonwealth;

(x) To elect or appoint officers and agents of the corporation, define their duties, and fix their compensation;

(xi) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this commonwealth, for the administration and regulation of the affairs of the cooperative;

(xii) To make donations for the public welfare or for charitable, scientific, or educational purposes;

(xiii) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, stock option plans, and other incentive plans for any or all of its directors, officers, and employees;

(xiv) To be a partner, member, associate, or manager of any partnership, joint venture, trust, or other enterprise;

(xv) To cease corporate activities and surrender its corporate franchise;

(xvi) To purchase, acquire, distribute, sell, resell, supply, and dispose of energy in any form or other services;

(xvii) To purchase, acquire, distribute, sell, resell, supply, and provide any energy or energy-related services to wholesale or retail customers within or without the commonwealth;

(xviii) To have access on comparable terms to energy transportation systems for delivery of energy to its members and other customers;

(xix) To sell electricity to any consumer, including, but not limited to, a consumer that receives electric distribution, transmission, or other services from an entity other than the municipal light plant cooperative organized under subsection (a), other than consumers served by municipal light plants which are not members of a municipal light plant cooperative, that is selling such electricity to such consumer; provided, that an entity providing such distribution, transmission, or other services shall provide non-discriminatory access and pricing for the use of its property and services and shall otherwise facilitate such transactions;

(xx) To contract with natural persons, firms, corporations, business trusts, partnerships, public and private agencies, non-profit organizations and corporations, other cooperatives, and local municipalities to accomplish any purposes of the cooperative;

(xxi) To have and exercise all powers necessary or convenient to effect its purposes;

(xxii) To exercise and perform all or part of its power and functions through one or more wholly-owned or partly-owned corporations or other business entities; and

(xxiii) To exercise all other powers not inconsistent with the state constitution or the United States Constitution, which may be reasonably necessary or appropriate for or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, and generally to exercise in connection with its property and affairs, and in connection with property within its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

(e) A municipal lighting plant cooperative organized pursuant to this section shall be managed by a board of not less than three directors. The directors shall be elected by and from the members of the cooperative at such time, in such manner, and for such term of office as the bylaws may prescribe and shall hold office during the term for which they were elected and until their successors are elected and qualified. Any vacancy occurring in the board of directors, and any directorship to be filled by reason of an increase in the number of directors, may be filled by the board of directors unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner. A director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of the predecessor in office.

(f) Any municipal lighting plant cooperative organized pursuant to the provisions of this section may enact

bylaws to govern itself in the implementation of the provisions of this section which are not inconsistent with the provisions of this section.

(g) The provisions of chapter 258 shall apply to the municipal lighting plant cooperatives established under the provisions of this section as if said municipal lighting plant cooperatives were municipal lighting plants.

(h) The right of a member of a cooperative to vote may be limited, enlarged, or denied to the extent specified in the articles of incorporation or bylaws. Unless so limited, enlarged, or denied, each member shall be entitled to one vote on each matter submitted to a vote of members.

(i) A member of the board of directors or an officer of any cooperative subject to the provisions of this section shall have immunity from liability equivalent to that granted to directors and officers of for-profit corporations in the commonwealth. Except for debts lawfully contracted between a member and the cooperative, no member shall be liable for the debts of the cooperative to an amount exceeding the sum remaining unpaid on his or her membership fee or subscription to capital stock.

(j) Except as provided for herein, a municipal lighting plant cooperative shall be exempt from paying taxes, including, but not limited to taxes on its income and real and personal property situated within the commonwealth and owned by the municipal light plant cooperative; provided, however, that the cooperative shall agree, in lieu of property taxes, to pay to any governmental body authorized to levy local property taxes the amount which would be assessable as local property taxes on the real and tangible personal property if such property were the property of a domestic corporation; provided, further, that no such municipal lighting plant cooperative shall be allowed to commence any such operations allowed pursuant to this section or exercise any such powers pursuant to subsection (d) until such payment in lieu of taxes is executed. The cooperative shall pay all sales or excise taxes which are properly assessed on its business activities under this section to the extent such taxes are assessed against domestic corporations.

(k) A municipal lighting plant cooperative created pursuant to the provisions of this section shall be exempt from the public records requirement of section 10 of chapter 66 and the open meeting requirements of section 23B of chapter 39 only in those instances when necessary for protecting trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter.

(l) The activities of a municipal lighting plant cooperative shall not be imputed to its individual members and the provision of energy brokering and other energy-related services by a municipal lighting plant cooperative to retail customers without any accompanying sale of electricity to such retail customers shall not constitute the supply of generation services by its members for the purposes of subsection (b) of section 47A.

#### CREDIT(S)

Added by St.1997, c. 164, § 197. Amended by St.1998, c. 194, § 192; St.2004, c. 269, §§ 1, 2, eff. Nov. 7, 2004;

St.2008, c. 169, § 66, eff. July 2, 2008.

Current through Chapter 102 of the 2012 2nd Annual Session

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M.G.L.A. 164 § 47D

Page 1

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

■ Title XXII. Corporations (Ch. 155-182)

■ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 47D. Exemption from public records and open meeting requirements in certain instances**

A municipal lighting plant created pursuant to the provisions of this chapter or any special law shall be exempt from the public record requirements of section 10 of chapter 66 and the open meeting requirements of sections 20 and 21 of chapter 30A in those instances when necessary for protecting trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter when such municipal lighting plant board determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling, or distributing electric power and energy pursuant to this chapter.

CREDIT(S)

Added by St.1997, c. 164, § 197. Amended by St.1998, c. 463, § 134; St.2000, c. 128, § 9; St.2010, c. 112, § 28, eff. July 1, 2010.

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

☞ Title XXII. Corporations (Ch. 155-182)

☞ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→→ **§ 47E. Facilities for operation of telecommunications systems for municipal use; construction, purchase, lease and maintenance; debt**

A municipal lighting plant or a cooperative public corporation and any municipal lighting plant member thereof, established pursuant to this chapter or any general or special law may construct, purchase or lease, and maintain such facilities as may be necessary for the distribution or the operation of a telecommunications system for municipal use or for the use of its customers. Such municipal lighting plant may incur debt for such facilities by a vote taken in the manner prescribed pursuant to section 8 of chapter 44. Such cooperative may incur debt for such facilities pursuant to the provisions of section 47C. Such facilities may include suitable land, structure, machinery, other apparatus and appliances for operating a telecommunications system. Such cooperative or municipal lighting plant, which is engaged in the business of operating a telecommunications system, may, as a part of such business, if an appropriation is made therefor, rent, lease, or sell for cash or credit at prevailing retail prices, install and service, within the territory served by such business, merchandise, equipment, utensils and chattels of any description which are incidental or auxiliary to the operation of said telecommunications system or the use of its customers or are necessary or expedient in the protection or management of its property used in such business. Wherever apt, the provisions of this chapter and chapter 44, which apply to the operation and maintenance of a municipal lighting plant, shall apply also to the operation and maintenance of such telecommunications system.

CREDIT(S)

Added by St.2000, c. 12, § 4.

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M.G.L.A. 164 § 50

Page 1



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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ §§ 48 to 50. Repealed, 1929, 379, Sec. 7

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 51. Purchase of gas, electricity, equipment, supplies or materials from another town**

A town which has acquired a plant for the manufacture or distribution of gas may purchase gas from another town authorized to sell the same or from any corporation selling gas; and a town which has acquired a plant for the manufacture or distribution of electricity may purchase electricity from another town authorized to sell the same or from any corporation selling electricity and may contract for the purchase, sale or maintenance of equipment, supplies or materials used in the ordinary course of business with any other town or towns having acquired such a plant or with any corporation selling electricity, except as provided in section fifty-two.

CREDIT(S)

Amended by St.1984, c. 320.

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 52. Purchase of electricity by town from street railway**

A town in which no person or corporation is engaged in generating or distributing electricity for sale and which has voted or shall vote to construct one or more plants for the manufacture or distribution of electricity for municipal use or for the use of its inhabitants, or for both purposes, may make contracts, for terms not exceeding ten years, with any street railway company operating a street railway in such town, for the purchase of electricity from such company in order to furnish electricity for municipal use or for the use of its inhabitants, or both; and street railway companies may make contracts to furnish electricity as aforesaid to a town, but the contracts shall not become operative unless the department shall, after a public hearing, approve the terms thereof as consistent with the public interest. This and the three following sections shall not apply to cities.

CREDIT(S)

Amended by St.1998, c. 463, § 135.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 53. Delivery by street railway; metering

Electricity supplied by a street railway company to a town shall be delivered to the distributing system of said town at some specified place or places therein, and the meter or meters by which such electricity is measured shall be a part of the distributing system.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 54. Disagreement as to price paid to street railway; action of department**

If a town voting to purchase electricity from a street railway company is unable to agree with such company at the expiration of a contract, made in accordance with section fifty-two, upon the price to be paid for electricity by, or upon the manner in which electricity is to be furnished to, said town in the future, its selectmen may apply to the department to fix the price which it shall pay for said electricity to, and the manner in which electricity shall be furnished by, said company; and thereupon the department shall set a date for a public hearing upon such application, giving said company reasonable notice thereof; and after the hearing the department shall, if it deems the furnishing of such electricity consistent with the interest of public travel upon the railway of such company, fix the price which said town shall pay for electricity to, and the manner in which electricity shall be furnished by, said company; and said company shall thereupon furnish to said town electricity at the price and in the manner fixed by the department.

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M.G.L.A. 164 § 55

Page 1

**C**

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 55. Municipal light board**

A town which has established or votes to establish a gas or electric plant may elect a municipal light board consisting of either three or five citizens of the town, each for a term of three years. Of the three-member board, initially one shall be chosen for one year, one for two years, and one for three years, and at each annual meeting thereafter one for a term of three years. Of the five-member board, initially one shall be chosen for one year, two for two years and two for three years and thereafter, the terms shall be for three years. The municipal light board shall have authority to construct, purchase or lease a gas or electric plant in accordance with the vote of the town and to maintain and operate the same.

CREDIT(S)

Amended by St.1977, c. 156.

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Part I. Administration of the Government (Ch. 1-182)

☐ Title XXII. Corporations (Ch. 155-182)

☐ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→→ § 56. Management of plant

The mayor of a city, or the selectmen or municipal light board, if any, of a town acquiring a gas or electric plant shall appoint a manager of municipal lighting who shall, under the direction and control of the mayor, selectmen or municipal light board, if any, and subject to this chapter, have full charge of the operation and management of the plant, the manufacture and distribution of gas or electricity, the purchase of supplies, the employment of attorneys and of agents and servants, the method, time, price, quantity and quality of the supply, the collection of bills, and the keeping of accounts. His compensation and term of office shall be fixed in cities by the city council and in towns by the selectmen or municipal light board, if any; and, before entering upon the performance of his official duties, he shall give bond to the city or town for the faithful performance thereof in a sum and form and with sureties to the satisfaction of the mayor, selectmen or municipal light board, if any, and shall, at the end of each municipal year, render to them such detailed statement of his doings and of the business and financial matters in his charge as the department may prescribe. All moneys payable to or received by the city, town, manager or municipal light board in connection with the operation of the plant, for the sale of gas or electricity or otherwise, shall be paid to the city or town treasurer. All accounts rendered to or kept in the gas or electric plant of any city shall be subject to the inspection of the city auditor or officer having similar duties, and in towns they shall be subject to the inspection of the selectmen. The auditor or officer having similar duties, or the selectmen, may require any person presenting for settlement an account or claim against such plant to make oath before him or them, in such form as he or they may prescribe, as to the accuracy of such account or claim. The wilful making of a false oath shall be punishable as perjury. The auditor or officer having similar duties in cities, and the selectmen in towns, shall approve the payment of all bills or payrolls of such plants before they are paid by the treasurer, and may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive; and in that case the auditor or officer having similar duties, or the selectmen, shall file with the city or town treasurer a written statement of the reasons for the refusal; and the treasurer shall not pay any claim or bill so disallowed. This section shall not abridge the powers conferred on town accountants by sections fifty-five to sixty-one, inclusive, of chapter forty-one. The manager shall at any time, when required by the mayor, selectmen, municipal light board, if any, or department, make a statement to such officers of his doings, business, receipts, disbursements, balances, and of the indebtedness of the town in his department.

**CREDIT(S)**

Amended by St.1958, c. 160; St.1998, c. 463, § 136.

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Part I. Administration of the Government (Ch. 1-182)

☐ Title XXII. Corporations (Ch. 155-182)

☐ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→→ § 56A. Municipal light commission; definition; contracts of members

The words “municipal light commission” as used in this section and in sections fifty-six B to fifty-six E, inclusive, shall mean a light commission, gas and electric commission or similar body established by act of the legislature and vested with all powers and duties formerly exercised by the mayor and selectmen under this chapter, and with the powers and duties conferred upon municipal light boards under this chapter.

No member of a municipal light commission or manager thereof shall directly or indirectly make a contract with the city or municipal lighting plant or receive any commission, discount, bonus, gift, contribution or reward from or any share in the profits of any person making or performing such contract unless such member or manager immediately upon learning of the existence of such contract, or that such contract is proposed, shall notify in writing the municipal light commission or city of the nature of his interest in such contract and shall abstain from doing any official act on behalf of the commission or plant in reference thereto.

A violation of any provision of this section shall render the contract in respect to which such violation occurs voidable at the option of the commission. Any person violating the provisions of this section shall be punished by a fine of not less than fifty nor more than one thousand dollars or by imprisonment for not more than one year, or both.

This section shall not apply to contracts of employment between a municipal lighting plant and its manager.

This section shall not apply to contracts between the city or municipal lighting plant and a corporation of which the member or manager is a stockholder or bondholder, unless the member or manager or a member of his immediate family owns or controls more than one per cent of the capital stock or more than one per cent of the outstanding bonds of such corporation.

CREDIT(S)

Added by St.1960, c. 643.

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Page 1

**C**

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 56B. Contracts of commission; requisites**

All contracts made by a municipal light commission where the amount involved is five thousand dollars or more shall be in writing. Any contract made as aforesaid may be required to be accompanied by a bond with sureties satisfactory to the municipal light commission, or by a deposit of money, certified check or other security for the faithful performance thereof, and such bonds or other securities shall be deposited with the city or town treasurer until the contract has been carried out in all respects; and no such contract shall be altered except by a written agreement of the contractor, the sureties on his bond, if any, and the officer or members of the municipal light commission making the contract.

CREDIT(S)

Added by St.1960, c. 643. Amended by St.1991, c. 283, § 1.

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M.G.L.A. 164 § 56C

Page 1

**C**

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

☞ Title XXII. Corporations (Ch. 155-182)

☞ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 56C. Contracts of commission; filing with city or town auditor; preservation; public inspection; penalty**

Every municipal light commission or manager thereof, who makes or executes a contract on behalf of a municipal lighting plant, where the amount involved is five thousand dollars or more, shall furnish said contract or a copy thereof to the city or town auditor within one week after its execution. Said city or town auditor shall keep such contract or copy on file, open to public inspection during business hours. Such contracts or copies shall be kept in a separate book, arranged according to the subject of the contract, or in other convenient form. An index of the subject matter of the contracts and to the names of the contractors shall be made semi-annually, and shall also be open to public inspection in some convenient form. All allowances under and additions to such contracts, or copies thereof, shall be filed with the city or town auditor, together with a sworn statement of the officer making such allowances or additions that the same are correct and in accordance with the contract. A city or town auditor, municipal light commissioner or manager wilfully failing to comply with this section shall be punished by a fine of not less than ten nor more than one hundred dollars.

CREDIT(S)

Added by St.1960, c. 643. Amended by St.1991, c. 283, § 2.

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Page 1

**C**

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→ → **§ 56D. Contracts of commission; advertisements and bids; application of section**

No contract for the purchase of equipment, supplies or materials, the actual or estimated cost of which amounts to \$25,000 or more, and no contract for the purchase of generation, transmission or distribution equipment, the actual cost or estimated cost of which amounts to \$25,000 or more, except in cases of special emergencies involving the health, safety or welfare of the people or their property, shall be awarded unless proposals for the same have been invited by advertisement in at least one newspaper published in the city or town in which the lighting plant is located, or, if there is no such newspaper, in a newspaper published in the same county, such publication to be at least one week before the time specified for the opening of said proposals. Such advertisement shall state the time and place for opening the proposals in answer to said advertisement, and shall reserve to the municipal light commission the right to reject any or all such proposals. All such proposals shall be opened in public. No bill or contract shall be split or divided for the purpose of evading any provision of this section. This section shall not apply to contracts for the supply of electricity to a municipal lighting plant.

CREDIT(S)

Added by St.1960, c. 643. Amended by St.1968, c. 16; St.1978, c. 301; St.1981, c. 226, § 1; St.1991, c. 283, § 3; St.1997, c. 164, § 198; St.2001, c. 130, §§ 1, 2.

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Part I. Administration of the Government (Ch. 1-182)

Title XXII. Corporations (Ch. 155-182)

Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

**→→ § 56E. Removal of members; notice and hearing; appeal**

Any member of a municipal light board or municipal light commission appointed under the provisions of any general or special law may be removed by the appointing authority for misfeasance or malfeasance in office or wilful neglect of duty. Prior to such removal the member shall be given a full hearing before the appointing authority, of which hearing he shall have at least three days' written notice, exclusive of Sundays and holidays, from the appointing authority. Said notice shall contain a full and complete statement of the specific reasons which are alleged to constitute the cause for such removal. Within two days, exclusive of Sundays and holidays, after completion of said hearing, the appointing authority shall give such member a written notice of his decision, stating fully and specifically the reasons therefor.

Any hearing under this section shall, if either party concerned so requests in writing, be public, and at any such hearing the member concerned shall be allowed to answer the charges preferred against him either personally or by counsel.

Within thirty days after receipt of the decision of the appointing authority, a member who was so removed may appeal to the superior court for the county in which the plant is located. Notwithstanding a decision of the appointing authority removing a member he shall continue to serve until the expiration of the appeal period provided in this paragraph. If such member appeals as hereinbefore provided such appeal shall be advanced for a speedy hearing. The court shall hear all pertinent evidence and determine the facts, and, upon the facts as so determined, annul or affirm such decision. Until the court affirms the order removing such member, his removal shall not take effect and such member shall continue to exercise the powers and perform the duties of his office. The decision of the court shall be final and conclusive upon the parties and a copy of the decision shall be forwarded forthwith by the clerk of the court to the appointing authority.

CREDIT(S)

Added by St.1960, c. 643.

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

■ Title XXII. Corporations (Ch. 155-182)

■ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→ → **§ 57. Manager's annual financial report; tax levy; expenditure of income**

At the beginning of each fiscal year, the manager of municipal lighting shall furnish to the mayor, selectmen or municipal light board, if any, an estimate of the income from sales of gas and electricity to private consumers during the ensuing fiscal year, and of the expense of the plant during said year, meaning the gross expenses of operation, maintenance and repair, the interest on the bonds, notes or certificates of indebtedness issued to pay for the plant, an amount for depreciation equal to three per cent of the cost of the plant exclusive of land and any water power appurtenant thereto, or such smaller or larger amount as the department may approve, the requirements of the sinking fund or debt incurred for the plant, and the loss, if any, in the operation of the plant during the preceding year, and of the cost, as defined in section fifty-eight, of the gas and electricity to be used by the town. The town shall include in its annual appropriations and in the tax levy not less than the estimated cost of the gas and electricity to be used by the town as above defined and estimated. By cost of the plant is intended the total amount expended on the plant to the beginning of the fiscal year for the purpose of establishing, purchasing, extending or enlarging the same. By loss in operation is intended the difference between the actual income from private consumers plus the appropriations for maintenance for the preceding fiscal year and the actual expense of the plant, reckoned as above, for that year in case such expenses exceeded the amount of such income and appropriation. The income from sales and the money appropriated as aforesaid shall be used to pay the annual expense of the plant, defined as above, for the fiscal year, except that no part of the sum therein included for depreciation shall be used for any other purpose than renewals in excess of ordinary repairs, extensions, reconstruction, enlargements and additions. The surplus, if any, of said annual allowances for depreciation after making the above payments shall be kept as a separate fund and used for renewals other than ordinary repairs, extensions, reconstructions, enlargements and additions in succeeding years, and for the cost of plant, nuclear decommissioning costs, the costs of contractual commitments, and deferred costs related to such commitments which the city council, the board of selectmen, or the municipal light board, if any, determines are above market value. Said depreciation fund shall be kept and managed by the town treasurer as a separate fund, subject to appropriation by the city council or selectmen or municipal light board, if any, for the foregoing purpose. Upon his own initiative or upon the request of the city council, selectmen or municipal light board, the treasurer shall invest or deposit the same as permitted by section fifty-five A of chapter forty-four, and any income thereon shall be credited to the depreciation fund. So much of said fund as the department may from time to time approve may also be used to pay notes, bonds or certificates of indebtedness issued to pay for the cost of reconstruction or renewals in excess of ordinary repairs, when such notes, bonds or certificates of indebtedness become due. All appropriations for the plant shall be either for the annual expense defined as above, or for extensions, reconstruction, enlargements or additions; and no appropriation shall be used for any purpose other than that stated in the vote making the same. No bonds, notes or certificates of indebtedness shall be issued by a town for the annual expenses as defined in this section.

CREDIT(S)

Amended by St.1963, c. 347, § 3; St.1977, c. 327; St.1997, c. 164, § 199.

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Page 1

**C**

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

■ Title XXII. Corporations (Ch. 155-182)

■ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 57A. Appropriations for maintenance and operation; payment in advance of receipts**

Any city or town having a municipal light plant may appropriate money for the maintenance and operation of such plant, specifying that the same shall be taken from the receipts of the department; and where such appropriations are made, the city or town treasurer may, in advance of the collection of said receipts, pay bills on account of the said appropriations, and any sum so advanced shall be repaid to the city or town from such receipts, when collected, and shall be applied as reimbursement to the city or town, or to the payment of any temporary loan made by the city or town in anticipation of revenue of that year.

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M.G.L.A. 164 § 57B

Page 1

**C**

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Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 57B. Income from investment or deposit of proceeds of municipal bonds or notes issued for gas or electrical purposes**

Any city or town having a municipal light plant shall appropriate any income from the investment or deposit of proceeds of bonds or notes of said plant issued under or subject to the provisions of chapter forty-four solely for the purposes of said municipal lighting plant.

CREDIT(S)

Added by St.1977, c. 866.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 57C. Appropriations from insurance escrow account**

Any city or town having a municipal light plan shall appropriate any income from the investment or deposit of funds in the insurance escrow account established by said plant solely for the purposes of said plant.

CREDIT(S)

Added by St.1978, c. 317.

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Part I. Administration of the Government (Ch. 1-182)

■ Title XXII. Corporations (Ch. 155-182)

■ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→ → § 58. Schedule of prices for gas and electricity

There shall be fixed schedules of prices for gas and electricity, which shall not be changed oftener than once in three months. Any change shall take effect on the first day of a month, and shall first be advertised in a newspaper, if any, published in the municipality. No price in said schedules shall, without the written consent of the department, be fixed at less than production cost as it may be defined from time to time by order of the department. Such schedules of prices shall be fixed to yield not more than eight per cent per annum on the cost of the plant, as it may be determined from time to time by order of the department, after the payment of all operating expenses, interest on the outstanding debt, the requirements of the serial debt or sinking fund established to meet said debt, and also depreciation of the plant reckoned as provided in section fifty-seven, and losses; but any losses exceeding three per cent of the investment in the plant may be charged in succeeding years at not more than three per cent per annum. The gas and electricity used by the municipality for any purpose except street lighting shall be charged for in accordance with the prices in the fixed schedules. The gas and electricity used by the municipality for street lighting shall be charged for at a cost to be determined as follows: the sum of all operating expenses, interest on the outstanding debt, the requirements of the serial debt or sinking fund established to meet said debt, and also depreciation of the plant reckoned as provided in section fifty-seven, and losses, shall be the dividend; the kilowatt hours sold including those supplied for street lighting shall be the divisor, and the resulting quotient multiplied by the kilowatt hours supplied for street lighting shall be the cost to be charged to the municipality for street lighting. In lieu of the method of determining charges for electricity used by the municipality for street lighting, as set forth in the preceding sentence, electricity so used may be charged for at a cost in accordance with a street lighting schedule filed with and approved by the department.

## CREDIT(S)

Amended by St.1964, c. 401.

Current through Chapter 102 of the 2012 2nd Annual Session

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**Effective: November 16, 2004**

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 58A. Advance deposit; shut off for non-payment; removal of appliances for distribution**

A sufficient deposit to secure the payment for gas or electricity for 3 months may be required in advance from any consumer, and if the advance deposit is retained for a longer period than 6 months, the interest rate shall be paid annually to said consumer or credited to his account. The rate of interest shall be revised annually and shall be equal to yields on Treasury securities at constant, fixed maturity 1-year rate as published by the Federal Reserve System and as established 12 months ending December of the prior year. The supply may be shut off from any premises until all arrears for gas or electricity furnished thereon to such consumer shall have been paid. After three months default in the payment of such arrears, all appliances for distribution belonging to the municipality on the premises may be removed and shall not be restored except on payment of all such arrears and the expenses of removal and restoration.

CREDIT(S)

Amended by St.1971, c. 452; St.2004, c. 318, eff. Nov. 16, 2004.

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**Effective:[See Text Amendments]**

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 58B. Lien upon real estate for nonpayment of service charges**

If the rates and charges due to a municipal lighting plant, which accepts the provisions of this section and sections fifty-eight C to fifty-eight F, inclusive, by vote of its municipal light board, as defined in section sixty-nine B and, by its manager of municipal lighting, files a certificate of such acceptance in the proper registry of deeds and files a copy of said certificate with the collector of taxes of the city or town in which the lien hereinafter mentioned is to take effect, for supplying or providing for gas, electricity, steam, or services, or furnishing materials or appliances in connection therewith to or for any real estate at the request of the owner are not paid on or before their due date as established by the municipal light board, such rates and charges, together with interest due thereon and costs, including attorneys fees, relative thereto, shall be a lien upon such real estate. The registrar of deeds shall record such certificate of acceptance in a book to be kept for the purpose, which shall be kept in an accessible location in the registry of deeds.

**CREDIT(S)**

Added by St.1980, c. 551. Amended by St.1981, c. 145, § 1.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 58C. Time for and length of lien**

Such lien shall take effect by operation of law on the day immediately following the due date of such rate or charge, and, unless dissolved by payment or abatement, shall continue until such rate or charge has been added to or committed as a tax under section fifty-eight D, and thereafter, unless so dissolved, shall continue as provided in section thirty-seven of chapter sixty; provided, however, that if any such rate or charge is not added to or committed as a tax under section fifty-eight D for the next fiscal year commencing after the inception of the lien under this section, then said lien shall terminate on October first of the third year following the year in which such charge becomes due.

Notwithstanding such lien any such overdue rate or charge may be collected through any legal means, including the shutting off of gas, electricity, steam or services, which may be deemed advisable; provided, that after the termination of such a lien, no city, town or municipal lighting plant shall attempt to enforce, by shutting off the gas, electricity, steam or service, collection of such rate or charge from any person, not liable therefor, who has succeeded to the title or interest of the person incurring such rate or charge.

CREDIT(S)

Added by St.1980, c. 551. Amended by St.1989, c. 469, § 3.

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M.G.L.A. 164 § 58D

Page 1

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**Effective:[See Text Amendments]**

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 58D. Unpaid charges added to real estate taxes**

If a rate or charge for which a lien is in effect under section fifty-eight C has not been added to or committed as a tax and remains unpaid when the assessors are preparing a real estate tax list and warrant to be committed by them under section fifty-three of chapter fifty-nine, the manager of municipal lighting shall certify such rate or charge to the assessors, who shall forthwith add such rate or charge to the tax on the property to which it relates and commit it with their warrant to the collector of taxes as part of such tax. If the property to which such tax or rate relates is tax exempt, such rate or charge shall be committed as the tax.

CREDIT(S)

Added by St.1980, c. 551.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 58E. Interest on taxes due by reason of unpaid charges**

Except as otherwise provided, the provisions of chapters fifty-nine and sixty shall apply, so far as pertinent, to all rates and charges certified to the assessors under section fifty-eight D. Without limiting the generality of the foregoing, upon commitment as a tax or part of a tax under section fifty-eight D, all such rates and charges shall be subject to the provisions of law relative to interest on the taxes of which they become, or, if the property were not tax exempt would become, a part; and the collector of taxes shall have the same powers and be subject to the same duties with respect to such rates and charges as in the case of annual taxes upon real estate, and the provisions of law relative to the collection of such annual taxes, the sale or taking of land for the nonpayment thereof and the redemption of land so sold or taken shall, except as otherwise provided, apply to such rates and charges.

Upon collection of such rates or charges certified to the assessors under section fifty-eight D, the city or town shall appropriate said amount solely for the purposes of the municipal lighting plant.

CREDIT(S)

Added by St.1980, c. 551.

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Part I. Administration of the Government (Ch. 1-182)

☞ Title XXII. Corporations (Ch. 155-182)

☞ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 58F. Abatement of real estate tax imposed by reason of unpaid charges**

An owner of real estate aggrieved by a charge imposed thereon under sections fifty-eight B to fifty-eight E, inclusive, may apply for an abatement thereon by filing a petition with the municipal light board, as defined in section sixty-nine B, within the time allowed by law for filing an application for abatement of the tax of which such charge is, or, if the property were not tax exempt, would have been a part, and if such board finds that such charge is more than is properly due, a reasonable abatement shall be made.

CREDIT(S)

Added by St.1980, c. 551.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 59. Notice of change of price to department

When a town fixes or changes a price, a notice thereof in form specified by the department shall be filed within sixty days with the department by the manager of municipal lighting, and for the failure to do so he shall forfeit not more than twenty-five dollars.

CREDIT(S)

Amended by St.1953, c. 502.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→ → **§ 60. Entitlement to service; review by department**

A town shall not be compelled to furnish gas or electricity to any person or corporation except upon order of the department, to whom any person aggrieved by the refusal of a town to furnish gas or electricity may appeal, stating the facts in such detail as the department directs.

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Part I. Administration of the Government (Ch. 1-182)

☐ Title XXII. Corporations (Ch. 155-182)

☐ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 61. Assessment of cost of establishing service**

A town acquiring a plant may provide by ordinance or by-law for the equitable assessment upon the owner or occupant of any premises of the cost, or any part thereof, of laying and maintaining pipes, conduits, conductors or other appliances thereon. Payment of such assessments shall not be compulsory, but it shall be a condition precedent to the supplying of gas or electricity to the occupants of such premises, and may be required before providing appliances therefor.

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M.G.L.A. 164 § 62

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Part I. Administration of the Government (Ch. 1-182)

☐ Title XXII. Corporations (Ch. 155-182)

☐ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→ → **§ 62. Protection of plant; municipal ordinances**

A town operating a plant may pass ordinances or by-laws, imposing penalties not exceeding fifty dollars, to protect the plant, control its use and prevent accidents from gas or electricity supplied by it, and to govern consumers in their use thereof.

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☐ Title XXII. Corporations (Ch. 155-182)

☐ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs &amp; Annos)

→→ § 63. Duties of municipality and its officers; violations; penalties

A town manufacturing or selling gas or electricity for lighting shall keep records of its work and doings at its manufacturing station, and in respect to its distributing plant, as may be required by the department. It shall install and maintain apparatus, satisfactory to the department, for the measurement and recording of the output of gas and electricity, and shall sell the same by meter to private consumers when required by the department, and, if required by it, shall measure all gas or electricity consumed by the town. The books, accounts and returns shall be made and kept in a form prescribed by the department, and the accounts shall be closed annually on the last day of the fiscal year of such town, and a balance sheet of that date shall be taken therefrom and included in the return to the department. The mayor, selectmen or municipal light board and manager shall, at any time, on request, submit said books and accounts to the inspection of the department and furnish any statement or information required by it relative to the condition, management and operation of said business. The department shall, in its annual report, describe the operation of the several municipal plants with such detail as may be necessary to disclose the financial condition and results of each plant; and shall state what towns, if any, operating a plant have failed to comply with this chapter, and what towns, if any, are selling gas or electricity with the approval of the department at less than cost. The mayor, or selectmen, or municipal light board, if any, shall annually, on or before such date as the department fixes, make a return to the department, for the preceding fiscal year, signed and sworn to by the mayor, or by a majority of the selectmen or municipal light board, if any, and by the manager, stating the financial condition of said business, the amount of authorized and existing indebtedness, a statement of income and expenses in such detail as the department may require, and a list of its salaried officers and the salary paid to each. The mayor, the selectmen or the municipal light board may direct any additional returns to be made at such time and in such detail as he or they may order. Any officer of a town manufacturing or selling gas or electricity for lighting who, being required by this section to make an annual return to the department, neglects to make such annual return shall, for the first fifteen days or portion thereof during which such neglect continues, forfeit five dollars a day; for the second fifteen days or any portion thereof, ten dollars a day; and for each day thereafter not more than fifteen dollars a day. Any such officer who unreasonably refuses or neglects to make such return shall, in addition thereto, forfeit not more than five hundred dollars. If a return is defective or appears to be erroneous, the department shall notify the officer to amend it within fifteen days. Any such officer who neglects to amend said return within the time specified, when notified to do so, shall forfeit fifteen dollars for each day during which such neglect continues. All forfeitures incurred under this section may be recovered by an information in equity brought in the supreme judicial court by the attorney general, at the relation of the department, and when so recovered shall be paid to the commonwealth.

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M.G.L.A. 164 § 64

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 64. Repealed, 1978, 512, Sec. 13**

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▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 65. Application of chapter to plants authorized by special act**

A town authorized by special act to construct, purchase, lease, establish or maintain a gas or electric plant shall be subject to this chapter, so far as the same may be applicable.

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Part I. Administration of the Government (Ch. 1-182)

☞ Title XXII. Corporations (Ch. 155-182)

☞ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 66. Application of chapter and by-laws of town to plant authorized by special act**

This chapter, and all ordinances or by-laws of any town acting under its provisions relative to the manufacture, use or distribution of gas or electricity, or to the quality thereof, or to the plant or the appliances therefor, shall apply to such town, so far as applicable.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 67. Revocation of rights, locations or licenses

No town having within its limits the main gas works or the central electric station, or the major portion of the wires, poles, conduits or pipes used in connection with any such works or plant, shall, except for a violation of the terms or conditions upon which the same were granted or for a violation of law respecting the exercise thereof, revoke any rights granted to any person or corporation engaged in manufacturing or distributing gas or electricity for sale after the introduction of the first vote authorizing the establishment of a gas or electric plant in a city council under section thirty-five or after the calling of a town meeting under a warrant including an article on the passage of such vote, until the proceedings so begun have been finally determined by granting or denying authority to establish such plant. After the ratification of the votes required by section thirty-five and the passage of both votes required by section thirty-six, no town, except as hereinbefore provided, shall revoke any rights, locations or licenses granted to any such person.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ § 68. Sale of plant by town

A town which has acquired a municipal lighting plant shall not sell it for the purpose of abandoning the distribution of gas or electricity to its inhabitants until such sale has been authorized in the manner and by the votes prescribed for the acquisition of such plants by sections thirty-five and thirty-six. No sale of such a plant shall be made for any purpose until the department, after notice and a public hearing, has determined that the facilities for furnishing and distributing gas and electricity in the territory served by such plant will not thereby be diminished, and that such sale and the terms thereof are consistent with the public interest.

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Part I. Administration of the Government (Ch. 1-182)

▣ Title XXII. Corporations (Ch. 155-182)

▣ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 69. Enforcement by supreme judicial court**

The supreme judicial court for the county where the town is situated shall have jurisdiction on petition of the department or of twenty taxable inhabitants of the town to compel the fixing of prices by the town in compliance with sections fifty-seven and fifty-eight, to prevent any town from purchasing, operating or selling a gas or electric plant in violation of any provision of this chapter, and generally to enforce compliance with the terms and provisions thereof relative to the manufacture or distribution of gas or electricity by a town.

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☞ Title XXII. Corporations (Ch. 155-182)

☞ Chapter 164. Manufacture and Sale of Gas and Electricity (Refs & Annos)

→→ **§ 69A. Purchase, sale and distribution of natural gas by municipality**

Any city or town which maintains or operates a municipal lighting plant which includes a gas plant may purchase, sell and distribute natural gas, and the provisions of sections thirty-four to sixty-nine, inclusive, so far as apt, shall apply to the purchase, sale and distribution by such city or town of natural gas. Every such city or town purchasing, selling and distributing natural gas shall have all the powers and be subject to all the liabilities of said sections, including the authority to borrow money for the establishment, extension or enlargement of a plant and providing facilities for the purchase, sale and distribution of natural gas.

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Added by St.1950, c. 419.

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# **EXHIBIT**

# **4**

(Composite Copy)  
November 1991

AGREEMENT FOR JOINT OWNERSHIP, CONSTRUCTION AND  
OPERATION OF NEW HAMPSHIRE NUCLEAR UNITS

---

Dated: May 1, 1973

As Amended: May 24, 1974 (First)  
June 21, 1974 (Second)  
September 25, 1974 (Third)  
October 25, 1974 (Fourth)  
January 31, 1975 (Fifth)  
April 18, 1979 (Sixth)  
April 18, 1979 (Seventh - not effective)  
April 25, 1979 (Eighth)  
June 8, 1979 (Ninth)  
October 11, 1979 (Tenth)  
December 15, 1979 (Eleventh)  
June 16, 1980 (Twelfth)  
December 31, 1980 (Thirteenth)  
May 25, 1982 (Fourteenth)  
April 27, 1984 (Fifteenth)  
June 15, 1984 (Sixteenth)  
March 8, 1985 (Seventeenth)  
March 14, 1986 (Eighteenth)  
May 1, 1986 (Nineteenth)  
September 18, 1986 (Twentieth)  
November 12, 1987 (Twenty-First)  
January 13, 1989 (Twenty-Second)  
November 1, 1990 (Twenty-Third)

---

Parties

Public Service Company of New Hampshire ←  
~~The United Illuminating Company~~ ✓  
~~Montaup Electric Company~~  
~~EUA Power Corporation~~  
~~New England Power Company~~ ✓  
~~Canal Electric Company~~ ✓  
~~The Connecticut Light and Power Company~~ ✓  
~~New Hampshire Electric Cooperative, Inc.~~ ✓  
~~Town of Hudson, Massachusetts Light and Power Department~~  
~~Vermont Electric Generation and Transmission Cooperative, Inc.~~ ✓  
~~Massachusetts Municipal Wholesale Electric Company~~  
~~Taunton Municipal Lighting Plant Commission~~

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Note:

In text that follows the wording which appears between these asterisks (\*\*\*). is that addition made by the amendment noted in the margin.

INDEX

<u>Paragraph No.</u>	<u>Subject</u>	<u>Page</u>
1	Description of the Units	2
2	Designation of the Site	2
3	Participation in the Units	3
4	Conveyance of Property	10
5	Waiver of Partition	13
6	Relationship of Participants	13
7	Environmental Studies	14
8	Design and Construction of the Units	14
9	Execution of Contracts	16
10	Insurance and Liability of Participants	16
11	Payment of Capital Costs Incurred	21
12	Operation and Maintenance of the Units	27
13	Payment of Operation and Maintenance Expenses; Inventories and Fuel	28
13A	Decommissioning Costs and Payments	33
14	Right to Audit	37
15	Entitlements	38
16	Dispatch of Units	38
17	Transmission of Power	38
18	Agreements - Delay in Commercial Operation Date	39
19	Destruction, Damage, or Condemnation of Units	40
20	Other Uses of the Site	42
21	Approvals of Regulatory Agencies	44
22	Conveyance of Security Interests or In Trust	44



23	Rights re Transfer of Ownership Shares	45
24	Termination, Suspension, Shutdown or Resumption of Construction	55
25	Defaults by Participants	56

<u>Paragraph No.</u>	<u>Subject</u>	<u>Page</u>
26	Arbitration	62
27	Notices	63
28	Severability of Provisions	64
29	Amendment	64
30	Applicable Law	65
31	Term	65
32	Miscellaneous	66
33	Certain Agreements Concerning Construction of the Units	68
34	Creation of Oversight Committee	70
35	Appointment of Disbursing Agent	71
36	Change in Project Management	72
37	Creation of Executive Committee	73

<u>Exhibit No.</u>	<u>Description</u>
1	Ownership Shares to be Made Available to Additional Participants
2	Seabrook Costs (Other Than Site Acquisition Costs) As of April 30, 1973

AGREEMENT FOR JOINT OWNERSHIP, CONSTRUCTION  
AND OPERATION OF NEW HAMPSHIRE NUCLEAR UNITS

Agreement made as of the first day of May, 1973, by and between Public Service Company of New Hampshire (PSNH), The United Illuminating Company (UI), Central Maine Power Company (CMP), The Connecticut Light and Power Company (CL&P), Fitchburg Gas and Electric Light Company (Fitchburg), Montaup Electric Company (Montaup), New Bedford Gas and Edison Light Company (New Bedford), New England Power Company (NEPCO), and Vermont Electric Power Company, Inc. (VELCO) (the Original Participants).

The Original Participants are signatories to a Memorandum of Agreement dated as of June 1, 1972, amended by agreement dated as of July 7, 1972 (the Preliminary Agreement) under which they have agreed to participate in the ownership, construction, and operation of two nuclear generating units to be constructed in Seabrook, New Hampshire, or at an alternate site in Litchfield, New Hampshire, and initially scheduled, respectively, for 1979 and 1981 operation (the Units). The unit scheduled for operation in 1979 is hereinafter sometimes referred to as the First Unit, and the unit scheduled for operation in 1981 is hereinafter sometimes referred to as the Second Unit. One of these sites, as designated by PSNH in accordance with paragraph 2, is hereinafter referred to as "the Site". The Preliminary Agreement also provides for participation in ownership of the Units by Additional Participants (as defined therein). As used in this Agreement, the term Participants shall mean the Original Participants and Additional Participants which become parties hereto.

- 2 -

This Agreement sets forth the rights and obligations of the Participants with respect to the ownership, construction, and operation of the Units.

It is agreed as follows:

1. Description of the Units

The Units shall be two nuclear fueled steam electric generating units each of approximately 1150 MW net capability and will include the main power transformer or transformers and those switching station facilities and connecting cables which are installed at the Site in connection with the two units. The First Unit shall initially be scheduled to commence commercial operation on or about November 1, 1979, and the Second Unit on or about November 1, 1981; provided, however, that PSNH reserves the right to revise the schedules from time to time to reflect actual progress in design, engineering, licensing, procurement, and construction. In order to meet the scheduled 1979 and 1981 commercial operating dates, PSNH presently intends to proceed with AEC license preparation pending receipt of the New Hampshire siting certificate; however, PSNH reserves the right to revise the schedules to reflect a PSNH decision, based on developments in its New Hampshire siting proceeding, to suspend or delay AEC license preparation pending receipt of the New Hampshire siting certificate.

2. Designation of the Site

- 3 -

The Units will be constructed at either the Seabrook site or the Litchfield site, as determined by PSNH. Such determination will be made not later than the time at which the last license or permit required to enable commencement of construction of the Units is obtained on terms satisfactory to PSNH.

The Seabrook site is located westerly of Hampton Harbor in Seabrook, Hampton, and Hampton Falls, New Hampshire, and the Litchfield site is located on the easterly side of the Merrimack River in Litchfield, New Hampshire.

3. Participation in the Units

3.1 Subject to change in accordance with the provisions of this Agreement, the Units and the Property Interests as defined in paragraph 4.1 of this Agreement will be owned jointly, as tenants in common with undivided interests, by the Original Participants in the following proportions:

- 4 -

PSNH	50.0000%
UI	20.0000
CMP	2.5505
CL&P	11.9776
Fitchburg	.1716
Montaup	1.9064
New Bedford	1.3539
NEPCO	8.9430
VELCO	<u>3.0970</u>
Total	100.0000%

Nothing herein shall be deemed to restrict the right of PSNH or UI to make capacity exchange arrangements on an ownership basis with other Participants which will reduce their Ownership Shares and increase the Ownership Shares of such other Participants.

In accordance with the Preliminary Agreement, the Original Participants agree to make available to the Additional Participants portions of their interests, as set forth in paragraphs 3.2 - 3.4 below.

The proportions in which the Participants shall own the Units and be entitled to their capacity and output, as from time to time established under this Agreement, are herein referred to as the "Ownership Share" or "Ownership Shares."

\*\*\*Over the Adjustment Periods (as defined below), the Ownership Share of PSNH shall be reduced and (i) the Ownership Shares of Bangor, CMP, Hudson, MMWEC, Montaup, NB and Taunton (herein collectively referred to as the "Initial Transferees") shall be increased by 1.80142%, 1.0%, 0.01957%, 6.00091%,<sup>1</sup> 1.0%, 2.17390% and 0.13065%, respectively, and (ii) the Ownership Share

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<sup>1</sup> May be slightly more or less, as specified by written notice by MMWEC to PSNH.

- 5 -

of each party which shall become an Additional Transferee as provided in clause (e) hereof shall be increased by the percentage Ownership Share specified by such party pursuant to said clause (e) (the Initial Transferees and Additional Transferees being herein referred to as the "Transferees" and the percentage increase of each Transferee being herein referred to as its "New Ownership Share"), as follows:\*\*\*

\*\*\* (a) That portion of amounts incurred while one or more Adjustment Periods are in effect for costs of the Units which would be applicable to the Ownership Share of PSNH in the absence of this provision shall be for all purposes of the Agreement deemed applicable to the Ownership Shares of the Transferees for which such Adjustment Periods are then in effect in the proportion that the New Ownership Share of each such Transferee bears to the aggregate New Ownership Shares of all Transferees for which Adjustment Periods are then in effect; provided, however, that if, at any time while the Adjustment Periods of Bangor, CMP, Fitchburg, Hudson, Montaup and NB are in effect, the Adjustment Period of MMWEC is not in effect, the portion of amounts incurred for such costs which shall be deemed applicable to the Ownership Shares of the above-named Transferees shall be computed as though the Adjustment Periods of MMWEC and Taunton were in effect.

For purposes of this provision, the terms "cost" or "costs" shall include the amount invoiced to the Participants, except that in the case of PSNH "cost" shall be the difference between the amounts invoiced to the Participants and the total amount on which

- 6 -

such invoices are based. In all cases, "costs" shall be considered to be applicable to a Participant's Ownership Share regardless of whether payment of the invoice has been received by PSNH and shall not include any Participant's allowance for funds used during construction or any equivalent thereof or interest, if any, paid by MMWEC pursuant to clause (f) below.

The Adjustment Period or Adjustment Periods in effect as to any Transferee shall be the period or periods beginning with the Effective Date with respect to each New Ownership Share of such Transferee and ending on the earlier of (i) in the case of a Transferee having another Ownership Share, when that Share has increased by the amount of its New Ownership Share, or (ii) in the case of each other Transferee, when such Transferee's Ownership Share is equal to its New Ownership Share, or (iii) termination of the Project. If the Effective Date of the Adjustment Period of New Hampshire Electric Cooperative, Inc. (NH Coop) has not occurred by January 1, 1981, NH Coop or PSNH may at any time thereafter, by written notice to NH Coop or PSNH, as the case may be, terminate the proposed acquisition of NH Coop's New Ownership Share, in which case NH Coop shall have no further rights or obligations with respect to such New Ownership Share. Such termination shall not affect the other acquisitions contemplated herein. PSNH shall promptly notify the Participants and other Transferees of such termination.

The Effective Date with respect to the New Ownership Shares of Bangor, CMP, Fitchburg, Hudson, Montaup and NB shall be January 31,



- 7 -

1981.

Subject to clause (f) below, the Effective Date with respect to the New Ownership Share of MMWEC shall be the last day of the month in which MMWEC shall receive an approval of the Massachusetts Department of Public Utilities of the financing by MMWEC of the acquisition of such New Ownership Share (MDPU Order).

The Effective Date with respect to the New Ownership Share of Taunton shall be the last day of the month in which Taunton shall have received the last of the approvals of the Municipal Lighting Plant Commission of the City of Taunton and the Taunton City Council. If the Effective Date of the Adjustment Period of Taunton has not occurred by June 30, 1981, Taunton shall have no further rights or obligations with respect to such New Ownership Share. No such termination shall affect any other acquisitions of New Ownership Shares contemplated herein.

The Effective Date with respect to the New Ownership Share of NH Coop shall remain as provided in the Tenth Amendment, i.e., the last day of the month in which the last of any required regulatory approvals of the type specified in Section 3 of the Seventh Amendment with respect to the acquisition by NH Coop of its New Ownership Share shall have been received and financing of such New Ownership Share shall have been accomplished.

Appeals or other requests for review of any such regulatory approvals shall not stay the Effective Date established in the preceding two paragraphs of this clause (a), unless a stay is issued by the court or other body to which the appeal or request

- 8 -

for review is directed.\*\*\*

\*\*\* (b) During any Adjustment Period, the Ownership Share of PSNH and of each of the Transferees shall be that percentage which the aggregate costs then applicable to such Ownership Share under the provisions of this Agreement including the foregoing clause (a) is of the aggregate costs then so applicable to all Participants.

(c) The obligation of each Transferee to pay any amount specified in the foregoing clause (a) shall be subject to the condition precedent, at the time such payment is required, that PSNH shall have delivered to the Transferee:

(i) an invoice for the amount of such payment, referring to paragraph 3.1 and showing the total costs otherwise applicable to PSNH's share, on which the Transferee's proportion is computed, and stating that the Adjustment Period has not been terminated pursuant to the foregoing clause (a);

(ii) a certificate or other instrument in recordable form of PSNH confirming the Transferee's adjusted Ownership Share pursuant to the foregoing clause (b) after giving effect to the invoice specified in the preceding subclause (i); and

(iii) such other instruments, certificates, opinions or documents as the Transferee may reasonably request to establish or confirm its interest in the Units, the Property Interests, and related rights and interests in accordance with its adjusted Ownership Share.

(d) At the time that PSNH requests from a Transferee the

- 9 -

first payment pursuant to the foregoing clause (a) inserted by the Tenth Amendment to the Agreement, PSNH shall deliver to such Transferee necessary releases, if any, from all trustees under bond indentures to which PSNH is a party or to which any of its assets or properties is subject, and an opinion of counsel for PSNH in form and substance satisfactory to such Transferee to the effect that the Agreement, as amended by the Tenth Amendment to the Agreement, is the valid, legal, and binding agreement of PSNH and will be effective to establish as to each Transferee the full legal right, free and clear of any liens or security interests of mortgages or security agreements of PSNH, to its proportionate share of the Units, Property Interests, and related rights and interests in accordance with its adjusted Ownership Share, in accordance with the provisions of the Agreement.

(e) A Participant may become an Additional Transferee with respect to an increase in its Ownership Share by execution and delivery to PSNH of an agreement to such effect, in the form attached as Exhibit 1 to the offer dated October 11, 1979, of PSNH with respect to the Units, specifying the percentage Ownership Share constituting such increase. If an Initial Transferee has agreed or shall agree to a further increase in its Ownership Share, such further increase shall be deemed a separate New Ownership Share with respect to which such Transferee shall be deemed an Additional Transferee (and not an Initial Transferee).

Any other public utility approved by PSNH, whether municipal, cooperative or investor-owned, may become an Additional Transferee

- 10 -

by entering into an Agreement with PSNH to such effect in the form attached as Exhibit 2 to the offer dated October 11, 1979, of PSNH with respect to the Units, specifying the percentage Ownership Share it agrees to acquire, and agreeing to become a party to the Agreement and entitled to all rights as a Participant hereunder to the extent of its Ownership Share.\*\*\*

\*\*\* (f) MMWEC shall use its best efforts to complete the first issuance of securities for the financing of its New Ownership Share as promptly as possible after receipt of the MDPU Order. PSNH may, in accordance with the provisions of clause (c)(i) of Paragraph 3.1 of this Agreement, invoice MMWEC for such New Ownership Share as of the first day of the month following the month in which the MDPU Order is received. The amount of any invoice issued to MMWEC pursuant to this clause for its New Ownership Share, together with interest thereon from the date of said invoice to the date of payment at a rate of thirteen percentum (13%) per annum until March 31, 1981, and thereafter at the rate equal to the rate at which PSNH has during the period accrued to its allowance for funds used during construction, shall not be due and payable until the first business day following receipt by MMWEC of the proceeds of such initial financing. If, for any reason, MMWEC shall be unable to complete such financing by June 30, 1981, (i) no further invoices shall be issued pursuant to the second sentence of this clause (f), (ii) MMWEC shall be and hereby is released and discharged from any obligations arising under the amendments to Paragraph 3.1 contained in the Thirteenth Amendment

- 11 -

to the Agreement, which relate to the Adjustment Period which started on the Effective Date established under clause (a) of Paragraph 3.1, including obligations under the outstanding invoices and such invoices shall be null and void, (iii) the Effective Date of MMWEC's New Ownership Share established in clause (a) of Paragraph 3.1 shall be deemed automatically cancelled and the Effective Date of MMWEC's New Ownership Share shall thereafter be the last day of the month in which MMWEC shall receive the proceeds from the first issuance of securities for such New Ownership Share, and (iv) such portion of the New Ownership Share theretofore acquired by MMWEC shall revert to PSNH; provided, however, that MMWEC shall not thereby be excused from the obligation to use its best efforts thereafter to complete such financing in the manner contemplated by this clause (f).\*\*\*

3.2 Each Original Participant shall, if and to the extent required by the provisions of paragraphs 3.3 and 3.4, make available to the Additional Participants a portion of its Ownership Share, as set forth in paragraph 3.1. In such event, the Units and the Property Interests will be owned jointly by the Original Participants and any Additional Participants so acquiring Ownership Shares.

3.3 The Ownership Shares to be made available to Additional Participants, and the Original Participants' respective obligations to make such Ownership Shares available, are set forth

- 12 -

in Exhibit 1 attached hereto and made a part hereof.

3.4 An Additional Participant desiring to participate in ownership of the Units shall, on or before November 30, 1974,<sup>2</sup> become a party to this Agreement and the Transmission Agreement identified in paragraph 17 of this Agreement by executing copies thereof and shall thereby acquire an Ownership Share in each of the Units equal to its Commitment. At the time of such execution each such Additional Participant shall reimburse each Original Participant by which any portion of its Ownership Share was made available for costs theretofore paid and incurred by such Original Participant under this Agreement in excess of such Original Participant's Ownership Share (as revised), including an "allowance for funds used during construction" at the rate or rates used by such Original Participant from the dates such costs were paid or incurred to the dates of reimbursement by such Additional Participant. Following their acquisition of Ownership Shares and reimbursement of Original Participants, such Additional Participants shall be deemed to be Participants for all purposes of this Agreement.

If an Additional Participant shall not, on or before November 30, 1974,<sup>3</sup> enter into this agreement and the Transmission

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<sup>2</sup> Date variously changed by Amendments dated May 24, 1974, September 25, 1974, and October 25, 1974; and ultimately extended to January 31, 1975, by Waiver Agreement dated December 26, 1974.

<sup>3</sup> Date variously changed by Amendments dated May 24, 1974, September 25, 1974, and October 25, 1974; and ultimately extended to January 31, 1975, by Waiver Agreement dated December 26, 1974.



- 13 -

Agreement with valid and binding effect on such Additional Participant, it shall no longer have any right to participate in the Units.

4. Conveyance of Property

4.1 Promptly following designation of the Site in accordance with paragraph 2 or June 30, 1974 (whichever is later), PSNH shall arrange for and complete conveyance to the Participants, in their adjusted Ownership Shares in the Units, of title, in fee simple, to that portion of the Site which is designated by PSNH as the First and Second Unit Site (or to such portions of the First and Second Unit Site so designated as have then been acquired), together with such easements, rights, and permissions as may be reasonably required for the construction and operation of the Units, but not including those required for necessary transmission lines. All of the property to be so conveyed (including such portions of the Site and such easements, rights and permissions) are hereinafter referred to as the "Property Interests". However, PSNH shall retain authority to determine activities on the Site so as to permit the Site to qualify as an "exclusion area" for the Units and any other units which may be located on the Site. If any portions of the First and Second Unit Site have not then been acquired, they shall later be conveyed to the Participants when acquired. In designating the First and Second Unit Site, PSNH will include sufficient area to permit (with such easements, rights and permissions) the use of the First and Second Unit Site for the

- 14 -

purposes contemplated by this Agreement. In making such easements, rights, and permissions available hereunder, PSNH shall take into account, to the extent it deems practicable, any special requirements of the other Participants' mortgage indentures as to bondable property or otherwise which are brought to the attention of PSNH. The conveyance will be by one or more indentures of co-tenancy and will be subject to any restrictions contained in the underlying deeds and any restrictions or liens resulting from municipal action, but free of any mortgages or attachments. Such conveyance shall be by instruments warranting only against defects in title based on any actions by Properties, Inc., or PSNH during their respective periods of ownership. Each Participant shall have the right to review the titles to the Property Interests. Upon notice by any Participant to PSNH that there is any defect in the titles to the land comprising the First and Second Unit Site; or any lien or encumbrance with respect thereto, which, in the reasonable opinion of counsel for such Participant, would prevent said land or any improvements thereto from being used as a basis for the issuance of securities by such Participant, PSNH shall use its best efforts in cooperation with such Participant and at the expense of such Participant to eliminate or cure such defect, lien or encumbrance. If any such defect affects more than one Participant, such expenses shall be shared by them in proportion to their Ownership Shares. In no event, however, shall any such defect, lien or encumbrance permit any Participant to delay or reduce payment of its Ownership Share of the price payable for the



- 15 -

Property Interests.

4.2 If deemed necessary by PSNH, appropriate easements in the First and Second Unit Site shall be provided to PSNH for transmission facilities by reservation in the conveyance to Participants.

4.3 In consideration for its Ownership Share of the Property Interests each Participant shall upon delivery of the instrument conveying title thereto pay to PSNH, Properties, Inc., and/or UI, as directed by PSNH, such Participant's Ownership Share of that portion of the total Site acquisition costs to PSNH, Properties, Inc., and/or UI to the date of conveyance, including an "allowance for funds used during construction" and property taxes, allocable to the First and Second Unit Site, such total Site acquisition costs being determined in accordance with the Federal Power Commission's Uniform System of Accounts Prescribed for Class A and B Public Utilities and Licensees (the Uniform System). The portion so allocable to the First and Second Unit Site shall be that portion of such total Site acquisition costs as determined by PSNH which is equal to the sum of (i) the purchase price of the land included in the First and Second Unit Site and (ii) the amount by which such total Site acquisition costs exceed the aggregate purchase price of all the land included in the Site (the costs as of April 30, 1972, of the Seabrook site being itemized in Exhibit 5 to the Preliminary Agreement). Upon delivery of such instrument of

- 16 -

conveyance, each Participant shall also evidence full compliance with the provisions of this Agreement by paying, in addition to the amount payable under the first sentence of this paragraph 4.3, all sums then due and payable which are required to be paid by any other provisions of this Agreement or under any contract entered into by or on behalf of each Participant in pursuance of this Agreement.

5. Waiver of Partition

5.1 Each Participant hereby waives any right to partition the Units and the Property Interests or any part thereof (whether by partition in kind or by sale and disposition of the proceeds thereof) so long as the Property Interests are used or useful for an electric generating unit, or for the term set forth in paragraph 31.1, whichever is less, and agrees not to commence during such period any action of any kind seeking any form of partition with respect thereto whether pursuant to a remedy at common law or under any statute and waives the benefit of all laws and decisions, now or hereafter enacted or decided authorizing such partition. The indenture of co-tenancy and each other deed or instrument conveying any title or right to any Participant shall contain an express waiver of any right to partition plus the other provisions of this Agreement or such of them as, in the opinion of counsel for PSNH, should appropriately be recorded in the Registry of Deeds.

- 17 -

6. Relationship of Participants

6.1 The obligations of the Participants are several and not joint. Any intent to create by this Agreement or by any grant, lease or license related hereto an association, joint venture, trust or partnership or to impose on any Participant trust or partnership rights or obligations is expressly negatived. Except as expressly provided herein, no Participant shall have by virtue of this Agreement or of any such grant, lease or license the right or power to bind any other Participant without its express written consent.

- 18 -

7. Environmental Studies

7.1 Certain environmental studies have been either completed or commenced by PSNH. Those not yet completed shall be completed and PSNH may undertake such additional environmental studies as it deems necessary or desirable in connection with the siting or design of the Units or the securing of any approvals therefor.

8. Design and Construction of the Units

\*\*\*8.1 PSNH shall have sole responsibility for, and is fully authorized to act for the other Participants with respect to, and shall determine the design, engineering, procurement, installation and all other aspects of the construction of, the Units and of any modifications or additions at any time made to the Units, except as the Participants shall otherwise agree, all in accordance with "Prudent Utility Practice". As used herein, the term "Prudent Utility Practice" shall at a particular time mean any of the practices, methods and acts which, in the exercise of reasonable judgment in the light of the facts known to PSNH at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with licensing and regulatory considerations, environmental considerations, reliability, safety and expedition and taking into account the interests of all Participants. In determining whether any practice, method or act is in accordance with Prudent Utility Practice, due consideration shall be given to the fact that the

- 19 -

design and other aspects of construction of nuclear electric generating units involve the application of advancing technology and are subject to changing regulatory and environmental requirements. Prudent Utility Practice is not intended to be limited to the optimum practice, method or act, to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts including those involving the use of new concepts or technology.\*\*\* It is expected that the Nuclear Services Division of Yankee Atomic Electric Company will provide engineering and construction supervision, that the architect-engineer will be United Engineers and Constructors, Inc., and that Westinghouse Electric Corporation will supply the nuclear steam supply system and fabrication of initial fuel loading and of several regions of reload fuel. The Participants shall share risks of employee negligence and other risks of construction in accordance with their respective Ownership Shares. During the process of design and construction of the Units or of any modifications or additions thereto, PSNH shall furnish reports, at least quarterly, to all Participants with respect to progress of the project, shall provide each Participant at other times with such other information relating thereto as such Participant reasonably may from time to time request, and shall endeavor to advise all Participants concerning any design decisions which will have a significant adverse effect upon the cost of power from the Units, or upon their reliability or availability, and to consider responses thereto. It is recognized by the Participants that requests and consideration

- 20 -

of responses as aforesaid must not be allowed to delay work on the Units to such an extent as to create a material adverse effect on the cost of the Units or the timetable for their completion and that PSNH will have sole discretion in making design and construction decisions.

9. Execution of Contracts

9.1 The contracts covering design, engineering and construction services and major components of the Units and all other contracts relating to procurement, operation and maintenance of the Units, including contracts for the purchase of materials, equipment, fuel, or services for the Units shall be executed by PSNH acting for itself and as agent on behalf of each of the Participants, shall provide for several and not joint liability in proportion to the Participants' respective Ownership Shares and may provide for separate invoicing to the Participants in accordance with their Ownership Shares; provided, however, that at the request of PSNH, any Participant shall, on its own behalf, execute any of such contracts; and provided further, that the firm or firms responsible for the engineering and construction of the Units may be authorized by PSNH to sign contracts as agent for all Participants. Whether or not a contract is entered into in the name of all Participants, each Participant shall be severally and not jointly responsible for its Ownership Share of all amounts that are payable under or with respect to the contract. No contract contemplated by this paragraph shall provide for retention of title

- 21 -

by a supplier to property purchased for the Units after the delivery of the property at the Site. It is understood that PSNH has prior to the date hereof executed in its own name certain contracts relating to the Units, including without limitation contracts with Westinghouse Electric Corporation for the purchase of two nuclear steam supply systems and for nuclear fuel fabrication, and each Participant by its execution hereof agrees at the request of PSNH to accept in writing assignments from PSNH of interests in such contracts proportional to such Participant's Ownership Share, whereupon such Participant shall be severally and not jointly responsible for its Ownership Share of all amounts payable under or with respect to such contracts.

10. Insurance and Liability of Participants

10.1 PSNH is authorized to obtain and maintain, and shall obtain and maintain on behalf of all Participants, policies of liability and property insurance with respect to ownership of the Property Interests and the construction, ownership, operation, and maintenance of the Units which shall afford protection against the insurable hazards and risks as to which the owners of units of similar size and type customarily maintain insurance, unless PSNH is unable to obtain, or to obtain on reasonable terms, any such insurance or unless Participants having Ownership Shares aggregating at least 80% agree that any such hazard or risk (other than that of nuclear liability) shall not be insured. Such coverage shall include, to the extent available, nuclear liability



- 22 -

insurance from NELIA or MAELU, or both, in such form and in such amount as will meet the financial protection requirements of the Atomic Energy Act of 1954, as amended, and an agreement of indemnification as contemplated by Section 170 of said Act. In the event that the nuclear liability protection system contemplated by said Section 170 is repealed or changed, PSNH shall obtain and maintain, to the extent available on reasonable terms, alternate protection against nuclear liability.

\*\*\*PSNH or any successor managing agent appointed under Paragraph 36.2 is further specifically authorized, subject to the direction of the Executive Committee, to obtain and maintain surety bonds, insurance or other forms of assurance to afford protection from liability or expense in the event that one or more of the Participants fail to pay all or any portion of their respective share or shares of Decommissioning Financing Fund payments pursuant to Paragraph 13A. All costs of any such surety bond premiums, insurance premiums or similar forms of assurance shall be part of the expenses of operating and maintaining the Units borne by the Participants and shall include any excise taxes paid or incurred in connection with the payment of such costs.\*\*\*

It is recognized that the amount of property insurance available to the generating units in a nuclear electric generating station may (as it now is) be subject to an overall site limitation and that if so, PSNH may be unable to obtain all of the property insurance coverage which would otherwise be required by this paragraph. If, as a result of such coverage limitation, the amount



- 23 -

of insurance proceeds received on a loss simultaneously affecting one of the Units and one or more other units or other property on the Site is less than the aggregate amount of the insurable loss, the insurance proceeds shall be allocated among the units or other property affected in proportion to the gross investments therein. If the insurance proceeds allocated (or reallocated) to any unit or other property in this manner are in excess of the insurable loss sustained as to it, such excess shall be reallocated in the same manner among the other units or property affected.

In the event PSNH determines that all or a portion of the property insurance for the Units should be provided through a mutual insurance company organized by electric utilities or otherwise, it may, following consultation with the other Participants, require all Participants to become members of such company, subject to their obtaining necessary regulatory approvals.

\*\*\*It is recognized that in order to meet applicable regulatory requirements it may be necessary from time to time to obtain policies of liability and property damage insurance and excess property insurance from one or more insurers. With respect to such policies, PSNH or the managing agent appointed under Paragraph 36.2 is specifically authorized to execute and deliver on behalf of the Participants all applications and other documents relating thereto. With respect to the Secondary Financial Protection Policy required by the Nuclear Regulatory Commission pursuant to the Price-Anderson Act, as amended through March 14, 1986, PSNH or any successor managing agent appointed under

- 24 -

Paragraph 36.2 is specifically authorized, notwithstanding any provisions to the contrary in Paragraphs 9 or 10 or any other Paragraph of this Agreement which provide authority to PSNH to execute with limitations contracts on the part of Participants, to execute and deliver on behalf of the Participants without restriction any Bond in connection with the Certificate of Insurance relating thereto. Notwithstanding any delegation of responsibilities pursuant to Paragraph 36 which may have occurred, PSNH or the managing agent appointed under Paragraph 36.2, when specifically authorized by vote of the Executive Committee, shall have the authority to obtain and maintain in its name any policy of insurance from a mutual insurer for the protection of the Property Interests and for the benefit of all Participants, each in an amount approved by the Executive Committee. To the extent possible, all Participants shall be named as additional insureds in such policies. Without derogating from the authority granted by the third preceding sentence, any payments (including without limitation any premiums, reserve premiums or retrospective premiums) required by such policies or Bond shall constitute an operating expense of the Units of which each Participant is obligated vis-a-vis the other Participants to pay its Ownership Share pursuant to Paragraph 13, the respective portions of such premiums to be paid by each Participant, promptly after receipt of notification, to the insurer or to PSNH or such managing agent for payment to the insurer in accordance with the payment provisions of the respective insurance policies. If any Participant pays less

- 25 -

than its Ownership Share of such payments, it shall indemnify and make whole, any other Participant who as a result has paid more than its Ownership Share of such payments.\*\*\*

The premium for the property insurance obtained pursuant hereto shall be allocated among all of the units covered on the basis of the gross investments in the units.

In the event any portion of the insurance contemplated by this paragraph cannot be obtained, or cannot be obtained on reasonable terms, written notice of such fact shall be given to all Participants. \*\*\*PSNH shall keep the other Participants informed as to the status of insurance in force. Any Participant may request additional insurance to the extent available, and PSNH shall purchase such requested insurance at the expense of such Participant. The proceeds from such requested insurance shall be disbursed as directed by such Participant.\*\*\*

Each insurance policy obtained pursuant to this paragraph shall name to the extent of their insurable interests all Participants as insureds, each to the same effect as if separately insured, and shall, if a Participant so requests, include as insureds mortgagees and others holding a security interest in such Participant's undivided interest in the Units; and certificates of insurance for all such policies shall be provided to each Participant upon request.

PSNH shall have authority on behalf of all Participants to settle any loss covered by any policy of insurance obtained pursuant to this paragraph. \*\*\*PSNH shall notify the other

- 26 -

Participants of any such loss, and before entering into any such proposed settlement, shall notify the other Participants of such proposed settlement, and shall, to the extent sufficient time is available, provide the other Participants with an opportunity to comment; provided, however, that such right to comment shall not be allowed to delay any settlement or to affect the sole discretion of PSNH in making such settlement.\*\*\*

10.2 Any uninsured loss, damage, or liability and any expenses arising out of any such loss, damage, or liability shall be borne by the Participants in accordance with their Ownership Shares.

10.3 \*\*\*For and in consideration of the fact that PSNH pursuant to this Agreement is undertaking to design, engineer, procure, install, construct, operate and maintain the Units for and on behalf of itself and the other Participants as their respective interests appear without any compensation or charge other than the recovery of PSNH's actual costs and expenses for such service, no \*\*\* Participant shall be entitled to recover from PSNH for any damages resulting from error or delay in the design, engineering, procurement, installation, or construction of either of the Units, or for any damage thereto, any curtailment of power, or any other damages of any kind, including consequential damages occurring during the course of the design, engineering, procurement, installation, construction, operation, or maintenance of the Units

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- 27 -

or otherwise arising out of the performance of this Agreement, unless such damages shall have resulted from a deliberate violation of this Agreement occurring pursuant to authorized corporate action by PSNH.

11. Payment of Capital Costs Incurred

11.1 Upon execution of this Agreement each Original Participant shall reimburse PSNH and UI such Original Participant's Ownership Share of the total amount shown in Column (C) of Exhibit 2 to this Agreement, said amount being the sum of (a) the costs for the period prior to May 1, 1972 shown in Exhibit 4 to the Preliminary Agreement plus (b) the costs for the period May 1, 1972 through April 30, 1973.

Each Participant shall thereafter promptly after receipt of invoices from PSNH, which shall be submitted by PSNH monthly, pay to PSNH its Ownership Share of any amounts incurred by PSNH additional to those reimbursed in accordance with the immediately preceding paragraph, whether incurred prior to the date of this Agreement or thereafter, for all direct and indirect costs (other than those covered by paragraph 4.3) associated with the design and construction of the Units, including but not limited to costs incurred pursuant to paragraphs 7, 8, 10, or 21, or for similar costs incurred by PSNH at any time during the lives of the Units as a result of modifications or additions to the Units, including any costs of removal and reflecting any salvage. Costs for which the Participants are liable pursuant to this paragraph 11 shall be

- 28 -

determined in accordance with the Uniform System and shall include all direct and indirect costs reasonably incurred by or on behalf of PSNH with respect to the Units or either of them which are properly chargeable to capital accounts under the Uniform System (or such similar accounts as may hereafter become appropriate) in connection with the design, engineering, procurement, installation, construction, insuring, and licensing of the Units or either of them. Such costs will also include costs incurred by PSNH in improving and developing the Site as required for the Units. Each Participant further agrees, with respect to all contracts for engineering and construction services and components of the Units as to which the Participants are separately invoiced for their Ownership Shares by the contractor or manufacturer, to pay promptly all such invoices properly rendered. Each Participant shall make available to PSNH upon PSNH's request the Participant's Ownership Share of such amounts as PSNH may reasonably request in order to enable PSNH to make timely payments for costs covered by this paragraph without the necessity of use by PSNH of its own funds to cover other Participants' Ownership Shares of such payments. Any amount remaining unpaid after 15 days following the receipt of invoices or requests under this paragraph shall bear interest thereon from the date of invoice or request at an annual rate of 2% over the lowest interest rate then being charged by The First National Bank of Boston on 90-day commercial loans; \*\*\* provided that any Participant which agrees to pay the additional expense, if any, which may be caused to PSNH by its request, may require PSNH



- 29 -

to furnish invoices and requests for funds to it 15 days in advance of the schedule followed by PSNH as to other Participants. A Participant which requests that invoices and requests for funds be so furnished to it 15 days in advance shall not be obligated to pay interest in accordance with the preceding sentence unless it fails to pay an invoice within 30 days of its receipt thereof, or fails to provide funds so requested within 30 days of receipt of the request.\*\*\* There shall be included in the costs covered by this paragraph amounts equal to the costs of ownership to PSNH and UI (including but not limited to capital costs, including related franchise and income taxes; property taxes; and insurance) of that portion of the Site which is not within the First and Second Unit Site as designated in accordance with paragraph 4.1, which amounts (a) for the period prior to operation of the First Unit shall be all of said costs of ownership and (b) for the period beginning with operation of the First Unit and prior to operation of the Second Unit shall be one-half of said costs of ownership.

\*\*\*As part of the quarterly reporting procedure required by paragraph 8, PSNH shall prepare and provide to each other Participant a cash flow estimate showing by quarters projected construction costs to be shared by the Participants under this Agreement throughout the construction period of the Units. Such cash flow estimate shall be reviewed semiannually and revised as necessary, and copies of any such revision shall be furnished Participants with the next progress report furnished pursuant to paragraph 8. At the beginning of each calendar year or as soon

- 30 -

thereafter as is practicable throughout the duration of this Agreement, PSNH shall provide each other Participant with a schedule showing by month the projected costs to be shared by Participants during such calendar year. Throughout the construction period of the Units, such schedule shall be revised for the remainder of the calendar year at approximately mid-year. In addition, each monthly invoice to one of the other Participants throughout the construction period shall include, in addition to the information provided for in the preceding paragraph, an estimate of the amounts of projected construction costs to be shared by Participants during the two months following the one for which the invoice is submitted. All schedules and estimates provided for in this paragraph shall be for informational purposes only, and any inaccuracies or errors therein shall in no way relieve any of the other Participants from the obligation to pay promptly all invoices rendered in accordance with the provisions of this Agreement.\*\*\*

\*\*\*11.2 Within not more than 20 days after receipt of a request from PSNH, each of the following Participants will make an advance payment toward the costs of the Units (in addition to the normal monthly payments made by such Participant), of the amount set forth opposite its name below (which shall be the amount specified in the request):

The United Illuminating Company	\$ 3,000,000
Bangor Hydro-Electric Company	111,747
Central Maine Power Company	765,150
Central Vermont Public Service Corporation	539,130



- 31 -

Fitchburg Gas and Electric Light Company	51,480
Hudson Light and Power Department	5,256
Maine Public Service Company	438,168
Massachusetts Municipal Wholesale Electric Company	195,924
Montaup Electric Company	571,920
New Bedford Gas and Edison Light Company	406,170
New England Power Company	3,033,090
Taunton Municipal Lighting Plant	30,102
Vermont Electric Power Company, Inc.	39,780
	<u>\$10,627,917</u>

The advance payments shall be credited against costs of the Units applicable to the Ownership Share of such Participant and invoiced or accrued to it commencing \*\*\* the earlier of (i) January 1, 1981, or (ii) the Effective Date with respect to the New Ownership Shares of the Initial Transferees specified in paragraph 3.1(a) of the Agreement<sup>4</sup> \*\*\* or on such earlier date as PSNH shall specify by written notice to each such Participant; provided, however, that if construction of the Units is suspended or terminated prior to \*\*\* the earlier of (i) January 1, 1981, or (ii) the Effective Date with respect to the New Ownership Shares of the Initial Transferees specified in paragraph 3.1(a) of the Agreement\*\*\*, such credit shall commence as of the date of such suspension or termination. Such credit shall be in the amount of the advance payment plus interest at the rate specified in paragraph 11.1 of the Agreement from the date of the advance payment to the date of such credit. The amount of the advance payment to be made by each such

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<sup>4</sup> This date was first changed to July 1, 1980 by the Eleventh Amendment which also provided "except that in the case of The United Illuminating Company said January 1, 1980, date shall not be changed and the advance payments of The United Illuminating Company shall be credited against costs of the Units applicable to its Ownership Share and invoiced or accrued to it commencing January 1, 1980."

- 32 -

Participant was arrived at by multiplying twice its Ownership Share at May 31, 1979, times \$15,000,000, except that The United Illuminating Company's advance payment was arrived at by multiplying its Ownership Share at May 31, 1979, times \$15,000,000.\*\*\*

\*\*\*11.3 Within not more than 20 days after receipt of a request from PSNH, each of the following Participants will make an advance payment toward the costs of the Units (in addition to the normal monthly payments made by such Participant and the advance payment heretofore made by such Participant under paragraph 11.2), of the amount set forth opposite its name below (which shall be the amount specified in the request):

Bangor Hydro-Electric Company	\$ 111,747
Central Maine Power Company	765,150
Central Vermont Public Service Corporation	539,130
Fitchburg Gas and Electric Light Company	51,480
Hudson Light and Power Department	5,256
Maine Public Service Company	438,168
Massachusetts Municipal Wholesale Electric Company	595,924
Montaup Electric Company	571,920
New Bedford Gas and Edison Light Company	406,170
New England Power Company	3,033,090
Taunton Municipal Lighting Plant	30,102
Vermont Electric Power Company, Inc.	39,780
	<u>\$7,627,917</u>

The advance payments shall be credited, together with the advance payments made by such Participants under paragraph 11.2, against costs of the Units applicable to the Ownership Share of such Participant and invoiced or accrued to it commencing on the earlier of (i) January 1, 1981, or (ii) the Effective Date with respect to the New Ownership Shares of the Initial Transferees specified in

- 33 -

paragraph 3.1(a) of the Agreement (as amended by the Tenth Amendment to the Agreement); provided, however, that if construction of the Units is suspended or terminated prior to January 1, 1981, such credit shall commence as of the date of such suspension or termination. Each such credit shall be in the amount of the advance payment plus interest at the rate specified in paragraph 11.1 of the Agreement from the date of the advance payment to the date of such credit. All advance payments under paragraph 11.2 shall be credited prior to any of those under this paragraph 11.3.

11.4 If the Value of the Trust Estate, as hereinafter defined, under the Collateral Trust Indenture dated as of July 2, 1979, between the Company and The Connecticut Bank and Trust Company, as Trustee, decreases at any time or from time to time to less than 125% of the aggregate amount of the advance payments outstanding from the Participants under paragraphs 11.2 and 11.3, the advance payments shall be credited against costs of the Units applicable to the Ownership Share of each such Participant and thereafter invoiced or accrued to it, until the Value of the Trust Estate equals or exceeds 125% of the aggregate advance payments under paragraphs 11.2 and 11.3 not so credited. Each such credit shall include interest on the advance payment so credited at the rate specified in paragraph 11.1 of the Agreement from the date of the advance payment to the date of such credit. All advance payments under paragraph 11.2 shall be credited prior to any of

- 34 -

those under paragraph 11.3. Such credit shall be apportioned among Participants according to the size of the advance payment of each Participant. The term "Value of the Trust Estate" as of any date shall mean (i) the number of pounds of  $U_3O_8$  included in the Trust Estate multiplied by the dollar price per pound of  $U_3O_8$  as quoted under the caption of "Exchange Value" in the Nuclear Exchange Corporation's most recently published Monthly Report to the Nuclear Industry plus (ii) the aggregate number of dollars, if any, expended in connection with the conversion of such pounds of  $U_3O_8$  into  $UF_6$ .\*\*\*

\*\*\*11.5 Notwithstanding the provisions of paragraph 11.2 of the Agreement to the contrary, advance payments made pursuant thereto shall be credited against the costs of the Units applicable to the Ownership Shares of Bangor, CMP, CVPS, Fitchburg, Hudson, MPSC, Montaup, NB, Taunton and VEC commencing on the earlier of June 1, 1981 or the first day of the month following the month in which MMWEC shall receive the proceeds from the first issuance of securities to finance its increased Ownership Share provided in Paragraph 3.1 of the Agreement and in the case of such costs applicable to MMWEC on the earlier of June 1, 1981 or the first business day following receipt by MMWEC of the proceeds of such initial financing; provided, however, that if construction of the Units is suspended or terminated prior to such date, such credit shall commence as of the date of such suspension or termination. Interest at the rate specified in Paragraph 11.1 of

- 35 -

the Agreement shall continue to accrue on such advance payments until the day of such credit.\*\*\*

12. Operation and Maintenance of the Units

12.1 Subject to paragraph 16.1 with respect to power pool operation, PSNH shall have sole responsibility for, and is fully authorized to act for the other Participants with respect to, operation and maintenance of the Units (which shall include but not be limited to replacements, repairs and fuel procurement) in accordance with \*\*\* Prudent Utility Practice (as defined in paragraph 8.1)\*\*\* for the benefit of all Participants, the objectives being to operate the Units as efficiently, economically and reliably as feasible. The Participants shall share risks of employee negligence and other risks of operation and maintenance in accordance with their respective Ownership Shares. In furtherance of such responsibility PSNH shall select, hire and control such personnel as are required, which personnel shall be employees solely of PSNH unless otherwise determined by PSNH upon notice to the other Participants. PSNH shall keep all Participants reasonably informed with respect to operation and maintenance of the Units and insofar as feasible consistently with the stated objectives shall consult with all Participants with respect to all significant decisions prior to making such decisions except (a) in emergency situations and (b) to the extent that such decisions relate to maintenance and dispatch of the Units in accordance with the provisions of a power pool agreement, as set forth in

- 36 -

paragraph 16.1; provided, however, that such consultation shall not be allowed to delay work on any phase of operation or maintenance or in any way to limit the sole discretion of PSNH in making such decisions. To facilitate such procedures each Participant shall from time to time designate one person and an alternate therefor who shall represent the Participant for purposes of such consultations and reports. After the Units are placed in commercial operation, PSNH shall furnish reports at least quarterly to all Participants with respect to the operation and maintenance of the Units and shall at other times furnish such information relating thereto as the Participants may reasonably request.

13. Payment of Operation and Maintenance Expenses;  
Inventories and Fuel

13.1 The Participants shall share in the expenses of operating and maintaining the Units, in accordance with their Ownership Shares. Expenses to be so shared shall include all costs and expenses with respect to the Units reasonably incurred and properly chargeable to the Units under the Uniform System (or such similar accounts as may hereafter become appropriate). Without limiting the generality of the foregoing, such costs and expenses shall include (i) a properly allocated portion of PSNH administrative and general expense, \*\*\* (ii) all costs of PSNH of keeping accounting and other records, of furnishing accounts, reports and other information with respect to the Units and of audits pursuant to paragraph 14, and (iii) all costs of staffing, testing, and starting up the Units which are not capitalized.



- 37 -

Notwithstanding the foregoing, PSNH may elect to segregate, and to require the Participants to share per capita, any portion of such costs of keeping accounting and other records, of furnishing accounts, reports and other information and of audits, as are incurred on a per capita basis.\*\*\*

13.2 Costs of capital, franchise and income taxes, and property, business, occupation and like taxes, of each Participant shall be borne entirely by such Participant, and such items, as well as depreciation, amortization, and allowance for funds used during construction, shall not be deemed expenses of operating and maintaining the Units for the purposes of this paragraph 13, except that there shall be included as such expenses, amounts equal to the product of (i) the costs of ownership to PSNH and UI (including but not limited to capital costs, including related franchise and income taxes; property taxes; and insurance) of that portion of the Site not included within the First and Second Unit Site or occupied by any other generating unit in operation or under construction, which costs of ownership (a) for the period beginning with operation of the First Unit and prior to operation of the Second Unit shall be one-half of said costs and (b) for the period after operation of the Second Unit begins shall be all of said costs, multiplied by (ii) the ratio of the actual or expected net capabilities of the Units to the sum of the actual or expected net capabilities of all of the units in service or under construction on the Site at any time during such period.

- 38 -

13.3 PSNH may request all Participants to execute contracts for nuclear fuel or for other expenses related to the operation and maintenance of the Units, which contracts shall provide for several and not joint liability in proportion to their Ownership Shares and may provide for separate invoicing to the Participants in proportion to their Ownership Shares, and all Participants agree to pay promptly any such invoices properly rendered. PSNH will submit to each Participant a monthly statement in reasonable detail showing all costs not so invoiced separately together with additional costs incurred by PSNH in purchasing and maintaining at appropriate levels inventories of nuclear fuel (to the extent such fuel is not leased) and materials and supplies, said inventories being deemed at all times to be owned by Participants in their Ownership Shares and credit for the use thereof to be appropriately applied. Such monthly statement may also include such amount as PSNH may reasonably request in order to enable PSNH to make timely payments for costs covered by this paragraph 13 without necessity of use by PSNH of its own funds to cover other Participant's Ownership Shares of such payments. Each Participant shall pay its Ownership Share of such monthly statement within fifteen days of receipt of such statement, and any amount set forth in such statement (including the amount of any funds so requested to be provided) which is not paid by the end of such fifteen day period shall bear interest from the date of such statement at an annual rate of 2% over the lowest interest rate then being charged by The First National Bank of Boston on 90-day



- 39 -

commercial loans; \*\*\* provided that any Participant which agrees to pay the additional expense, if any, which may be caused to PSNH by its request, may require PSNH to furnish monthly statements to it 15 days in advance of the schedule followed by PSNH as to other Participants. A Participant which requests that monthly statements be so furnished to it 15 days in advance shall not be obligated to pay interest in accordance with the preceding sentence unless it fails to pay a statement within 30 days of its receipt thereof.\*\*\*

13.4 PSNH shall have sole responsibility for, and is fully authorized to act for the other Participants with respect to, the procurement of nuclear fuel and purchasing and maintaining at appropriate levels inventories of materials, supplies and spare parts required for the operation and maintenance of the Units, and with respect to arranging for the storage, transportation, disposition and/or reprocessing of irradiated nuclear fuel and for the disposition or use of reprocessed material.

In discharging its responsibility and so acting with respect to the procurement, disposition and reprocessing of nuclear fuel, PSNH shall have the authority to determine the basis on which fuel will be procured and, subject to the terms of this Agreement, to purchase or lease uranium, plutonium or other fuel materials in an enriched or unenriched form, to arrange for the enrichment or processing of fuel materials, to arrange for fuel design and fabrication, or to purchase or lease fabricated fuel, and generally to make several and not joint long or short-term commitments on

- 40 -

behalf of each of the Participants with respect to any phase of nuclear fuel procurement, disposition and reprocessing; \*\*\* provided, however, that PSNH, in addition to any other notice herein required, shall keep the other Participants informed, insofar as practicable, of the means by which it intends to finance nuclear fuel requirements for the foreseeable future.\*\*\*

Unless arrangements are made for the leasing of nuclear fuel for the Units or other special joint fuel financing arrangements are made, all such fuel, materials, supplies and spare parts for the Units shall be deemed to be owned by the Participants in their Ownership Shares.

If PSNH determines that fuel materials or nuclear fuel should be obtained on a lease basis, or that other special joint fuel financing arrangements should be made, it shall have the authority to enter into such a lease or other arrangement on behalf of the Participants, containing such terms, conditions and provisions as PSNH may deem appropriate, but in any event providing for several and not joint liability. Before entering into any such lease or other arrangement, however, PSNH shall notify each of the other Participants of the action to be taken and shall provide them an opportunity to comment on it, provided that any such comment shall not affect the sole discretion of PSNH to determine whether to go forward with such lease or other arrangement. If, within ten days of its receipt of such a notification or with such longer period as may be specified by PSNH in such notification, any Participant notifies PSNH that it may not legally participate in the lease or

- 41 -

other arrangement without the prior approval of a regulatory body or for any other reason, such Participant shall not be obligated to participate in such arrangement so long as such disability continues, but PSNH may (but shall not be required to) elect:

- (i) to increase the percentage participation of PSNH in the lease or other arrangement by a percentage equal to such Participant's Ownership Share in which case such Participant shall be obligated to pay, as an operating cost, to PSNH each month an amount equal to the increase in the costs to PSNH resulting from such election; or
- (ii) to cause such Participant to enter into another arrangement for the financing of its Ownership Share of the fuel, such arrangement to be one chosen by such Participant but subject to review and approval by PSNH insofar as it may conflict with or adversely affect the negotiation or implementation of the proposed lease or other arrangement for the balance of the fuel; or
- (iii) to require such Participant to use its best efforts to obtain any such prior approval of a regulatory body as it may require or to take such other reasonable action as may be necessary to permit it to participate legally in the arrangement; provided, that nothing herein shall be deemed to require such Participant to discharge or eliminate any security outstanding on the date of this Agreement if to do so would substantially adversely affect such Participant.

Upon the request of PSNH, all Participants shall themselves enter into any such lease or other joint arrangement.

#### 13A. Decommissioning Costs and Payments

In recognition of the Participants' obligations under an

- 42 -

operating license and the applicable statutory requirements and regulations of the NRC to decommission the Units and in implementation of the Participants' respective obligations contained in Paragraph 11.1 hereof or enforceable under Chapter 162-F of the New Hampshire Revised Statutes Annotated ("NHRSA") to pay costs of such decommissioning, the Participants agree as follows:

13A.1 PSNH or any successor managing agent appointed pursuant to Paragraph 36.2 hereof (hereinafter in this Paragraph 13A referred to as the "Managing Agent") shall, subject to the direction of the Executive Committee, be responsible on behalf of all Participants: for making, and periodically updating, appropriate plans and cost estimates for the eventual decommissioning of the Units; for establishing appropriate reserves to provide for the ultimate payment of the decommissioning of the Units; for administering the collection from the Participants and the appropriate depositing on their behalf of monthly Decommissioning Financing Fund payments, in each case consistent with applicable statutory and regulatory requirements; and for periodically providing the Participants with a written notice of Decommissioning Financing Fund payment calculations, the applicable schedule of payments and other relevant information as to collections and the financial status of the Fund.

13A.2 Each month each Participant shall pay to the

- 43 -

Managing Agent or as the Managing Agent directs, as part of the expenses identified in Paragraph 13 hereof, an amount equal to its Ownership Share of the Decommissioning Financing Fund payments for that month with respect to each Unit.

The Participants understand and agree (i) that the Decommissioning Financing Fund may be held by the Fund (as defined) or its designated agent or by an independent trust or other separate fund, as determined by the Committee (as defined) or, in the absence of such determination, in related but separate funds for each Participant according to its Ownership Share or as otherwise determined by the Managing Agent, (ii) that, to the extent feasible, the Decommissioning Financing Fund shall satisfy the requirements for tax deductibility under Section 468A of the Internal Revenue Code of 1954, as amended, (iii) that the amount and/or timing of accruals to the Decommissioning Finance Fund may from time to time during the term hereof be modified by the Managing Agent, subject to the direction of the Executive Committee, consistent with the determinations of the Committee (as defined), if any, or to reflect changes in the amount or timing of anticipated Decommissioning Costs, and (iv) that the use of the terms "decommission" and "decommissioning" in this Paragraph encompass compliance with all requirements (other than those relating to spent nuclear fuel) of the NRC for permanent cessation of operation of a nuclear facility and any activities reasonably related thereto and all requirements of other governmental authorities having jurisdiction related to removal and disposal of

- 44 -

a Unit and restoration of the Site.

The Participants further understand that the aggregate amount of Decommissioning Financing Fund payments made by them prior to the commencement of decommissioning may not be sufficient to make full payment of Decommissioning Costs of a Unit, and each Participant agrees that, notwithstanding any insufficiency of the Decommissioning Financing Fund, it shall have a continuing obligation to pay into the Decommissioning Financing Fund the balance of its Ownership Share of the entire amount of the Decommissioning Costs of such Unit.

13A.3 Certain terms defined in NHRSA 162-F:14 (namely, without limitation, "Fund" and "Committee") are used in this Paragraph 13A with the meanings there provided.

As used in this Paragraph 13A: "Decommissioning Financing Fund" shall mean the Fund; and "Decommissioning Financing Fund payments" for any month shall mean an amount equal to all accruals in such month to the Decommissioning Financing Fund, as from time to time established by the Managing Agent in accordance with Paragraph 13A.2, to provide for the ultimate payment of the Decommissioning Costs of a Unit.

"Decommissioning Costs" for each Unit shall include:

- (1) All costs and expenses related to removal of the Unit from service, including without limitation, dismantling, mothballing, removing radioactive material (excluding spent nuclear fuel) to temporary and/or permanent storage



- 45 -

sites, decontaminating, restoring and supervising the site, and any costs and expenses incurred in connection with proceedings before governmental authorities relating to any authorization to decommission such Unit or remove such Unit from service.

- (2) All costs of labor and services, whether directly or indirectly incurred, including without limitation, services of foremen, inspectors, supervisors, surveyors, engineers, security personnel, counsel and accountants, performed or rendered in connection with the decommissioning of the Unit, supervising the site, and removal of the Unit from service; and all costs of materials, supplies, machinery, construction equipment and apparatus acquired or used (including rental charges for machinery, equipment or apparatus hired) for or in connection with the decommissioning of the Unit and removal of the Unit from service, and all administrative costs, including services of counsel and financial advisors, of any applicable independent trust or other separate fund established pursuant to this Paragraph; it being understood that any amount (exclusive of proceeds of insurance) realized as salvage on any machinery, construction equipment and apparatus shall be treated as a reduction of the amounts otherwise chargeable on account of the costs of decommissioning of the Unit; and
- (3) All overhead costs applicable to the Unit during its

- 46 -

decommissioning period, including, without limiting the generality of the foregoing, taxes (other than taxes on or in respect of income), charges, licenses, excises and assessments, casualties, surety bond premiums and insurance premiums.

Without limiting the generality of the foregoing, any other amounts expended or to be paid with respect to decommissioning of the Unit or removal of the Unit from service shall constitute part of the Decommissioning Costs if they are, or when paid will be, either (i) properly chargeable to any account related to decommissioning of a nuclear generating unit in accordance with the Uniform System (or such similar accounts as may hereafter become appropriate), or (ii) properly chargeable to decommissioning of a nuclear generating unit in accordance with then applicable regulations of the NRC or any other governmental authority having jurisdiction.\*\*\*

#### 14. Right to Audit

14.1 \*\*\* PSNH shall keep complete and accurate accounts of all receipts and expenditures hereunder, in accordance with the Uniform System of Accounts prescribed for Class A and B Public Utilities and Licensees by the Federal Power Commission as amended from time to time (or such similar accounts as may hereafter become appropriate).\*\*\* At least annually PSNH shall account to all Participants in such form as the Participants reasonably request



- 47 -

for all expenses incurred in the design, construction, operation, and maintenance of the Units. Any reasonable requests by a Participant for an additional accounting in a different form required by it shall also be granted to the extent practicable but shall be at the expense of such Participant. With reasonable frequency and not less often than annually, upon the reasonable request of a majority in interest of the Participants other than PSNH, PSNH shall make its accounts and records available at its offices at reasonable times for examination, at the expense of the Participants requesting the audit, by an independent certified public accountant or other representative designated by a majority in interest of the Participants other than PSNH requesting the audit.

15. Entitlements

15.1 Each Participant shall be entitled to its Ownership Share of the installed capacity, available capacity and hourly generation of each of the Units. All deliveries of power shall be made to Participants and metered at the low side of the station transformer. Each Participant shall be responsible for all transformer and transmission losses incurred with respect to transformation and deliveries of energy for it beyond the point at which the Units are metered. Subject to the restrictions on transfer of Ownership Shares contained in paragraph 23 and to paragraph 25, any Participant shall be free to sell all or any part of its entitlements in the Units upon such terms and to such

- 48 -

parties as it may choose.

16. Dispatch of Units

16.1 The Units shall be maintained and dispatched in accordance with the provisions of the New England Power Pool Agreement as in effect from time to time, or the provisions of such other power pool agreement as may supersede it, so long as PSNH is a party to such Agreement. If no such agreement is in effect, the Units shall be maintained and dispatched in accordance with the schedule determined to be appropriate by PSNH in its sole discretion, after consultation with the other Participants, it being the intention to meet to the extent reasonably possible, the requirements and desires of all Participants.

17. Transmission of Power

17.1 Arrangement for transmission of its entitlement from the Units will be the responsibility of each Participant. However, this provision shall not in any respect limit any Participant's rights under the terms of the New England Power Pool Agreement or any power pool agreement which may supersede it.

17.2 Except as may otherwise be mutually agreed by the Participants, the following transmission facilities to be constructed, owned, and operated by PSNH and NEPCO will be deemed to be associated with both of the Units if the Units are constructed at the Seabrook site, and the fixed and operating costs

- 49 -

related to them will be borne by PSNH, UI, and the other Participants in the Units in proportion to their Ownership Shares in the Units:

345 kV Line, including terminal facilities - Seabrook to Scobie S/S

345 kV Line, including terminal facilities - Seabrook to Tewksbury

345 kV Line, including terminal facilities - Seabrook to Newington

In the event the Units are constructed at the Litchfield site, PSNH will designate the transmission facilities to be associated with the Units and supported by all Participants. Such determination will be consistent with any uniform policy which may then have been adopted by the NEPOOL participants covering the designation of transmission facilities to be treated as associated with particular generating units. The rights and obligations of the Participants under this paragraph 17.2 are defined and set forth in a separate agreement which shall be executed by each Participant contemporaneously with its execution of this Agreement.

18. Agreements - Delay in Commercial Operation Date

18.1 PSNH and UI (for purposes of this paragraph, the "lead participants" for the Units) previously signed agreements dated as of August 7, 1972, with the lead participants for the

- 50 -

Connecticut nuclear unit, which agreements were intended to be signed also by the lead participant for the Pilgrim 2 Unit and to provide for (1) the sharing of additional capacity made necessary by delay of the scheduled commercial operation of either of said units or the Units (the "Additional Capacity Agreement") and (2) the temporary reallocation of capacity in the event of such delay of either of said units or the Units (the "Reallocation Agreement"). Copies of the Additional Capacity Agreement and the Reallocation Agreement have been furnished to each Participant. The Additional Capacity Agreement and the Reallocation Agreement are currently being revised both to reflect a new scheduled in-service date for the Pilgrim 2 Unit and to acknowledge that no Participant making capacity available to others in accordance with the Reallocation Agreement should be required as a result thereof to pay a Capability Responsibility deficiency charge under Section 9.4(d) of the NEPOOL Agreement on the amount of capacity so made available and to provide that the signatories to, and the other entities which become bound by, the Reallocation Agreement shall take appropriate action in the NEPOOL Management Committee to obtain appropriate waivers of the Capability Responsibility deficiency charge in such circumstances. Each Participant understands that PSNH and UI expect to sign the Additional Capacity Agreement and the Reallocation Agreement, revised as aforesaid, and by its execution of this Agreement expressly agrees that upon such signing by PSNH and UI it will be deemed hereby to have expressly assumed all the respective obligations imposed on joint ownership

- 51 -

participants in the Units by, and that it will thereupon be bound by, the Additional Capacity Agreement and the Reallocation Agreement, as so revised, in accordance with the terms thereof as if such Participant had executed such Agreements.

19. Destruction, Damage, or Condemnation of Units

19.1 If either during construction or after completion of construction of either of the Units all or substantially all of either or both of the Units or that portion constructed shall be destroyed, damaged or condemned, PSNH may elect to repair, restore or reconstruct such Unit or Units to its or their former character and use or to such character and use as PSNH may then determine to be appropriate; and, in any such case, each Participant shall pay its Ownership Share of the costs thereof after due credit for any net salvage or insurance proceeds realized. Although the sole responsibility and authority for making any such election shall rest with PSNH, it shall, upon request, consult with any Participant concerning the repair, restoration or reconstruction of such Unit or Units, provided, however, that any such request or consultation shall not be allowed to delay work on repair, restoration or reconstruction of such Unit or Units or to affect the sole discretion of PSNH in making such election.

19.2 In the event that less than substantially all of either or both of the Units or that portion constructed is destroyed, damaged, or condemned, and such destruction, damage or

- 52 -

condemnation does not preclude prompt completion of construction or repair, restoration or reconstruction of such Unit or Units, PSNH shall proceed with steps required to effect completion of construction or repair, restoration or reconstruction of such Unit or Units and each Participant shall pay its Ownership Share of the costs thereof after due credit for any net salvage or insurance proceeds realized, unless Participants having at least \*\*\* 51% \*\*\* of the Ownership Shares elect that such completion of construction or repair, restoration or reconstruction should not be effected.

19.3 If under either paragraph 19.1 or paragraph 19.2 the election is made not to repair, restore or reconstruct the Unit or Units, each Participant shall pay its Ownership Share of any costs or expenses incurred by PSNH in the shutdown, demolition or disposal of the Unit or Units and the provisions of paragraph 24 with respect to conveyance of the Property Interests shall be applicable.

20. Other Uses of the Site

20.1 Participants recognize that units in addition to the Units may be constructed and operated on other portions of the Site and that in connection therewith it may be necessary or desirable to relocate or modify some of the facilities constructed in connection with the Units. In the event of such occurrence, PSNH may, subject to the obtaining by each Participant of any necessary regulatory approvals and mortgage indenture releases (which each



- 53 -

Participant agrees to use its best efforts to obtain), make such relocations and modifications provided they are accomplished without cost to the Participants, other than PSNH and the participants in any such additional unit, as provided in paragraph 20.2 below. It is further recognized that in the event of construction of additional units on the Site it may be necessary or desirable to provide for joint use by the Units and one or more other units of parts of the First and Second Unit Site, certain interests in land, and certain facilities constructed in connection with the Units such as the administration and service buildings, the cooling water intake and discharge facilities, the fuel handling facilities, the station transformer, and switching facilities. Such joint use shall be permitted, subject to the obtaining by each Participant of any necessary regulatory approvals and mortgage indenture releases (which each Participant agrees to use its best efforts to obtain), and the Participants shall execute such documents as may reasonably be required to accomplish such purpose, if arrangements are made to reimburse the Participants on an equitable basis for their investment in any facilities or land or interests in land to be jointly used and provided such joint use is accomplished without cost to the Participants, other than PSNH and the participants in any such additional unit, as provided in paragraph 20.2 below.

No Participant (other than PSNH and UI) shall have any right as a result of its ownership of the Units and the Property Interests to participate in the ownership of any additional unit on

- 54 -

the Site.

20.2 PSNH agrees that if the construction, operation or maintenance of additional units on the Site requires relocation or modification of, or results in an increase in the fixed, operation or maintenance costs of, the Units or results in an increase in the Participants' system power costs because of the unavailability or reduced availability of the Units or either of them, neither the costs of such relocations or modifications nor such increases in fixed operation, maintenance or system power costs shall be borne by the Participants.

20.3 In the event PSNH determines that any portion of the Property Interests, or any interest therein, is not needed for operation of the Units, it may provide for the conveyance of such portion to itself or to any other purchaser for a fair and reasonable price and establish the terms and conditions for such conveyance. \*\*\* Subject to obtaining necessary regulatory approvals and mortgage indenture releases where applicable (which each Participant agrees to use its best efforts to obtain), each Participant shall execute and deliver any deed or other instrument necessary to convey, free and clear of all liens and encumbrances other than (i) those which existed at the time of conveyance to such Participant, (ii) liens securing taxes or other governmental charges, the payment of which is not yet delinquent, and (iii) liens and encumbrances caused by the acts or omissions of



- 55 -

PSNH, such portion of the Property Interests or any interest therein determined by PSNH not to be necessary for the operation of the Units, and upon such conveyance by it each Participant shall receive its Ownership Share of the price, less any related expenses.\*\*\*

21. Approvals of Regulatory Agencies

21.1 PSNH shall proceed, and is fully authorized to act on behalf of all Participants, to use its best efforts to obtain all approvals or permits from regulatory agencies required for construction and operation of the Units, and all Participants shall cooperate as reasonably requested in such process. Each Participant shall be responsible for securing any approvals required for its participation in the Units and for any actions required by it pursuant to applicable statutes and governmental regulations, including but not limited to actions under the laws of the State of New Hampshire in order for such Participant to carry on such activities, if any, in New Hampshire as may be required in accordance with this Agreement.

22. Conveyance of Security Interests or in Trust

22.1 Each Participant shall have, without need for consent from or prior offer to any other Participant, the right at any time and from time to time to convey any form of security interest including a mortgage of, or to convey to a trustee or trustees as security for its present or future bonds or obligations

- 56 -

or securities, its Ownership Share of the Property Interests and the Units. \*\*\*Any such conveyance shall be subject to all the terms and conditions of this Agreement, except that agreements herein limiting the amount of, or means of determining, the consideration to be paid to a Participant for its right, title and interest in any property conveyed by it or on its behalf pursuant to paragraphs 19.3, 20.1, 20.3, 24.5 or 25.2(d) of this Agreement shall not be controlling in determining such property's value for any purposes of any mortgage indenture or other security instrument to which it is subject.\*\*\* Subject to such terms and conditions, any such trustee or trustees, mortgagee or holder of a security interest, any successor or assign thereof, and any receiver or trustee in bankruptcy, reorganization or receivership of a Participant may, without need for consent of any other Participant, succeed to and acquire all rights of a Participant pursuant to this Agreement. No such conveyance permitted by this paragraph shall involve an interest in only one of the Units or different interests in the First Unit and the Second Unit; provided, however, that this sentence shall not be deemed to prohibit a Participant's creation of a security interest in particular nuclear fuel.

23. Rights re Transfer of Ownership Shares

23.1 Except as contemplated by paragraph 3 and as provided in this paragraph and paragraphs 22 and 25, no Participant shall sell or transfer any portion of its Ownership Share of the Units or the Property Interests. Subject to the provisions of

- 57 -

paragraph 32.5, any Participant may at any time sell all or any portion of its Ownership Share of the Property Interests and the Units to any entity which is engaged in the electric utility business in New England, but no such sale shall be made unless PSNH and UI have (and in the event (i) of an offer of sale by either PSNH or UI to which the other does not respond with an offer to purchase or (ii) of an offer of sale by a Participant other than PSNH or UI to which neither PSNH nor UI responds with an offer to purchase, then all other Participants) have first been afforded in writing an opportunity to purchase the interest involved separately or in the aggregate on equal or better terms than those of the offer of sale and have declined such opportunity. \*\*\*Any writing to Participants pursuant to this paragraph shall specify the interest offered, the proposed terms and conditions of the sale, and the date not less than eight months from the date of the writing when it is proposed to consummate the sale. Failure by any Participant within two months of the date of the writing to respond in writing with an offer to purchase the interest involved shall be deemed a declination of the offer of sale by such Participant.\*\*\* In the event that (i) both PSNH and UI fail to offer to purchase or (ii) either PSNH or UI offers to sell and the other fails to offer to purchase and such an offer of sale results in offers by more than one Participant to purchase the interest, such interest shall be apportioned in accordance with the Ownership Shares of the Participants making offers or in such other manner as the purchasing Participants agree. In the event an offer of sale

- 58 -

results in offers by both PSNH and UI to purchase the interest, such interest shall be apportioned between them in accordance with their respective Ownership Shares, or in such other manner as they may agree. Any Participant may \*\*\*transfer all or part of its Ownership Share or any right to acquire an increased or revised Ownership Share (a) to a wholly-owned subsidiary; or (b) to another company in the same holding company system or a construction trust or similar entity for the benefit of the transferor or another company in the same holding company system,\*\*\* provided, that transfers by VELCO shall be permitted only as set forth below in this paragraph 23.1; or (c) in connection with a merger, consolidation or acquisition of substantially all of the properties or all of the generating facilities of a Participant; and VELCO may, prior to September 30, 1974,<sup>5</sup> transfer to Central Vermont Public Service Corporation a portion of VELCO's Ownership Share equal to 1.7971% and/or to Green Mountain Power Corporation a portion of VELCO's Ownership Share equal to 1.1673%, subject in each case to the obligation of any assignee to make available to the Additional Participants, in the same manner as VELCO is obligated to do hereunder, a portion of its Ownership Share equal to the ratio of its Ownership Share to the original Ownership Share of VELCO (3.0970%) multiplied by the Ownership Share which VELCO would have been obligated to make available to the Additional Participants hereunder as set forth in Exhibit 1 attached hereto;

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<sup>5</sup> Date extended to September 30, 1974 by Second Amendment dated June 21, 1974.

- 59 -

and either PSNH or UI may, prior to the time of transfer of title in accordance with paragraph 4.1 hereof, transfer a portion of its Ownership Share as part of a capacity exchange on an ownership basis with another Participant. Neither any transfer permitted by the preceding sentence, nor any transfer contemplated by paragraph 3.2, paragraph 22, or paragraph 25 hereof, shall be subject to the foregoing right of refusal. Any transfer of any portion of an Ownership Share shall be made expressly subject to all provisions of this Agreement. No such conveyance permitted by this paragraph shall involve an interest in only one of the Units or different interests in the First Unit and the Second Unit.

\*\*\*23.2 Notwithstanding the provisions of 23.1 but subject to the provisions of paragraph 32.5, any Participant may sell all or any portion of its Ownership Share in particular nuclear fuel provided that such Participant makes arrangements to lease the fuel share so sold, that the terms of such sale and lease arrangements do not adversely affect the rights and interests of the other Participants in such particular nuclear fuel and in its use and financing in accordance with this Agreement, and that such terms are satisfactory to PSNH.\*\*\*

\*\*\*23.3 For purposes of Paragraph 23 of this Agreement only, the following terms, when capitalized but not otherwise, shall have the following meanings:

(a) "Departing Participants" means Bangor Hydro-

- 60 -

Electric Company ("BHE"), Central Maine Power Company ("CMP"), Central Vermont Public Service Corporation ("CVPS"), Fitchburg Gas & Electric Light Company ("Fitchburg") and Maine Public Service Company ("MPSC"). "Departing Participant" means any one of BHE, CMP, CVPS, Fitchburg or MPSC.

- (b) "EUA" means Eastern Utilities Associates.
- (c) "EUA Power" means EUA Power Corporation.
- (d) "Purchase and Sale Agreements" means: (i) that certain purchase and sale agreement by and between BHE and EUA dated as of February 19, 1986, as amended and supplemented by a certain addendum by and between BHE, EUA and EUA Power dated as of June 30, 1986, relating to BHE's sale of its Ownership Interest to EUA Power; (ii) that certain purchase and sale agreement by and between CMP and EUA dated as of February 19, 1986, as amended and supplemented by a certain addendum by and between CMP, EUA and EUA Power dated as of June 23, 1986, relating to CMP's sale of its Ownership Interest to EUA Power; (iii) that certain purchase and sale agreement by and between CVPS and EUA dated as of February 19, 1986, as amended and supplemented by a certain addendum by and between CVPS, EUA and EUA Power dated as of June 23, 1986 relating to CVPS's sale of its Ownership Interest to EUA Power;



- 61 -

(iv) that certain purchase and sale agreement by and between Fitchburg and EUA dated as of April 8, 1986, as amended and supplemented by a certain addendum by and between Fitchburg, EUA and EUA Power dated as of June 30, 1986, relating to Fitchburg's sale of its Ownership Interest to EUA Power; and (v) that certain purchase and sale agreement by and between MPSC and EUA dated as of April 7, 1986, as amended and supplemented by a certain addendum by and between MPSC, EUA and EUA Power dated as of June 26, 1986, relating to MPSC's sale of its Ownership Interest to EUA Power. "Purchase and Sale Agreement" means any one of the Purchase and Sale Agreements.

- (e) "Remaining Participants" means the Participants other than EUA Power and the Departing Participants.
- (f) "Costs of Cancellation" means any and all obligations, whether contractual, statutory or otherwise, relating to, arising out of, connected with or in anticipation of the cancellation, termination or shutdown (for an extended period or permanently) of either or both of the Units (including without limitation removal, relocation, demolition, dismantling or storage, or any combination thereof, of structures, or the

- 62 -

restoration and rehabilitation of the physical and aesthetic appearance of the Site) accruing to the Participants as a direct result of either or both of the Units being cancelled, terminated or shutdown for an extended period or permanently (including without limitation any costs payable in accordance with contracts executed under Paragraph 9 of this Agreement). For the purposes of the foregoing sentence only, shutdown for an extended period shall be deemed to have occurred (i) in the case of Unit 2, upon closing of the transactions contemplated by any Purchase and Sale Agreement, and (ii) in the case of Unit 1, if the Participants by appropriate action under Paragraph 24.1 of this Agreement decide that Unit 1 shall be shut down for an extended period.

23.4 Upon closing of the transactions contemplated by any Purchase and Sale Agreement, this Agreement shall be deemed amended without any further action by the Participants to (i) delete the Departing Participant party to such Purchase and Sale Agreement as a Participant and party to this Agreement, and (ii) substitute EUA Power in such Departing Participant's stead.

23.5 Upon closing of the transactions contemplated by any Purchase and Sale Agreement, the Department Participant party to



- 63 -

such Purchase and Sale Agreement (and its officers, directors, employees, affiliates and the officers, directors and employees of its affiliates) shall be deemed released, discharged and excused by the Remaining Participants and all other Departing Participants without any further action by them of and from (a) any and all contractual obligations of any kind whatsoever to be performed after such closing arising from, related to, or connected with the ownership, construction or operation of the Units, including without limitation those arising under or related to (i) this Agreement, (ii) the Transmission Support Agreement by and among the Participants dated May 1, 1973, as amended from time to time, (iii) any and all resolutions adopted by the Participants with respect to the ownership, construction or operation of the Units (to the extent, if any, of obligations arising thereunder), (iv) any other agreement among the Participants created in pursuance of this Agreement, the Transmission Support Agreement, the aforesaid resolutions of the ownership, construction or operation of the Units, and (v) any and all contracts, agreements or other undertakings arising from transactions between the Participants or anyone acting on their behalf, on the one hand, and other persons, corporations, firms or entities of any nature, on the other hand, created in pursuance of the ownership, construction or operation of the Units, and (b) \*\*\* any and all obligations, whether contractual (including without limitation under Paragraph 13A of this Agreement as added by the Nineteenth Amendment to this Agreement dated as of May 1, 1986 (the

- 64 -

"Nineteenth Amendment") with respect to "Decommissioning Costs" as defined therein), statutory or otherwise, relating to, arising out of, connected with or in anticipation of the decommissioning, conversion or cancellation of all or any portion of either or both of the Units, including without limitation (i) removal, relocation, shipment, containment, demolition, dismantling or storage or any combination thereof of any radioactive equipment, materials, nuclear wastes or contaminated structures, (ii) storage of radioactive debris, and (iii) restoration and rehabilitation of the physical and aesthetic appearance of the Site.

23.6 Upon closing of the transactions contemplated by any Purchase and Sale Agreement, the Remaining Participants and the Departing Participants not party to such Purchase and Sale Agreement (and their officers, directors, employees, affiliates and the officers, directors and employees of their affiliates) shall be deemed released, discharged and excused by the Departing Participant party to such Purchase and Sale Agreement without any further action by it of and from any and all obligations of the kind described in clauses (a) and (b) of Paragraph 23.5 of this Agreement.

23.7 Notwithstanding the generality of Paragraphs 23.5 and 23.6 of this Agreement, the closing of the transactions contemplated by any Purchase and Sale Agreement shall not operate to release (i) any rights of contribution or indemnification that

- 65 -

the Participants would, but for Paragraphs 23.5 and 23.6 of this Agreement, have against each other (whether under this Agreement, any other agreement or statute, at law or in equity) relating to any claim of any person, corporation, firm or entity of any nature (other than a Participant) based upon any actionable act, omission or breach of contract occurring prior to such closing, or (ii) the obligations (if any) of CMP, BHE or Fitchburg under that certain "Agreement to Share Certain Costs Associated with the Tewksbury-Seabrook Transmission Line" dated as of May 8, 1986.

23.8 \*\*\* "The obligations of EUA Power to pay its share of Decommissioning Costs and Costs of Cancellation are secured by a separate fund of \$10 million ("EUA Power Fund"), which has been established under, and is subject to the terms and provisions of, a Decommissioning Costs Security Agreement dated November 26, 1986. The several obligations of the Departing Participants which existed under Paragraph 23.8 of this Agreement prior to the Twenty-Second Amendment to pay up to an aggregate of \$10 million of Decommissioning Costs and Costs of Cancellation after exhaustion of the EUA Power Fund are hereby released, discharged and excused upon the effective date of the Twenty-Second Amendment. On and after the effective date of the Twenty-Second Amendment to this Agreement, EUA Power shall deposit into the EUA Power Fund, promptly upon receipt thereof, such amounts, if any, as may be paid in cash to EUA Power on account of claims asserted by EUA Power against United Engineers and Constructors, Inc., which claims have

- 66 -

been assigned to EUA Power by the Departing Participants under the aforesaid Settlement Agreement. The amount to be so deposited shall be the cash paid to EUA Power in settlement of said claims or as a result of a final judgment entered upon litigation or arbitration of said claims less (i) \$1 million and (ii) EUA Power's payments of indemnification and contribution under Section 3 of said Settlement Agreement." \*\*\*

23.9 Notwithstanding the provisions of Paragraphs 23.1 and 32.5 of this Agreement, the Participants hereby consent to the sale and transfer to EUA Power by the Departing Participants of their respective Ownership Shares, and hereby irrevocably waive and release any and all rights of first refusal or other rights to purchase such Ownership Shares (and any and all written notice requirements with respect thereto) under this Agreement or otherwise, arising by reason of the proposal or consummation of such sales and transfers to EUA Power, all in order that such sales and transfers to EUA Power may be consummated and carried into effect.\*\*\*

\*\*\* 23.10 - "Notwithstanding any other provision to the contrary in this Agreement or in the Agreement for Seabrook Project Disbursing Agent dated May 23, 1984, as amended to the date hereof (the "Disbursing Agreement"), PSNH, pursuant to the terms providing therefor in this Agreement and in the Disbursing Agreement (but not subject to Paragraph 33.1 of this Agreement), shall pay or cause to

- 67 -

be paid with respect to the Seabrook Project, in an aggregate amount not to exceed \$30 million, all of the funds necessary to pay (i) MMWEC's Ownership Share of the Seabrook Project Costs (as defined in Paragraph 37.4 of this Agreement, but excluding Decommissioning Costs and Costs of Cancellation), if not paid prior to the effective date hereof by MMWEC or CL&P; and, also, as they become due on and after December 1, 1988, (ii) MMWEC's Ownership Share of property taxes with respect to the Seabrook Project and (iii) MMWEC's Ownership Share of amounts due under the Transmission Support Agreement dated May 1, 1973, as amended to the date hereof. If prior to such effective date MMWEC is billed for MMWEC's Ownership Share of Project Costs, which has not been paid previously by MMWEC or CL&P, or for MMWEC's Ownership Share of property taxes or amounts due under the Transmission Support Agreement, PSNH shall reimburse such party as shall have made payment therefor, and such reimbursements shall be credited against PSNH's obligations to make payments of up to \$30 million as provided hereunder. MMWEC hereby assigns to PSNH all credits, refunds, recoveries, damages and settlements which are paid or credited to MMWEC or to which MMWEC would be entitled had MMWEC made the payments referred to in clauses (i), (ii) and (iii) above, and which are attributable directly and proportionately to payments made by PSNH. If any cash credits, refunds, recoveries, damages or settlements (collectively, the "Credits") which, prior to the first to occur of NEPOOL Dispatch or Cancellation, are paid or credited against the payments described in clauses (i), (ii) and (iii)

- 68 -

above, the Credits shall not reduce PSNH's obligation to make payments up to \$30 million, and shall be applied toward the next payment due for MMWEC's Ownership Share of Project Costs. PSNH's obligations to make the aforesaid payments pursuant hereto shall cease, even if the aggregate amount of \$30 million has not then been reached, upon (a) NEPOOL Dispatch of Seabrook Unit No. 1 or (b) Cancellation of Unit No. 1, whichever occurs first. As used in this Paragraph 23.10 and in Paragraphs 23.11, 23.12 and 23.13: "NEPOOL Dispatch" means the date upon which said Unit No. 1 receives an operating license granted by the Nuclear Regulatory Commission to operate at more than five percent (5%) of Unit No. 1's generating capacity and the Unit is released to the New England Power Exchange for dispatch; and "Cancellation" means the time at which pursuant to due authorization the Joint Owners cancel, abandon or cease activities leading to full power operation of Unit No. 1 as a nuclear unit. Notwithstanding the foregoing provisions of this Paragraph 23.10, MMWEC shall remain fully liable as a Participant, and shall pay its Ownership Share of all Project Costs, property taxes and amounts owing under the Transmission Support Agreement either (i) for amounts due above the aforesaid \$30 million or upon NEPOOL Dispatch, whichever is earlier, or (ii) to the extent, but only to the extent before NEPOOL Dispatch and before PSNH has expended the aforesaid \$30 million, of any credits received by or on behalf of MMWEC on account of the billing dispatch savings of any electric power actually taken by MMWEC from Seabrook Unit No. 1, provided, that to the extent that MMWEC does



- 69 -

not so take such power, PSNH shall be entitled to receive such power without MMWEC thereby incurring liability except as provided in this Paragraph 23.10."

23.11 - "Notwithstanding any other provisions to the contrary in this Agreement, if Cancellation of Seabrook Unit No. 1 occurs prior to NEPOOL Dispatch, MMWEC shall pay its Ownership Share of all Decommissioning Costs (as defined in Paragraph 13A.3) and all Costs of Cancellation (as defined in Paragraph 23.3(f)), including its Ownership Share of all payments which may then become due under Paragraph 23.8 as amended by the Twenty-Second Amendment, and its Ownership Share of all property taxes and all payments due under the Transmission Support Agreement, but in an amount not exceeding \$10 million in the aggregate; and in such event PSNH shall pay all of MMWEC's Ownership Share of (i) such Decommissioning Costs and Costs of Cancellation, (ii) property taxes and (iii) payments under the Transmission Support Agreement to the full extent that the aggregate of them exceeds \$10 million. If Cancellation occurs after NEPOOL Dispatch, the preceding provisions of this Paragraph 23.11 shall be null and void, and MMWEC shall pay its Ownership Share of the foregoing costs."

23.12 - "Whether or not PSNH makes the payments which would otherwise be required of MMWEC, as provided under Paragraphs 23.10 and 23.11 hereof, MMWEC shall have no obligation to make any such payment prior to (i) PSNH's full payment of

- 70 -

\$30 million, (ii) NEPOOL Dispatch or (iii) Cancellation, whichever occurs first, except to the extent of the value of any credits or benefits received by or on behalf of MMWEC on account of electric power actually taken by MMWEC. Upon the effective date of the Twenty-Second Amendment, MMWEC shall be deemed not to have been in default since June 1, 1988 under this Agreement, the Disbursing Agreement, or the Transmission Support Agreement. The failure by PSNH to make any payment which would otherwise be required of MMWEC, as provided under Paragraphs 23.10 and 23.11 hereof, shall not (i) constitute a default by MMWEC under this Agreement, the Disbursing Agreement or the Transmission Support Agreement or (ii) reduce or diminish the Ownership Share of MMWEC existing on June 1, 1988. However, any such failure of PSNH shall constitute a default by PSNH under this Agreement, for which the other Participants (except MMWEC) may assert any remedy available under this Agreement, seek equitable relief or damages, or exercise any other right or remedy at law or in equity, including without limitation the reduction of PSNH's Ownership Share."

23.13 - "The obligations of PSNH under Paragraphs 23.10 and 23.11 to make MMWEC's payments to the Seabrook Project shall be limited as provided in said Paragraphs. Neither PSNH nor any other Participant shall have any obligation to make any additional or other MMWEC payments. Failure by PSNH or any other Participant to make any such additional or other MMWEC payment shall neither constitute a default under this Agreement nor diminish the



- 71 -

Ownership Share of PSNH or of any other Participant. Failure by MMWEC to pay its Ownership Share of Project Costs, property taxes, or amounts due under the Transmission Support Agreement as required by Paragraphs 23.10 and 23.11:

(a) if before NEPOOL Dispatch and before Cancellation, and after 60 days' written notice has been given to MMWEC, shall entitle the other Participants to obtain equitable relief or damages, or exercise any other right or remedy at law or in equity, but not to reduce MMWEC's Ownership Share, nor may PSNH exercise its rights under Paragraph 25.2; and

(b) if after Cancellation or after NEPOOL Dispatch, shall constitute a default by MMWEC under this Agreement for which the other Participants may seek any remedies available under this Agreement (including without limitation PSNH's exercise of its rights under Paragraph 25.2), equitable relief or damages, or exercise any other right or remedy at law or in equity, including without limitation the reduction of MMWEC's Ownership Share. For purposes of this subsection (b), a default shall include without limitation the failure after Cancellation or NEPOOL Dispatch to cure a nonpayment under subsection (a) above within seven days after Cancellation or NEPOOL Dispatch.

23.14 - "Except as specifically provided otherwise in Paragraphs 23.10, 23.11, 23.12 and 23.13, all of the Participants, including PSNH and MMWEC, shall remain fully liable and obligated for their respective Ownership Shares of all Seabrook Project

- 72 -

Costs, property taxes, Transmission Support Agreement payments, Costs of Cancellation and Decommissioning Costs, and all other costs and expenses as provided in this Agreement and in the Disbursing Agreement, and no Participant shall be obligated or become obligated to pay or assume the obligations of any other Participant with respect to the Seabrook Project." \*\*\*

\*\*\* 24. Termination, Suspension, Shutdown or Resumption of Construction

24.1 Construction or operation of Unit 1 may be terminated or suspended or shut down for a brief or extended period or permanently, or construction or operation may be resumed after suspension or shut down for a brief or extended period by written agreement of Participants owning fifty-one percent (51%) or more of the Ownership Shares. Each Participant shall bear its Ownership Share of all costs of such termination, suspension or shutdown and of all costs resulting therefrom, including, in the event of resumption of construction or operation, the costs thereof.

24.2 Recognizing that: (a) by a vote of the Participants on September 8, 1983, construction of Unit 2 was reduced to the lowest feasible level; (b) by a vote of the Participants on March 30, 1984, it was agreed that Unit 2 be cancelled as of December 1, 1984 subject to the satisfaction of two specified conditions and that, until December 1, 1984, expenditures for Unit 2 would be further reduced to the level necessary to preserve

- 73 -

and maintain Unit 2 and any existing permits and approvals therefor; and (c) pursuant to PSNH action of April 19, 1984, all construction of Unit 2 was suspended, construction of Unit 2 shall not be resumed without a vote of Participants owning at least fifty-one percent (51%) of the Ownership Shares. \*\*\*

25. Defaults by Participants

25.1 In the event of default by any Participant in any obligation pursuant to this Agreement the remaining Participants, or any of them, shall be free to invoke such remedies at law or in equity as may be deemed appropriate, subject to the arbitration provision set forth in paragraph 26 hereof. No default in the performance of any obligation other than an obligation to make any payment hereunder which the Participant may legally make shall be deemed to exist if such default is the result of an "uncontrollable force". The term "uncontrollable force" as used herein shall mean storm, flood, lightning, earthquake, fire, explosion, failure of facilities not due to lack of proper care or maintenance, civil disturbance, labor disturbance, sabotage, war, national emergency, restraint by court or public authority, or other causes beyond the control of the affected Participant, which such Participant could not reasonably have been expected to avoid by exercise of due diligence and foresight. Any Participant affected by an uncontrollable force shall use due diligence to place itself in a position to fulfill its obligations hereunder and if unable to fulfill any obligation by reason of an uncontrollable force such

- 74 -

Participant shall exercise due diligence to remove such disability with reasonable dispatch. \*\*\*In the event that any Participant shall fail to make when due any payment required by this Agreement or under any contract relating to the construction, operation or maintenance of the Units or the support of their associated transmission facilities entered into pursuant to this Agreement, in addition to any other rights which may then exist and in consideration of the mutual agreements of the other Participants, each of the Participants hereby agrees (i) that PSNH shall have the right in its sole discretion to make such payment, or the Disbursing Agent (appointed by the Participants under a separate Agreement dated as of May 23, 1984, as amended, the "Disbursing Agent Agreement"), shall have the right to accept funds with which to make such payment and to disburse any funds so accepted to meet obligations of the defaulting Participant, (ii) that, whenever such a payment has been made on behalf of a defaulting Participant, PSNH or the Disbursing Agent, as the case may be, are hereby authorized on behalf of all Participants to recover from any such defaulting Participant the amount of such payments, heretofore or hereafter made, together with interest from the date payment by the defaulting Participant was due to the date of reimbursement, and (iii) that the interest so payable by the defaulting Participant shall be at an annual rate of seven percentage points over the lowest interest rate then being charged by The First National Bank of Boston on 90-day commercial loans or, if such rate would be deemed usurious, at the highest rate then legally permissible. The

- 75 -

Participants further agree that (a) if PSNH has itself made the payment, it shall retain any such recovery together with the interest thereon, and (b) if the Disbursing Agent has made such payment, all such recoveries shall be applied as follows: the principal thereof to reimburse the appropriate accounts and the interest thereon to be credited for the pro rata benefit of all non-defaulting Participants, unless otherwise directed pursuant to the Disbursing Agent Agreement. \*\*\*

25.2 If a default by a Participant other than PSNH or UI (the "defaulting Participant") in any obligation under this Agreement has continued for more than five months \*\*\* after written notice of such default has been given to the defaulting Participant by PSNH, \*\*\* PSNH may, in lieu of any other rights or remedies that it may have against the defaulting Participant by reason of the default, by written notice to the defaulting Participant with copies to all other Participants, terminate all rights of the defaulting Participant under this Agreement on the date specified in such notice, which date shall not be less than thirty days after the giving of such notice.

Upon the effectiveness of such termination,

(a) The defaulting Participant shall cease to have any rights in the capacity and output of the Units or any rights under this Agreement except as set forth in this paragraph 25.2.

(b) PSNH shall succeed to all the defaulting Participant's rights, under all contracts, leases and other

- 76 -

instruments relating to the Units, including this Agreement;

(c) The defaulting Participant shall pay to PSNH all amounts then owed by the defaulting Participant under the terms of this Agreement with interest thereon at the rate specified in paragraph 25.1, and the amount of any legal or other expenses incurred by PSNH in connection with such default or the termination of the defaulting Participant's rights under this Agreement, and, in addition, as liquidated damages, an amount equal to 25% of the lesser of (i) the defaulting Participant's net investment (as determined in accordance with the Uniform System, if applicable to the Participant, or, if not so applicable, in a manner consistent with the principles of the Uniform System) at the effectiveness of such termination in the Units, the Property Interests and the fuel and operating inventories for the Units, or \*\*\* (ii) the then fair market value of said defaulting Participant's Ownership Share in the Units, Property Interests and such fuel and inventories (without giving effect to the defaulting Participant's loss of its rights in the capacity and output of the Units pursuant to paragraph 25.2(a) above. \*\*\* Such amount of liquidated damages is agreed by the Participants to be a fair and reasonable approximation of the additional damages which will result to PSNH upon the breach of this Agreement by any other Participant, which damages cannot more accurately be determined by any other method due to the duration of this Agreement and the uncertainty which necessarily exists at the date of this Agreement with respect to the costs associated with the Units and to other pertinent factors,



- 77 -

considering the protection afforded to PSNH by the provisions of paragraph 25.2(d) hereof.

(d) \*\*\* Subject to obtaining necessary regulatory approvals and mortgage indenture releases where applicable (which the defaulting Participant agrees to use its best efforts to obtain promptly), the defaulting Participant shall convey, transfer and assign to PSNH or its designees (in such proportions as it may designate), free and clear of all liens and encumbrances other than (i) those which existed at the time of conveyance to such Participant, (ii) liens securing taxes or other governmental charges, the payment of which is not yet delinquent, and (iii) liens and encumbrances caused by the acts or omissions of PSNH, all its right, title and interest in the Units, the Property Interests and the fuel and operating inventories for the Units and all contracts, leases or other instruments relating to the Units.

\*\*\* Upon the completion of such conveyance, transfer and assignment, PSNH shall pay to the defaulting Participant an amount equal to the lesser of (i) the defaulting Participant's net investment (as determined according to the method described in subparagraph (c) above) at the effectiveness of such termination in the Units, the Property Interests and the fuel and operating inventories for the Units or \*\*\* (ii) the then fair market value of said defaulting Participant's Ownership Share in the Units, Property Interests and such fuel and inventories (without giving effect to the defaulting Participant's loss of its rights in the capacity and output of the Units pursuant to paragraph 25.2(a)



- 78 -

above, \*\*\* less (iii) all amounts owed to PSNH pursuant to the terms of sub-paragraph (c) above. If the amount required to be deducted under clause (iii) of the preceding sentence is greater than the lesser of the amounts described in clauses (i) and (ii), the defaulting Participant shall remain liable for the deficiency.

\*\*\* Notwithstanding any provision hereof to the contrary, a Participant shall not be deemed to be in default if (A) such Participant fails to pay its Ownership Share of the cost of a capital item, as hereinafter defined, which such Participant determines after good faith investigation of all reasonable alternatives can be financed only by the issuance of bonds or other securities, and (B) (i) if such Participant is a municipal corporation, such issuance requires the approval of the voters, town meeting members or city council of such municipality and is disapproved by such voters, town meeting members or city council despite the best efforts of such Participant or (ii) in the case of both a Participant which is a municipal corporation and any other Participant, such issuance requires such authorization by a state legislature and such authorization is not granted despite the best efforts of such Participant, and (C) such Participant tenders to PSNH within five months (or such longer period as may be fixed by written agreement of the Participant and PSNH) after the initial payment with respect to the cost of such capital item has been requested, a good and sufficient deed conveying to PSNH, free and clear of all liens and encumbrances, other than (i) those which existed at the time of conveyance to such Participant, (ii) liens

- 79 -

securing taxes or other governmental charges, the payment of which is not delinquent, and (iii) liens and encumbrances caused by the acts or omissions of PSNH, the portion of the Participant's Ownership Share in the Units determined in accordance with the formula specified below. (Such deed shall be completed by the insertion of the percentage conveyed when the amount of the reduction is finally determinable.) If the foregoing conditions are met PSNH shall undertake the payment of the share of the cost of such capital item which such Participant would otherwise have been obligated to pay, such Participant shall not be obligated to pay such share and shall not be deemed in default hereunder by reason of its failure to make such payment, and the Ownership Share of such Participant shall be reduced in accordance with the following formula:

$$S_r = S_o \frac{(V - (1.25 \times A))}{V}$$

where:

V = The lesser of (i) such Participant's unadjusted Ownership Share of the estimated fair market value of the Units, the Property Interests and the fuel and operating inventories for the Units after addition of such capital item, or (ii) such Participant's net investment as determined in accordance with the Uniform System of Accounts prescribed for Class A and B Public Utilities and Licensees by the Federal Power Commission as amended from time to time (or such similar accounts as may hereafter become appropriate) in the Units, the Property Interests and the fuel and operating inventories for the Units plus such Participant's unadjusted Ownership Share of the cost of the capital item (as finally determined on the basis of

- 80 -

the costs to PSNH.)

A = Such Participant's unadjusted Ownership Share of the cost of the capital item which such Participant is unable to pay including interest as provided in paragraph 11.1 on any part of such cost already billed.

S<sub>0</sub> = Such Participant's Ownership Share prior to nonpayment.

S<sub>r</sub> = Such Participant's reduced Ownership Share.

"Cost of a (or the) capital item" means (i) costs (other than costs for which the Participants are individually responsible of the type described in paragraph 13.2) incurred under this Agreement for design, engineering, procurement, installation, and construction of the Units, including costs incurred with respect to the acquisition of the Site, in excess of the estimated aggregate of such costs, which estimated aggregate of such costs for purposes of this provision is \$1,075,000,000; (ii) costs (other than costs for which the Participants are individually responsible of the type described in paragraph 13.2) incurred under this Agreement with respect to renewals, replacements, modifications, additions, extensions, betterments and improvements of the Units, whether elective, pursuant to regulatory law, or otherwise; and (iii) costs (other than costs for which the Participants are individually responsible of the type described in paragraph 13.2) incurred under this Agreement with respect to any completion, repair, restoration or reconstruction of the Units pursuant to the terms of paragraph 19 hereof, in excess of any proceeds of insurance or award upon condemnation available therefor. The costs required to be incurred in connection with the termination, shutdown, demolition or disposal of the Units shall not constitute "cost of a capital item", and the provisions of this paragraph shall not be applicable to a failure to pay such costs. \*\*\*

25.3 Failure by a Participant to insist on any occasion upon strict performance of any provision of this Agreement or to take advantage of any rights hereunder shall not be construed as a waiver thereof and no waiver of any provision of this Agreement shall be effective unless in writing and executed by Participants

- 81 -

having at least 80% of the Ownership Shares.

26. Arbitration

26.1 Any dispute among the Participants with respect to this Agreement shall be submitted to arbitration on the request of a Participant. Copies of any such request shall be served on all Participants and it shall specify the issue or issues in dispute and summarize the Participant's claim with respect thereto. Within ten days after receipt of such a request authorized representatives of all Participants shall confer and attempt to agree upon appointment of a single arbitrator. If such agreement is not accomplished, any Participant may request the American Arbitration Association to appoint an arbitrator in accordance with its Commercial Arbitration Rules, which rules shall govern the conduct of the arbitration in the absence of contrary agreement by all Participants. The arbitrator shall conduct a hearing in Manchester, New Hampshire, and within thirty days thereafter, unless such time is extended by agreement of all Participants, shall notify the Participants in writing of his decision, stating his reasons for such decision and listing his findings of fact and conclusions of law. The arbitrator shall not have power to amend or add to this Agreement, except as provided in paragraph 29 hereof. Subject to such limitation, the decision of the arbitrator shall be final and binding on all Participants except that any Participant may petition a court of competent jurisdiction for review of errors of law. The decision of the arbitrator shall

- 82 -

determine and specify how the expenses of the arbitration shall be allocated among the Participants.

- 83 -

27. Notices

27.1 \*\*\* Any notice, demand, or request to any Participant pursuant to any provision of this Agreement shall be made in writing and shall be delivered either in person, by prepaid telegram, or by registered or certified mail to an officer, official, or agent of the Participant at such Participant's principal office or place of business or to such officer, official, or agent of the Participant, and at such address, as may be designated from time to time by such Participant by written notice to the other Participants. If no such designation by written notice shall have been made by a Participant, such Participant shall be deemed to have designated such officer, official, or agent as shall have executed the most recent amendment or addendum to this Agreement and such address as shall be shown thereon.\*\*\*

28. Severability of Provisions

28.1 A holding by any court having jurisdiction that any provision of this Agreement is invalid shall not result in invalidation of the entire Agreement, but all remaining terms shall remain in full force and effect.

29. Amendment

29.1 this Agreement may be amended from time to time by agreement in writing executed by Participants having Ownership Shares aggregating at least 80% with binding effect on all Participants; provided that no such amendment shall operate to



- 84 -

change the Ownership Share of a Participant or its right to submit disputes to arbitration in accordance with paragraph 26, without the express consent of such Participant; and provided further that without the express consent of all Participants no such amendment shall operate (a) to reduce the aforesaid percentage of the Ownership Shares required to agree to an amendment, or (b) to make the relative rights and obligations of any Participant differ in any respect from the rights and obligations of any other Participant, or (c) to change substantially (i) the description of the Units set forth in paragraph 1, (ii) the form of ownership thereof as set forth in paragraph 3, (iii) the relationship of the Participants as set forth in paragraph 6, or (iv) the nature of costs and expenses to be shared by the Participants as set forth in paragraphs 11, 13, 17, 19, and 24. \*\*\* Prior to December 31, 1992, the provisions of Paragraph 37 pertaining to the initial target amount of the Operating Deposit and the Operating Deposit Funding Schedule shall not be subject to any amendment, in whole or in part, or to any alteration by action of the Executive Committee or Participants, except upon the written consent of Participants who own in the aggregate at least 95% of the Ownership Shares of the Project." \*\*\*

In the event any provision of this Agreement is determined to be invalid under or in conflict with any applicable statute or any regulation or order of any regulatory agency having jurisdiction, or is in conflict with any provisions of any electric power pooling agreement to which Participants owning at least 80% of the Unit are



- 85 -

signatories, the Participants shall, unless they unanimously agree that no amendment is necessary, attempt by negotiation in good faith to agree upon an amendment of this Agreement which eliminates such invalidity or conflict while at the same time permitting the accomplishment of the objectives hereof to the greatest extent possible. In the event that agreement on an amendment cannot be reached by Participants having Ownership Shares aggregating at least 80% the matter shall be submitted to arbitration in accordance with paragraph 26.1 hereof and for this purpose only the arbitrator shall have the power to amend or add to this Agreement.

30. Applicable Law

30.1 This Agreement is made under and shall be governed by the law of the State of New Hampshire.

- 86 -

31. Term

31.1 This Agreement shall remain in full force and effect for the lesser of (i) the full useful lives of the Units, or of any replacement or reconstruction thereof pursuant to paragraph 19 hereof, or (ii) the period of ninety-nine years from the date of execution; provided, however, that in the event it shall be found that the Rule against Perpetuities applies, no transfer, conveyance or offering of any interest in the Units or the Property Interests shall be required to be made, and no option or right of refusal or declination with respect to any such transfer, conveyance or offering may be exercised under any provision of this Agreement later than twenty-one years after the death of the last to survive of the following persons living at the date of this Agreement: Elizabeth A. Tallman, child of William C. Tallman of Bedford; Deborah L. Adams, Stephen P. Adams, and Sally Anne Adams, children of William A. Adams, Jr., of Manchester; Christina J. Anderson, grandchild of David N. Merrill of Candia; Ian B. MacDermott, Derek A. MacDermott, Kimberly S. MacDermott, Joshua E. T. Foster, Shawn A. Foster, and Samantha J. Foster, grandchildren of Eliot Priest of Manchester; MaryAnne Sinville and Donald E. Sinville, Jr., children of Donald E. Sinville of Manchester; and David R. Harrison, Gregory J. Harrison, Marie E. Harrison, and Thomas G. Harrison, children of Robert J. Harrison of Manchester; all of the State of New Hampshire; and provided, further that, notwithstanding the expiration of the term of this Agreement, the provisions of this Agreement shall continue in effect after such

- 87 -

expiration to the extent necessary to permit full effect to be given to paragraph 24.

32. Miscellaneous

32.1 Each Participant shall, upon request of another Participant, execute and deliver any document reasonably required to implement any provision hereof.

32.2 A Participant shall not have the right to challenge any bill, invoice or statement, invoke arbitration of the same or bring any court or administrative action of any kind questioning the propriety of the same after a period of eighteen months from the date it is rendered. In the case of a bill, invoice or statement containing estimates, a Participant shall not have the right to challenge its accuracy after a period of eighteen months from the date it is adjusted to reflect the actual amounts due.

32.3 If it becomes necessary to estimate charges, any item billed on an estimated basis shall be paid when rendered. An adjustment will be made to the extent appropriate after the actual amount of the estimated item has been determined.

32.4 This Agreement shall be binding on successors and assigns of each Participant and, insofar as permitted by law, on any receiver or trustee in bankruptcy, receivership, or reorganization of any Participant.

- 88 -

32.5 No assignment or transfer of any interest by any Participant except in accordance with paragraph 3.2 hereof or the third from last sentence of \*\*\* paragraph 23.1 \*\*\* shall relieve it of any of its obligations hereunder absent express release by the remaining Participants, but PSNH is authorized, on behalf of all Participants, and agrees to grant such an express release with respect to any transfer contemplated by the first refusal provision of paragraph 23 hereof upon the furnishing to PSNH of reasonable assurance that the financial ability of the assignee or transferee is substantially as satisfactory as that of the Participant involved and that such assignee or transferee has met, or can reasonably be expected to meet prior to the time of issuance of a construction permit for the Units, the financial qualification requirements of the Atomic Energy Act of 1954. In the event of any transfer in accordance with paragraph 3.2 or the third from last sentence of \*\*\* paragraph 23.1 \*\*\* hereof, each Participant shall be deemed to have granted to the Participant making such transfer its express release from all obligations under this Agreement to the extent of the interest transferred except obligations outstanding at the time of such transfer whether or not due.

32.6 Any number of counterparts of this Agreement may be executed and each shall have the same force and effect as an original and as if all of the parties to all of the counterparts had signed the same instrument.

- 89 -

32.7 Except to the extent that the Preliminary Agreement or any exhibit thereto is specifically referred to herein and except to the extent that the continued applicability of any other agreement is specifically recognized herein, this Agreement shall constitute the entire understanding between the Participants, superseding any and all previous understandings pertaining to the subject matter contained herein.

\*\*\* 32.8 References. The following shorthand references may have been or may be employed with respect to the named Participants, Initial Transferees, Additional Transferees, or Transferees as the same may be from time to time referenced in the Agreement:

Public Service Company of New Hampshire	PSNH
The United Illuminating Company	UI
Bangor Hydro-Electric Company	Bangor
Central Maine Power Company	CMP
Central Vermont Public Service Corporation	CVPS
The Connecticut Light and Power Company	CL&P
Fitchburg	
Green Mountain Power Corporation	GMP
Hudson Light and Power Department	Hudson
Maine Public Service Company	MPSC
Massachusetts Municipal Wholesale Electric Company	MMWEC
Montaup Electric Company	Montaup
New Bedford Gas and Edison Light Company	NB
New England Power Company	NEP
Taunton Municipal Lighting Plant	Taunton
Vermont Electric Cooperative, Inc.	VEC
Vermont Electric Power Company, Inc.	VELCO

provided, however, that any shorthand reference shall be for that purpose only and shall not otherwise control or affect the operation or interpretation of any of the provisions of the

- 90 -

Agreement. \*\*\*

\*\*\* 33. Certain Agreements Concerning Construction of the Units

33.1 Financing of Costs. Each Participant will use its reasonable best efforts, subject to regulatory requirements, to finance its Ownership Share of the costs of completing in a timely manner construction of the Units. If at any time a Participant (a "Delinquent Participant") should determine that it cannot pay its Ownership Share of current construction costs, it will notify the other Participants in writing, in as timely a manner as possible. One or more of the remaining Participants may then, after timely notice to all Participants, make on behalf of the Delinquent Participant advances for all or part of the monthly payments due from the Delinquent Participant. In the event two or more Participants give notice of an intent to make advances aggregating more than the monthly payments due from the Delinquent Participant, the right to make such advances shall be apportioned between them in accordance with their respective Ownership Shares, or in such other manner as they may agree. If within 5 months after it becomes delinquent in its payment of current construction costs, the Delinquent Participant fails to recommence its payments, and repay the advances plus interest at the rate specified in paragraph 11.1 of the Agreement from the date of the advance to the date of repayment, then, at the option of each Participant which has made advances, (a) its Ownership Share shall be increased and that of the Delinquent Participant decreased, so that the Ownership

- 91 -

Share of each is in the proportion which the aggregate costs paid by it (including said advances) bears to the total costs applicable to all Participants, or (b) it shall be credited with the amount of its advances against payments which would otherwise be due from such Participant thereafter on account of its existing Ownership Share. Such changes in Ownership Shares shall take effect when all regulatory approvals therefor are received, and the Participants agree to use their best efforts to obtain such approvals promptly.

33.2 Termination or Suspension of Construction or Operation. Notwithstanding any other provision of this Agreement, PSNH will not terminate the Project, suspend construction for an extended period, or defer the scheduled dates of commercial operation of either of the Units, except (a) with the written agreement of Participants (including PSNH) having Ownership Shares aggregating at least 75%, or (b) unless such action is required by any law, regulation, or order of any governmental body or agency or by reason of an emergency, requirements of public safety or health, or other similar causes. \*\*\*

\*\*\* 34. Creation of Oversight Committee

34.1 An Oversight Committee of five (5) members is hereby established to participate in the oversight of the Project. Members of the Oversight Committee shall be appointed from time to time by majority vote of Participants, with each such Participant's vote given weight proportional to its Ownership Share in the



- 92 -

Project. Members of the Oversight Committee will have experience in nuclear construction and operation. The Oversight Committee will hold meetings as required, but no less frequently than once a month.

It is the intent of the Participants that at all times the Oversight Committee act consistently with the regulations of the Nuclear Regulatory Commission (NRC) and that there be no delegation to, nor assumption by, the Committee of any duties or authority given to the NRC licensees.

The Senior Vice President of PSNH or such other officer of PSNH with primary responsibility for managing the construction of the Project will, from time to time: (a) inform the Oversight Committee of the status of the Project and of problems and other developments at the site; and (b) meet with the Oversight Committee at such times as the Committee may request.

PSNH will consult with the Oversight Committee prior to making major decisions in connection with the Project which PSNH could reasonably expect to be of concern to the Participants. Each such consultation shall be as detailed as time permits. PSNH will follow the recommendations of the Oversight Committee to the extent reasonably practicable, unless PSNH believes that such recommendations are not in accordance with the NRC regulations or prudent utility practice. The creation of the Oversight Committee shall not be deemed to affect PSNH's responsibility for construction under this Agreement.

- 93 -

35. Appointment of Disbursing Agent

35.1 Participants owning fifty-one percent (51%) or more of the Ownership Shares may appoint one or more disbursing agents to receive, hold and disburse payments due from Participants under the terms of this Agreement, including without limitation Paragraphs 11 and 13 of this Agreement.

35.2 All monies paid to the disbursing agent or agents shall not be property of the Participants, but shall be held in escrow and disbursed by the Disbursing Agent, subject to and in accordance with the provisions of the Agreement for Seabrook Project Disbursing Agent made as of May 23, 1984, as amended.

35.3 The disbursing agent or agents so appointed shall disburse monies received from Participants only to meet each Participant's own Ownership Share of the costs.

35.4 The powers, duties, responsibilities, terms of employment, compensation and other matters regarding the disbursing agent or agents so appointed shall be limited to activities reasonably incident to collection and disbursement of Participants' payments, as distinguished from those of a managing agent under paragraph 36, and shall be further defined by written agreement of Participants owning fifty-one percent (51%) or more of the Ownership Shares. The disbursing agent or agents may be removed by Participants owning fifty-one percent (51%) of the Ownership

- 94 -

Shares, and a successor disbursing agent or agents may be appointed by Participants owning fifty-one percent (51%) of the Ownership Shares. The disbursing agent or agents may resign by giving seven days' prior written notice to all Participants.

35.5 The disbursing agent or agents so appointed may assess Participants for their Ownership Shares of the ordinary and necessary costs of carrying out the functions of the disbursing agent, including the costs of counsel.

36. Change in Project Management

36.1 Upon the written agreement of Participants owning fifty-one percent (51%) or more of the Ownership Shares, approval of the necessary regulatory authorities, including any necessary action of the NRC, and appointment of a managing agent under Paragraph 36.2, PSNH shall be relieved of all of its management duties, functions, responsibilities, prerogatives, discretionary rights, and authorizations to act for and on behalf of all other Participants hereunder, including, without limitation, those described in Paragraphs 8, 9, 10, 12, 13, 19, 20, and 24; provided, however, that nothing herein shall be construed so as to affect PSNH's Ownership Share or its duty to pay its Ownership Share of the costs of the Project, or to perform such other duties as are required to be performed by each Participant.

36.2 Upon written agreement and effective upon approval

- 95 -

of the necessary regulatory authorities, Participants owning fifty-one percent (51%) or more of the Ownership Shares may appoint a managing agent (which may be a Participant) for the Project who shall perform all of the management duties and functions, and who shall have all of the responsibilities, prerogatives, discretionary rights, and authorizations to act on behalf of all other Participants previously vested in PSNH. The terms, powers, duties, responsibilities, term of employment, compensation and other matters regarding the managing agent so appointed, will be defined by written agreement of Participants owning fifty-one percent (51%) or more of the Ownership Shares prior to the effective date of the appointment. The Managing Agent may be removed by Participants owning at least fifty-one percent (51%) of the Ownership Shares, and a successor Managing Agent may be appointed by Participants owning at least fifty-one percent (51%) of the Ownership Shares. The Managing Agent may resign upon written notice to all Participants. \*\*\*

\*\*\* 37. Creation of Executive Committee

37.1 (a) An Executive Committee is hereby established to perform the functions set out in this Paragraph 37, subject to the limitations of Paragraph 37.4 and 37.5 below. The members of such Executive Committee shall be appointed from among the Chief Executive Officers of Participants in the Units, and may be removed, according to the following method: (i) as to each of the New England States (except the State of New Hampshire), all of the

- 96 -

investor-owned and cooperative Participants serving that State, at wholesale or at retail, shall together select, and may remove, by a majority of the total Ownership Shares of such Participants, the Chief Executive Officer of one such Participant as an Executive Committee member (currently, the Participants serving Connecticut, Maine, Massachusetts, Rhode Island and Vermont shall thus each select an Executive Committee member), except that no Participant shall have more than one representative on the Executive Committee; (ii) if the New Hampshire Electric Cooperative, Inc. and all of the investor-owned and cooperative Participants serving Vermont so agree in writing, such Participants may together select an Executive Committee member, who shall be the Chief Executive Officer of a Participant serving Vermont; and (iii) all those Participants owned by or organized pursuant to authority of governmental entities shall select, and may remove, by a majority of the total Ownership Shares of such Participants, a Chief Executive Officer of one such Participant as an Executive Committee member. The foregoing selections and removals shall be made either at a meeting of all Participants or at a special meeting of the Participants that are entitled to select the member. Any member of the Executive Committee may designate an alternate to attend and vote at any meeting of the Executive Committee in his place and stead.

(b) In the event that a member resigns or is removed from the Executive Committee or becomes unable to serve as an Executive Committee member by virtue of default in payment of

- 97 -

Project Costs as described in clause (c) of this Paragraph 37.1 or by disablement, death or resignation or removal as a Chief Executive Officer of a Participant, or if the Participant employing such member as its Chief Executive Officer ceases to be a Participant or is succeeded by another Participant, the successor to such member shall be selected within two weeks of the date on which such vacancy first occurs and by the same method as such member being replaced was selected.

(c) The Chief Executive Officer of PSNH shall be and shall remain as an additional member of the Executive Committee so long as PSNH continues to pay its full share of current Project Costs (as defined in Paragraph 37.4). No other Participant shall be entitled to have its Chief Executive Officer or alternate serve on the Executive Committee if it is more than one month in arrears in the payment of its full share of current Project Costs.

(d) The Executive Committee shall be entitled to appoint task forces, consisting of persons who are not Executive Committee members, to undertake specific assignments on its behalf, including oversight of the activities of the Disbursing Agent appointed under Paragraph 35. The Executive Committee will maintain supervisory control over each task force. Each task force and each member thereof shall be considered a designee of the Executive Committee.

\*\*\* 37.2 (a) The Executive Committee shall hold meetings as required, but no less frequently than once a month. A quorum for effective action at any meeting of the Executive Committee shall consist of a majority of all members. The Executive Committee



- 98 -

shall act by majority vote of its members present, voting per capita rather than by Ownership Share.

(b) The Executive Committee may adopt rules of procedure or by-laws to govern the conduct of its meetings and the performance of its functions under this Paragraph. The Executive Committee shall appoint a Chairman, who shall have such duties, consistent with this Paragraph, as the Executive Committee may give to him.

(c) The Executive Committee shall be subject to control and direction by the Participants, and action of the Executive Committee may be modified by written agreement executed by Participants owning fifty-one percent (51%) or more of the Ownership Shares; except that the rights, duties and responsibilities of the Executive Committee under the Agreement for Seabrook Project Disbursing Agent may only be modified or altered by amendment of that agreement, and the Executive Committee's actions thereunder shall only be subject to modification consistent with the provisions of that agreement.

(d) Upon the effectiveness of the appointment of a managing agent pursuant to Paragraph 36 of this Agreement, the powers, duties and responsibilities of the Executive Committee set out in this Paragraph shall be reexamined and may be modified; provided that any modification shall be consistent with this Paragraph, including the limitations of Paragraph 37.5.

\*\*\* 37.3 (a) On a quarterly basis, or more frequently



- 99 -

if the Executive Committee so requests, the Project Manager shall prepare and present to the Participants an itemized cash budget for Project Costs (as defined in Paragraph 37.4) for each of the next six months (referred to as the "next six months' budget") and, if construction of either Unit is in progress, for Project Costs of construction through completion, with an estimated date for scheduled commercial operation. \*\*\*Upon the after Commercial Operation of Unit No. 1, the Project Manager shall prepare and present the next six months' budget, quarter-annually. The budget will be prepared on a cash basis unless the Executive Committee has voted to permit the Project Manager to prepare the budget on an accrual or modified accrual basis. In performing its function under this Paragraph 37.3, the Executive Committee shall use and be entitled to rely upon, the budget when approved or deemed approved by the Participants as provided in Paragraph 37.3(c) below.\*\*\* The Project Manager shall deliver a copy of such next six months' budget (with the estimated costs through completion and the estimated date of completion) to each Participant at least ten days before the Participants' meeting called to consider it. The Executive Committee may also present to the Participants its recommendation with respect to the next six months' budget and costs through completion. The Participants shall review the next six months' budget, and, after consultation with the Project Manager and the Executive Committee, shall either approve or modify the aggregate dollar amount of such budget pursuant to the methods described in either subparagraph (b) or (c) below, as appropriate.

- 100 -

(b) Prior to full funding of construction, the Participants shall approve or modify the next six months' budget by either of the following methods, as appropriate:

(i) agreement by Participants owning fifty-one percent (51%) or more of the Ownership Shares in the Seabrook Project, if the aggregate dollar amount of such budget does not exceed the aggregate dollar amount of the current six months' budget, provided that if Participants owning more than forty-nine percent (49%) of the Ownership Shares in the Seabrook Project do not disagree by the tenth day after the meeting called and held to consider it, then the Participants shall be deemed to have approved such budget; or

(ii) agreement by five (5) or more Participants owning sixty-two percent (62%) or more of the Ownership Shares in the Seabrook Project, if the aggregate dollar amount of such budget exceeds the aggregate dollar amount of the current six months' budget, except that if such proportion and number of Participants do not so agree by the tenth day after the Participants' meeting called and held to consider it, then the Participants shall be deemed to have approved the next six months' budget in an aggregate dollar amount equal to the current six months' budget.

(c) After full funding of construction, the Participants shall approve or modify the next six months' budget by either of the following methods, as appropriate:

(i) agreement by Participants owning fifty-one percent (51%) or more of the Ownership Shares in the Seabrook

- 101 -

Project, if the aggregate dollar amount of such budget does not exceed one hundred and ten percent (110%) of the aggregate dollar amount of the current six months' budget, provided that if Participants owning more than forty-nine percent (49%) of the Ownership Shares in the Seabrook Project do not disagree by the tenth day after the meeting called and held to consider it, then the Participants shall be deemed to have approved such budget; or

(ii) agreement by five (5) or more Participants owning sixty-two percent (62%) or more of the Ownership Shares in the Seabrook Project if the aggregate dollar amount of such budget exceeds one hundred and ten percent (110%) of the aggregate dollar amount of the current six months' budget, except that if such proportion and number of Participants do not so agree by the tenth day after the Participants' meeting called and held to consider it, then the Participants shall be deemed to have approved the next six months' budget in an aggregate dollar amount equal to the current six months' budget.

\*\*\* (d) (i) Operating Deposit. After Commercial Operation of Unit No. 1, the Executive Committee shall determine from time to time the amount ("target amount") of an Operating Deposit which shall be made by each Participant pro-rata in accordance with its Ownership Share. The initial target amount shall be one month's average Project Costs as determined from the approved budget for the period July through December 1990 and funded in accordance with the Operating Deposit Funding Schedule (as defined in Paragraph 37.3(d)(ii) below). The Operating Deposit

- 102 -

shall be held by the Disbursing agent, together with routine monthly billing payments, made as required in Paragraph 37.3(e) below, to provide the Project Manager with working capital sufficient to carry out the Project Manager's obligations as managing agent of the Project. The Project Manager shall recommend semi-annually (January 1 - June 30 and July 1 - December 31) to the Executive Committee the target amount for the following six months when the Project Manager presents to the Participants its "next six-months' budget". Such recommendation shall include details of the basis and calculation of the target amount for the next six months. The target amount so established by the Executive Committee shall in no event be greater than one and one-half months', average Project Costs as projected in the next six-months' budget. The Operating Deposit shall be funded consistent with the Operating Deposit Funding Schedule by the Participants pro-rata in accordance with their respective Ownership Shares on the first business day of each month as may be necessary, from time to time, to restore the target amount so established. The Executive Committee shall determine the schedule for funding the Operating Deposit, which determination shall be binding upon all Participants. Any Participant which fails to fund its pro-rata share of the Operating Deposit and to make payments required by Paragraph 37.3(d)(ii) below shall be liable for interest on the unpaid amount at the rate provided elsewhere in this Agreement. The Disbursing Agent shall bill each Participant for its pro-rata share of the target amount. Such billings shall be included in the

- 103 -

routine monthly billing made by the Disbursing Agent under Paragraph 37.3(e) hereof. Each Participant's share of the Operating Deposit shall be held in escrow by the Disbursing Agent as provided in Paragraph 37.3(h) below.

(ii) Operating Deposit Funding Schedule. Each Participant shall pay its pro-rata share of the initial target amount of one month's average Project Costs as follows: 48.2405% thereof ("initial payment") when billed by the Disbursing Agent as provided in paragraph (d)(i); and 51.7595% thereof in 18 equal monthly installments on the first business day of each month, commencing on July 1, 1991 ("Operating Deposit Funding Schedule"). Upon dissolution of the Seabrook Preoperational and Supplemental Decommissioning Trusts, each Participant shall promptly pay 51.7595% of its share of the distributions made to it from such Trusts to be applied against installments of its then unpaid pro-rata share of the target amount in the inverse order of when they are to become due. The initial payment by each Participant shall constitute the minimum dollar amount to be maintained by each Participant in the Operating Deposit until the Participant pays its full pro-rata share. Prior to December 31, 1992, the target amount shall not exceed one month's average Project Costs as provided in the then current six-months' budget."

(e) Routine Monthly Billing. Not later than the fifteenth day of each month, or the first business day thereafter, the Disbursing Agent shall, subject to the provisions of Paragraph 37.3(f) of the Joint Ownership Agreement, bill ("routine monthly

- 104 -

billing") each Participant for its pro-rata Ownership Share of the estimated Project Costs for the subsequent month under the then approved current six-months' budget, as established pursuant to Paragraphs 37.3(a), 37.3(b) and 37.3(c) above. Each invoice shall be due and payable on the first business day of the next following month. Any amount not paid on such date shall bear interest from said due date until the date of payment at the rate provided elsewhere in this Agreement. Succeeding routine monthly billings shall set forth a reconciliation for the previous month between the estimated Project Costs previously billed, including any interim payments billed pursuant to Paragraph 37.3(g) below, and the actual Project Costs incurred. Such billings also shall set forth a credit or debit to the then current routine monthly billed amount to reflect such reconciliation and interest due for late payment or other adjustments, such as vendor credits and interest. The routine monthly billings shall show as debits or credits the amounts necessary to restore the Operating Deposit to the target amount as set from time to time and such amounts shall be funded by the Participants as provided in Paragraph 37.3(d)(i) and (ii) above. Unless otherwise directed by the Executive Committee or provided by other provisions of this Agreement, any net interest paid by any Participant with respect to an overdue payment for any month's bill shall be credited by the Disbursing Agent pro-rata determined by Ownership Share to those Participants which made timely payment of their bills for each such month."

(f) Special Provisions Re Payment of Project Costs and



- 105 -

Determination of Target Amount. Notwithstanding the other provisions of this Paragraph 37, the following additional provisions shall apply and control with respect to payment of Project Costs and the determination of the target amount:

(i) The Disbursing Agent shall not include in a routine monthly billing for Project Costs a bill for funds for a major expenditure unless such expense is to be paid by the Disbursing Agent during the month for which the routine monthly billing is made.

(ii) The Project Manager, on a quarterly basis, shall report to the Participants the difference, if any, between estimated Project Costs to date under the then current budget and Project Costs actually incurred to said date, together with estimated Project Costs for the remainder of the current budget. If Project Costs actually incurred and Project Costs estimated for the remainder of the then current budget exceed 110% or are less than 90% of the estimated Project Costs in said budget, the Project Manager shall recommend to the Executive Committee that a change be made to the estimated Project Costs for the remainder of the budget which change, if approved in accordance with Paragraph 37.3(c), shall then be reflected by modification of future routine monthly billings by the Disbursing Agent.

(iii) The Project Manager shall monitor and inform the Executive Committee promptly of the ledger book balance of the Project as of the end of the month. If such ledger book balance is anticipated, or continues, to exceed or be less than the



- 106 -

target amount by plus or minus 10%, the Project Manager shall recommend to the Executive Committee whether and in what amount a reduction or increase should be made in the funding for future Project Costs so that the closing ledger book balance and the target amount will be substantially the same."

(g) Interim Billing: Subject to the prior approval of the Executive Committee, the Disbursing Agent may, from time to time, obtain an interim payment from each Participant by means of an Interim Billing to all Participants, for payment of unanticipated expenditures, which, in the absence of such interim payment, would result in the reduction at the end of the month of the sum of (i) the balance of the Operating Deposit and (ii) the amount of funds then remaining from the routine monthly billings to the minimum required amount of \$5,300,000, or less. To the extent that any Interim Billing would result in the estimated Project Costs exceeding the then current six months' budget, such Interim Billing shall require approval, in advance, as provided in paragraph 37.3(c)(i) and (ii) above. Upon receipt of the aforesaid required approvals, the Disbursing Agent shall without delay bill each Participant for its pro-rata Ownership Share of the Interim Billing which shall be the amount necessary to restore said minimum required balance to \$5,300,000. Each Interim Billing shall be due and payable ten business days after issuance by the Disbursing Agent and any amount not paid by such date shall bear interest from said due date until the date of payment at the rate provided elsewhere in this Agreement. Each Interim Billing shall be

- 107 -

accompanied by a letter from the Project Manager confirming the amount requested and the reason for the request. The Project Manager shall use its best efforts at all times to manage cash so as to avoid the need for interim billings."

(h) Escrowed Funds. All funds held by, or under the control of, the Disbursing Agent at any time, including without limitation, credits received from contractors, suppliers and others and all gains and interest derived from investments or otherwise, shall at no time be property of the Participants or of the Disbursing Agent but shall be received, held and invested at all times in escrow and escrow accounts solely for the benefit of creditors of the Project, to be disbursed solely to pay each Participant's Ownership Share of Project Costs." \*\*\*

\*\*\* 37.4 The Executive Committee shall perform the following functions and shall also have the specific rights, and be subject to the specific duties and responsibilities, given it in the Agreement for Seabrook Project Disbursing Agent made the 23rd day of May 1984:

(a) On a periodic basis, the Executive Committee shall review and approve or modify the Project Manager's budget, workplan and level of activity to assure that construction costs, costs resulting from suspension and termination (including any costs associated with restarting construction after suspension), and costs of operation and maintenance of the Units (all such costs being collectively referred to in this Paragraph as "Project

- 108 -

Costs") incurred or proposed to be incurred by the Project Manager on behalf of Participants (i) are authorized by the provisions of this Agreement, including without limitation the provisions of Paragraphs 11, 13 and 24.2 of this Agreement and the Resolution referred to in Paragraph 24.2, and (ii) do not and will not exceed the reasonable budgetary limits established by the Participants from time to time, as provided in Paragraph 37.3 above;

(b) The Executive Committee shall provide direction to and oversee the functions of the Disbursing Agent appointed under Paragraph 35 of this Agreement to assure that Participants' payments and the funds and credits attributable to those payments are properly allocated and applied under the provisions of this Agreement, including without limitation ensuring the proper application of credits to Project Costs and the allocation of payments made by each Participant to pay only such Participant's Ownership Share of such Project Costs; and shall further provide direction to the Disbursing Agent and shall oversee the allocation of Participants' payments in cases where one or more of the Participants have not paid their Ownership Share of Project Costs;

(c) The Executive Committee is authorized to conduct a search for and make recommendations to the Participants with respect to a new managing agent to be appointed under Paragraph 36 of this Agreement and upon the execution of a written agreement making such appointment as provided in Paragraph 36, shall be authorized to take any and all steps necessary to effectuate the transfer of project management; provided, however, that the

- 109 -

Executive Committee shall take no action that would subject the Participants to additional New Hampshire regulation;

(d) In respect of the functions given to the Executive Committee by clause (a) of this Paragraph 37.4, the Executive Committee is specifically directed to ensure that no liabilities on behalf of Participants are incurred with respect to, or billed or paid for, Project Costs of Unit 2, except insofar as such liabilities, bills or payments are consistent with the limitations of Paragraph 24.2 of this Agreement and the level of construction of Unit 2, if any, approved by the Participants under this Agreement.

\*\*\* 37.5 It is the intention of the Participants that at all times the Executive Committee shall act consistently with the regulations of the Nuclear Regulatory Commission ("NRC") and that there shall be no delegation to, nor assumption by, the Executive Committee of any duties or authority that would conflict with NRC permits or licenses held by the Participants or the technical specifications for the Units. The Executive Committee shall exercise only the limited financial oversight and direction functions set out in this Paragraph 37, and the creation of the Executive Committee shall not be deemed to affect the duties and responsibilities for construction, operation and maintenance of the Units, as provided in this Agreement, of PSNH when acting in its capacity as Project Manager or of a managing agent appointed pursuant to Paragraph 36. The Participants (other than PSNH when

- 110 -

acting in its capacity as Project Manager) do not hereby undertake, or intend to undertake, or grant to the Executive Committee, any responsibility for management of the construction or operation and maintenance of the Units.

\*\*\* 37.6 Neither the Executive Committee nor any member or designee thereof, when acting in such capacity, nor any employer of any member or designee, nor any affiliate, agent or employee of such member, designee or employer, shall by virtue of its or his relationship to the Executive Committee or any member or designee thereof acting in such capacity, be liable to any Participant for claims for direct, incidental, indirect, consequential or other damages of any nature, including, but not limited to, damages for loss of anticipated profits, loss of use of revenue, loss by reason of construction shutdown or interruption and cost of capital, connected with or resulting from the actions of the Executive Committee or of any member or designee thereof under this Paragraph, under the Agreement for Seabrook Project Disbursing Agent, and under the Participants' May 14, 1984 Resolutions, except in the event of willful misconduct. In addition, the Participants, severally (and not jointly, or jointly and severally), in accordance with their respective Ownership Shares, agree to defend, indemnify and hold the Executive Committee and each member and designee thereof, when acting in such capacity, and each of the other persons or entities referred to in the preceding sentence, harmless against all losses, claims, expenses (including reasonable

- 111 -

counsel fees) and liabilities, not resulting from his or their willful misconduct, which may be asserted, imposed or incurred in connection with the performance of his or its responsibilities under this Paragraph, under the Agreement for Seabrook Project Disbursing Agent, and under the Participants' May 14, 1984 resolutions, including any litigation arising from the foregoing. Nothing in this Paragraph shall be construed to affect any Participant's Ownership Share or its duty to pay its Ownership Share of the Project Costs or to perform such other duties as are required to be performed by each Participant under this Agreement, under the Agreement for Seabrook Project Disbursing Agent, under the Participants' May 14, 1984 Resolutions, or under other agreements among the Participants.

\*\*\* 37.7 The Executive Committee may assess Participants for their respective Ownership Shares of the ordinary and necessary costs of carrying out the functions of the Executive Committee, including the reasonable costs of consultants and counsel."



OCT-25-2002 10:02

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Confirmed Copy

**TWENTY-FOURTH AMENDMENT TO AGREEMENT  
FOR JOINT OWNERSHIP, CONSTRUCTION AND OPERATION  
OF NEW HAMPSHIRE NUCLEAR UNITS**

This Twenty-Fourth Amendment, made as of the 8 day of September 2000, to the Agreement for Joint Ownership, Construction and Operation of New Hampshire Nuclear Units, dated as of May 1, 1973, ("Joint Ownership Agreement"), as heretofore amended, by and among North Atlantic Energy Corporation (successor in interest to Public Service Company of New Hampshire and Vermont Electric Generation and Transmission Cooperative, Inc.), The United Illuminating Company, Canal Electric Company (successor in interest to New Bedford and Edison Light Company), The Connecticut Light and Power Company, Great Bay Power Corporation (successor in interest to EUA Power Corporation), Massachusetts Municipal Wholesale Electric Company, Little Bay Power Corporation (successor in interest to Montaup Electric Company), New England Power Company, New Hampshire Electric Cooperative, Inc., Taunton Municipal Lighting Plant, Hudson Light & Power Department, Inc. (collectively, the "Participants").

W I T N E S S E T H T H A T:

WHEREAS, Participants with at least 80% of all the Ownership Shares wish to amend certain provisions of the Joint Ownership Agreement regarding membership of the Executive Committee.



OCT-25-2002 10:

NAESCO LICENSING

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Conformed Copy

NOW, THEREFORE in consideration of the foregoing and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Participants executing this Amendment hereby agree as follows:

1. Amendments. The Joint Ownership Agreement is hereby amended as follows:

A. Paragraph 37.1(a) is hereby amended in its entirety as follows:

37.1 (a) An Executive Committee is hereby established to perform the functions set out in this Paragraph 37, subject to the limitations of Paragraph 37.4 and 37.5 below. The members of the Executive Committee are as follows:

The Chief Executive Officer of the United Illuminating Company, as the Participant serving Connecticut;

The Chief Executive Officer of New England Power Company, as the Participant serving Massachusetts;

The Chief Executive Officer of Massachusetts Municipal Wholesale Electric Cooperative, as the Participant owned by or organized pursuant to authority of a governmental entity;

The Chief Executive Officer of North Atlantic Energy Corporation, as successor to Public Service Company of New Hampshire; and

The Chief Executive Officer of Little Bay Power Corporation, as successor to Montaup Electric Company.

Any member of the Executive Committee may designate an alternate to attend and vote at any meeting of the Executive Committee in his place and stead.

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B. Paragraph 37.1(b) is hereby amended in its entirety as follows:

(b) In the event that a member resigns or is removed from the Executive Committee or becomes unable to serve as an Executive Committee member by virtue of default in payment of Project Costs as described in cause (c) of this paragraph 37.1 or by disablament, death or resignation or removal as a Chief Executive Officer of a Participant, or if the Participant employing such member as its Chief Executive Officer ceases to be a Participant or is succeeded by another Participant, the successor to such member shall be selected within two weeks of the date on which vacancy first occurs.

C. Paragraph 37.1(c) is hereby amended in its entirety as follows:

(c) No Participant shall be entitled to have its Chief Executive Officer or alternate serve on the Executive Committee if it is more than one month in arrears in the payment of its full share of Project Costs.

2. Counterparts. Any number of counterparts of this Twenty-Fourth Amendment may be executed, and each shall have the same force and effect as an original and as if all parties to all of the counterparts had signed the same instrument.

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3. Limitation of Amendments. Except as specifically amended by this Twenty-Fourth Amendment, the Joint Ownership Agreement shall continue in full force and effect without amendment or alteration.

4. Effectiveness. This Twenty-Fourth Amendment shall become effective when duly executed and delivered by Participants having ownership shares aggregating at least eighty percent (80%), at which time it shall become binding on all Participants.

IN WITNESS WHEREOF, the Participants have caused this Twenty-Fourth Amendment to be duly executed by an authorized officer, as of the date first written above.

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NEW ENGLAND POWER COMPANY

By \_\_\_\_\_  
Title: \_\_\_\_\_

NEW HAMPSHIRE ELECTRIC COOPERATIVE

By \_\_\_\_\_  
Title: \_\_\_\_\_

NORTH ATLANTIC ENERGY CORPORATION

By \_\_\_\_\_  
Title: \_\_\_\_\_

THE CONNECTICUT LIGHT & POWER  
COMPANY

By \_\_\_\_\_  
Title: \_\_\_\_\_

TAUNTON MUNICIPAL LIGHTING PLANT

By \_\_\_\_\_  
Title: \_\_\_\_\_

THE UNITED ILLUMINATING COMPANY

By James T. Crane  
Title: Group VP

OCT-25-02 FRI 12:53 PM NO LEGAL DEPT.

FAX NO. 3

OCT-25-2002 10:6

NAESCO LICENSING

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NEW ENGLAND POWER COMPANY

By \_\_\_\_\_

Title: \_\_\_\_\_

NEW HAMPSHIRE ELECTRIC COOPERATIVE

By \_\_\_\_\_

Title: \_\_\_\_\_

NORTH ATLANTIC ENERGY CORPORATION

By J. B. Keane

Title: \_\_\_\_\_

THE CONNECTICUT LIGHT AND POWER  
COMPANY

By J. B. Keane

Title: \_\_\_\_\_

TAUNTON MUNICIPAL LIGHTING PLANT

By \_\_\_\_\_

Title: \_\_\_\_\_

THE UNITED ILLUMINATING COMPANY

By \_\_\_\_\_

Title: \_\_\_\_\_

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NRESCO LICENSING

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NEW ENGLAND POWER COMPANY

By Cynthia L. Lucate

Title: VICE PRESIDENT

NEW HAMPSHIRE ELECTRIC COOPERATIVE

By \_\_\_\_\_

Title: \_\_\_\_\_

NORTH ATLANTIC ENERGY CORPORATION

By \_\_\_\_\_

Title: \_\_\_\_\_

THE CONNECTICUT LIGHT AND POWER  
COMPANY

By \_\_\_\_\_

Title: \_\_\_\_\_

TAUNTON MUNICIPAL LIGHTING PLANT

By \_\_\_\_\_

Title: \_\_\_\_\_

THE UNITED ILLUMINATING COMPANY

By \_\_\_\_\_

Title: \_\_\_\_\_

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NAESCO LICENSING

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CANAL ELECTRIC COMPANY

By \_\_\_\_\_

Title: \_\_\_\_\_

GREAT BAY POWER CORPORATION

By [Signature]

Title: President and Chief Executive Officer

LITTLE BAY POWER CORPORATION

By [Signature]

Title: President and Chief Executive Officer

HUDSON LIGHT & POWER DEPARTMENT

By \_\_\_\_\_

Title: \_\_\_\_\_

MASSACHUSETTS MUNICIPAL WHOLESALE  
ELECTRIC COMPANY

By \_\_\_\_\_

Title: \_\_\_\_\_



# **EXHIBIT**

# **5**

**NEXTERA ENERGY SEABROOK, LLC, ET AL.\***

**DOCKET NO. 50-443**

**SEABROOK STATION, UNIT NO. 1**

**FACILITY OPERATING LICENSE**

License No. NPF-86

1. The Nuclear Regulatory Commission (the Commission) has found that:
  - A. The application for a license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations set forth in 10 CFR Chapter I; and all required notifications to other agencies or bodies have been duly made;
  - B. Construction of the Seabrook Station, Unit No. 1 (the facility) has been substantially completed in conformity with Construction Permit No. CPPR-135 and the application, as amended, the provisions of the Act, and the regulations of the Commission;
  - C. The facility will operate in conformity with the application, as amended, the provisions of the Act, and the regulations of the Commission (except as exempted from compliance in Section 2.D below);
  - D. There is reasonable assurance: (i) that the activities authorized by this operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D below);
  - E. NextEra Energy Seabrook, LLC, is technically qualified to engage in the activities authorized by this license in accordance with the Commission's regulations set forth in 10 CFR Chapter I;
  - F. The licensees have satisfied the applicable provisions of 10 CFR 140, "Financial Protection Requirements and Indemnity Agreements," of the Commission's regulations;

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\*NextEra Energy Seabrook, LLC, is authorized to act as agent for the: Hudson Light & Power Department, Massachusetts Municipal Wholesale Electric Company, and Taunton Municipal Lighting Plant and has exclusive responsibility and control over the physical construction, operation and maintenance of the facility.

-2-

- G. The issuance of this license will not be inimical to the common defense and security or to the health and safety of the public;
  - H. After weighing the environmental, economical, technical, and other benefits of the facility against environmental and other costs and considering available alternatives, the issuance of Facility Operating License No. NPF-86 subject to the conditions for protection of the environment set forth in the Environmental Protection Plan attached as Appendix B, is in accordance with 10 CFR 51 of the Commission's regulations and all applicable requirements have been satisfied; and
  - I. The receipt, possession and use of source, byproduct, and special nuclear material as authorized by this license will be in accordance with the Commission's regulations in 10 CFR 30, 40, and 70.
2. Based on the foregoing findings and the Commission's Memorandum and Order, CL 1-90-03 (March 1, 1990), Facility Operating License No. NPF-67 is superseded by Facility Operating License No. NPF-86, which is hereby amended to read as follows:
- A. This license applies to the Seabrook Station, Unit 1, a pressurized water nuclear reactor and associated equipment (the facility), owned by the licensees. The facility is located in Seabrook Township, Rockingham County, on the southeast coast of the State of New Hampshire, and is described in the licensees' "Final Safety Analysis Report," as supplemented and amended, and in the licensees' Environmental Report, as supplemented and amended.
  - B. Subject to the conditions and requirements incorporated herein, the Commission hereby licenses:
    - (1) NextEra Energy Seabrook, LLC, pursuant to Section 103 of the Act and 10 CFR 50, to possess, use and operate the facility at the designated location in Rockingham County, New Hampshire, in accordance with the procedures and limitations set forth in this license;
    - (2) Hudson Light and Power Department, Massachusetts Municipal Wholesale Electric Company, and Taunton Municipal Light Plant to possess the facility at the designated location in Rockingham County, New Hampshire, in accordance with the procedures and limitations set forth in this license;
    - (3) NextEra Energy Seabrook, LLC, pursuant to the Act and 10 CFR 70, to receive, possess, and use at any time special nuclear material as reactor fuel, in accordance with the limitations for storage and amounts required for reactor operation, as described in the Final Safety Analysis Report, as supplemented and amended;

AMENDMENT NO. 86, 122

- 3 -

- (4) NextEra Energy Seabrook, LLC, pursuant to the Act and 10 CFR 30, 40, and 70, to receive, possess, and use at any time any byproduct, source, and special nuclear material as sealed neutron sources for reactor startup, sealed sources for reactor instrumentation and radiation monitoring equipment calibration, and as fission detectors in amounts as required;
- (5) NextEra Energy Seabrook, LLC, pursuant to the Act and 10 CFR 30, 40, and 70, to receive, possess, and use in amounts as required any byproduct, source, or special nuclear material without restriction to chemical or physical form, for sample analysis or instrument calibration or associated with radioactive apparatus or components;
- (6) NextEra Energy Seabrook, LLC, pursuant to the Act and 10 CFR 30, 40, and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility authorized herein; and
- (7) DELETED

C. This license shall be deemed to contain and is subject to the conditions specified in the Commission's regulations set forth in 10 CFR Chapter I and is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect; is subject to the additional conditions specified or incorporated below:

(1) Maximum Power Level

NextEra Energy Seabrook, LLC, is authorized to operate the facility at reactor core power levels not in excess of 3648 megawatts thermal (100% of rated power).

(2) Technical Specifications

The Technical Specifications contained in Appendix A, as revised through Amendment No.130 \*, and the Environmental Protection Plan contained in Appendix B are incorporated into the Facility License No. NPF-86. NextEra Energy Seabrook, LLC shall operate the facility in accordance with the Technical Specifications and the Environmental Protection Plan.

(3) License Transfer to FPL Energy Seabrook, LLC\*\*

- a. On the closing date(s) of the transfer of any ownership interests in Seabrook Station covered by the Order approving the transfer, FPL Energy Seabrook, LLC\*\*, shall obtain from each respective transferring owner all of the accumulated decommissioning trust funds for the facility, and ensure the deposit of such funds and additional funds, if necessary, into a decommissioning trust or trusts for Seabrook Station established by FPL Energy Seabrook, LLC\*\*, such that the amount of such funds deposited meets or exceeds the amount required under 10 CFR 50.75 with respect to the interest in Seabrook Station FPL Energy Seabrook, LLC\*\*, acquires on such dates(s).

\* Implemented

\*\* On April 16, 2009, the name "FPL Energy Seabrook, LLC" was changed to "NextEra Energy Seabrook, LLC".

AMENDMENT NO.130

- 4 -

- b. With respect to the decommissioning trust(s) established by FPL Energy Seabrook, LLC\*,
  - (i) The decommissioning trust agreement must be in a form acceptable to the NRC.
  - (ii) Investments in the securities or other obligations of FPL Group Inc. or its affiliates, successors, or assigns shall be prohibited. In addition, except for investments tied to market indexes or other non-nuclear-sector mutual funds, investments in any entity owning one or more nuclear power plants shall be prohibited.
  - (iii) The decommissioning trust agreement must provide that no disbursements or payments from the trust(s), other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of payment. The decommissioning trust agreement shall further provide that no disbursements or payments from the trust(s) shall be made if the trustee receives prior written notice of objection from the Director of the Office of Nuclear Reactor Regulation.
  - (iv) The decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30 days prior written notification to the Director of the Office of Nuclear Reactor Regulation.
  - (v) The appropriate section of the decommissioning trust agreement shall provide that the trustee, investment advisor, or anyone else directing the investments made in the trust(s) shall adhere to a "prudent investor" standard, as specified in 18 CFR 35.32(a)(3) of the Federal Energy Regulatory Commission's regulations.
- c. NextEra Energy Seabrook, LLC, shall take all necessary steps to ensure that the decommissioning trust(s) are maintained in accordance with the license transfer application and the requirements of the Order approving the transfer, and consistent with the safety evaluation supporting the Order.
- d. NextEra Energy Seabrook, LLC, shall take no action to cause FPL Group Capital, Inc. or its parent companies to void, cancel, or modify the Support Agreement to provide funding of up to \$110 million for FPL Energy Seabrook, LLC, as represented in the license transfer application without prior written consent of the Director of the Office of Nuclear Reactor Regulation.

\* On April 16, 2009, the name "FPL Energy Seabrook, LLC" was changed to "NextEra Energy Seabrook, LLC".

- 5 -

(4) Mitigation Strategy License Condition

The licensee shall develop and maintain strategies for addressing large fires and explosions and that include the following key areas:

- a. Fire fighting response strategy with the following elements:
  - (i) Pre-defined coordinated fire response strategy and guidance
  - (ii) Assessment of mutual aid fire fighting assets
  - (iii) Designated staging areas for equipment and materials
  - (iv) Command and control
  - (v) Training of response personnel
- b. Operations to mitigate fuel damage considering the following:
  - (i) Protection and use of personnel assets
  - (ii) Communications
  - (iii) Minimizing fire spread
  - (iv) Procedures for implementing integrated fire response strategy
  - (v) Identification of readily-available, pre-staged equipment
  - (vi) Training on integrated fire response strategy
- c. Actions to minimize release to include consideration of:
  - (i) Water spray scrubbing
  - (ii) Dose to onsite responders

D. Exemptions

NextEra Energy Seabrook, LLC, is exempted from the Section III.D.2(b)(ii) containment airlock testing requirements of Appendix J to 10 CFR 50, because of the special circumstances described in Section 6.2.6 of SER Supplement 5 and authorized by 10 CFR 50.12(a)(2)(ii) and (iii) (51 FR 37684 October 23, 1986).

NRC Materials License No. SNM-1963, issued December 19, 1985, granted an exemption pursuant to 10 CFR 70.24 with respect to requirements for criticality alarms. NextEra Energy Seabrook, LLC, is hereby exempted from provisions of 10 CFR 70.24 insofar as this section applies to the storage and handling of new fuel assemblies in the new fuel storage vault, spent fuel pool (when dry), and shipping containers.

These exemptions, authorized by law, will not present an undue risk to the public health and safety and are consistent with the common defense and security. These exemptions are hereby granted pursuant to 10 CFR 50.12. With the granting of these exemptions, the facility will operate, to the extent authorized herein, in conformity with the application, as amended, the provisions of the Act, and the rules and regulations of the Commission.

AMENDMENT NO. 122

- 6 -

E. Physical Security

The licensee shall fully implement and maintain in effect all provisions of the Commission-approved physical security, training and qualification, and safeguards contingency plans including amendments made pursuant to provision of the Miscellaneous Amendments and Search Requirements revisions to 10 CFR 73.55 (51 FR 27817 and 27822) and to the authority of 10 CFR 50.90 and 10 CFR 50.54(p). The combined set of plans<sup>1</sup>, submitted by letter dated September 23, 2004, and supplemented by letters dated October 15, October 22, and October 29, 2004, and May 18, 2006, is entitled: "Florida Power and Light & FPL Energy Seabrook Physical Security Plan, Training and Qualification Plan and Safeguards Contingency Plan." The set contains Safeguards Information protected under 10 CFR 73.21. NextEra Energy Seabrook, LLC shall fully implement and maintain in effect all provisions of the Commission-approved cyber security plan (CSP), including changes made pursuant to the authority of 10 CFR 50.90 and 10 CFR 50.54(p). The NextEra Energy Seabrook, LLC CSP was approved by License Amendment No. 127.

F. Fire Protection

NextEra Energy Seabrook, LLC, shall implement and maintain in effect all provisions of the approved fire protection program as described in the Final Safety Analysis Report, the Fire Protection Program Report, and the Fire Protection of Safe Shutdown Capability report for the facility, as supplemented and amended, and as approved in the Safety Evaluation Report, dated March 1983; Supplement 4, dated May 1986; Supplement 5, dated July 1986; Supplement 6, dated October 1986; Supplement 7, dated October 1987; and Supplement 8, dated May 1989 subject to the following provisions: NextEra Energy Seabrook, LLC, may make changes to the approved fire protection program without prior approval of the Commission, only if those changes would not adversely affect the ability to achieve and maintain shutdown in the event of a fire.

G. DELETEDH. Financial Protection

The licensees shall have and maintain financial protection of such type and in such amounts as the Commission shall require in accordance with Section 170 of the Atomic Energy Act of 1954, as amended, to cover public liability claims.

I. DELETED


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<sup>1</sup>The Training and Qualification Plan and Safeguards Contingency Plan are Appendices to the Security Plan.



- 7 -

J. Additional Conditions

The Additional Conditions contained in Appendix C, as revised through Amendment No. 119, are hereby incorporated into this license. NextEra Energy Seabrook, LLC, shall operate the facility in accordance with the Additional Conditions.

K. Inadvertent Actuation of the Emergency Core Cooling System (ECCS)

Prior to startup from refueling outage 11, FPL Energy Seabrook\* commits to either upgrade the controls for the pressurizer power operated relief valves (PORV) to safety-grade status and confirm the safety-grade status and water-qualified capability of the PORVs, PORV block valves and associated piping or to provide a reanalysis of the inadvertent safety injection event, using NRC approved methodologies, that concludes that the pressurizer does not become water solid within the minimum allowable time for operators to terminate the event.

3. This license is effective as of the date of issuance and shall expire at midnight on March 15, 2030.

FOR THE NUCLEAR REGULATORY COMMISSION

(Original signed by:  
Thomas E. Murley)

Thomas E. Murley, Director  
Office of Nuclear Reactor Regulation

Attachments/Appendices:

1. Appendix A - Technical Specifications (NUREG-1386)
2. Appendix B - Environmental Protection Plan
3. Appendix C - Additional Conditions

Date of Issuance: March 15, 1990

\* On April 16, 2009, the name "FPL Energy Seabrook, LLC" was changed to "NextEra Energy Seabrook, LLC".

AMENDMENT NO. ~~86, 94, 101, 105, 112, 116, 119~~, 122

# **EXHIBIT**

# **6**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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In the Matter of

NEXTERA ENERGY SEABROOK, LLC

(Seabrook Station, Unit 1)

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)  
) Docket No. 50-443-LR  
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CLI-12-05

**MEMORANDUM AND ORDER**

This proceeding stems from the May 25, 2010, application of NextEra Energy Seabrook, LLC (NextEra) to renew its operating license for Seabrook Station, Unit 1 (Seabrook).<sup>1</sup> Beyond Nuclear, the Seacoast Anti-Pollution League, and the New Hampshire Sierra Club (collectively, Beyond Nuclear) filed a joint petition to intervene.<sup>2</sup> Separately, Friends of the Coast and the New England Coalition (collectively, Friends/NEC) filed their own joint petition.<sup>3</sup>

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<sup>1</sup> See *generally* Seabrook Station License Renewal Application (May 25, 2010) (Vol. I: ADAMS accession no. ML101590098; Vol. II: ML101590101; Vol. III: ML101590091) (Application).

<sup>2</sup> *Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club Request for Public Hearing and Petition to Intervene* (Oct. 20, 2010) (Beyond Nuclear Petition).

<sup>3</sup> *Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions* (dated Oct. 20, 2010, but filed Oct. 21, 2010) (Friends/NEC Petition). Friends/NEC supported their petition with a Declaration by Mr. Paul Blanch. Declaration of Paul Blanch (Oct. 18, 2010) (Blanch Declaration), appended as Attachment 7 to Friends/NEC Petition (ML102940557).

- 2 -

On February 15, 2011, the Board issued LBP-11-2, finding that all petitioners had demonstrated standing, and admitting one contention in part and three more in their entirety.<sup>4</sup> NextEra has appealed LBP-11-2.<sup>5</sup> As discussed below, we affirm in part and reverse in part LBP-11-2.

## I. REGULATORY BACKGROUND

As the U.S. Court of Appeals for the Third Circuit recognized, the scope of our license renewal process is limited.<sup>6</sup> The license renewal safety review—and any associated license renewal adjudicatory proceeding—focuses on the detrimental effects of aging posed by long-term reactor operation.<sup>7</sup>

Part 54 of our regulations sets forth the safety review standards for license renewal. Section 54.4 defines the scope of the review, which focuses on those systems, structures, and components (SSCs) that (1) perform the safety functions outlined in section 54.4(a)(1)(i)-(iii);

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<sup>4</sup> LBP-11-2, 73 NRC \_\_ (Feb. 15, 2011) (slip op. at 9-15 (standing) and 20-61 (contentions)). In addition, the Board “decline[d] to consider the revised declaration of Paul Blanch and other materials submitted by Friends/NEC on December 6, 2010,” and therefore denied as moot Friends/NEC’s motion for leave to reply to NextEra’s and the Staff’s objections to the revised declaration. LBP-11-2, 73 NRC at \_\_ (slip op. at 64), referring to both *Supplement to Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions: Errors and Corrections and New Information* (Dec. 6, 2010), and *Motion by Friends of the Coast and New England Coalition for Leave to Reply to NRC Staff Objections; NextEra Energy Seabrook, LLC. Response in Opposition to the Friends of the Coast and New England Coalition Supplement to its Petition* (Dec. 20, 2010). The Board’s specific ruling with regard to the revised Blanch Declaration and other materials is not now before us on appeal.

<sup>5</sup> *NextEra Energy Seabrook, LLC’s Notice of Appeal of LBP-11-02 as to the New England Coalition and Friends of the Coast* (Feb. 25, 2011); *Brief in Support of NextEra Energy Seabrook, LLC’s Appeal of LBP-11-02 as to the New England Coalition and Friends of the Coast* (Feb. 25, 2011) (NextEra Appeal I); *NextEra Energy Seabrook, LLC’s Notice of Appeal of LBP-11-02 as to Beyond Nuclear, the Seacoast Anti-Pollution League, and the Sierra Club of New Hampshire* (Feb. 25, 2011); *Brief in Support of NextEra Energy Seabrook, LLC’s Appeal of LBP-11-02 as to Beyond Nuclear, the Seacoast Anti-Pollution League, and the Sierra Club of New Hampshire* (Feb. 25, 2011) (NextEra Appeal II).

<sup>6</sup> See *N.J. Env’tl. Fed’n v. NRC*, 645 F.3d 220, 224 (3d Cir. 2011).

<sup>7</sup> See *id.*

- 3 -

(2) whose failure could prevent accomplishment of the safety-related functions outlined in section 54.4(a)(1)(i)-(iii); or (3) are relied on to demonstrate compliance with NRC regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, or station blackout.<sup>8</sup> License renewal applicants must conduct aging management reviews of any SSC that performs one of these intended functions if the SSC is both “passive” (that is, it performs its intended function(s) “without moving parts or without a change in configuration or properties”<sup>9</sup>) and “long-lived” (that is, it is “not subject to replacement based on a qualified life or specified time period”<sup>10</sup>). Applicants must demonstrate “reasonable assurance”<sup>11</sup> that “the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB [current licensing basis] for the period of extended operation.”<sup>12</sup>

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<sup>8</sup> 10 C.F.R. § 54.4(a).

<sup>9</sup> 10 C.F.R. § 54.21(a)(1)(i); *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 454 (2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 466 (2008).

<sup>10</sup> 10 C.F.R. § 54.21(a)(1)(ii); *Oyster Creek*, CLI-08-23, 68 NRC at 466. See 10 C.F.R. §§ 54.21(a)(3), 54.29(a)(1). “[S]tructures and components associated only with active functions can be generically excluded from a license renewal aging management review. Functional degradation resulting from the effects of aging on active functions is more readily determinable, and existing programs and requirements are expected to directly detect the effects of aging.” Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,472 (May 8, 1995) (1995 License Renewal Rule). See also *Pilgrim*, CLI-10-14, 71 NRC at 454 (“Existing regulatory programs . . . can be expected to ‘directly detect the effects of aging’ on active functions” (quoting 1995 License Renewal Rule, 60 Fed. Reg. at 22,472)); *Oyster Creek*, CLI-08-23, 68 NRC at 466-67.

<sup>11</sup> 10 C.F.R. § 54.29(a).

<sup>12</sup> 10 C.F.R. § 54.21(a)(3). See also 10 C.F.R. § 54.4(b) (regarding the limited scope of the intended functions). The “current licensing basis” is “the set of NRC requirements (including regulations, orders, technical specifications, and license conditions) applicable to a specific plant, and includes the licensee’s written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis.” *Pilgrim*, CLI-10-14, 71 NRC at 453-54 (footnote omitted).

- 4 -

In reviewing license renewal applications, the NRC is guided primarily by two documents—the Generic Aging Lessons Learned (GALL) Report and the License Renewal Standard Review Plan.<sup>13</sup> If the NRC concludes that an aging management program (AMP) is consistent with the GALL Report, then it accepts the applicant's commitment to implement that AMP, finding the commitment itself to be an adequate demonstration of reasonable assurance under section 54.29(a).<sup>14</sup>

License renewal applications are also subject to an environmental review under the National Environmental Policy Act (NEPA)<sup>15</sup> and our Part 51 regulations implementing NEPA.<sup>16</sup> The Staff's review, and ultimately our own, are guided largely by a Generic Environmental Impact Statement (GEIS) that focuses specifically on license renewal applications.<sup>17</sup>

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<sup>13</sup> "Generic Aging Lessons Learned (GALL) Report," NUREG-1801, Rev. 1 (Sept. 2005), Vol. 1 (ML052770419) & Vol. 2 (ML052110006) (GALL Report); "Generic Aging Lessons Learned (GALL) Report – Final Report," NUREG-1801, Rev. 2 (Dec. 2010) (ML103490041) (GALL Report Rev. 2); "Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants," NUREG-1801, Rev. 1 (Sept. 2005) (ML052770566) (Standard Review Plan).

<sup>14</sup> *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 36 (2010); *Oyster Creek*, CLI-08-23, 68 NRC at 467-68.

<sup>15</sup> 42 U.S.C. §§ 4332(2)(C)(i), (iii) (requiring an agency to prepare a detailed statement describing the reasonably foreseeable environmental impacts both of the proposed federal action and of any feasible alternative(s) to the proposed federal action).

<sup>16</sup> See generally 10 C.F.R. pt. 51.

<sup>17</sup> "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," NUREG-1437, Vol. 1 (May 1996) (ML040690705), & Vol. 2 (Sept. 2005) (ML052780376) (License Renewal GEIS). The GEIS sets forth the technical basis for our 1996 revisions to the Part 51 rules, as they relate to power reactor license renewal. See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537, 66,537 (Dec. 18, 1996) ("The amendments [to Part 51] are based on the analyses reported in NUREG-1437"); License Renewal GEIS, Vol. 1, § 1.1, at 1-1.

- 5 -

## II. PROCEDURAL BACKGROUND

In its petition to intervene, Beyond Nuclear proffered one environmental contention.<sup>18</sup> And in their petition to intervene, Friends/NEC proffered four contentions, one of which was divided into six discrete parts.<sup>19</sup> NextEra and the NRC Staff submitted answers in which they argued that all contentions were inadmissible.<sup>20</sup> Friends/NEC and Beyond Nuclear each filed replies opposing the Staff's and NextEra's Answers.<sup>21</sup> The Board held oral argument on the petitions. Subsequently, in LBP-11-2, the Board admitted Beyond Nuclear's contention, as well as two contentions and portions of a third, proffered by Friends/NEC.<sup>22</sup> Separately,

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<sup>18</sup> Beyond Nuclear Petition at 6-49.

<sup>19</sup> Friends/NEC Petition at 10-79.

<sup>20</sup> *NextEra Energy Seabrook, LLC's Answer Opposing the Petition to Intervene and Request for Hearing of Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club* (Nov. 15, 2010), at 16-36 (NextEra Answer to Beyond Nuclear Petition); *NextEra Energy Seabrook, LLC's Answer Opposing The Petition to Intervene and Request for Hearing of Friends of the Coast and the New England Coalition* (Nov. 15, 2010), at 24-105 (NextEra Answer to Friends/NEC Petition); *NRC Staff's Answer to Petitions to Intervene and Requests for Hearing Filed by (1) Friends of the Coast and New England Coalition and (2) Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club* (Nov. 15, 2010), at 18-108 (Staff Answer to Petitions). Additionally, NextEra contended that Friends/NEC had failed to demonstrate standing. NextEra Answer to Friends/NEC Petition at 4-6.

<sup>21</sup> *Combined Reply of Joint Petitioners (Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club) to Answers of NextEra Energy Seabrook, LLC and the United States Nuclear Regulatory Commission* (Nov. 22, 2010) (Beyond Nuclear Reply); [Original] *Friends of the Coast and New England Coalition Reply to NextEra and NRC Staff Answers to Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions* (Nov. 22, 2010); [Revised] *Friends of the Coast and New England Coalition Reply to NextEra and NRC Staff Answers to Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions* (dated Nov. 22, 2010; served Nov. 23, 2010) (Friends/NEC Reply).

<sup>22</sup> Friends/NEC's remaining contentions were excluded and are not at issue here. LBP-11-2, 73 NRC at \_\_\_ (slip op. at 63).



- 6 -

Friends/NEC filed a motion for reconsideration of those portions in LBP-11-2 where the Board had ruled against them.<sup>23</sup> The Board denied their motion for reconsideration shortly thereafter.<sup>24</sup>

On appeal, NextEra challenges all of the Board's contention admissibility rulings.<sup>25</sup> Both Friends/NEC and Beyond Nuclear oppose NextEra's appeal.<sup>26</sup>

### III. DISCUSSION

#### A. Applicable Standards

A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . .;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

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<sup>23</sup> *Friends of the Coast and New England Coalition, Inc. Motion for Leave to File for Reconsideration of Memorandum and Order LBP-11-02* (Feb. 25, 2011).

Under NRC practice, the filing of this motion tolled our consideration of the two appeals. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 3 (2001) ("When a petition for review is filed with the Commission at the same time as a motion for reconsideration is filed with the Board, the Commission will delay considering the petition for review until after the Board has ruled" (citation omitted)); *Commonwealth Edison Co.*, (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985 (1981) ("It simply is not customary for an appeal to proceed through at least the briefing process while the trial tribunal has before it an authorized and timely-filed petition for reconsideration of the decision or order in question" (footnote omitted)).

<sup>24</sup> Order (Denying Extension Request and Denying Motion for Leave to File for Reconsideration) (Mar. 9, 2011) (unpublished).

<sup>25</sup> NextEra does not challenge the Board's rulings on standing.

<sup>26</sup> *Petitioners' Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club Reply in Opposition to NextEra Seabrook, LLC's Appeal of LBP-11-02* (Mar. 7, 2011) (Beyond Nuclear Opposition to Appeal); *Friends of the Coast and New England Coalition Answer and Opposition to NextEra Energy Seabrook, LLC's Notice of Appeal of LBP-11-02* (Mar. 10, 2011) (Friends/NEC Opposition to Appeal). The Secretary granted Friends/NEC a three-day extension of time within which to file its opposition. See Order (Denying Extension Request and Denying Motion for Leave to File for Reconsideration) (SECY Mar. 9, 2011) (unpublished).

- 7 -

- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . together with references to the specific sources and documents on which the requestor/petitioner intends to rely . . .; [and]
- (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.<sup>27</sup>

As we have outlined in earlier decisions, the NRC in 1989 revised its rules to prevent the admission of contentions “based on little more than speculation.”<sup>28</sup> The agency deliberately “rais[ed] the admission standards for contentions . . . to obviate serious hearing delays caused in the past by poorly defined or [poorly] supported contentions.”<sup>29</sup> Prior to our 1989 rule revision, intervenors were able to trigger hearings after merely copying a contention from another proceeding, even though these “[a]dmitted intervenors often had negligible knowledge” of the issues “and, in fact, no direct case to present.”<sup>30</sup> Although under our current rules intervenors of course may use the discovery process to develop a case once contentions are admitted, “contentions shall not be admitted if at the *outset* they are not described with reasonable specificity or are not supported by some alleged fact or facts *demonstrating* a genuine material dispute” with the applicant.<sup>31</sup> We properly “reserve our hearing process for genuine, material controversies between knowledgeable litigants.”<sup>32</sup>

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<sup>27</sup> 10 C.F.R. § 2.309(f)(1).

<sup>28</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 335 (internal quotation and citation omitted) (emphasis added).

<sup>32</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003) (footnote omitted).

- 8 -

We generally defer to Board rulings on contention admissibility unless we find “an error of law or abuse of discretion.”<sup>33</sup> With these points in mind, we turn to NextEra’s appeals.

## **B. Analysis of the Board’s Rulings on Contention Admissibility**

### **1. Friends/NEC Contention 1**

The license renewal application for Seabrook Station fails to comply with the requirements of 10 C.F.R. §§ 54.21(a) and 54.29 because Applicant has not proposed an adequate or sufficiently specific plan for aging management of non-environmentally qualified inaccessible electrical cables and wiring for which such aging management is required. Without an adequate plan for aging management of non-environmentally qualified inaccessible electrical cables[,] protection of public health and safety cannot be assured.<sup>34</sup>

#### **a. Background**

NextEra’s original Application contained an AMP addressing non-environmentally qualified inaccessible medium-voltage electrical cables and wiring. On October 29, 2010, NextEra submitted a supplement to the Application<sup>35</sup> to bring the Application into conformity with Revision 2 of the GALL Report.<sup>36</sup> This supplement amended the “Non-EQ Inaccessible Medium-Voltage Cables Program,” expanding its scope to include certain low-voltage cables as well.<sup>37</sup>

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<sup>33</sup> See, e.g., *South Carolina Electric and Gas Co. and South Carolina Public Service Authority (also referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-21, 72 NRC 197, 200 (2010) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009)).

<sup>34</sup> Friends/NEC Petition at 10-11.

<sup>35</sup> The supplement included amendments to two AMPs. See Letter from Paul O. Freeman, Site Vice President of NextEra Energy Seabrook, LLC, to NRC Document Control Desk (Oct. 29, 2010) (Application Supplement) (ML103060022), and enclosures. See, particularly, *id.*, Enclosure 2 to SBK-L-10179, “Changes to the Seabrook Station License Renewal Application Associated with Inaccessible Medium-Voltage Cables Not Subject to 10 CFR 50.49 Environmental Qualification Requirements Program.”

<sup>36</sup> See NextEra Appeal I at 5 (citing GALL Report Rev. 2).

<sup>37</sup> *Id.* at 5 (citing Application Supplement, Encl. 2 to SBK-L-10179, at 2, 6).

- 9 -

In submitting Contention 1, Friends/NEC argued generally that the original Application's aging management program for non-environmentally qualified inaccessible electrical cables and wiring fails to demonstrate that the effects of aging will be adequately managed, to the detriment of public health and safety.<sup>38</sup> Friends/NEC submitted the Declaration of Mr. Paul Blanch in support of this contention. Friends/NEC offered a number of bases for the contention.<sup>39</sup> The Board in LBP-11-2 appears to rely on five particular bases, discussed below, in admitting Contention 1.<sup>40</sup>

The Board found generally that the combination of Mr. Blanch's Declaration and the cited technical documents provided the required minimum support for Contention 1.<sup>41</sup> The Board, however, limited the admissibility ruling to "the adequacy of the . . . AMP . . . to manage age-related degradation of the cable insulation due to exposure to a wet or moist environment."<sup>42</sup> It expressly excluded assertions of current violations or noncompliance with the current licensing basis.<sup>43</sup>

In reaching this result, the Board acknowledged that Contention 1 was a challenge to an AMP that was assertedly consistent with the GALL Report,<sup>44</sup> but concluded that such an assertion by an applicant does not immunize it against a challenge to the AMP.<sup>45</sup> It likewise

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<sup>38</sup> Friends/NEC Petition at 11-13.

<sup>39</sup> See *id.* The record reflects some confusion as to the number of bases supporting the contention. For example, Judge Kennedy suggests there are at least seventeen bases. See Transcript of Hearing for Oral Argument (Nov. 30, 2010) (Tr.) at 86-87.

<sup>40</sup> NextEra does the same on appeal. See NextEra Appeal I at 10-11.

<sup>41</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 29, 31-32).

<sup>42</sup> *Id.* at \_\_\_ (slip op. at 31).

<sup>43</sup> *Id.* at \_\_\_ (slip op. at 31-32).

<sup>44</sup> *Id.* at \_\_\_ (slip op. at 30) (citing GALL Report, Vol. 1, at iii, 1).

<sup>45</sup> *Id.* (citing *Vermont Yankee*, CLI-10-17, 72 NRC at 36, 38).

stated, without further discussion, that Friends/NEC's factual assertions, at least to some extent, may have been rendered moot by NextEra's October 29, 2010, Supplement to its Application.<sup>46</sup>

*b. Discussion*

The scope of the contention as admitted by the Board is difficult to discern. The Board expressly mentions four bases and alludes to another<sup>47</sup> but does not explain specifically why any of them supports the contention's admission, or whether it included, or excluded, any particular basis in making its admissibility decision. Instead, the Board issued a blanket finding that Friends/NEC "provid[ed] a specific statement of the contention[,] . . . challeng[ed] the adequacy of the proposed AMP . . . [and] provide[d] references to the appropriate sections of the Application and supporting documents including the Blanch [D]eclaration . . . ."<sup>48</sup> NextEra interprets the Board's decision to admit Contention 1 as relying on the five claims discussed by the Board. NextEra asserts on appeal that, under 10 C.F.R. § 2.309(f)(1)(v), each of these five bases lacked the required factual or expert support to support a litigable contention.<sup>49</sup> Similarly, we assume that any basis not addressed by the Board was not relied upon in making its admissibility decision.<sup>50</sup>

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<sup>46</sup> *Id.* at \_\_\_ (slip op. at 31). NextEra submitted the Application Supplement on October 29, 2010, shortly after Friends/NEC had filed their October 20, 2010, Petition. Friends/NEC did not file subsequently a new or amended Contention 1.

<sup>47</sup> *Id.* at \_\_\_ (slip op. at 27-28).

<sup>48</sup> *Id.* at \_\_\_ (slip op. at 29) (footnote omitted).

<sup>49</sup> NextEra Appeal I at 6-10. Friends/NEC's answer does not respond to these points. See Friends/NEC Opposition to Appeal at 5. Rather, Friends/NEC present only one argument in rebuttal of NextEra's appeal of the admission of Contention 1. They assert that NextEra untimely raised, for the first time on appeal, the argument that the Application Supplement rendered much of Contention 1 moot. *Id.* But the record directly contradicts Friends/NEC's appellate argument. See NextEra Answer to Friends/NEC Petition at 25, 28 n.15, 41-42; Staff Answer to Petitions at 19-20, 24; Tr. at 172 (Mr. Shadis, acknowledging NextEra's argument that the Application Supplement rendered some of Friends/NEC's arguments moot).

<sup>50</sup> For this reason, we need not reach NextEra's alternative arguments that the Board erred in failing to identify the specific bases on which it admitted the contention, or that several of the (continued . . . )

- 11 -

Friends/NEC argue that the Application does not address certain specific recommendations made in two reports prepared by the Sandia and Brookhaven National Laboratories.<sup>51</sup> The Board appeared to accept the argument that NextEra purportedly failed to address specific recommendations made in the two reports. NextEra argues on appeal (as it did before the Board) that Friends/NEC failed to identify with the required “particularity” the specific recommendations that NextEra should have addressed in the Application.<sup>52</sup> Our review of the record confirms that Friends/NEC identified no specific recommendations from either of these two reports.

As NextEra observes, the Sandia Report is one of the sources that provided the technical basis for the relevant section of the GALL Report.<sup>53</sup> NextEra stated in its application that its AMP is consistent with the GALL Report, with no exceptions.<sup>54</sup> Moreover, NextEra

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bases had been rendered moot by NextEra’s submittal of a revised AMP. See NextEra Appeal I at 10-11 (referring to LBP-11-2, 73 NRC at \_\_\_ (slip op. at 31)). We remind our boards, however, of the need to specify each basis relied upon for admitting a contention. *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553-54 (2009). Contrary to the Board’s statement (slip op. at 31), an admitted contention is defined by its bases. *Id.* See generally *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 & n.103 (2010) (“The reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.”) (emphasis in original; footnote and internal quotation marks omitted).

<sup>51</sup> Friends/NEC Petition at 12, 15-16 (citing and quoting Ogden Environmental and Energy Services Co., Inc., “Aging Management Guideline for Commercial Nuclear Power Plants – Electrical Cable and Terminations,” SAND96-0344, at 6.4 (Sept. 1996) (ML031140264) (Sandia Report), and citing M. Villaran & R. Lofaro, Brookhaven National Laboratory, “Essential Elements of an Electrical Cable Condition Monitoring Program,” NUREG/CR-7000 (Jan. 2010) (ML100540050) (Brookhaven Report)).

<sup>52</sup> NextEra Appeal I at 6-7 (citing 10 C.F.R. § 2.309(f)(1)); NextEra Answer to Friends/NEC Petition at 34. See also Oconee, CLI-99-11, 49 NRC at 336-38 (mere general references to the Staff’s Requests for Additional Information do not provide the requisite reasonable specificity).

<sup>53</sup> See GALL Report, Vol. 2, § XI.E3, “Inaccessible Medium-Voltage Cables not Subject to 10 CFR 50.49 Environmental Qualification Requirements,” at XI E-9.

<sup>54</sup> See NextEra Appeal I at 7 (referring to Application, Vol. III, App. B, “Aging Management Programs,” § B.2.1.34, at B-182); NextEra Answer to Friends/NEC Petition at 33 (same).



- 12 -

stated that it considered the technical information and guidance from the Sandia Report in its original and its revised AMP.<sup>55</sup>

As for the Brookhaven Report, Friends/NEC have identified no provision that contradicts or is not already addressed in the Application's relevant AMP.<sup>56</sup> Mr. Blanch takes issue with reliance on in-service systems testing conducted under normal operating conditions, to which the Brookhaven Report refers.<sup>57</sup> But the AMP in the original Application provided for "a proven test for detecting deterioration of the insulation system due to wetting, such as power factor, partial discharge, or polarization index, as described in EPRI TR-103834-P1-2, 'Effects of Moisture on the Life of Power Plant Cables' [(Aug. 1994)] or other testing that is state-of-the-art at the time the test is performed."<sup>58</sup> This language is nearly identical to the referenced GALL AMP.<sup>59</sup> Friends/NEC dispute none of this. Neither Mr. Blanch nor Friends/NEC address the testing plan specified in the AMP, much less explain why it is inadequate. NextEra further points out, and our record review confirms, that its Application Supplement to bring this AMP "in

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<sup>55</sup> NextEra Appeal I at 7 (citing Application, Vol. III, App. B, § B.2.1.34, at B-181); NextEra Answer to Friends/NEC Petition at 33 (same). *See also* Application Supplement, Encl. 2, at 7 (citing the Sandia Report as a source of guidance and technical information for the AMP).

<sup>56</sup> *See* NextEra Answer to Friends/NEC Petition at 30 (citing Application, Vol. III, App. B, § B.2.1.34).

<sup>57</sup> *See* Blanch Declaration at 9-10 & n.3.

<sup>58</sup> Application, Vol. III, App. B, § B.2.1.34, at B-181. *See also* NextEra Appeal I at 7-8 n.8; NextEra Answer to Friends/NEC Petition at 31; Staff Answer to Petitions at 23.

<sup>59</sup> *See* GALL Report, Vol. 2, § XI.E3, at XI E-7. This section of the GALL Report was revised in 2010. The revision expanded the reference to "wetting" so that it now includes both "wetting" and "submergence," removed the cross-reference to EPRI TR-103834-P1-2, replaced it with a non-exclusive list of specific "proven test[s]," and explained the purpose of those tests. *See* GALL Report Rev. 2, § XI.E3, at XI E3-1. *See also* NextEra Appeal I at 7-8 n.8 (the AMP "does not rely on the in-service systems testing to which Mr. Blanch refers but instead requires a 'proven test' that will 'provide an indication of the condition of the conductor insulation'" (quoting Application, Vol. III, App. B, § B.2.1.34, at B-181, and citing GALL Report, Vol. 2, § XI.E3, at XI E-7)).



- 13 -

line with GALL Rev. 2 did not modify this description of the tests . . . .<sup>60</sup> In short, we find that Friends/NEC's arguments above do not present a genuine issue of material fact or law, and that the Board therefore erred in admitting Contention 1 on this basis.

Friends/NEC also assert that "[t]here are no testing methods available to adequately assure that submerged or previously submerged cables would perform their functions for the duration of [a] postulated accident."<sup>61</sup> NextEra points to the absence of support for this basis, even in the Blanch Declaration.<sup>62</sup> Our review of the Declaration and the Petition substantiates NextEra's assertion, which Friends/NEC do not challenge on appeal. Moreover, Basis 2 appears to be a variation on Friends/NEC's argument in Basis 1 regarding the Brookhaven Report. To the extent that it is, we reject it on the same grounds, specifically that such testing methods do exist and are referenced in both the GALL Report's model AMP and NextEra's AMP.<sup>63</sup> In short, we find that the Board erred in finding that this basis supports the admission of Contention 1.

Next, Friends/NEC argue that the Application fails to provide measures to detect cable degradation prior to failure, particularly techniques for measuring and trending the condition of cable insulation.<sup>64</sup> NextEra asserts on appeal that, on this point, Friends/NEC fail to address

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<sup>60</sup> NextEra Appeal I at 8 (citing Application Supplement, Encl. 2 at 2, 5). The revision in the supplement did, however, increase testing frequency.

<sup>61</sup> Friends/NEC Petition at 14. See also Blanch Declaration at 9-11. In LBP-11-2, the Board described this basis (slip op. at 28) but did not discuss it. NextEra correctly points out that the Board mischaracterized this basis in its decision. NextEra Appeal I at 7. Compare LBP-11-2, 73 NRC at \_\_\_ (slip op. at 27-28) (stating that Friends/NEC assert that the AMP for non-environmentally qualified inaccessible cables and wiring, among other things, does not "identify testing methods that would adequately assure that submerged or previously submerged cables will perform their functions for the duration of a postulated accident").

<sup>62</sup> NextEra Appeal I at 8; NextEra Answer to Friends/NEC Petition at 28.

<sup>63</sup> See text associated with nn. 57-60, *supra*.

<sup>64</sup> Friends/NEC Petition at 16-17 (quoting NRC Generic Letter (GL) 2007-01, "Inaccessible or Underground Power Cable Failures that Disable Accident Mitigation Systems or Cause Plant (continued . . . )

the relevant AMP in the Application.<sup>65</sup> We agree. The Application's relevant AMP provides the detection measures that Friends/NEC claim are missing.<sup>66</sup> Friends/NEC have an "ironclad obligation" to review the Application thoroughly and to base their challenges on its contents.<sup>67</sup> Friends/NEC did not satisfy this obligation here.

It bears mention that Friends/NEC take this basis from the NRC's Generic Letter 2007-01.<sup>68</sup> The generic letter informed licensees that inaccessible or underground cables susceptible to moisture-induced failures, particularly prior to the end of their qualified lives, could result in certain equipment failures. Such failures could either disable accident mitigation systems in operating power reactors or cause plant transients in those reactors. The GL states that licensees can assess the condition of cable insulation "with reasonable confidence" using one or more of several testing techniques: "partial discharge testing, time domain reflectometry, dissipation factor testing, and very low frequency AC testing."<sup>69</sup>

The Board appears to cite GL 2007-01 as support to litigate this issue in license renewal.<sup>70</sup> But GL 2007-01 provides no support for Friends/NEC's third basis. The GL sought information from operating license holders regarding the history of underground cable failures

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Transients" (Feb. 7, 2007) (GL 2007-01) (ML070360665)). In LBP-11-2, the Board described this basis (73 NRC at \_\_\_ (slip op. at 28)) but did not discuss it.

<sup>65</sup> NextEra Appeal I at 8 (citing both the original and revised AMP for non-environmentally-qualified inaccessible electrical cables).

<sup>66</sup> Basis 3 also appears to be a variant of Bases 1 and 2. If so, it fails on the same grounds (discussed *supra*).

<sup>67</sup> See, e.g., *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009) (referring to intervenors' "ironclad obligation to . . . diligently search publicly available NRC or Applicant documents for information relevant to their [c]ontention" (internal quotation marks and citation omitted)).

<sup>68</sup> Petition at 16-17.

<sup>69</sup> GL 2007-01 at 4.

<sup>70</sup> See LBP-11-2, 73 NRC at \_\_\_ (slip op. at 28 n.149).

for cables within the scope of the maintenance rule, as well as information on inspection, testing and monitoring programs to detect degradation in such cables.<sup>71</sup> The GL is not focused on license renewal and does not address aging management. It neither requests additional AMPs for cables nor recommends improvements to existing cable AMPs.<sup>72</sup> For these reasons, the Board erred in finding this basis to provide a justification for admitting Contention 1.

Friends/NEC next argue that the Application fails to identify the location and extent of Seabrook's non-environmentally-qualified inaccessible cables.<sup>73</sup> In particular, Mr. Blanch challenged NextEra's explanation of its decision not to include "boundary drawings" in its Application, specifically taking issue with NextEra's conclusion in the Application that such drawings were unnecessary because "commodity grouping was used in the scoping process."<sup>74</sup> According to Mr. Blanch, "[c]haracterization of cables by commodity grouping is an acceptable practice *only* if the location where each cable type is used is also identified."<sup>75</sup> Mr. Blanch, however, offered no support for this assertion.

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<sup>71</sup> GL 2007-01 at 4.

<sup>72</sup> See *id.* at 4-5 (requesting information from current operating licensees regarding the history of inaccessible or underground cable failures within the scope of the Maintenance Rule, and a description of inspection, testing, and monitoring programs for inaccessible or underground cables).

<sup>73</sup> Friends/NEC Petition at 12. In LBP-11-2, the Board described this basis but did not discuss it. See 73 NRC at \_\_\_ (slip op. at 28).

<sup>74</sup> Blanch Declaration at 13 (quoting Application, Vol. I, § 2.1.2, at 2.1-7). A "boundary drawing" depicts mechanical piping and instrumentation diagrams. The Standard Review Plan for license renewal provides that a license renewal applicant may group like structures and components into "commodity groups." Standard Review Plan at 2.1-14 to 2.1-15, Table 2.1-2, "Specific Staff Guidance on Scoping." The basis for such a grouping "can be determined by such characteristics as similar function, similar design, similar materials of construction, similar aging management practices, or similar environments." *Id.* at 2.1-14, Table 2.1-2.

<sup>75</sup> Blanch Declaration at 13 (emphasis added).

- 16 -

As NextEra argues on appeal,<sup>76</sup> the approach taken in the Application is consistent with the GALL Report, which provides that “[e]lectrical cables and their required terminations (i.e., connections) are typically reviewed as a single commodity.”<sup>77</sup> Likewise, the Standard Review Plan provides that an applicant may group like structures into commodity groups, as long as the applicant provides the basis for the groups.<sup>78</sup> In its Application, NextEra offered the following explanation for its use of commodity grouping. As a general rule, NextEra focused upon the Seabrook plant’s *systems and structures* when determining which ones meet “the requirements for inclusion in the scope of license renewal.”<sup>79</sup> Once NextEra identified the relevant systems and structures (along with their intended functions), it identified the particular components that fell within the scope of license renewal.<sup>80</sup> However, it concluded that some components were more effectively evaluated “by component type, rather than by system or structure.”<sup>81</sup> In those instances, NextEra instead employed an alternative approach—commodity grouping—to evaluate “[c]omponents constructed from similar materials, exposed to similar environments,

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<sup>76</sup> See NextEra Appeal I at 9.

<sup>77</sup> GALL Report, Vol. 2, § VI.A, “Equipment not Subject to 10 CFR 50.49 Environmental Qualification Requirements,” at VI A-1 (cited in NextEra Appeal I at 9). The identical language also appears in GALL Report Rev. 2, § VI.A, at VI A-1.

<sup>78</sup> Standard Review Plan at 2.1-14, Table 2.1-2, “Specific Staff Guidance on Scoping.” Although the GALL Report and the Standard Review Plan are guidance documents, and therefore not binding, they do carry special weight. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375 n.26 (2005) (“We recognize, of course, that guidance documents do not have the force and effect of law. Nonetheless, guidance is at least implicitly endorsed by the Commission and therefore is entitled to correspondingly special weight”) (citations and internal quotation marks omitted); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001) (“Where the NRC develops a guidance document to assist in compliance with applicable regulations, it is entitled to special weight”), *pet. for review held in abeyance, Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007).

<sup>79</sup> Application, Vol. I, § 2.1.2, at 2.1-4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

- 17 -

and which perform similar intended functions.”<sup>82</sup> Each commodity group was evaluated “as if it were a separate individual system,” with the group’s components “not associated with a specific system or structure during the component’s evaluation” but rather “with their assigned commodity group.”<sup>83</sup> NextEra evaluated all electrical components, including cables, using the “commodity grouping” approach.<sup>84</sup>

Neither Friends/NEC nor Mr. Blanch challenged this explanation, or explained why commodity grouping for cables in the Seabrook license renewal application was inappropriate, or offered a reason or other unmet need that would require us to mandate inclusion of the exact location of each cable in the Seabrook license renewal application. Consequently, we find that this basis does not justify the admission of Contention 1.

Finally, Friends/NEC make a general claim (or, more precisely, a request for relief) that the NRC should require NextEra to “preclude” moisture from affecting non-environmentally-qualified inaccessible cables.<sup>85</sup> NextEra argues that this requirement appears nowhere in our regulations and finds no support in the Blanch Declaration.<sup>86</sup> We agree. At bottom, Friends/NEC ask the agency to impose a burden greater than the requirement imposed by section 54.21(a)(3) to “adequately *manage*[]” aging effects.<sup>87</sup> Friends/NEC would have us

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<sup>82</sup> *Id.* See also *id.*, Vol. I, § 2.5, at 2.5-1 (“similar function, similar design or similar materials of construction”).

<sup>83</sup> *Id.*, Vol. I, § 2.1.2, at 2.1-4 to 2.1-5. See also *id.*, Vol. I, § 2.5, at 2.5-1.

<sup>84</sup> *Id.*, Vol. I, § 2.1.2, at 2.1-5, 2.1-22. See also *id.* at 2.1-22 to 2.1-23 (describing the sequence of screening steps used to identify electrical commodity groups requiring an aging management review), § 2.5.1, at 2.5-2 (listing “Electrical Cables and Connections” as a commodity group).

<sup>85</sup> Friends/NEC Petition at 20. See also *id.* at 18-19 (include additional preventive measures in the AMP). In LBP-11-2, the Board described this basis (73 NRC at \_\_\_ (slip op. at 28)) but did not discuss it.

<sup>86</sup> NextEra Appeal I at 9. Mr. Blanch does not assert a need to preclude wetting. See Blanch Declaration at 7-11.

<sup>87</sup> 10 C.F.R. § 54.21(a)(3) (emphasis added).

- 18 -

elevate that burden to the point where NextEra would be required to “preclude,” not just “manage,” such effects. This proposition contravenes our longstanding practice of rejecting, as a collateral attack, any contention calling for requirements in excess of those imposed by our regulations.<sup>88</sup>

In sum, we have reviewed the administrative record, including the Board’s brief ruling on Contention 1, and find no basis sufficient to support the Board’s admission of this contention. We recently held that a license renewal applicant who commits to implement an AMP that is consistent with the corresponding AMP in the GALL Report has demonstrated reasonable assurance under 10 C.F.R. § 54.29(a) that the aging effects will be adequately managed during the period of extended operation.<sup>89</sup> While referencing an AMP in the GALL Report does not insulate that program from challenge in litigation, as discussed above, Friends/NEC have not submitted an adequately supported challenge here. We therefore conclude that the Board erred, and reverse the Board’s ruling admitting Contention 1.

## **2. Friends/NEC Contention 2**

The [license renewal application] for Seabrook violates 10 C.F.R. §§ 54.21(a) and 54.29 because it fails to include an aging management plan for each electrical transformer whose proper function is important for plant safety.<sup>90</sup>

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<sup>88</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 39 (2004) (rejecting a contention that would exceed regulatory requirements), *pet. for review held in abeyance*, *Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000) (rejecting an “attempt[] to impose . . . a requirement more stringent than the one imposed by the regulations”); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995) (“Intervenors are, in essence, contending that those regulatory provisions are themselves insufficient to protect the public health and safety. This assertion constitutes an improper collateral attack upon our regulations.”) (footnote omitted). See generally 10 C.F.R. § 2.335(a).

<sup>89</sup> *Vermont Yankee*, CLI-10-17, 72 NRC at 36; *Oyster Creek*, CLI-08-23, 68 NRC at 467-68.

<sup>90</sup> Friends/NEC Petition at 20 (capitalization omitted).



a. *Background*

Simply stated, Friends/NEC argue in Contention 2 that an electrical transformer is a component that should be classified as “passive” and “long-lived,” and therefore should be subject to an aging management review. The particular focus of the contention is on whether electrical transformers are appropriately characterized as having “passive” functions.

In the Statements of Consideration for the 1995 License Renewal Rule, the Commission determined that an aging management review is required for structures and components that fall within the scope of the rule and that perform “passive” intended functions. Our license renewal review focuses on so-called “passive” structures and components because structures and components performing “passive” functions generally do not have performance or condition characteristics that are as readily observable as those performing “active” functions.<sup>91</sup> Put another way, structures and components with “active” functions generally can be directly verified. As such, the existing regulatory process, existing licensee programs and activities, and the maintenance rule provide the basis for generically excluding from an aging management review those structures and components that perform “active” functions.<sup>92</sup> For this reason, the Commission generically excluded from license renewal aging management review structures and components associated only with “active” functions.<sup>93</sup> As reflected in the statements of consideration for the 1995 License Renewal Rule, “[f]unctional degradation resulting from the

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<sup>91</sup> Section 54.21(a)(1)(i) provides an illustrative list of structures and components that are subject to an aging management review, because they perform an intended function (as defined in 10 C.F.R. § 54.4) without moving parts or without a change in configuration or properties. Electrical transformers are not among the structures and components listed.

<sup>92</sup> See 1995 License Renewal Rule, 60 Fed. Reg. at 22,468-73 and, particularly, 22,471 (“Performance and condition monitoring for systems, structures and components typically involves functional verification, either directly or indirectly. Direct verification is practical for active functions such as pump flow, valve stroke time, or relay actuation where the parameter of concern (required function), including any design margins, can be directly measured or observed.”).

<sup>93</sup> See *id.* at 22,472.



- 20 -

effects of aging on *active* functions is more readily determinable, and existing programs and requirements are expected to directly detect the effects of aging.”<sup>94</sup>

The rule devoted significant discussion to defining a “passive” component. The Commission observed, as relevant here:

[P]assive structures and components for which aging degradation is *not readily monitored* are those that perform an intended function without moving parts or *without a change in configuration or properties*.<sup>95</sup>

The Commission went on to observe that the phrase “a change in configuration or properties” should be interpreted to include a ‘change in state.’”<sup>96</sup>

Following implementation of the License Renewal Rule, the nuclear industry developed guidelines for use by applicants in developing license renewal applications that would comply with the rule.<sup>97</sup> During the initial development of those guidelines, questions arose as to whether certain electrical components were, in fact, subject to an aging management review under the rule. Transformers were among the components discussed. The Staff in 1997 provided additional guidance, which addressed specifically whether electrical transformers (among other electrical components) are subject to an aging management review.

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<sup>94</sup> *Id.* (emphasis added).

<sup>95</sup> *Id.* at 22,477 (emphases added). The Statements of Consideration explain that “a pump or valve has moving parts, an electrical relay can change its configuration, and a battery changes its electrolyte properties when discharging. Therefore, the performance or condition of these components is readily monitored and would not be captured by this description.” *Id.*

<sup>96</sup> *Id.* (offering the example of a transistor).

<sup>97</sup> See generally NEI 95-10 (Rev. 0 Mar. 1996), “Industry Guideline for Implementing the Requirements of 10 CFR Part 54 – The License Renewal Rule” (ML031600708). The Staff reviewed this guidance (which has since been updated several times) and has indicated that licensees may use a later version of NEI 95-10 (currently Revision 6) to implement the License Renewal Rule. See Regulatory Guide 1.188, “Standard Format and Content for Applications to Renew Nuclear Power Plant Operating Licenses” (Rev. 1 Sept. 2005), at 4 (Regulatory Guide 1.188) (ML051920430).

In its guidance, the Staff observed that 10 C.F.R. § 54.21(a)(1)(i) expressly excludes a variety of electrical and instrumentation and control components from an aging management review for license renewal, and stated that the exclusion “is not limited to” only these components.<sup>98</sup> The Staff went on to state that it had considered aging management review requirements for transformers (among other components), and concluded that transformers are not subject to an aging management review. The Staff reasoned that transformers performed their intended function through a “change in state,” by “stepping down voltage from a higher to a lower value, stepping up voltage to a higher value, or providing isolation to a load.”<sup>99</sup> The Staff also observed that degradation of a transformer’s ability to perform its intended function would be “readily monitorable by a change in the electrical performance of the transformer and the associated circuits.”<sup>100</sup> Ultimately, the Staff recommended that NEI revise its guidance to indicate that transformers (among other components) do not require an aging management review.<sup>101</sup> NEI’s current guidance reflects the Staff position on transformers.<sup>102</sup>

Friends/NEC argue in Contention 2 that NextEra’s Application violates 10 C.F.R. §§ 54.21(a) and 54.29 because it fails to include an aging management program for each

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<sup>98</sup> Letter from C.I. Grimes, Office of Nuclear Reactor Regulation, to D.J. Walters, NEI, “Determination of Aging Management Review for Electrical Components” (Sept. 19, 1997) (Grimes Letter), Attachment at 1. See generally 10 C.F.R. § 54.21(a)(1)(i). The Grimes Letter is included as App. C, Ref. 2, to NEI 95-10 (Rev. 6, June 2005), “Industry Guideline for Implementing the Requirements of 10 CFR Part 54 – The License Renewal Rule” (NEI 95-10 (Rev. 6)) (ML051860406).

<sup>99</sup> Grimes Letter, Attachment at 2. The Staff went on to state: “Transformers perform their intended function through a change in state similar to switchgear, power supplies, battery chargers, and power inverters, which have been excluded in [10 C.F.R.] § 54.21(a)(1)(i) from an aging management review.” *Id.*

<sup>100</sup> *Id.* The Staff also cited other indications of transformer performance, including observing trending of certain electrical parameters, and advanced monitoring methods. *Id.*

<sup>101</sup> *Id.* at 4.

<sup>102</sup> The Grimes Letter is incorporated into NEI 95-10 (Rev. 6) in App. C, Ref. 2.

- 22 -

electrical transformer whose “proper function” is important for plant safety.<sup>103</sup> The crux of their argument is that electrical transformers perform “passive” functions, and therefore must be addressed in an AMP, but that NextEra’s Application contains no such AMP. In support, Friends/NEC offered the expert opinion of Paul Blanch. Mr. Blanch asserted, without more, that “[t]ransformers function without moving parts or without a change in configuration or properties as defined in [10 C.F.R. § 54.21(a)].”<sup>104</sup> The Blanch Declaration went on to raise general concerns associated with the failure to properly manage aging of electrical transformers.<sup>105</sup>

The Staff and NextEra responded before the Board that electrical transformers are “active” and are therefore not subject to aging management review.<sup>106</sup> They relied primarily upon the guidance discussed above, and also upon the NRC’s prior “issuance of other license renewals where transformers were treated as active components.”<sup>107</sup> They also criticized Friends/NEC and the Blanch Declaration for referring to license renewal applications and supporting documents relevant only to other nuclear facilities,<sup>108</sup> for presenting only conclusory

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<sup>103</sup> Friends/NEC Petition at 20-22. *See also* Tr. at 100-25.

<sup>104</sup> Blanch Declaration at 11.

<sup>105</sup> *Id.* at 11-13.

<sup>106</sup> NextEra Answer to Friends/NEC Petition at 43-47; Staff Answer to Petitions at 26-30.

<sup>107</sup> Tr. at 120 (Mr. Fernandez).

<sup>108</sup> *See, e.g.*, NextEra Answer to Friends/NEC Petition at 43 & n.32 (referring to Friends/NEC’s near-verbatim paraphrase and use of a contention from the *Indian Point* license renewal proceeding, despite the fact that the Seabrook Application lacks the language challenged in the *Indian Point* contention); Blanch Declaration at 4 (asserting that he has “reviewed Vermont Yankee’s License Renewal Application[,] . . . the subsequent submittals by Entergy to renew the operating licenses for Indian Point Unit 2 and Unit 3 . . . [and] the NRC’s Safety Evaluation Report dated May 2008 (NUREG-1907).”).

- 23 -

arguments,<sup>109</sup> and for contradictorily stating, at different places, that electrical transformers are “active” and “passive.”<sup>110</sup>

The Board’s discussion of Contention 2 is brief. The Board found significant that the Staff guidance upon which the Staff and NextEra relied is non-binding, and further that we had not addressed the issue whether electrical transformers are “active” or “passive” components.<sup>111</sup> The Board therefore concluded that “[i]n the absence of a definitive designation for transformers, this contention requires fact-based determinations best left to further adjudicatory proceedings.”<sup>112</sup>

In admitting Contention 2, the Board rejected NextEra’s and the Staff’s arguments regarding the internal inconsistency of the Blanch Declaration. The Board concluded that the inconsistency stemmed merely from clerical errors, were clarified at oral argument, and therefore should not be strictly construed against Friends/NEC.<sup>113</sup>

*b. Discussion*

NextEra argues that Friends/NEC’s contention is too thinly supported to merit admission.<sup>114</sup> We agree. Longstanding Staff guidance directly addresses the classification of electrical transformers for the purposes of license renewal, and has found them to be “active”

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<sup>109</sup> NextEra Appeal I at 14; NextEra Answer to Friends/NEC Petition at 46-47; Staff Answer to Petitions at 30-35.

<sup>110</sup> NextEra Appeal I at 13; NextEra Answer to Friends/NEC Petition at 46; Staff Answer to Petitions at 25-26, 31. See Blanch Declaration at 12 (*compare* ¶ 35 with ¶ 36); Friends/NEC Petition at 22 (*compare* ¶ 8 with ¶ 9).

<sup>111</sup> LBP-11-2, 73 NRC at \_\_ (slip op. at 34).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at \_\_ (slip op. at 34-35). On this point, we agree with the Board. In considering the matter on appeal, we construed the petition and the Blanch Declaration in favor of Friends/NEC. But we caution all parties to take care in the preparation of documents for litigation, given that unclear drafting renders decision-making challenging not only for the Board, but for us.

<sup>114</sup> NextEra Appeal I at 11-12.

- 24 -

components. At no time did Friends/NEC challenge the guidance documents in their filings before the Board. Instead, Friends/NEC rested on its initial cursory argument that “it is well known that many transformers . . . are passive devices in that they contain no moving parts and do not undergo a change of properties or state.”<sup>115</sup> The Board is correct that the applicability of a guidance document may be challenged in an individual proceeding. However, we decline here to find Friends/NEC’s conclusory statements sufficient to support an admissible contention.

As discussed above, the Grimes Letter sets forth the Staff’s reasoning that transformers perform “active” functions:

Transformers perform their intended function through a change in state by stepping down voltage from a higher to a lower value, stepping up voltage to a higher value, or providing isolation to a load. Transformers perform their intended function through a change in state similar to switchgear, power supplies, battery chargers, and power inverters, which have been excluded in §54.21(a)(1)(i) from an aging management review. Any degradation of the transformer’s ability to perform its intended function is readily monitorable by a change in the electrical performance of the transformer and the associated circuits. Trending electrical parameters measured during transformer surveillance and maintenance such as Doble test results, and advanced monitoring methods such as infrared thermography, and electrical circuit characterization and diagnosis provide a direct indication of the performance of the transformer. Therefore, transformers are not subject to an aging management review.<sup>116</sup>

Friends/NEC and Mr. Blanch disregard the Staff guidance. As a result, Mr. Blanch’s conclusory statement that transformers are passive components is not adequate as a basis for the contention.<sup>117</sup> In order to raise a litigable challenge to the categorization of electrical

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<sup>115</sup> Friends/NEC Petition at 22; Blanch Declaration at 12.

<sup>116</sup> Grimes Letter, Attachment at 2. See *also* Standard Review Plan at 2.1-24, Table 2.1-5, item 104 (excluding transformers from the list of SSCs subject to an aging management review).

<sup>117</sup> See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (“[A]n expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion . . . .”) (quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 181, *recons. granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998)).

transformers, Friends/NEC would have to provide sufficient factual information or expert opinion to merit further consideration of the matter. Here, in the absence of a supported challenge to the guidance, we do not find a genuine dispute with the applicant meriting litigation in this proceeding.

Instead, in support of this contention, Friends/NEC assert that the Staff “has determined that the plant system portion of the offsite power system that is used to connect the plant to the offsite power source should be included within the scope of” section 54.21, and that “[t]his path typically includes switchyard circuit breakers that connect to the offsite system power transformers (startup transformers), the transformers themselves . . . .”<sup>118</sup> Based on these two premises, Friends/NEC argue that “[e]nsuring that the appropriate offsite power system long-lived passive structures and components that are part of this circuit path are subject to an [aging management review] will assure that the bases underlying the [station blackout] requirements are maintained over the period of extended license.”<sup>119</sup> The upshot of this argument appears to be that, because transformers are included in a portion of a plant system that is within the scope of license renewal, they are themselves subject to an aging management review.

However, considered in context, the Staff’s statement upon which Friends/NEC rely does not support the assumption that transformers perform “passive” functions. The statement referenced by Friends/NEC appears to be a direct quotation from a Draft Request for Additional Information (Draft RAI) attached to a summary of a conference call regarding the Indian Point license renewal application.<sup>120</sup> The Draft RAI, in turn, quotes Staff guidance identifying

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<sup>118</sup> Blanch Declaration at 12 (emphasis omitted). *Accord* Friends/NEC Petition at 22 (emphasis omitted).

<sup>119</sup> Blanch Declaration at 13. *Accord* Friends/NEC Petition at 22.

<sup>120</sup> See Staff Answer to Petitions at 31-32 & n.35 (citing Summary of Telephone Conference Call Held on September 21, 2007, between the U.S. Nuclear Regulatory Commission and Entergy Nuclear Operations, Inc., concerning Draft Requests for Additional Information Pertaining to the (continued . . . )



- 26 -

equipment relied on to meet the requirements of the station blackout rule, as it affects scoping for license renewal.<sup>121</sup> The guidance states, in relevant part:

For purposes of the license renewal rule, the staff has determined that the plant system portion of the offsite power system that is used to connect the plant to the offsite power source should be included within the scope of the rule. *This path typically includes switchyard circuit breakers that connect to the offsite system power transformers (startup transformers), the transformers themselves . . . . Ensuring that the appropriate offsite power system long-lived passive structures and components that are part of this circuit path are subject to an [aging management review]* will assure that the bases underlying the [station blackout] requirements are maintained over the period of extended license.<sup>122</sup>

Read in its proper context, we discern no support in the guidance for the argument that a transformer is a “passive component” and should be subject to an aging management review. The guidance simply delineates the portion of the offsite power system that is “inside the plant” for the purpose of identifying structures and components that are subject to an aging management review to confirm compliance with the station blackout rule for the period of extended operation. The Staff concluded that the portion of the offsite power system that is used to connect the plant to the offsite power source is included within the scope of the license renewal rule. That system includes several components, including transformers. But the guidance does not distinguish—or discuss at all—which of those components perform active or passive functions (or some combination thereof). For this reason, the document does not provide support for Friends/NEC’s Contention 2.

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Indian Point Nuclear Generating Unit Nos. 2 & 3, License Renewal Application (Oct. 16, 2007), at 10 (ML072770605)).

<sup>121</sup> See generally 10 C.F.R. § 54.4(a)(3) (citing 10 C.F.R. § 50.63 (station blackout rule)).

<sup>122</sup> Draft RAI at 10 (emphases added) (quoting “NRC Staff Position on the License Renewal Rule (10 CFR 54.4) as it relates to The Station Blackout Rule (10 CFR 50.63),” at 2, attached to letter dated April 1, 2002, “Staff Guidance on Scoping of Equipment Relied on to Meet the Requirements of the Station Blackout (SBO) Rule (10 CFR 50.63) for License Renewal (10 CFR 54.4(a)(3))” (ML020920464)).



In sum, the Board erred in admitting Contention 2, as it lacks the support required by 10 C.F.R. § 2.309(f)(1)(v).

**3. Friends/NEC Contention 4**

The Environmental Report is inadequate because it underestimates the true cost of a severe accident at Seabrook Station in violation of 10 C.F.R. § 51.53(c)(3)(ii)(L) and further analysis is called for.<sup>123</sup>

**a. Background**

Friends/NEC Contention 4 challenges NextEra's severe accident mitigation alternatives (SAMA) analysis for Seabrook. Mitigation alternatives, or "SAMAs," refer to potential safety enhancements intended to reduce the risk of severe accidents. The NRC's current Generic Environmental Impact Statement for license renewal provides a generic and bounding analysis of potential severe accident impacts, encompassing all existing plants.<sup>124</sup> The SAMA analysis is a site-specific analysis focusing on potential additional mitigation measures that could be implemented to *further* reduce severe accident risk (probability or consequences). The analysis by practice has been a cost-benefit analysis, examining whether particular hardware or procedural changes may be cost-beneficial to implement, given the degree of risk reduction that reasonably could be expected from the change.

Under the NRC's environmental regulations for license renewal, applicants must provide a SAMA analysis if the Staff has not yet previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement (EIS) or related supplement, or in an environmental assessment.<sup>125</sup> The SAMA analysis is an environmental mitigation analysis under NEPA, and is not part of the license renewal safety review. Whether additional accident mitigation measures may be warranted to assure public health and safety is

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<sup>123</sup> Friends/NEC Petition at 33-34.

<sup>124</sup> See License Renewal GEIS, Vol. 1 at 5-12 to 5-106, 5-113, 5-115.

<sup>125</sup> See 10 C.F.R. § 51.53(c)(3)(ii)(L).

- 28 -

addressed through the NRC's ongoing regulatory oversight of existing plants.<sup>126</sup> In regard to SAMAs, we have stressed that “[u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions and models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis.”<sup>127</sup>

SAMA analysis involves extensive computer modeling, and therefore may involve issues not readily understood by those not familiar with the computer codes and methodologies that are used. We recognize that SAMA analysis issues can present difficult judgment calls at the contention admissibility stage, and we are reluctant as a general matter to second-guess Board rulings on contention admissibility.<sup>128</sup> Nonetheless, as NextEra highlights, where arguably large portions of contentions have been “cut and pasted” from one or more other NRC proceedings—which Friends/NEC’s representative concedes was done for their intervention—it is especially important to “ensure the existence of a genuine material dispute with [the] *particular* application” at issue.<sup>129</sup>

Given the quantitative nature of the SAMA analysis, where the analysis rests largely on selected inputs, it may always be possible to conceive of alternative and more conservative inputs, whose use in the analysis could result in greater estimated accident consequences. But the proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA. We have long held that

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<sup>126</sup> See, e.g., “Procedural and Submittal Guidance for the Individual Plant Examination of External Events (IPEEE) for Severe Accident Vulnerabilities,” Final Report, NUREG-1407 (June 1991) (ML063550238).

<sup>127</sup> *Pilgrim*, CLI-10-11, 71 NRC at 317.

<sup>128</sup> *AmerGen Energy Corp., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 276-77 (2009).

<sup>129</sup> NextEra Appeal I at 4 & n.6, 20 (emphasis in original). See also Tr. at 68; Friends/NEC Answer to NextEra Appeal at 4.

- 29 -

contentions admitted for litigation must point to a deficiency in the application, and not merely “suggestions” of other ways an analysis could have been done, or other details that could have been included.<sup>130</sup> SAMA adjudications would prove endless if hearings were triggered merely by suggested alternative inputs and methodologies that conceivably could alter the cost-benefit conclusions. A contention proposing alternative inputs or methodologies must present some factual or expert basis for why the proposed changes in the analysis are warranted (e.g., why the inputs or methodology used is unreasonable, and the proposed changes or methodology would be more appropriate). Otherwise, there is no genuine material dispute with the SAMA analysis that was done, only a proposal for an alternate NEPA analysis that may be no more accurate or meaningful. We turn now to the SAMA contention.

Contention 4 challenged the SAMA analysis based on six claimed deficiencies (labeled alphabetically “a” through “f”). The contention claims that the SAMA analysis “improperly minimized” the potential costs of a severe accident, and therefore made additional risk reduction measures “appear[] not to be justified.”<sup>131</sup> The Board addressed the admissibility of each of the contention “subparts” separately, as essentially distinct contentions.<sup>132</sup> The Board admitted Friends/NEC Contentions 4B, 4D, and 4E, as limited by LBP-11-2.<sup>133</sup> NextEra appeals admission of the three SAMA contentions. We address each in turn.

*b. Friends/NEC’s Contention 4B – The SAMA analysis minimizes the potential amount of radioactive release in a severe accident*<sup>134</sup>

In LBP-11-2, the Board admitted one portion of Friends/NEC 4B. The admitted issue challenges the use in the Seabrook SAMA analysis of source terms obtained with the Modular

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<sup>130</sup> See *USEC*, CLI-06-10, 63 NRC at 477.

<sup>131</sup> Friends/NEC Petition at 37.

<sup>132</sup> LBP-11-2, 73 NRC at \_\_ (slip op. at 38-39).

<sup>133</sup> *Id.* at \_\_ (slip op. at 48, 55-56, 63).

<sup>134</sup> Friends/NEC Petition at 41.

Accident Analysis Progression (MAAP) computer code. Specifically, Friends/NEC argue that the MAAP code “has not been validated by the NRC,” and that the radionuclide release fractions generated by MAAP “are consistently smaller for key radionuclides than the release fractions specified in NUREG-1465 and its recent revision for high-burnup fuel.”<sup>135</sup> They go on to claim that “the source term used [in the SAMA analysis] results in lower [accident] consequences than would be obtained from NUREG-1465 release fractions and release durations.”<sup>136</sup> Friends/NEC further argue that it “has been previously observed” that “MAAP generates lower release fractions than those derived and used by NRC in studies such as NUREG-1150.”<sup>137</sup> They argue that the use of source terms generated by MAAP “appears to lead to anomalously low consequences when compared to source terms generated by NRC staff.”<sup>138</sup>

In support, Friends/NEC cite to excerpts from two documents. One is a 1987 draft of the NUREG-1150 severe accident risk study that, in examining accident risk at the Zion Nuclear Station found that “the MAAP estimates for environmental release fractions were significantly smaller” than those obtained with “the Source Term Code Package” computer code.<sup>139</sup> The other is a 2002 Brookhaven National Laboratory (BNL) report examining ice condenser and Mark III containment plants, which compared the probabilistic risk assessment (PRA) results for

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<sup>135</sup> *Id.* at 44. See “Accident Source Terms for Light-Water Nuclear Power Plants,” Final Report, NUREG-1465 (Feb. 1995) (ML041040063).

<sup>136</sup> Friends/NEC Petition at 44.

<sup>137</sup> *Id.* NUREG-1150 assessed the risks from severe accidents at five commercial nuclear power plants of different design. See “Severe Accident Risks: An Assessment for Five U.S. Nuclear Plants,” NUREG-1150 (Dec. 1990) (ML040140729). Seabrook was not one of the five plants specifically evaluated in the report.

<sup>138</sup> Friends/NEC Petition at 45.

<sup>139</sup> “Reactor Risk Reference Document,” Main Report, Draft for Comment, NUREG-1150, Vol. 1 (Feb. 1987), at 5-14 (ML063540601) (cited at Friends/NEC Petition at n.16). The Source Term Code Package (STCP) and MELCOR computer codes were used in the NUREG-1150 reactor accident study.

- 31 -

the Catawba plant (obtained using the MAAP code) with a “typical NUREG-1150 release” for the Sequoyah plant (obtained using the Source Term Code Package and MELCOR).<sup>140</sup> The BNL study noted that the “NUREG-1150 release fractions for the important radionuclides are about a factor of 4 higher than the ones” in the Catawba PRA, and that the “differences in the release fractions . . . are primarily attributable to the use of the different codes in the two analyses.”<sup>141</sup>

In LBP-11-2, the Board admitted Friends/NEC Contention 4B “to the limited extent that it relates to the selection of the source term release fractions.”<sup>142</sup> On appeal, NextEra argues that the contention does not provide sufficient information to demonstrate the existence of a genuine dispute with the application. NextEra argues that the source term claims are taken from an expert report filed in the *Indian Point* proceeding, specifically, an accident consequence analysis that Dr. Edwin Lyman prepared, which substituted NUREG-1465 source terms for the MAAP-generated source terms the applicant used in the SAMA analysis for Indian Point Unit 2.<sup>143</sup> NextEra further stresses that the contention “only alleges that other models may produce a larger source term,” and that there is no expert support provided to indicate that other source terms would be more accurate or more reasonable for the SAMA analysis.<sup>144</sup>

In our view, the support for the contention is weak. To the extent that the contention suggests that NextEra simply should replace the Seabrook SAMA analysis release fractions

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<sup>140</sup> John R. Lehner et al., Benefit Cost Analysis of Enhancing Combustible Gas Control Availability at Ice Condenser and Mark III Containment Plants, Final Letter Report (Dec. 2002) at 17 (referenced at Friends/NEC Petition at 44-45).

<sup>141</sup> *Id.*

<sup>142</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 44).

<sup>143</sup> NextEra Appeal I at 19-20 (citing to Edwin Lyman, A Critique of the Radiological Consequence Assessment Conducted in Support of the Indian Point Severe Accident Mitigation Alternatives Analysis (Nov. 2007), attached to *Riverkeeper, Inc.’s Request for Hearing and Petition to Intervene in Indian Point License Renewal Proceeding* (Nov. 30, 2007) (ML073410093)).

<sup>144</sup> *Id.* at 20.

- 32 -

with generic release fractions derived from NUREG-1465, Friends/NEC identify no factual or expert support. As NextEra describes, the portion of the contention discussing NUREG-1465 appears to be “copied almost verbatim” from a site-specific consequence analysis Dr. Lyman prepared for the *Indian Point* proceeding.<sup>145</sup> It is not apparent to us that the site-specific accident “consequence” conclusions of Dr. Lyman’s report can, without more, simply be lifted and directly applied to the site-specific Seabrook SAMA analysis.

Essentially, the challenge to the MAAP-generated release fractions rests on a thin reed—the excerpts from the draft NUREG-1150 report and the BNL report. We do not read these excerpts to necessarily suggest that MAAP-generated source terms are inaccurate, only that under the specific comparisons noted the MAAP-generated source terms were smaller than source terms obtained from the NUREG-1150 report. Further, it is not clear that these comparisons (one dating back 24 years) involved the same version of the MAAP code used in the Seabrook SAMA analysis. Contention 4B does not compare NUREG-1150 values to the Seabrook SAMA analysis release fractions, or otherwise discuss or even reference the Seabrook release fractions.<sup>146</sup> And while the contention suggests that generic source term values obtained from NUREG-1150 would be larger, it does not suggest why the generic values would be more accurate for a plant-specific SAMA analysis than the MAAP-generated plant-specific release fractions.

Yet the Board found the support from the two documents sufficient, concluding that the “alleged fact that the source terms provided by MAAP are lower than those produced by the methodology used in NRC studies (resulting in consequence values that are lower by a factor of 3 and 4 according to the [BNL Report]) raises sufficient question concerning whether the

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<sup>145</sup>*Id.* at 19.

<sup>146</sup> We additionally note that MAAP-generated release fractions and durations apparently were not used for all of the ten accident categories analyzed in the Seabrook SAMA analysis. See *id.*, Att. F at F-59, F-63.

calculated consequences and resulting cost-benefit analyses at Seabrook are adequate for rendering decisions on potential mitigation alternatives.”<sup>147</sup> Although we consider, as we said previously, that support for this contention is weak, because the Board is the appropriate arbiter of such fact-specific questions of contention admissibility, we will not second-guess the Board’s evaluation of factual support for the contention, absent an error of law or abuse of discretion.<sup>148</sup> Here, we additionally note that NextEra never addressed specifically the relevance of the cited comparisons to the Seabrook SAMA analysis. Because we cannot conclude that the Board’s assessment of the documents amounts to legal error, we defer to the Board’s judgment in admitting Contention 4B.<sup>149</sup>

- c. *Friends/NEC 4D – Use of an inappropriate air dispersion model, the straight-line Gaussian plume, and meteorological data inputs that did not accurately predict the geographic dispersion and deposition and radionuclides at Seabrook’s coastal locations.*<sup>150</sup>

The straight-line Gaussian plume model is the atmospheric dispersion model in the MACCS2 computer code (a version of the MELCOR Accident Consequence Code System code), which was used for the Seabrook SAMA analysis. Friends/NEC argue that the straight-line Gaussian plume model is inappropriate for a coastal location because it “ignores the presence of sea breeze circulations which dramatically alter air flow patterns.”<sup>151</sup> Friends/NEC further argue that the straight-line Gaussian plume model does not properly account for the impact of terrain effects, and that the terrain at the Seabrook site varies from “hilly to

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<sup>147</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 48).

<sup>148</sup> See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

<sup>149</sup> We note, however, that in the Board’s assessment, we expect a thorough and thoughtful review of all facts offered in support of a contention, particularly where, as here, the contention and/or factual support was taken directly from a case involving a different facility.

<sup>150</sup> Friends/NEC Petition at 47.

<sup>151</sup> *Id.* at 49-50.



- 34 -

mountainous except along the coast.”<sup>152</sup> They stress that there are other more “advanced [atmospheric dispersion] models” that can be applied in “complex terrain settings such as in mountainous or coastal areas.”<sup>153</sup> Friends/NEC claim that use of the straight-line Gaussian plume model in the Seabrook SAMA analysis “underestimated the area likely to be affected in a severe accident and the dose likely to be received” in the affected area.<sup>154</sup>

In LBP-11-2, the Board admitted Friends/NEC 4D, concluding that “Friends/NEC sufficiently support their allegation that use of the [straight-line Gaussian plume] model might significantly distort the Seabrook SAMA analysis.”<sup>155</sup> The Board found that Friends/NEC had provided “sufficient information to indicate that it is more than plausible that the use of an alternative model has the potential to change the cost-benefit conclusions for the SAMA candidates evaluated by NextEra.”<sup>156</sup>

On appeal, NextEra argues that Friends/NEC did not provide any expert opinion or document indicating that “use of an alternate dispersion model would predict *greater* offsite consequences.”<sup>157</sup> NextEra goes on to assert that Friends/NEC and “by extension, the Board,” merely “assume that certain modeling features in the ATMOS<sup>[158]</sup> model (such as the straight-line Gaussian plume, lack of modeling of terrain effects, and the use of a single year of meteorological data) ultimately might be significant.”<sup>159</sup> NextEra states that “[c]ertainly the use

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<sup>152</sup> *Id.* at 50-51 (quoting Environmental Report), 53-54.

<sup>153</sup> *Id.* at 59-60.

<sup>154</sup> *Id.* at 47.

<sup>155</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 52).

<sup>156</sup> *Id.*

<sup>157</sup> NextEra Appeal I at 22 (emphasis added).

<sup>158</sup> ATMOS is the module in the MACCS2 computer code that performs the atmospheric dispersion modeling for the SAMA analysis.

<sup>159</sup> NextEra Appeal I at 22.

of a different model *might* result in a prediction of greater offsite consequences,” but that Friends/NEC “provides no support to suggest that this is actually the case.”<sup>160</sup> NextEra further stresses that the Friends/NEC claims fail to challenge or otherwise address the “extensive sensitivity analyses” included in the SAMA analysis, which address atmospheric modeling uncertainty.<sup>161</sup>

We agree that Friends/NEC did not provide specific expert or factual support for its claim that use of the straight-line Gaussian plume model “underestimates” radiological doses. Rather, Friends/NEC offered factual support questioning the precision of the model. The Board rejected Staff and licensee arguments going to the sufficiency of Friends/NEC’s plume modeling claims, finding these to be “reasonable counter arguments,” but “merits-based.”<sup>162</sup> NextEra insists that its arguments before the Board were not arguments on the merits, but arguments on whether Friends/NEC met the “threshold” contention requirement of showing materiality.<sup>163</sup>

NextEra’s arguments are not without force. Although petitioners need not “rerun the Applicant’s own cost-benefit calculations”<sup>164</sup> at the contention admissibility stage, they can

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<sup>160</sup> *Id.* (emphasis in original).

<sup>161</sup> *Id.* at 22-23.

<sup>162</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 55).

<sup>163</sup> NextEra Appeal I at 18. NextEra provides an example of a Friends/NEC argument that appears immaterial. While Friends/NEC challenges the use of a single year’s worth of meteorological data, the SAMA analysis indicates that in fact five years of data were reviewed, and the year with the most conservative data, resulting in the “maximum dose and cost risk” was used in the analysis. See *id.* at 22 (citing Environmental Report). The Board did not specifically address this claim. Moreover, we note that one argument Friends/NEC provided appears to *undercut* its contention. Referencing (actually quoting verbatim, although quotation marks were not inserted) a 2004 MACCS2 code guidance document, Friends/NEC claim that because Gaussian models are “inherently flat-earth models,” there is “inherent *conservatism* (and simplicity) if the environs” involve grade variations, significant nearby buildings, or tall vegetation that is “not taken into account in the dispersion parameterization.” See Friends/NEC Petition at 59 (emphasis added) (citation omitted).

<sup>164</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 40).

- 36 -

support SAMA contentions by providing the opinion of an expert with knowledge of SAMA code modeling issues, who has reviewed the SAMA analysis. In its reply before the Board, Friends/NEC suggested that it will, at a later “stage” in the proceeding, “present factual evidence that indeed the straight-line Gaussian plume model is NOT conservative.”<sup>165</sup>

While we agree with NextEra that the SAMA analysis involves numerous considerations and properly ought to be considered in its “entirety,”<sup>166</sup> we also recognize that at the contention admissibility stage there may be close questions on the materiality of claims, particularly given the complexity of the SAMA code modeling issues and Board reluctance to delve into merits-related inquiries. As in any proceeding, the Board makes threshold decisions on materiality on a case-by-case basis, given the nature of the issue and the record presented before the Board.

Here, the Board held that “Friends/NEC have raised plausible limitations of air dispersion modeling at the [Seabrook] site,” and that the asserted limitations of the atmospheric dispersion model plausibly could affect the SAMA cost-benefit conclusions.<sup>167</sup> Given the substantial deference we typically accord licensing boards on contention admissibility, we conclude that the Board did not abuse its discretion or commit legal error in finding adequate factual support for the contention, given the limited record before it on SAMA analysis computer modeling and the inter-relationships between, and significance of, the different portions and levels of the SAMA analysis. We therefore decline to disturb the Board’s admission of Contention 4D.

- d. *Friends/NEC 4E – Use of inputs that minimized and inaccurately reflected the economic consequences of a severe accident, including decontamination costs, cleanup costs and health costs, and that either minimized or ignored a host of other costs.*<sup>168</sup>

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<sup>165</sup> Friends/NEC Reply at 39 (emphasis in original).

<sup>166</sup> NextEra Appeal I at 18.

<sup>167</sup> LBP-11-2, 73 NRC at \_\_ (slip op. at 52-53).

<sup>168</sup> Friends/NEC Petition at 61.

- 37 -

From Contention 4E, the Board admitted the limited issues of “decontamination and cleanup costs”—specifically claims involving radionuclide “particle size” and “remediation difficulty in urban areas.”<sup>169</sup> In the Board’s description of the contention, “Friends/NEC allege that because [NextEra] ‘uses the outdated and inaccurate MACCS2 code to calculate decontamination and clean up costs,’ NextEra employs an inapplicable [radionuclide] particle size,” and “ignores the difficulty of cleanup in an urban area.”<sup>170</sup>

As to radionuclide particle size, Friends/NEC claim that “[n]uclear reactor releases range in size from a fraction of a micron to a couple of microns,” but “nuclear bomb explosions fallout is much larger—particles that are ten to hundreds of microns.”<sup>171</sup> They claim that the “small nuclear releases [from reactor accidents] can get wedged into small cracks and crevices of buildings making [cleanup] extremely difficult or impossible.”<sup>172</sup> They therefore conclude that “cleanup after a nuclear bomb explosion is not comparable to clean up after a nuclear reactor accident and assuming so will underestimate cost.”<sup>173</sup>

Friends/NEC go on to argue that the MACCS2 code uses an “economic cost model” that improperly assumes inappropriately large radionuclide particles, such as those that would be released in a nuclear weapon explosion.<sup>174</sup> Friends/NEC claim that use of the MACCS2 code will result in underestimated decontamination costs because the smaller radionuclide particles that would be released in a reactor accident would be more difficult and more expensive to

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<sup>169</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 56).

<sup>170</sup> *Id.* (quoting Friends/NEC Petition at 62).

<sup>171</sup> Friends/NEC Petition at 63.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 62.

<sup>174</sup> *Id.*

- 38 -

remove or “clean up” than the larger particles released in a nuclear weapon explosion.<sup>175</sup> As support, they cite to a 1996 Sandia National Laboratories study of the potential economic costs of a plutonium dispersal accident.<sup>176</sup> They argue that the Sandia Study recognized that earlier estimates of decontamination costs, “such as incorporated in [the 1975 NRC reactor accident risk study] WASH-1400 and up through and including MACCS2” are erroneous because “they examined fallout from [explosions] of nuclear weapons that produce large particles and high mass loadings.”<sup>177</sup>

In LBP-11-2, the Board found adequate support for Friends/NEC’s “assertion that smaller particles will create higher cleanup costs.”<sup>178</sup> The Board concluded that Friends/NEC “dispute sufficiently important assumptions in the calculation of severe accident decontamination and cleanup costs to make it plausible that another SAMA candidate might be cost-effective.”<sup>179</sup>

On appeal, NextEra argues that Friends/NEC failed to provide the requisite factual support for their decontamination cost claim and point to no genuine dispute with the Seabrook SAMA analysis on a material issue of law or fact.<sup>180</sup> We agree.

First, it is not clear what exactly this decontamination costs contention is challenging. Friends/NEC refer without explanation or support to an unidentified MACCS2 code “cost

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<sup>175</sup> *Id.* at 62-63, 66.

<sup>176</sup> See *id.* at 66-67 (citing David I. Chanin, Walter B. Murfin, SAND96-0957, Site Restoration: Estimation of Attributable Costs From Plutonium-Dispersal Accidents (May 1996) (Sandia Study)).

<sup>177</sup> Friends/NEC Petition at 66. See also “Reactor Safety Study: An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants (WASH-1400),” NUREG-75/014 (Oct. 1975) (WASH-1400).

<sup>178</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op at 56, 58).

<sup>179</sup> *Id.* at \_\_\_ (slip op. at 58).

<sup>180</sup> NextEra Appeal I at 25-27.

formula” that “underestimates costs likely to be incurred as a result of a dispersion of radiation.”<sup>181</sup> There is no discussion of any specific “cost formula used in the MACCS2 code.”<sup>182</sup> The contention itself refers to the “use of inputs” that minimize or inaccurately reflect economic consequences, but Friends/NEC do not provide a supported and particularized argument regarding “inputs.”

The Board apparently viewed the contention as claiming that the MACCS2 code, by definition, assumes or “employs an inapplicable particle size.”<sup>183</sup> But we do not see even minimal factual or expert support presented for a claim that the MACCS2 code assumes “inapplicable” radionuclide particle sizes.

Friends/NEC rest their particle size claims largely on the 1996 Sandia Study that examined the potential economic costs of a plutonium dispersal accident. As Friends/NEC’s argument goes, the MACCS2 code User’s Guide indicates that the code has an “economic cost model” that is “based on WASH-1400.”<sup>184</sup> In turn, Friends/NEC describe the WASH-1400 study as having been “based on [cleanup] after a nuclear explosion.”<sup>185</sup> Friends/NEC then go on to describe that the 1996 Sandia Study of plutonium dispersal accidents criticized “earlier estimates” of decontamination costs, such as those in WASH-1400, because these earlier cost estimates were based upon explosions of nuclear weapons involving large – and therefore

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<sup>181</sup> Friends/NEC Petition at 62.

<sup>182</sup> *Id.*

<sup>183</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 56). In their reply before the Board, Friends/NEC describe that they challenge “assumptions regarding cleanup . . . costs *embedded* in the code.” Friends/NEC Reply at 36 (emphasis added).

<sup>184</sup> Friends/NEC Petition at 62 (citing “Code Manual for MACCS2: User’s Guide,” NUREG/CR-6613, Vol. 1 (May 1998) (ML063550020), at 7-10 (User’s Guide)).

<sup>185</sup> *Id.* at 62.

- 40 -

easier to remove – radionuclide particles.<sup>186</sup> Specifically, Friends/NEC claim that the Sandia Study “recognized that earlier estimates (such as incorporated in WASH-1400 and up through and including MACCS2) of decontamination costs are incorrect because they examined fallout from nuclear explosion [sic] of nuclear weapons that produce large particle sizes and high mass loadings.”<sup>187</sup>

But again, the intervenors’ claims are ill-defined and poorly supported. It is not clear what Friends/NEC mean by “incorrect” decontamination cost “estimates” that are “incorporated” in the MACCS2 code. Friends/NEC provide page citations to only three pages in the Sandia Study, none of which specifically refer to radionuclide particle sizes, the WASH-1400 reactor accident study, or the MACCS2 code.<sup>188</sup> The Sandia Study is a lengthy report focused on plutonium dispersal events, and neither we nor the Board should be expected to sift through it in search of asserted factual support that Friends/NEC has not specified.<sup>189</sup> We nonetheless reviewed portions of the Sandia Study but discerned no suggestion that the MACCS2 code assumes inapplicable radionuclide particle sizes. In fact, the 1996 Sandia Study predates issuance of the MACCS2 code User’s Guide and does not appear to discuss the MACCS2 code at all.

NextEra points out on appeal, as it did before the Board, that the Sandia Study does criticize the WASH-1400 reactor study for underestimating the economic costs of severe reactor accidents. But as NextEra describes, this criticism was of *particular* assumptions made in

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<sup>186</sup> See *id.* at 66.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* at 66-67 (citing Sandia Study at 2-3 to 2-4, 6-5).

<sup>189</sup> See, e.g., *Commonwealth Edison Co.* (Zion Nuclear Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999) (petitioner bears burden for setting forth clear argument for contention); *USEC*, CLI-06-10, 63 NRC at 457 (a “contention must make clear why cited references provide a basis”).



- 41 -

WASH-1400 regarding decontamination costs—assumptions that the MACCS2 code does not “require or imply.”<sup>190</sup> As NextEra points out, the Sandia Study criticizes assumptions regarding a variable input called a “decontamination factor,”<sup>191</sup> explained further below.

Like WASH-1400, the MACCS2 code uses inputs called “decontamination factors” to reflect different levels or strategies of decontamination to reduce radiological dose to an acceptable dose level or standard for long-term use. Logically, a less contaminated area will need less decontamination to reduce the radiological dose to the necessary standard. A decontamination factor of 20, for example, reflects an assumption “that contamination is reduced by a factor of 20 (i.e., 95% of the radioactive material is removed)” after a specified period of time.<sup>192</sup> Higher decontamination factors reflect a need for higher levels of decontamination activities, and are therefore associated with higher costs.

The Sandia Study criticizes WASH-1400 and other reactor risk assessments for assuming that a decontamination factor of 20—meaning radiological dose would be reduced by 95%—could be achieved “in urban areas at *minimal cost*”.<sup>193</sup>

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<sup>190</sup> NextEra Appeal I at 26 (citing Sandia Study at p. 2-9). See also NextEra Answer to Friends/NEC Petition at 91-92.

<sup>191</sup> NextEra Appeal I at 26.

<sup>192</sup> *Id.* at 26 n.16 (citing Sandia Study at 2-9 n.8). As the MACCS2 code User’s Guide explains, the decontamination “objective is to reduce doses to acceptable levels” in a “cost-effective manner.” See User’s Guide at 7-9. In some cases, it may simply be more cost-effective to condemn a property. For example, if, even assuming a specified high level of decontamination a site would not become habitable, then the “property will be condemned and permanently withdrawn from use” and an economic cost assessed for condemning the property. See *id.* (cited in NextEra Appeal I at 26 n.16). Likewise, if the cost of decontamination “exceeds the property’s value,” then the code will assess an economic cost for condemning the property. See *id.* at 7-4. In other words, the SAMA economic cost analysis accounts for the costs of decontaminating property to particular user-defined decontamination levels, as well as the costs of condemning property that cannot sufficiently be decontaminated, or would be less expensive to condemn than to decontaminate.

<sup>193</sup> See Sandia Study at 2-9 to 2-10 (emphasis added); NextEra Appeal I at 26-27. The Sandia Study also criticized the WASH-1400 report’s decontamination cost estimates because they were based on decontamination to a long-term radiological dose criterion of 25 rem (incurred (continued . . . )

- 42 -

*Prior to the 1986 Chernobyl accident*, reactor accident risk assessments in the U.S and Europe relied heavily on the economic cost model of WASH-1400, in which the decontamination of residential property was modeled as achieving a DF [decontamination factor] of 20 in urban areas at minimal cost, that is, one tenth of the value of the affected property.

The use of 20 in WASH-1400 was apparently based on contemporary guidance documents for anticipated recovery actions, following nuclear explosions of warfare. Nuclear weapons explosions produce fallout with large particles and high mass loadings. The DF of 20 was widely used in planning documents addressing such events.<sup>194</sup>

But as NextEra argues, “use of the MACCS2 code does not require or imply the use of a DF of 20” because the decontamination factor used is a *variable input* into the SAMA analysis, and the MACCS2 User’s Guide in fact suggests the use of other decontamination factors, 3 and 15.<sup>195</sup> Up to three different decontamination factors can be defined.<sup>196</sup> And the SAMA analysis has user-defined economic parameters for determining the dollar cost of performing the decontamination to the specified decontamination levels. In any event, the contention does not explain how the Sandia Study criticism of WASH-1400 supports the claim that the MACCS2 code employs inapplicable radionuclide particle sizes.

At bottom, Friends/NEC simply do not tie the Sandia Study to a genuine material dispute with the Seabrook SAMA analysis. Their contention does not discuss or even mention the issue of “decontamination factors” (or “decontamination levels,” as they are called in the Seabrook SAMA analysis).<sup>197</sup> Moreover, there are other user-defined inputs in the MACCS2 code that

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over 30 years), noting that long-term radiological exposure standards “have been tightened considerably” since 1975. *See id.* at 2-9.

<sup>194</sup> Sandia Study at 2-9 (emphasis added).

<sup>195</sup> NextEra Appeal at 26 (citing User’s Guide at 7-9 to 7-11).

<sup>196</sup> *See* User’s Guide at 7-9.

<sup>197</sup> Only in responding to NextEra’s arguments before the Board did Friends/NEC refer to decontamination factors, inquiring if NextEra took “the User’s Guide’s suggestion” of using 3 and 15 for decontamination level inputs, and stating that “[t]hese are questions to answer as we go along.” *See* Friends/NEC Reply at 41-42. But our contention rules precisely are intended to prevent admission of ill-defined contentions where petitioners at the outset have not set forth (continued . . . )

- 43 -

also reflect underlying assumptions about how difficult – and how expensive – decontamination activities may need to be.

Here, for example, the Seabrook SAMA analysis expressly outlines various decontamination cost parameters used in the analysis. These include the estimated cost of farm decontamination (per hectare) for two levels of decontamination; the estimated cost of non-farm decontamination (per resident person) for two levels of decontamination; the estimated labor cost for decontamination (per man year); the estimated value of farm wealth (per hectare); the estimated average value of non-farm wealth (per person); and the estimated population relocation costs per person.<sup>198</sup> Friends/NEC do not provide any factual or expert support challenging these specific economic cost parameters. Nor does their contention claim that the SAMA analysis lacks necessary information. In short, while the Sandia Study may criticize “earlier estimates” or studies of severe accident decontamination costs for inappropriately assuming achievement of high levels of decontamination at a low cost, Friends/NEC Contention 4E does not set forth a genuine material dispute with the *Seabrook* SAMA analysis, and therefore does not satisfy the contention admissibility requirements.<sup>199</sup>

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particularized concerns. See, e.g., *Oconee*, CLI-99-11, 49 NRC at 337-38; see also *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004) (improper to use reply brief to introduce new arguments to “reinvigorate thinly supported contentions”). Contention 4E nowhere suggests a view on the User’s Guide suggested decontamination factors. Even in their reply brief, Friends/NEC did not argue that particular decontamination factors should (or should not) be used in the Seabrook analysis – again, no particularized argument on decontamination factors is raised. Before us, Friends/NEC had no further comment on either the relevance of the Sandia Study to the Seabrook analysis, or on decontamination factors. See Friends/NEC Opposition to NextEra Appeal at 5-6.

<sup>198</sup> Environmental Report, Att. F at F-58.

<sup>199</sup> At best, Friends/NEC offer a generalized claim of a failure to consider remediation of “economic infrastructure that make[s] business, tourism and other economic activity possible.” See Friends/NEC Petition at 67. Generalized “economic cost” arguments, unsupported by asserted facts or expert opinion, are insufficient to show a genuine dispute with the application. The Board did not address specifically the Friends/NEC “economic infrastructure” claim, but rejected other similarly unsupported “economic cost” claims. See LBP-11-2, 73 NRC at \_\_\_ (slip (continued . . . )

- 44 -

Other arguments made as part of the Friends/NEC “decontamination costs” claims equally lack support or simply do not raise a genuine dispute with the application. These include the unsupported argument that “[CERCLA], EPA, and local authorities would not allow use of” decontamination processes such as “firehosing” and “plowing.” Friends/NEC claim that these methods “simply move[] the contamination from one place to another,” and would result in a cleanup that would “take far longer, be more expensive and its success . . . unlikely.”<sup>200</sup>

Friends/NEC quote a passage from the MACCS2 User’s Guide, which acknowledges that “[m]any” decontamination processes, such as “plowing” and “firehosing,” reduce direct exposure doses from groundshine and re-suspension, but wash surface contamination down into the ground and therefore may not move contaminants “out of the root zone.”<sup>201</sup> The passage goes on to explain that because contaminants may remain in root systems, the MACCS2 economic cost model (like the earlier WASH-1400 model) assumes that farmland decontamination reduces direct exposure doses to farmers, but “*does not reduce* the ingestion doses” from “consumption of crops that are contaminated by root uptake.”<sup>202</sup> Friends/NEC neither point to any error regarding this aspect of the MACCS2 code, nor tie the passage to a specific and supported material dispute with the Seabrook SAMA analysis. Nor does either the MACCS2 User’s Guide or WASH-1400 suggest that “plowing” and “firehosing” are the only decontamination methods available.<sup>203</sup> Friends/NEC’s “firehosing” and “plowing” claims raise no genuine material dispute with the application.

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op. at 60) (rejecting claims of overlooked “business value of property,” “job retraining,” “unemployment payments,” and “inevitable litigation”).

<sup>200</sup> Friends/NEC Petition at 64.

<sup>201</sup> *Id.* at 62 (quoting User’s Guide at 7-10).

<sup>202</sup> User’s Guide at 7-10 (emphasis added).

<sup>203</sup> See, e.g., WASH-1400, App. VI, App. K at K-2 (noting both wet and dry decontamination methods).

- 45 -

The Board also admitted as part of Contention 4E a claim that “urban areas are more costly to clean up than rural areas.”<sup>204</sup> But like the general argument that small radionuclide particles are more difficult to remove than large particles, we do not see how this claim—even assuming it is true—raises a genuine dispute with the Seabrook SAMA analysis. Friends/NEC do not suggest with any support that the SAMA analysis fails to encompass the decontamination of particular urban areas that should have been considered, or proffer any site-specific economic cost information or cost estimates for any relevant “urban areas.” Friends/NEC provide no factual or expert support identifying error in the estimated costs of decontamination or identifying specific overlooked “urban” decontamination costs that may bear on the analysis’s results.

Instead, as NextEra argues, Friends/NEC merely referenced excerpts of reports that “reflect the intuitive notions that cleanup of urban areas and cleanup to a higher standard can be more expensive than cleanup of rural areas or to a lower standard.”<sup>205</sup> While not challenging any of the specific decontamination cost estimates or parameters provided in the Seabrook analysis, Friends/NEC refer to decontamination costs estimates in the 1996 Sandia Study of plutonium dispersal accidents, which estimated a cost of \$309 million per square kilometer for areas with “heavy [plutonium] contamination.”<sup>206</sup> With no expert or factual support describing why or how it would be appropriate to directly compare the decontamination cost estimates for plutonium dispersal accident scenarios studied in the Sandia Study with the *site-specific* Seabrook SAMA analysis, Friends/NEC argue that Boston, Manchester, Portsmouth, and

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<sup>204</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 58).

<sup>205</sup> NextEra Appeal I at 27.

<sup>206</sup> Friends/NEC Petition at 66 (citing Sandia Study at 6-5).

Portland would have “much higher” decontamination costs than the costs outlined in the Sandia Study.<sup>207</sup>

Again without support or explanation, Friends/NEC claim that instead of the “outdated decontamination costs figure in the MACCS2 code”—and notably, the challenged “costs figure” is never identified—“the SAMA analysis for Seabrook should incorporate, for example, the analytical framework contained in the 1996 Sandia” Study, “as well as studies examining Chernobyl and [radioactive dispersal-type devices].”<sup>208</sup> The Seabrook SAMA analysis is a site-specific mitigation alternatives analysis considering reactor severe accident scenarios for the Seabrook site. The analysis takes into account the particular mix of radionuclides in the reactor core, reactor accident radiological contaminants and their half-lives; facility-specific characteristics and accident scenarios; economic data for the 13 counties within 50 miles of the plant; site-specific meteorological data and atmospheric dispersion modeling; and other site-specific and reactor accident-specific factors. Friends/NEC’s generalized suggestions that other cost estimates and studies involving significantly different accident scenarios and assumptions reflect more accurate approaches or values to use, or otherwise indicate errors in the Seabrook SAMA analysis, are unsupported and therefore speculative. Again, any number of alternative

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<sup>207</sup> *Id.* at 66. Moreover, Friends/NEC go on to claim that the “economic losses stemming from the stigma effects of a severe accident are staggering.” *See id.* at 66-67. Psychological fears or “stigma” effects, however, are not cognizable NEPA claims. *See generally Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

Repeatedly, Friends/NEC make other assertions that are not linked to a specific dispute with the application. For example, they generally assert that the health consequences of a severe reactor accident could greatly exceed the consequences of a plutonium-dispersal accident because the quantities of a radioactive material in an operating reactor are greater. *See* Friends/NEC Petition at 67. Friends/NEC also generally refer to longstanding differences in “cleanup standards” between the NRC and the Environmental Protection Agency, as indicated in a cited 2004 General Accounting Office report. *See* Friends/NEC Petition at 65. This issue does not fall within the scope of this license renewal proceeding. Friends/NEC raise no claim that any particular NRC or EPA standard should have been used in the Seabrook SAMA analysis.

<sup>208</sup> Friends/NEC Petition at 66.



- 47 -

analyses may be reasonable under NEPA. The issue is not whether alternative approaches exist, alternative inputs may be substituted, or yet another factor could be considered. Petitioners must provide factual or expert support that proposed alternatives are warranted because the analysis that was done is insufficient to satisfy NEPA.

To conclude, we gave careful review to the Friends/NEC Contention 4E, but the contention is largely speculative, displays minimal understanding of the issues raised, and at bottom, fails to raise a supported genuine material dispute with the application. We do not disagree with the Board that Friends/NEC provided adequate support for general claims that “smaller particle sizes will create higher cleanup costs, and that urban areas are more costly to clean up than rural areas.”<sup>209</sup> But as we described, these assertions do not point to a genuine dispute with the application. The Board admitted the contention on the ground that Friends/NEC “dispute sufficiently important assumptions in the calculation of severe accident decontamination and cleanup costs” in the Seabrook SAMA analysis.<sup>210</sup> But the contention nowhere identifies with support the specific “assumptions in the calculation” that are challenged. We therefore find that the Board erred in admitting Friends/NEC Contention 4E.

#### **4. *Beyond Nuclear Contention***

The NextEra Environmental Report fails to evaluate the potential for renewable energy to offset the loss of energy production from the Seabrook nuclear power plant and to make the requested license renewal action for 2030 unnecessary. In violation of the requirements of 10 C.F.R. § 51.53(c)(3)(iii) and of the GEIS § 8.1, the NextEra Environmental Report (§ 7.2) treats all of the alternatives to license renewal except for natural gas and coal plants as unreasonable[,] and does not provide a substantial analysis of the potential for significant alternatives which are being aggressively planned and developed in the Region of Interest for the requested relicensing period of 2030-2050. The scope of the [Supplemental EIS] is improperly narrow, and the issue of the need for Seabrook as a means of satisfying demand forecasts for the relicensing period must be revisited due to

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<sup>209</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 58).

<sup>210</sup> *Id.*



- 48 -

dramatically-changing circumstances in the regional energy mix throughout the two decades preceding the relicensing period.<sup>211</sup>

The Board admitted this contention but restricted its scope. Concluding that all “supporting facts focus exclusively on wind power generation,” the Board limited Beyond Nuclear’s contention to just that form of renewable energy.<sup>212</sup>

*a. Background*

Our regulations implementing NEPA Section 102 require Environmental Reports submitted by license renewal applicants to address the environmental impacts of the proposed action and also to compare them to impacts of alternative actions.<sup>213</sup> But NEPA requires consideration of “reasonable” alternatives, not all conceivable ones.<sup>214</sup>

Our License Renewal GEIS<sup>215</sup> provides guidance on the scope of the energy alternatives analysis for license renewal. In particular, the GEIS concluded “that a reasonable set of alternatives should be limited to analysis of single, discrete electric generation sources . . . that are technically feasible and commercially viable.”<sup>216</sup> This is guidance currently in place on the subject; however, the Staff is preparing an update to the License Renewal GEIS—still under way—that proposes a somewhat broader analysis of alternative energy sources.<sup>217</sup> The proposed revised GEIS would provide for reviewing several individual energy alternatives, and also observes that “combinations of alternatives may be considered during plant-specific license

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<sup>211</sup> Beyond Nuclear Petition at 6.

<sup>212</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 27).

<sup>213</sup> 10 C.F.R. § 51.53(c)(2). See NEPA § 102(2)(C)(i)-(iii), 42 U.S.C. § 4332(2)(C)(i)-(iii).

<sup>214</sup> *NRDC v. Morton*, 458 F.2d 827, 834, 837, 838 (D.C. Cir. 1972).

<sup>215</sup> See *generally* License Renewal GEIS.

<sup>216</sup> License Renewal GEIS, Vol. 1, § 8.1 at 8-1.

<sup>217</sup> See *generally* Proposed Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117 (July 31, 2009).

- 49 -

reviews.”<sup>218</sup> While the 1996 License Renewal GEIS carries special weight as a guidance document that has been approved by the Commission, in the end it is non-binding guidance, and thus, not unassailable. An application that complies with existing guidance may be challenged, provided that contention-admissibility requirements are met.<sup>219</sup>

We also have held that our Staff’s EISs “need only discuss those alternatives that . . . ‘will bring about the ends’ of the proposed action”<sup>220</sup>—a principle equally applicable to Environmental Reports.<sup>221</sup> We give “substantial weight to the preferences of the applicant and/or sponsor.”<sup>222</sup> NextEra’s stated purpose for the Seabrook license renewal, as reflected in

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<sup>218</sup> “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Draft Report for Comment,” NUREG-1437, Rev. 1 (Vol. 1 July 2009) (ML091770049), at 2-18 (Draft Revised GEIS). As the Staff indicated earlier in this proceeding, the Staff has taken this approach in at least one supplemental EIS, associated with the Salem and Hope Creek license renewal applications. See Tr. at 113-14; “Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants: Regarding Hope Creek Generating Station and Salem Nuclear Generating Station, Units 1 and 2,” NUREG-1437, Supplement 45 (Mar. 2011) (ML11089A021), §§ 8.1, 8.2. With respect to renewable alternatives in particular, the proposed revised GEIS states: “Combinations of energy renewable alternatives may be considered during plant-specific licensing reviews.” Draft Revised GEIS at 2-20. The Seabrook Environmental Report provided a brief assessment of several renewable alternatives, but determined that none was a reasonable replacement for Seabrook. See Environmental Report, § 7.2.1.5.

<sup>219</sup> See, e.g., *International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000) (noting that the Commission is not bound by guidance documents, which do not carry the force of regulations and do not impose legal requirements upon licensees).

<sup>220</sup> *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)). See also *Rancho Seco*, CLI-93-3, 37 NRC at 144-45.

<sup>221</sup> See generally *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 263, *aff’d*, CLI-09-22, 70 NRC 932 (2009).

<sup>222</sup> *City of Grapevine v. Dep’t of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir.) (quoting *Citizens Against Burlington*, 938 F.2d 197-98), *cert. denied*, 513 U.S. 1043 (1994); *Hydro Resources*, CLI-01-4, 53 NRC at 55 (internal quotation marks and citations omitted):

When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accord substantial weight to the preferences of the applicant . . . in the siting and design of the project. . . . The agency thus may take into account the economic goals of the project’s sponsor.

its application, is baseload power generation.<sup>223</sup> Thus, although NextEra in its Environmental Report briefly examined wind energy as a potential alternative to a license renewal, NextEra rejected that option on the ground that wind power, at least in its current state, is incapable of producing baseload power.<sup>224</sup>

The Board held that, despite the broad language of the contention, Beyond Nuclear's "supporting facts focus[ed] exclusively"<sup>225</sup> on the alternative of a "system of interconnected *offshore wind farms*" that, according to Beyond Nuclear, could provide baseload power for the "region of interest" currently served by Seabrook.<sup>226</sup> The Board therefore narrowed the contention to include only this issue, which it found to be supported by "sufficient minimal evidence" in Beyond Nuclear's exhibits.<sup>227</sup> The Board found that Beyond Nuclear had plausibly asserted that offshore wind farms may prove feasible in the near future.<sup>228</sup>

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<sup>223</sup> NextEra Appeal II at 4 (quoting Environmental Report, § 7.2.1, at 7-6), 4-5 (citing Environmental Report, § 7.2.1, at 7-12). "Baseload power" generates "energy intended to continuously produce electricity at or near full capacity, with high availability." *Env'tl. Law and Policy Ctr. v. NRC*, 470 F.3d 676, 679 (7th Cir. 2006).

<sup>224</sup> Environmental Report, § 7.2.1.5, at 7-12 to 7-13.

<sup>225</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 27).

<sup>226</sup> *Id.* at (slip op. at 20) (emphasis added). Seabrook's "region of interest" is Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Environmental Report, § 7.2.1, at 7-6.

<sup>227</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 25) (internal quotation marks omitted). *See also id.* at \_\_\_ (slip op. at 25) (internal quotation marks omitted); *id.* at \_\_\_ (slip op. at 20-22) (describing various Beyond Nuclear exhibits); *id.* at \_\_\_ (slip op. at 27) (limiting the scope of the contention). The Board also concluded that many of the Staff's and NextEra's arguments regarding the remaining admissibility standards "improperly address[ed] the merits of [Beyond Nuclear's] contention, rather than whether petitioners have provided a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate." *Id.* at \_\_\_ (slip op. at 23-24) (footnote and internal quotation marks omitted).

<sup>228</sup> *Id.* at \_\_\_ (slip op. at 25) (citing Tr. at 24, 34). *Accord id.* at \_\_\_ (slip op. at 26-27) (Beyond Nuclear has "demonstrated some possibility that wind power might be a reasonable alternative as early as 2015"). *See generally id.* (slip op. at 20) (Beyond Nuclear supports its contention "with 20 exhibits purporting to demonstrate that, within the foreseeable future, an environmentally superior system of interconnected offshore wind farms might provide baseload (continued . . . )

- 51 -

*b. Discussion*

As discussed below, we conclude that the Board erred in admitting this contention.<sup>229</sup>

**(1) THE SCOPE OF THE ENERGY-ALTERNATIVES ANALYSIS**

The Board disagreed with the Staff's position that "Beyond Nuclear . . . must show 'that wind is a feasible alternative *at the present time*.'"<sup>230</sup> Acknowledging that "'remote and speculative' alternatives need not be addressed in an applicant's environmental report,"<sup>231</sup> the Board nonetheless indicated that, for license renewal, "the relevant time frame is considerably broader than 'the present time.'"<sup>232</sup> Rather, the Board concluded that it was required "to consider alternatives 'as they exist and are likely to exist.'"<sup>233</sup> The Board construed some of Beyond Nuclear's supporting references to indicate that "an integrated system of offshore wind farms could be a viable source of baseload power in the region as early as 2015."<sup>234</sup>

Beyond Nuclear argued before the Board that in their NEPA analyses the NRC and NextEra should predict which technologies will be available by the beginning of the "requested relicensing period of 2030 to 2050"<sup>235</sup> rather than confine themselves to what is available either

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power in the relevant region and thus should have been evaluated in greater detail in the Applicant's environmental report.").

<sup>229</sup> NextEra argues on appeal that the contention constitutes a prohibited collateral attack on 10 C.F.R. § 54.17(c) and, separately, that the Board improperly reformulated the contention. See NextEra Appeal II at 10 & 19, respectively. Because we reject this contention on other grounds, we need not address these arguments.

<sup>230</sup> LBP-11-2, 73 NRC at \_\_ (slip op. at 24) (emphasis added) (quoting Staff Answer to Petitions at 102).

<sup>231</sup> *Id.* at \_\_ (slip op. at 24-25) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (quoting, in turn, *NRDC v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972))).

<sup>232</sup> *Id.* at \_\_ (slip op. at 25).

<sup>233</sup> *Id.* (quoting *Carolina Envtl. Study Grp. v. U.S.*, 510 F.2d 796, 801 (D.C. Cir. 1975)).

<sup>234</sup> *Id.* at \_\_ (slip op. at 25) (citing Tr. at 24, 34).

<sup>235</sup> Beyond Nuclear Petition at 13.

- 52 -

now or in the near future.<sup>236</sup> The Board found “sufficient ‘minimal’ evidence” regarding an integrated system of offshore wind farms “to warrant further inquiry as to whether such a system might be ‘likely to exist’ during the relevant time period.”<sup>237</sup> NextEra challenges this aspect of the Board’s decision as unsupported by the record<sup>238</sup> and as an improper requirement that NextEra consider a “remote and speculative” alternative.<sup>239</sup>

The Board is correct that the relevant period “is considerably broader than ‘the present time.’”<sup>240</sup> As the Board observed, the standard established in *Carolina Environmental Study Group* is whether an alternative is “likely to exist.” It is the future environmental effect of activities during the renewal period that must be considered, not current environmental effects.<sup>241</sup>

Pragmatically, however, near-term effects often are the best indicator of future ones. NEPA requires a “hard look” at the environmental effects of the planned action and reasonable alternatives to that action, using the best information available at the time the assessment is performed. An environmental impact statement is not “intended to be a ‘research document,’

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<sup>236</sup> See, e.g., *id.* at 13, 18 (“NEPA challenges the Applicant and the federal agency to ‘reasonably foresee’ beyond the present time in formulating its evaluation of alternatives in the Environmental Report for the projected federal relicensing action as proposed to begin in 2030”). Beyond Nuclear presents the same argument to us. See, e.g., Beyond Nuclear Opposition to Appeal at 27 (criticizing NextEra for “tak[ing] the requested licensing action out of context for 2030 to 2050 and replac[ing] with its own interpretation of reasonableness for ‘at this time,’ ‘in the near term,’ and ‘does not exist today’”) (emphasis omitted).

<sup>237</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 25). The Board explained that it was not deciding at the contention admissibility stage “the exact date by which an integrated system of offshore wind farms would have to be found ‘likely to exist.’” *Id.*

<sup>238</sup> NextEra Appeal II at 11-15.

<sup>239</sup> *Id.* at 9-10.

<sup>240</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 25).

<sup>241</sup> See generally *Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-13 (2001) (describing the Part 51 process for environmental review associated with license renewal, focusing upon the potential impacts of an additional 20 years of plant operation).

- 53 -

reflecting the frontiers of scientific methodology, studies, and data.”<sup>242</sup> Assessments of future energy alternatives necessarily are of a predictive nature, and the assessment therefore will include uncertainties associated with predicting advances in technology.

In other words, in performing an alternatives analysis, the applicant—and the agency—are limited by the information that is reasonably available in preparing the environmental review documents. When considering energy alternatives, it is nearly always impossible to predict, decades in advance, the viability of technologies that are currently not operational and are many years from large-scale development. Except in rare cases where there is evidence of unusual predictive reliability, it is not workable to consider, for purposes of NEPA analysis, what are essentially hypothetical or speculative alternatives as a source of future baseload power generation.<sup>243</sup> For this reason, we find sensible the Staff’s argument that in most cases a “reasonable” energy alternative is one that is currently commercially viable, or will become so in the relatively near term. Such an assessment generally will be sufficient to provide the requisite “hard look” under NEPA.

In sum, to submit an admissible contention on energy alternatives in a license renewal proceeding, a petitioner ordinarily must provide “alleged facts or expert opinion” sufficient to raise a genuine dispute as to whether the best information available today suggests that commercially viable alternate technology (or combination of technologies) is available now, or will become so in the near future, to supply baseload power.<sup>244</sup> As a general matter, a

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<sup>242</sup> See *Pilgrim*, CLI-10-11, 71 NRC 287 at 315 (citing *Town of Winthrop v. FAA*, 535 F.3d 1, 11-13 (1st Cir. 2008)).

<sup>243</sup> “NEPA does not require agencies to analyze impacts of alternatives that are speculative, remote, impractical, or not viable.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 729 (2005) (citations omitted).

<sup>244</sup> See *Roosevelt Campobello Int’l Park Comm’n v. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (holding that, for siting alternatives, EPA’s “duty under NEPA is to study all alternatives that appear reasonable and appropriate for study at the time of drafting the EIS” (internal quotations omitted)); *Seacoast Anti-Pollution League v. NRC*, 598 F.2d 1221, 1230 (1st Cir. 1979) (holding (continued . . . )



“reasonable” energy alternative—one that must be assessed in the environmental review associated with a license renewal application—is one that is currently commercially viable, or will become so in the near term. We therefore conclude that the Board erred in admitting the contention.<sup>245</sup>

**(2) FAILURE TO PROPERLY TAKE INTO ACCOUNT NEXTERA’S PURPOSE IN SEEKING LICENSE RENEWAL**

To demonstrate the admissibility of a NEPA contention that an applicant failed to consider a viable alternative to its proposed action, a petitioner must show that its contention presents a “genuine dispute” under 10 C.F.R. § 2.309(f)(1)(vi). One element of that demonstration is a showing that the petitioner’s proposed alternative would satisfy the purpose of the applicant’s proposed action.<sup>246</sup> NextEra argues on appeal that the Board erred in finding that wind power might satisfy the purpose of NextEra’s proposed action and that Beyond Nuclear had therefore presented a “genuine dispute.”<sup>247</sup>

Neither this agency nor the applicant need consider any alternative that does not “‘bring about the ends’ of the proposed action.”<sup>248</sup> As the D.C. Circuit stated in *Citizens Against Burlington*, “[w]hen the purpose is to accomplish one thing, it makes no sense to consider the

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that, for siting alternatives, an agency must consider alternatives that appear reasonable “at the time” of the NEPA review). *Cf. Carolina Env’tl. Study Group*, 510 F.2d at 800 (holding that NEPA was not meant to require detailed discussion of “remote and speculative” alternatives).

<sup>245</sup> To avoid any misunderstanding, however, we hasten to add that our ruling does not exclude the possibility that a contention could show a genuine dispute with respect to a technology that, while not commercially viable at the time of the application, is under development for large-scale use and is “likely to” be available during the period of extended operation. *See Carolina Env’tl. Study Grp.*, 510 F.2d at 800.

<sup>246</sup> *See* note 221, *supra*.

<sup>247</sup> Beyond Nuclear Petition at 15-18.

<sup>248</sup> *Hydro Resources*, CLI-01-4, 53 NRC at 55 (quoting *Citizens Against Burlington*, 938 F.2d at 195). *Accord Env’tl. Law & Policy Center v. NRC*, 470 F.3d at 683-84.



alternative ways by which another thing might be achieved.”<sup>249</sup> NextEra states that its purpose in seeking license renewal is to make available “baseload power”—a preference to which we accord substantial weight.<sup>250</sup> Beyond Nuclear has not articulated a genuine dispute with the Application as to the viability of offshore wind farms as a source of baseload power. For wind power to merit detailed consideration as an alternative to renewing the license for a nuclear power plant, that alternative should be capable of providing “technically feasible and commercially viable” baseload power during the renewal period. As we have discussed, in assessing energy-alternatives contentions, practicality requires us to consider chiefly, often exclusively, alternatives that can be shown to have viability today or in the near future.<sup>251</sup> Here, Beyond Nuclear has not provided support for its claim that offshore wind is technically feasible and commercially viable—either today or in the near future—and therefore has not submitted an admissible contention.<sup>252</sup> We rest this conclusion on the grounds discussed below.

Energy Storage. As NextEra points out, Beyond Nuclear does not challenge the conclusion in NextEra’s Environmental Report that the combination of wind-based generation and compressed air energy storage would be too costly to be a reasonable alternative to nuclear energy as a source of baseload power.<sup>253</sup> NextEra argues on appeal that this omission

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<sup>249</sup> 938 F.2d at 195 (citation and internal quotation marks omitted).

<sup>250</sup> See note 223, *supra*, and associated text.

<sup>251</sup> See License Renewal GEIS, Vol. 1, § 8.1, at 8-1.

<sup>252</sup> In theory, a petitioner might show that an alternate technology, while not viable today or in the near future, is highly likely to come on line during the period of extended operation. But such a showing is possible, as we noted above (at 53), “only in rare cases where there is evidence of unusual predictive reliability.” Beyond Nuclear proffered no such evidence in support of its contention in this proceeding.

<sup>253</sup> See NextEra Appeal II at 18; Environmental Report, § 7.2.1.5, at 7-12. See also Beyond Nuclear Petition at 20-21. Beyond Nuclear’s Exhibit 3 addresses the potential of compressed air energy storage technology but does not address its cost, other than to observe generally that “additional work will be required to examine the feasibility of advanced wind/[compressed air energy storage] concepts.” National Renewable Energy Laboratory, “Creating Baseload Wind (continued . . . )

- 56 -

is fatal to Beyond Nuclear's contention, and therefore also to the Board's admission of that contention.<sup>254</sup> We agree. Absent a challenge on this essential issue, there is no genuine dispute as required under section 2.309(f)(1)(vi).

Offshore Wind Technology. The Board ruled that Beyond Nuclear presented a genuine dispute regarding the feasibility of offshore wind technology. The Board concluded that although "[p]etitioners may face a difficult task in trying to demonstrate that such a system is . . . practical . . . [s]uch disputed facts are not appropriately resolved . . . in connection with the Board's [admissibility] determination . . . ."<sup>255</sup> We disagree with the Board on this point. As we view the record, Beyond Nuclear's "offshore wind" contention is not sustainable on its face because it lacks a supporting basis. We reach this result without improperly resolving disputed facts.

NextEra stated in its Environmental Report that the technology for an ocean-based wind farm even approaching the generation capacity of Seabrook is only in its nascent stage.<sup>256</sup> Beyond Nuclear did not address this point (nor did the Board in LBP-11-2). Without some challenge to NextEra's Environmental Report on the nascent technology point, there is no

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Power Systems Using Advanced Compressed Air Energy Storage Concepts" (ML102930308). NextEra provides an explanation of why this approach is not financially feasible / commercially viable, which Beyond Nuclear does not challenge. See NextEra's Answer to Beyond Nuclear Petition at 19-23; Environmental Report, § 7.2.1.5, at 7-12 to 7-13.

<sup>254</sup> NextEra Appeal II at 19. As an alternative to energy storage, Beyond Nuclear alludes to the use of high-voltage direct-current transmission lines to connect independent wind farms. See Beyond Nuclear Reply at 35-36. This alternative, however, supports electric power transmission, which is not NextEra's stated purpose. NextEra states that it does not currently "own or operate substantial transmission assets in the region." NextEra Answer to Beyond Nuclear Petition at 29. See also NextEra Appeal II at 21-22. Because Beyond Nuclear poses an alternative that would expand the purpose of the Application, it fails to proffer a "genuine dispute" as required under 10 C.F.R. § 2.309(f)(1)(vi).

<sup>255</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 24).

<sup>256</sup> Environmental Report, § 7.2.1.5, at 7-12.

- 57 -

genuine dispute of material fact as to whether offshore wind power is, or soon will be, a reasonable alternative to license renewal.

NextEra takes issue with the following reasoning offered by the Board in partial support of its admission of Beyond Nuclear's contention:

Allegedly, some of the Beyond Nuclear petitioners' supporting references show that an integrated system of offshore wind farms could be a viable source of baseload power in the region as *early as 2015*. Whether this is so remains to be seen. In the Board's view, however, petitioners have proffered sufficient "minimal" evidence to warrant further inquiry as to whether such a system might be "likely to exist" during the relevant time period.<sup>257</sup>

The Board cites the prehearing conference transcript, where Beyond Nuclear's representative discussed one of its exhibits, not cited by the Board.<sup>258</sup> NextEra argues that in actuality the "supporting references" do not support the Board's conclusion that Beyond Nuclear had "proffered sufficient 'minimal' evidence."<sup>259</sup> We agree with NextEra.

The Beyond Nuclear representative first stated that, according to a University of Maine document, the operators of offshore wind farms "are delivering baseload by 2015."<sup>260</sup> This statement appears to offer a prediction or statement of expectation that wind-derived baseload power *will* be delivered by 2015. This statement, however, is contradicted by the same representative later in oral argument, and also by Beyond Nuclear's Exhibit 17 (upon which the representative relied in making this statement).

In the representative's second statement, he described the University of Maine document as presenting only a "plan" for "25 megawatts [MW] of . . . deep water offshore wind .

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<sup>257</sup> LBP-11-2, 73 NRC at \_\_\_ (slip op. at 25) (footnotes omitted; emphasis added).

<sup>258</sup> *Id.* (citing Tr. at 24, 34). See generally Beyond Nuclear Ex. 17, University of Maine, "Maine Offshore Wind Plan, Setting the Course for Energy Independence" (ML102930375).

<sup>259</sup> NextEra Appeal II at 11-14.

<sup>260</sup> Tr. at 24, referring to Beyond Nuclear Ex. 17 (Phases 2-5).

- 58 -

. . to come online by 2014.”<sup>261</sup> Our review of Beyond Nuclear’s referenced exhibit confirms that it refers to a plan only—not a statement of expectation that the project will be commercially viable as of 2014. Therefore, the two cited portions of the oral argument transcript, when read together and in light of the exhibits, do not support the Board’s conclusion.

Indeed, the representative’s first statement is contradicted by the cited exhibit, which sets forth a timeline for the “planned” offshore wind power in Maine. The timeline for the plan describes 2012-2014 as the period for accomplishing the design, construction, deployment and testing of a 3-5 MW “floating wind turbine prototype.”<sup>262</sup> But because a single wind turbine cannot provide “continuous” production of electricity “at or near full capacity,” it does not constitute a source of “baseload” power<sup>263</sup>—the term Beyond Nuclear’s representative used, and on which the Board appeared to rely in its finding.<sup>264</sup>

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<sup>261</sup> *Id.* at 34.

<sup>262</sup> Beyond Nuclear Ex. 17 (Phase 2). We also observe that this description does not match the 25-MW wind turbine to which Beyond Nuclear’s representative referred in his second statement.

<sup>263</sup> See *Envtl. Law and Policy Ctr.*, 470 F.3d at 679 (defining baseload power). Beyond Nuclear’s own exhibits confirm that the prototype does not satisfy this definition. See Beyond Nuclear Ex. 4, Cristina L. Archer and Mark Z. Jacobson, *Supplying Baseload Power and Reducing Transmission Requirements by Interconnecting Wind Farms*, 46 J. OF APPLIED METEOROLOGY AND CLIMATOLOGY 1701, 1716 (“an average of 33% and a maximum of 47% of yearly averaged wind power from interconnected farms can be used as reliable, baseload electric power”) (Nov. 2007) (ML102930309); Beyond Nuclear Ex. 9, EnerNex Corp., “Eastern Wind Integration and Transmission Study” (Jan. 2010), at 54 & 217 (referring to wind turbine capacity factors between 24.1% and 32.8%); Beyond Nuclear Ex. 19, U.S. Department of Energy (DOE), “20% Wind Energy by 2030: Increasing Wind Energy’s Contribution to U.S. Electricity Supply” (July 2008), at 26 (36% capacity factor in 2004 and 2005), 89 (Table 4.3: 30% capacity factor from June 2005 to May 2006), 183 (Table B-11: projecting 34-55% capacity factors for shallow-water offshore wind turbines between 2005 and 2030), 221 (“Most wind power plants operate at a capacity factor of 25% to 40%”) (ML102930395); Beyond Nuclear Ex. 21, National Renewable Energy Laboratory, “Large-Scale Offshore Wind Power in the United States: Assessment of Opportunities and Barriers” (Sep. 2010) at 35 n.7 (assigns offshore wind a capacity factor of 37%), 59 (35% to 50% capacity factor), 117 (nn.3-4: assumes a 35% capacity factor to offshore wind plants in shallow water) (ML102930637).

<sup>264</sup> To the extent the Board may have relied on the two additional exhibits from the University of Maine, we find that they likewise do not support the Board’s ruling. See Beyond Nuclear Ex. 16, University of Maine, “Deepwater Offshore Wind in Maine: the Plan, the Timeline” (June 18, (continued . . . )

In short, neither the transcript nor the referenced exhibit provides support for Beyond Nuclear's assertion that wind energy may provide baseload power by 2015. The Board therefore erred in relying on those portions of the record as support for its conclusion that Beyond Nuclear's Contention was admissible.<sup>265</sup>

Further, Beyond Nuclear's Exhibits 14 and 15 undermine its arguments regarding the technical feasibility that would be needed to show a genuine dispute regarding offshore wind power as a reasonable alternative. The "Final Report of the Maine Ocean Energy Task Force to Governor John E. Baldacci" (Exhibit 14) observes:

[T]echnologies that would enable the placement of wind turbines on floating platforms or other structures in greater depths needed to tap the world-class deep-water resources in Maine's coastal waters or in adjoining federal waters are under development . . . . Lack of the requisite technology is an obvious barrier to establishment of the deep-water wind industry in Maine or elsewhere in the near term.<sup>266</sup>

Similarly, a preliminary draft report by the Department of Energy that is in the record (Exhibit 15) raises serious questions regarding the technical feasibility of offshore wind farms as a source of baseload power.<sup>267</sup> According to the DOE report, offshore wind power deployment

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2009) (ML102930376) (pages 13 and 14 further describe portions of the planned schedule set forth in Ex. 17); Beyond Nuclear Ex. 18, University of Maine, "Deepwater Offshore Wind: A National Opportunity" (Aug. 17, 2010) (ML102930391) (page 30 contains the same chart that comprises Ex. 17, and pages 33, 36, and 37 further describe portions of the planned schedule set forth in Ex. 17).

<sup>265</sup> For a contention to be admissible, the sponsoring petitioner must, among other things, "[p]rovide a concise statement of the alleged facts or expert opinions which support [its] position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which [it] intends to rely to support its position on the issue." 10 C.F.R. § 2.309(f)(1)(v).

<sup>266</sup> Beyond Nuclear Ex. 14, "Final Report of the Maine Ocean Energy Task Force to Governor John E. Baldacci" (Dec. 2009), at 27 (ML102930365). *See also, e.g., id.* at iv ("the technology to economically harness off-shore winds in deep water (greater than 60 meters) does not exist today."), 28-29 (listing technological (and financial) hurdles facing wind power).

<sup>267</sup> Beyond Nuclear Ex. 15, "Creating an Offshore Wind Industry in the United States: A Strategic Work Plan for the United States Department of Energy, Fiscal Years 2011-2015" (Predecisional Draft) (Sep. 2, 2010), at 7-8 (ML102930374).

- 60 -

still faces significant challenges regarding resource characterization, infrastructure, and grid interconnection and operation.<sup>268</sup> The DOE report states that offshore wind power needs to overcome significant uncertainties related to both potential project power production and the design of turbines and arrays.<sup>269</sup> The implications for adding large amounts of offshore wind generation to the power system are, says DOE, still not well-understood and, as a consequence, reliable integration cannot be assured.<sup>270</sup> DOE concludes that, “with current technology, cost-effective installation of offshore wind turbines requires specialized turbine installation vessels, purpose-built portside infrastructure for installation, operations, and maintenance, and robust undersea electricity transmission lines and grid interconnections [none of which] . . . currently exist in the U.S. . . .”<sup>271</sup>

The DOE report further states that very little site-specific data are available on the external conditions that influence design requirements and energy production, and that the paucity of documentation regarding factors such as “wind resource[, . . .] wave action and seabed mechanics” currently precludes “accurate marine spatial planning [and] establishment of prioritized offshore wind zones . . . .”<sup>272</sup> Ultimately, the DOE Report concludes that “[l]ong-term gigawatt deployment of offshore wind energy in the United States cannot exist within the current [regulatory] landscape” and, further, that “key market, social and environmental risks are not

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<sup>268</sup> *Id.* at 7.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 7-8. See also *Beyond Nuclear* Ex. 19 at 57 (“Today’s European shallow-water technology is still too expensive and too difficult to site in U.S. waters. . . . [N]ecessary technologies have yet to be developed . . . .”); *Beyond Nuclear* Ex. 21 at 4-6 (addressing current technological challenges), 72 (addressing technological immaturity).

<sup>272</sup> *Beyond Nuclear* Ex. 15 at 14.



well-understood; offshore wind resources are poorly characterized; and essential transmission, supply chain, installation and maintenance infrastructure does not yet exist.”<sup>273</sup>

Beyond Nuclear’s Exhibits 14 and 15 thus do not support its arguments regarding the technical feasibility that would be needed to show a genuine dispute regarding offshore wind power as a reasonable alternative to license renewal.

For all these reasons, we conclude that Beyond Nuclear’s contention, and the record-at-large, provide insufficient support for the Board’s statement that “[a]llegedly, some” of Beyond Nuclear’s “supporting references show that an integrated system of offshore wind farms could be a viable source of baseload power in the region as early as 2015.”<sup>274</sup> To the contrary, the record demonstrates that Beyond Nuclear has failed to raise a genuine dispute regarding whether offshore wind farms are a technically feasible source of baseload power today, or whether they will become so in the near future.

**(3) NO DISPUTED QUESTION AS TO WHETHER WIND FARMS ARE “SINGLE, DISCRETE ELECTRIC GENERATION SOURCES” UNDER THE GEIS**

Finally, NextEra argues on appeal that the Board erred in concluding that a disputed question of fact existed as to whether wind farms that combine with other wind farms to create an interconnected network would constitute a “*single, discrete* electric generation source” as specified in the GEIS.<sup>275</sup> As NextEra correctly points out, Beyond Nuclear does not make this argument.<sup>276</sup> The Board therefore committed legal error by supplying a basis not argued by

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<sup>273</sup> *Id.* at 10.

<sup>274</sup> LBP-11-2, 73 NRC at \_\_ (slip op. at 25) (footnote omitted).

<sup>275</sup> NextEra Appeal II at 8, 20-21 (emphasis added). See also LBP-11-2, 73 NRC at \_\_ (slip op. at 25-26); License Renewal GEIS, Vol. 1, § 8.1, at 8-1.

<sup>276</sup> NextEra Appeal II at 5 n.8. Indeed, Beyond Nuclear’s own Exhibit 17 would appear to undermine such an argument. See, e.g., Beyond Nuclear Ex. 17, at Phase 5 (indicating that each of the University of Maine’s planned wind farms would cover 64 square miles of ocean surface, and that there would be four to eight such farms).



- 62 -

Beyond Nuclear, although we consider that error to be harmless, given that the GEIS does not impose a requirement on the alternatives analysis.<sup>277</sup>

\* \* \* \* \*

One last matter bears mention. On April 18, 2011, Friends/NEC and Beyond Nuclear, filed in this proceeding a petition requesting, among other things, that we suspend “all decisions” regarding the issuance of renewed licenses, pending completion of several actions associated with the recent nuclear events in Japan.<sup>278</sup> We granted the requests for relief in part, and denied them in part.<sup>279</sup> In particular, we declined to suspend this or any other adjudication, or any final licensing decisions, finding no imminent risk to public health and safety, or to common defense and security. The agency continues to evaluate the implications of the events in Japan for U.S. facilities, as well as to consider actions that may be taken as a result of lessons learned in light of those events. Particularly with regard to license renewal, we stated that “[t]he NRC’s ongoing regulatory and oversight processes provide reasonable assurance that each facility complies with its ‘current licensing basis,’ which can be adjusted by future

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<sup>277</sup> See *USEC, CLI-06-10*, 63 NRC at 457 (“it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply infer unarticulated bases of contentions.”) (footnote and internal quotation marks omitted). See generally *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) (“A contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions . . .”).

<sup>278</sup> See generally *Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident* (dated Apr. 14-18, 2011; served and docketed Apr. 15, 2011; corrected petition filed Apr. 18, 2011); *Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident* (dated Apr. 19, 2011; filed Apr. 19, 2011; docketed Apr. 20, 2011).

<sup>279</sup> See generally *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC \_\_ (Sept. 9, 2011) (slip op.).

- 63 -

Commission order or by modification to the facility's operating license outside the renewal proceeding (perhaps even in parallel with the ongoing license renewal review).<sup>280</sup>

#### IV. CONCLUSION

For the reasons discussed above, we *reverse* LBP-11-2 in part, and *affirm* it in part.

IT IS SO ORDERED.

For the Commission

**[NRC Seal]**

/RA/

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 8<sup>th</sup> day of March, 2012

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<sup>280</sup> *Id.* at \_\_ (slip op. at 26).

**Commissioners Svinicki and Apostolakis, Dissenting in Part**

We respectfully dissent with regard to the admissibility of Friends/NEC Contention 4B. The majority itself acknowledges that this challenge by Friends/NEC to the use of the MAAP-generated release fractions in the Seabrook SAMA analysis “rests on a thin reed.” Indeed, the majority’s discussion renders it unnecessary for us to elaborate further on the deficiencies of the contention. In our view, Friends/NEC did not present the minimal factual or expert support necessary to demonstrate the existence of a genuine material dispute with the application. We do not expect our adjudicatory boards to arbitrate factual disputes at the contention admissibility stage, but admitting such an ill-defined and poorly-supported contention undermines the very purposes of our contention admissibility rules.<sup>1</sup> Contention 4B provides no basis on which a hearing would be meaningfully focused. Since the contention does not meet our rules on admissibility, we conclude that the Board erred in admitting Contention 4B.

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<sup>1</sup> See *supra* p. 7.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NEXTERA ENERGY SEABROOK, LLC	)	DOCKET NO. 50-443-LR
(Seabrook Station, Unit 1)	)	
	)	
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-12-05) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea ]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 8<sup>th</sup> day of March 2012

# **EXHIBIT**

# **7**

**C****Effective:[See Text Amendments]**

United States Code Annotated Currentness

Title 28. Judiciary and Judicial Procedure (Refs &amp; Annos)

Part VI. Particular Proceedings

Chapter 158. Orders of Federal Agencies; Review (Refs &amp; Annos)

**→→ § 2348. Representation in proceeding; intervention**

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

CREDIT(S)

(Added Pub.L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 623.)

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

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# **EXHIBIT**

# **8**

Westlaw

Page 1

17 F.3d 1515, 305 U.S.App.D.C. 162, 1994-1 Trade Cases P 70,543, 28 Fed.R.Serv.3d 1069  
(Cite as: 17 F.3d 1515, 305 U.S.App.D.C. 162)

P

United States Court of Appeals,  
District of Columbia Circuit.  
CITY OF CLEVELAND, OHIO, Petitioner,  
v.  
NUCLEAR REGULATORY COMMISSION and  
The United States of America, Respondents,  
Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, City of Brook Park, Ohio, Intervenor.  
OHIO EDISON COMPANY, Petitioner,  
v.  
NUCLEAR REGULATORY COMMISSION and  
The United States of America, Respondents,  
City of Cleveland, Ohio, Intervenor.  
CLEVELAND ELECTRIC ILLUMINATING COMPANY and The Toledo Edison Company, Petitioners,  
v.  
NUCLEAR REGULATORY COMMISSION and  
The United States of America, Respondents,  
City of Cleveland, Ohio, Intervenor.  
CITY OF CLEVELAND, OHIO, Petitioner,  
v.  
NUCLEAR REGULATORY COMMISSION, Respondent.

Nos. 92-1532, 93-1665, 93-1672 and 93-1673.  
March 18, 1994.

Electric cooperative moved for leave to intervene in proceedings concerning antitrust conditions included in operating licenses for two nuclear power plants. The Court of Appeals held that electric cooperative lacked standing and thus could not intervene as of right.

Motion denied.

West Headnotes

**[1] Federal Civil Procedure 170A ⚡331**

170A Federal Civil Procedure  
170AII Parties  
170AII(H) Intervention

**170AII(H)2 Particular Intervenor**

**170Ak331 k. In General. Most Cited**

**Cases**

Electric cooperative which lacked economic relationship to nuclear power plants would not be permitted to intervene in proceedings concerning antitrust conditions included in operating licenses for power plants; cooperative's concern about precedential effect of adverse decision was not sufficient to confer standing on cooperative. 28 U.S.C.A. § 2348; U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

**[2] Federal Civil Procedure 170A ⚡315**

170A Federal Civil Procedure

170AII Parties

170AII(H) Intervention

170AII(H)1 In General

170Ak314 Grounds and Factors

170Ak315 k. Interest of Applicant in General. Most Cited Cases

Because intervenor as of right seeks to participate on equal footing with original parties to the suit, he must satisfy standing requirements imposed on those parties. 28 U.S.C.A. § 2348; U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

**\*1515 \*\*162 Motion for Leave to Intervene.** D. Biard MacGuineas and Bennett Boskey, Washington, DC, attorneys, were on the Motion for Leave to Intervene filed by Alabama Electric Cooperative, Inc.

Gerald Charnoff and Mitchell S. Ross, Washington, DC, attorneys, were on the Opposition to the Motion for Leave to Intervene filed by petitioner Ohio Edison Company.

Before: SILBERMAN, BUCKLEY, and GINSBURG, Circuit Judges.

Opinion PER CURIAM.

PER CURIAM:

17 F.3d 1515, 305 U.S.App.D.C. 162, 1994-1 Trade Cases P 70,543, 28 Fed.R.Serv.3d 1069  
(Cite as: 17 F.3d 1515, 305 U.S.App.D.C. 162)

[1] Alabama Electric Cooperative, Inc. (AEC) moves for leave to intervene in these proceedings concerning the antitrust conditions included in the operating licenses for two nuclear power plants. Because AEC has no economic relationship to the power plants and because AEC's concern about the precedential effect of an adverse decision is not \*1516 \*\*163 sufficient to confer standing, we deny the motion for leave to intervene.

## I.

Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company are part owners of the Perry and Davis-Besse Nuclear Power Plants. In 1987 and 1988, the companies asked the Nuclear Regulatory Commission (NRC) to suspend the antitrust conditions included in the plants' operating licenses on the ground that the actual cost of electricity from the plants was higher than the cost of electricity from alternative sources. Rejecting the companies' narrow focus on cost comparisons, the NRC's Atomic Safety and Licensing Board denied their requests on November 18, 1992. The Board's order became final agency action on August 3, 1993, when the time for the NRC to act on the companies' petitions for review expired without the Commission granting the petitions in whole or in part. These petitions followed.<sup>FN1</sup>

<sup>FN1</sup>. The City of Cleveland petitions for review of related orders in the remaining consolidated cases. AEC moved for leave to intervene before these cases were consolidated, however, and AEC did not seek leave to intervene in the City of Cleveland's petitions.

AEC does not operate in petitioners' geographic market or have any other economic relationship with petitioners or their direct competitors. In the 1970s and early 1980s, however, AEC did lead a successful effort to have antitrust conditions included in the operating license for Alabama Power Company's Joseph M. Farley Nuclear Plant. See *Alabama Power Co. v. NRC*, 692 F.2d 1362 (11th Cir.1982), cert. denied, 464 U.S. 816, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983). In light of AEC's experience in this area, the Atomic Safety and Licensing Board granted AEC discretionary intervention in the agency proceedings concerning the Perry and Davis-Besse plants. However, the Board denied AEC's motion to intervene as of right for lack of standing.

AEC now moves for leave to intervene in the proceedings before this court under 28 U.S.C. § 2348. Section 2348 provides:

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order.

AEC asserts that it should be allowed to intervene in support of the agency because petitioners' claims are "comparable to those which might at some time be asserted by Alabama Power Company to open up NRC's order protecting AEC in the *Alabama Power* case," AEC would thus be harmed by any adverse decision in these cases, and such a decision "might even provoke Alabama Power Company into seeking to open up that order." Reply to Opposition to Motion for Leave to Intervene at 2. Ohio Edison opposes the motion on the ground that AEC lacks Article III standing.

## II.

We have not previously specifically decided whether a movant for leave to intervene in proceedings before this court under § 2348 must have Article III standing when there is a live case or controversy between the parties already in the suit. Cf. *Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283-84 (D.C.Cir.1993) (holding that intervenor must have Article III standing to continue suit if court lacks jurisdiction over action brought by original parties). We have, however, addressed the standing requirement with respect to intervention as of right in district court proceedings under FED.R.CIV.P. 24(a)(2).

Rule 24(a)(2) allows intervention as of right

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant \*1517 \*\*164 is so situated

17 F.3d 1515, 305 U.S.App.D.C. 162, 1994-1 Trade Cases P 70,543, 28 Fed.R.Serv.3d 1069  
(Cite as: 17 F.3d 1515, 305 U.S.App.D.C. 162)

that the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C.Cir.1984), the original parties had settled their litigation in district court by agreeing that certain tapes concerning Martin Luther King would be sealed for 50 years, with disclosures only by court order. Six years after the district court entered the sealing order, Senator Jesse Helms sought access to the tapes in order to cast an informed vote on the bill making King's birthday a federal holiday. He therefore moved for leave to intervene under Rule 24. In affirming the denial of Helms's motion, we stated:

Rule 24(a)(2) requires the intervenor to demonstrate "an interest relating to the property or transaction which is the subject of the action." The rule impliedly refers not to any interest the applicant can put forward, but only to a legally protectable one. See Donaldson v. United States, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971) (applicant must demonstrate "significantly protectable interest"). Such a gloss upon the rule is in any case required by Article III of the Constitution. See Allen v. Wright, [468] U.S. [737, 750-52], 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984) (discussing limits to standing); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970) (discussing "zone of interest" requirement).

747 F.2d at 779 (original emphasis).

[2] Kelley establishes that a movant for leave to intervene under Rule 24(a)(2) must have Article III standing to participate in proceedings before the district court. See also Cook v. Boorstin, 763 F.2d 1462, 1470 (D.C.Cir.1985) ("[A]n intervenor of right, just like an ordinary plaintiff, must have standing."). Although not expressly stated in Kelley, the underlying rationale for this requirement is clear: because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties. Intervenors in proceedings before this court under § 2348 likewise enjoy many of the same rights afforded the original parties. For example, intervenors may file briefs, participate in oral argument with the consent of the party they support, and, most important, petition

for rehearing and petition the Supreme Court for writs of certiorari. Cf. Diamond v. Charles, 476 U.S. 54, 68-71, 106 S.Ct. 1697, 1706-1708, 90 L.Ed.2d 48 (1986) (dismissing appeal because Rule 24 intervenor was sole appellant and he lacked standing). Thus, absent a material distinction between Kelley and the present case, AEC should also be required to demonstrate Article III standing.

AEC does not address Kelley directly. Rather, relying on the text of § 2348, AEC argues that it need only show an "interest[ ] ... affected by the order of the agency," not an interest satisfying the requirements of Article III. AEC emphasizes that it does not seek to participate as a party as of right under the second sentence of § 2348 ("The agency, and any party in interest in the proceeding before the agency whose interest will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties [before this court] of their own motion and as of right...."), but as an intervenor under the third sentence of § 2348 ("Communities, associations, corporations, firms, and individuals whose interests are affected by the order of the agency, may intervene in any proceeding to review the order.").<sup>FN2</sup>

FN2. Although AEC characterizes the latter provision as discretionary, the provision is not discretionary on its face, and AEC provides no authority construing it as such.

AEC's position is unpersuasive. There is no reason to read the statute as indicating that Congress wished to confer a right to intervene on a party that lacked constitutional standing (which would itself raise a constitutional question). To be sure, § 2348 does not expressly require that an intervenor's interest "relate[ ] to the property or transaction which is the subject of the action," FED.R.CIV.P. 24(a)(2), or that he have Article III standing. As in Kelley and Cook, however, AEC seeks to participate with many of the same rights enjoyed by the original parties. \*1518 \*\*165 Thus, despite the absence of an express statutory command, AEC must meet the standing requirements that Article III imposes on the parties.

As noted above, AEC does not operate in petitioners' geographic market or have any other economic relationship with petitioners or their direct competitors. AEC's only concern is that Alabama Power Company "might at some time" seek to reopen

17 F.3d 1515, 305 U.S.App.D.C. 162, 1994-1 Trade Cases P 70,543, 28 Fed.R.Serv.3d 1069  
(Cite as: 17 F.3d 1515, 305 U.S.App.D.C. 162)

the proceedings concerning the Farley license if petitioners succeed before this court. We agree with the agency, however, that AEC's concern is "unduly remote" and "too 'academic' to cloak it with standing." In the Matter of Ohio Edison Co., Cleveland Electric Illuminating Co., and Toledo Edison Co., 34 NRC 229, 249 (1991). Accordingly, we deny AEC's motion for leave to intervene. AEC may, however, participate as *amicus curiae*.

C.A.D.C., 1994.

City of Cleveland, Ohio v. Nuclear Regulatory Com'n  
17 F.3d 1515, 305 U.S.App.D.C. 162, 1994-1 Trade Cases P 70,543, 28 Fed.R.Serv.3d 1069

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# **EXHIBIT**

# **9**

Westlaw

112 S.Ct. 2130

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

Page 1

P

Supreme Court of the United States  
Manuel LUJAN, Jr., Secretary of the Interior, Petitioner  
v.

DEFENDERS OF WILDLIFE, et al.

No. 90-1424.  
Argued Dec. 3, 1991.  
Decided June 12, 1992.

Environmental groups brought action challenging regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, dismissed for lack of standing, 658 F.Supp. 43. The Court of Appeals for the Eighth Circuit reversed, 851 F.2d 1035. The District Court entered judgment in favor of environmental groups, 707 F.Supp. 1082, and the Court of Appeals affirmed, 911 F.2d 117. On certiorari, the Supreme Court, Justice Scalia, held that: (1) plaintiffs did not assert sufficiently imminent injury to have standing, and (2) plaintiffs' claimed injury was not redressable.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice Souter joined.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun dissented and filed an opinion in which Justice O'Connor joined.

West Headnotes

# **[1] Constitutional Law 92 ↪2330**

92 Constitutional Law

## **92XX Separation of Powers**

### **92XX(A) In General**

**92k2330 k. In General. Most Cited Cases**  
(Formerly 92k50)

Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. U.S.C.A. Const. Art. 1, § 1; Art. 2, § 1, cl. 1; Art. 3, § 1 et seq.

## **[2] Federal Civil Procedure 170A ↪103.2**

### **170A Federal Civil Procedure**

#### **170AII Parties**

##### **170AII(A) In General**

##### **170Ak103.1 Standing**

**170Ak103.2 k. In General; Injury or Interest. Most Cited Cases**  
(Formerly 170Ak103.1)

Though some of its elements express merely prudential considerations that are part of judicial self-government, core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

## **[3] Federal Civil Procedure 170A ↪103.2**

### **170A Federal Civil Procedure**

#### **170AII Parties**

##### **170AII(A) In General**

##### **170Ak103.1 Standing**

**170Ak103.2 k. In General; Injury or Interest. Most Cited Cases**

## **Federal Civil Procedure 170A ↪103.3**

### **170A Federal Civil Procedure**

#### **170AII Parties**

##### **170AII(A) In General**

##### **170Ak103.1 Standing**

**170Ak103.3 k. Causation; Redressability. Most Cited Cases**



112 S.Ct. 2130

Page 2

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

**Federal Civil Procedure 170A ⚡103.4**170A Federal Civil Procedure170AII Parties170AII(A) In General170Ak103.1 Standing170Ak103.4 k. Rights of Third Parties or Public. Most Cited Cases

Irreducible constitutional minimum of standing requires that plaintiff have suffered an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical; that there be a causal connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court; and that it be likely, as opposed to merely speculative, that injury will be redressed by a favorable decision.

**[4] Federal Civil Procedure 170A ⚡103.2**170A Federal Civil Procedure170AII Parties170AII(A) In General170Ak103.1 Standing170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

In order for injury to be "particularized," it must affect the plaintiff in a personal and individual way.

**[5] Federal Civil Procedure 170A ⚡103.2**170A Federal Civil Procedure170AII Parties170AII(A) In General170Ak103.1 Standing170Ak103.2 k. In General; Injury or Interest. Most Cited Cases  
(Formerly 170Bk247)

Party invoking federal jurisdiction bears the burden of establishing elements of standing.

**[6] Federal Civil Procedure 170A ⚡103.2**170A Federal Civil Procedure170AII Parties170AII(A) In General170Ak103.1 Standing170Ak103.2 k. In General; Injury or Interest. Most Cited Cases**Federal Civil Procedure 170A ⚡103.5**170A Federal Civil Procedure170AII Parties170AII(A) In General170Ak103.1 Standing170Ak103.5 k. Pleading. Most Cited Cases

Elements of standing are not merely pleading requirements but, rather, are an indispensable part of the plaintiff's case, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, with the manner and degree of evidence required at successive stages of litigation.

**[7] Federal Civil Procedure 170A ⚡103.2**170A Federal Civil Procedure170AII Parties170AII(A) In General170Ak103.1 Standing170Ak103.2 k. In General; Injury or Interest. Most Cited Cases**Federal Civil Procedure 170A ⚡2544**170A Federal Civil Procedure170AXVII Judgment170AXVII(C) Summary Judgment170AXVII(C)3 Proceedings170Ak2542 Evidence170Ak2544 k. Burden of Proof. Most Cited Cases

At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing; in response to summary judgment motion, plaintiff can no longer rest on mere allegations but must set forth by affidavit or other evidence the specific facts which will be taken as true for purposes of summary judgment; at the final stage, those facts, if controverted, must be supported ade-

112 S.Ct. 2130

Page 3

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913  
(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

quately by the evidence adduced at trial. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

#### **[8] Federal Civil Procedure 170A ⚡103.3**

##### 170A Federal Civil Procedure

###### 170AII Parties

###### 170AII(A) In General

###### 170Ak103.1 Standing

170Ak103.3 k. Causation; Redressability. Most Cited Cases

When plaintiff's asserted injury arises from the government's allegedly unlawful regulation or lack of regulation of someone else, causation and redressability required for standing hinge on response of the regulated or regulable third party to the government action or inaction and on the response of others as well.

#### **[9] Environmental Law 149E ⚡651**

##### 149E Environmental Law

###### 149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

149Ek651 k. Cognizable Interests and Injuries, in General. Most Cited Cases  
(Formerly 187k3.5, 187k31/2)

Desire to use or observe animal species, even for purely aesthetic purposes, is a cognizable interest for standing purposes.

#### **[10] Federal Civil Procedure 170A ⚡2544**

##### 170A Federal Civil Procedure

###### 170AXVII Judgment

###### 170AXVII(C) Summary Judgment

###### 170AXVII(C)3 Proceedings

###### 170Ak2542 Evidence

170Ak2544 k. Burden of Proof. Most Cited Cases

To survive summary judgment motion for dismissal of suit under Endangered Species Act for lack of standing, environmental groups had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad but, also that

one or more of the groups' members would thereby be directly affected, apart from their special interest in the subject. Endangered Species Act of 1973, § 11(g), as amended, 16 U.S.C.A. § 1540(g).

#### **[11] Environmental Law 149E ⚡652**

##### 149E Environmental Law

###### 149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases  
(Formerly 187k3.5, 187k31/2)

Affidavits in which members of organizations stated that they had previously traveled to places in the world where projects being funded by the Agency for International Development (AID) were taking place and that they hoped to be able to return and observe endangered species in those locations did not show that damage to species from the projects would produce imminent injury to them, and organizations thus did not have standing to challenge regulation of the Secretary of the Interior requiring that other agencies consult under the Endangered Species Act only with respect to actions in the United States or on the high seas. Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

#### **[12] Federal Civil Procedure 170A ⚡103.2**

##### 170A Federal Civil Procedure

###### 170AII Parties

###### 170AII(A) In General

###### 170Ak103.1 Standing

170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

Imminence of injury is demanded for standing even when the alleged harm does not depend upon affirmative actions of third parties which are beyond the plaintiff's control.

#### **[13] Environmental Law 149E ⚡651**

##### 149E Environmental Law

###### 149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

112 S.Ct. 2130

Page 4

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

149Ek651 k. Cognizable Interests and Injuries, in General. Most Cited Cases

(Formerly 199k25.15(4.1), 199k25.15(4) Health and Environment)

"Ecosystem nexus," under which a person who uses any part of a continuous ecosystem may be considered adversely affected by activity, does not provide basis for standing to challenge the activity.

#### [14] Environmental Law 149E ⚡656

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

149Ek656 k. Other Particular Parties. Most Cited Cases

(Formerly 187k3.5, 187k31/2)

Persons seeking to challenge regulation of the Secretary of the Interior which required other agencies to consult under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas, and not in other countries, could not obtain standing under a "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing, or under a "vocational nexus" approach, under which anyone with a professional interest in the animals can sue. Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

#### [15] Environmental Law 149E ⚡652

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases  
(Formerly 187k3.5, 187k31/2)

Harm allegedly suffered by members of environmental groups as result of federal funding of projects in other countries which might threaten endangered species could not be redressed in action against Secretary of the Interior challenging his regulation which required consultation under the Endangered

Species Act by other governmental agencies only with respect to funding of projects in the United States and on the high seas, and groups thus lacked standing, as other agencies denied the authority of the Secretary to order consultation and would not be bound by an order and action to which they were not a party. (Per Justice Scalia with the Chief Justice and two Justices concurring and two Justices concurring in part and in the judgment.) Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

#### [16] Federal Civil Procedure 170A ⚡103.3

170A Federal Civil Procedure

170AII Parties

170AII(A) In General

170Ak103.1 Standing

170Ak103.3 k. Causation; Redressability. Most Cited Cases

Existence of federal jurisdiction ordinarily depends upon facts as they exist when the complaint is filed, and later participation in a suit by those parties necessary for plaintiffs' injury to be redressed will not give plaintiffs standing when their injury was not redressable by any of the parties to the suit at the time that it was filed. (Per Justice Scalia with the Chief Justice and two Justices concurring and two Justices concurring in part and in the judgment.)

#### [17] Environmental Law 149E ⚡656

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

149Ek656 k. Other Particular Parties. Most Cited Cases

(Formerly 187k3.5, 187k31/2)

Members of environmental groups who asserted injury due to lack of opportunity to observe endangered species as a result of projects in other countries partially funded by the Agency for International Development (AID) did not show an injury which would be redressable as a result of challenge to regulation of the Secretary of the Interior which required AID to consult under the Endangered Species Act only with respect to projects in the United States and on the high seas where AID provided less than 10% of the funding

112 S.Ct. 2130

Page 5

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

for project about which plaintiffs complained and there was nothing to indicate that the project would be suspended or do less harm to endangered species if that funding were eliminated. (Per Justice Scalia with Chief Justice and two Justices concurring and two Justices concurring in part and in judgment.) Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

#### [18] Environmental Law 149E ↪ 656

##### 149E Environmental Law

##### 149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek Review; Standing

149Ek656 k. Other Particular Parties. Most Cited Cases

(Formerly 187k3.5, 187k31/2)

Persons challenging regulation of the Secretary of the Interior requiring other agencies to consult with him under the Endangered Species Act only with respect to funding of projects in the United States and on the high seas did not have standing on basis of the "citizen-suit" provision of the Endangered Species Act. Endangered Species Act of 1973, §§ 7(a)(2), 11(g), as amended, 16 U.S.C.A. §§ 1536(a)(2), 1540(g).

#### [19] Federal Civil Procedure 170A ↪ 103.4

##### 170A Federal Civil Procedure

##### 170AII Parties

##### 170AII(A) In General

##### 170Ak103.1 Standing

170Ak103.4 k. Rights of Third Parties or Public. Most Cited Cases

Plaintiff raising only a generally available grievance about government, and claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large does not state an Article III case or controversy. U.S.C.A. Const. Art. 3, § 1 et seq.

**\*\*2133 Syllabus** <sup>FN\*</sup>

<sup>FN\*</sup> The syllabus constitutes no part of the opinion of the Court but has been prepared by

the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between petitioner Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species. Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)'s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section's geographic scope to the United States and the high seas. Respondents, wildlife conservation and other environmental organizations, filed an action in the District Court, seeking a declaratory judgment that the new regulation erred as to § 7(a)(2)'s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Court of Appeals reversed the District Court's dismissal of the suit for lack of standing. Upon remand, on cross-motions for summary judgment, the District Court denied the Secretary's motion, which renewed his objection to standing, and granted respondents' motion, ordering the Secretary to publish a new rule. The Court of Appeals affirmed.

**\*\*2134 Held:** The judgment is reversed, and the case is remanded.

911 F.2d 117, (CA 8 1990), reversed and remanded.

Justice SCALIA delivered the opinion of the Court, except as to Part III-B, concluding that respondents lack standing to seek judicial review of the rule. Pp. 2135-2140, 2142-2146.

(a) As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, *inter alia*, that they have suffered an injury in fact, *i.e.*, a concrete and particularized, actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim. Standing is particularly difficult to



show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object. Pp. 2135-2137.

**\*556** b) Respondents did not demonstrate that they suffered an injury in fact. Assuming that they established that funded activities abroad threaten certain species, they failed to show that one or more of their members would thereby be directly affected apart from the members' special interest in the subject. See *Sierra Club v. Morton*, 405 U.S. 727, 735, 739, 92 S.Ct. 1361, 1366, 1368, 31 L.Ed.2d 636. Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an "imminent" injury. Respondents also mistakenly rely on a number of other novel standing theories. Their theory that any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use is inconsistent with this Court's opinion in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695. And they state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals. Pp. 2137-2140.

(c) The Court of Appeals erred in holding that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding their inability to allege any separate concrete injury flowing from that failure. This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an *Article III* case or controversy. See, e.g., *Fairchild v. Hughes*, 258 U.S. 126, 129-130, 42 S.Ct. 274, 275, 66 L.Ed. 499. Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important con-

stitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. Pp. 2142-2146.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III-B, in which REHNQUIST, C.J., and WHITE and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post*, p. 2146. STEVENS, J., filed an opinion concurring in the judgment, *post*, **\*\*2135 \*557** p. 2147. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 2151. Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Robert L. Klarquist, David C. Shilton, Thomas L. Sansonetti*, and *Michael Young*.

*Brian B. O'Neill* argued the cause for respondents. With him on the brief were *Steven C. Schroer* and *Richard A. Duncan*.\*

\* *Terence P. Ross, Daniel J. Popeo*, and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the City of Austin et al. by *William A. Butler, Angus E. Crane, Michael J. Bean, Kenneth Oden, James M. McCormack*, and *Wm. Robert Irvin*; for the American Association of Zoological Parks & Aquariums et al. by *Ronald J. Greene* and *W. Hardy Callcott*; for the American Institute of Biological Sciences by *Richard J. Wertheimer* and *Charles M. Chambers*; and for the Ecotopica Foundation of Brazil et al. by *Durwood J. Zaelke*.

A brief of *amici curiae* was filed for the State of Texas et al. by *Patrick J. Mahoney, Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Nancy N. Lynch, Mary Ruth Holder*, and *Shannon J. Kilgore*, Assistant Attorneys General, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Robert A. Butterworth*, Attorney General of Florida, *Michael E. Carpenter*, At-

112 S.Ct. 2130

Page 7

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913  
(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

torney General of Maine, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Robert J. Del Tufo, Attorney General of New Jersey, Robert Abrams, Attorney General of New York, Lee Fisher, Attorney General of Ohio, and Jeffrey L. Amestoy, Attorney General of Vermont, Victor A. Kovner, Leonard J. Koerner, Neal M. Janey, and Louise H. Renne.

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part III-B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered \*558 Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

## I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 et seq., seeks to protect species of animals against threats to their continuing existence caused by man. See generally TVA v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.” 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secre-

tary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting \*559 § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. Defenders of Wildlife v. Hodel, 658 F.Supp. 43, 47-48 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. Defenders of Wildlife v. Hodel, 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. Defenders of Wildlife v. Hodel, 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915, 111 S.Ct. 2008, 114 L.Ed.2d 97 (1991).

## II

[1][2] While the Constitution of the United States divides all power conferred upon \*\*2136 the Federal Government into “legislative Powers,” Art. I, § 1, “[t]he executive Power,” Art. II, § 1, and “[t]he judicial Power,” Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to “Cases” and “Controversies,” but an executive inquiry can bear the name “case” (the Hoffa case) and a legislative dispute can bear the name “controversy” (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of

separation of powers depends\*560 largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In *The Federalist* No. 48, Madison expressed the view that “[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere,” whereas “the executive power [is] restrained within a narrower compass and ... more simple in its nature,” and “the judiciary [is] described by landmarks still less uncertain.” *The Federalist* No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the “Cases” and “Controversies” that are of the justiciable sort referred to in *Article III*—“serv[ing] to identify those disputes which are appropriately resolved through the judicial process,” *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of *Article III*. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

[3][4] Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.*, at 756, 104 S.Ct., at 3327; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16, 92 S.Ct. 1361, 1368-1369, n. 16, 31 L.Ed.2d 636 (1972); <sup>FN1</sup> and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ ” *Whitmore*, *supra*, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” \*561 *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Id.*, at 38, 43, 96 S.Ct., at 1924, 1926.

FN1. By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

[5][6][7] The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); *Warth*, *supra*, 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889, 110 S.Ct. 3177, 3185-3189, 111 L.Ed.2d 695 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-115, and n. 31, 99 S.Ct. 1601, 1614-1615, and n. 31, 60 L.Ed.2d 66 (1979); \*2137 *Simon*, *supra*, 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; *Warth*, *supra*, 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we “presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” *National Wildlife Federation*, *supra*, 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such “mere allegations,” but must “set forth” by affidavit or other evidence “specific facts,” *Fed. Rule Civ. Proc.* 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be “supported adequately by the evidence adduced at trial.” *Gladstone*, *supra*, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

[8] When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or for-gone action) at issue. If he is, there is ordinarily little question that the action or inaction has \*562 caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the gov-



ernment's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," ASARCO Inc. v. Kadish, 490 U.S. 605, 615, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989) (opinion of KENNEDY, J.); see also Simon, supra, 426 U.S., at 41-42, 96 S.Ct., at 1925, 1926; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g.*, Warth, supra, 422 U.S., at 505, 95 S.Ct., at 2208. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. Allen, supra, 468 U.S., at 758, 104 S.Ct., at 3328; Simon, supra, 426 U.S., at 44-45, 96 S.Ct., at 1927; Warth, supra, 422 U.S., at 505, 95 S.Ct., at 2208.

### III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

#### A

[9][10] Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of \*563 standing. See, *e.g.*, Sierra Club v. Morton, 405 U.S., at 734, 92 S.Ct., at 1366. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.*, at 734-735, 92 S.Ct., at 1366. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by \*\*2138

funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.*, at 735, 739, 92 S.Ct., at 1366, 1368. See generally Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

[11][12] With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members-Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [ , which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.*, at 145-146. When Ms. Skilbred was asked \*564 at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.*, at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species-though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Ms. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself show a

present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' ” Lyons, 461 U.S., at 102, 103 S.Ct., at 1665 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an “inten[t]” to return to the places they had visited before-where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species-is simply not enough. Such “some day” intentions-without any description of concrete plans, or indeed even any specification of *when* the some day will be-do not support a finding of the “actual or imminent” injury that our cases require. See *supra*, at 2136.<sup>FN2</sup>

<sup>FN2</sup>. The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because “a reasonable finder of fact could conclude ... that ... Kelly or Skilbred will soon return to the project sites.” *Post*, at 2152. This analysis suffers either from a factual or from a legal defect, depending on what the “soon” is supposed to mean. If “soon” refers to the standard mandated by our precedents-that the injury be “imminent,” Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990)-we are at a loss to see how, as a factual matter, the standard can be met by respondents' mere profession of an intent, some day, to return. But if, as we suspect, “soon” means nothing more than “in this lifetime,” then the dissent has undertaken quite a departure from our precedents. Although “imminence” is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes-that the injury is “ ‘certainly impending,’ ” ” *id.*, at 158, 110 S.Ct., at 1725 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of

deciding a case in which no injury would have occurred at all. See, e.g., *id.*, at 156-160, 110 S.Ct., at 1723-1726; Los Angeles v. Lyons, 461 U.S. 95, 102-106, 103 S.Ct. 1660, 1665-1667, 75 L.Ed.2d 675 (1983).

There is no substance to the dissent's suggestion that imminence is demanded only when the alleged harm depends upon “the affirmative actions of third parties beyond a plaintiff's control,” *post*, at 2153. Our cases *mention* third-party-caused contingency, naturally enough; but they also mention the plaintiff's failure to show that he will soon expose *himself* to the injury, see, e.g., Lyons, *supra*, at 105-106, 103 S.Ct., at 1666-1667; O'Shea v. Littleton, 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974); Ashcroft v. Mattis, 431 U.S. 171, 172-173, n. 2, 97 S.Ct. 1739, 1740 n. 2, 52 L.Ed.2d 219 (1977) (*per curiam*). And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, “demand ... detailed descriptions” of damages, such as a “nightly schedule of attempted activities” from plaintiffs alleging loss of consortium. *Post*, at 2153. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

**\*\*2139 [13] \*565** Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled “ecosystem nexus,” proposes that any person who uses *any part* of a “contiguous ecosystem” adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in National Wildlife

112 S.Ct. 2130

Page 11

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

Federation, which held that a plaintiff claiming injury from environmental damage\*566 must use the area affected by the challenged activity and not an area roughly “in the vicinity” of it. 497 U.S., at 887-889, 110 S.Ct., at 3188-3189; see also Sierra Club, 405 U.S., at 735, 92 S.Ct., at 1366. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

[14] Respondents' other theories are called, alas, the “animal nexus” approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the “vocational nexus” approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not “an ingenious academic exercise in the conceivable,” United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals \*\*2140 of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that \*567 might have been the subject of his interest will no longer exist, see Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably

harmed by a single project affecting some portion of that species with which he has no more specific connection.<sup>FN3</sup>

FN3. The dissent embraces each of respondents' “nexus” theories, rejecting this portion of our analysis because it is “unable to see how the distant location of the destruction necessarily (for purposes of ruling at summary judgment) mitigates the harm” to the plaintiff. *Post*, at 2154. But summary judgment must be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, “certainly impending.” The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not “necessarily” prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent's position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in Sierra Club, for example, could have avoided the necessity of establishing anyone's use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. Justice BLACKMAN's accusation that a special rule is being crafted for “environmental claims,” *post*, at 2154, is correct, but *he* is the craftsman.

Justice STEVENS, by contrast, would allow standing on an apparent “animal nex-



us” theory to all plaintiffs whose interest in the animals is “genuine.” Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post*, at 2148-2149, and n. 2. We decline to join Justice STEVENS in this Linnaean leap. It is unclear to us what constitutes a “genuine” interest; how it differs from a “nongenuine” interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

#### \*568 B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, “suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication.” *Allen*, 468 U.S., at 759-760, 104 S.Ct., at 3329.

[15] The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents’ alleged injury unless the funding agencies were bound by the Secretary’s regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary’s controlling authority, see, e.g., 16 U.S.C. § 1533(a)(1) (“The Secretary shall” promulgate regulations determining endangered species); § 1535(d)(1) \*\*2141 (“The Secretary is authorized to provide financial assistance to any State”), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory neces-

sity, lies with \*569 the agencies, see § 1536(a)(2) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any” funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed.Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary’s authority. (During the period when the Secretary took the view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

[16] Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary’s authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents’ alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.<sup>FN4</sup> The \*570 Court of Appeals tried to finesse this problem by simply proclaiming that “[w]e are satisfied that an injunction requiring the Secretary to publish [respondents’ desired] regulatio[n] ... would result in consultation.” *Defenders of Wildlife*, 851 F.2d, at 1042, 1043-1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the \*\*2142 position that the regulation is not binding.<sup>FN5</sup> The \*571 short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

<sup>FN4</sup>. We need not linger over the dissent’s facially impracticable suggestion, *post*, at 2154-2155, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its

own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be “collaterally estopped” to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post*, at 2155-2156: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. “The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*” Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989) (emphasis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post*, at 2156, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.*, that Rule 19 of the Federal Rules of Civil Procedure, governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the Article III standing requirement and the “*complete relief*” referred to by Rule 19 are not identical. Finally, we reach the dissent's contention, *post*, at 2156, n. 4, that by refusing to waive our settled rule for purposes of this case we have made “federal subject-matter jurisdiction ... a one-way street running the Executive Branch's way.” That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct.

But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a pre-existing standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

**FN5.** Seizing on the fortuity that the case has made its way to *this* Court, Justice STEVENS protests that no agency would ignore “an authoritative construction of the [ESA] by this Court.” *Post*, at 2149. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

[17] A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in Simon, 426 U.S., at 43-44, 96 S.Ct., at 1926-1927, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.<sup>FN6</sup> There is no standing.

**FN6.** The dissent criticizes us for “overlook[ing]” memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post*, at 2157-2158. The memoranda, however, contain no indication whatever that the projects will cease or be

112 S.Ct. 2130

Page 14

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the " 'negative impacts to the wildlife,' " *post*, at 2157, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.

#### IV

[18] The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence\*572 a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 911 F.2d, at 121-122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). <sup>FN7</sup> Nor is it simply a case where concrete injury has been \*\*2143 suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the \*573 unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, non-instrumental "right" to have the Executive observe the procedures required by law. We reject this view. <sup>FN8</sup>

<sup>FN7</sup>. There is this much truth to the assertion

that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

<sup>FN8</sup>. The dissent's discussion of this aspect of the case, *post*, at 2157-2160, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties ... so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post*, at 2159. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in *Japan*



504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913  
(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

*Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), *post*, at 2158-2159, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting," see 478 U.S., at 230-231, n. 4, 106 S.Ct., at 2866, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 812-813 (CA9 1987).

[19] We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that \*574 no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. For example, in *Fairchild v. Hughes*, 258 U.S. 126, 129-130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

"[This is] not a case within the meaning of ... Article III.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit...." *Ibid*.

In *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

"The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the

result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will execute \*\*2144 an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 488-489, 43 S.Ct., at 601.

In *Ex parte Lévit*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2. \*575 "It is an established principle," we said, "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433-434, 72 S.Ct. 394, 396-397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.'" *Richardson, supra*, at 171, 176-177, 94 S.Ct., at 2944, 2946. And in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the



112 S.Ct. 2130

Page 16

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913  
(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

military Reserves. We said that the challenged action, “standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind....” *Schlesinger, supra*, at 217, 220, 94 S.Ct., at 2930, 2932. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because \*576 “ ‘assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.’ ” *Allen*, 468 U.S., at 754, 104 S.Ct., at 3326; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 764, 70 L.Ed.2d 700 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal’s execution on the basis of “ ‘the public interest protections of the Eighth Amendment’ ”; once again, “[t]his allegation raise [d] only the ‘generalized interest of all citizens in constitutional governance’ ... and [was] an inadequate basis on which to grant ... standing.” *Whitmore*, 495 U.S., at 160, 110 S.Ct., at 1725.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental \*\*2145 to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches. “The province of the court,” as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), “is, solely, to decide on the rights of individuals.” Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies’ observance of a particular, statutorily prescribed procedure) can be converted into an individual

right by a statute that denominates it as such, and \*577 that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department,” *Massachusetts v. Mellon*, 262 U.S., at 489, 43 S.Ct., at 601, and to become “ ‘virtually continuing monitors of the wisdom and soundness of Executive action.’ ” *Allen, supra*, 468 U.S., at 760, 104 S.Ct., at 3329 (quoting *Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972)). We have always rejected that vision of our role:

“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.” *Stark v. Wickard*, 321 U.S. 288, 309-310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944) (footnote omitted).

\*578 “Individual rights,” within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club*, 405 U.S., at 740-741, n. 16, 92 S.Ct., at 1369, n. 16.

Nothing in this contradicts the principle that “[t]he ... injury required by Art. III may exist solely by

112 S.Ct. 2130

Page 17

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913  
(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

virtue of 'statutes creating legal rights, the invasion of which creates standing.' " Warth, 422 U.S., at 500, 95 S.Ct., at 2206 (quoting Linda R. S. v. Richard D., 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by Linda R. S. as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-212, 93 S.Ct. 364, 366-368, 34 L.Ed.2d 415 (1972), and injury to a company's interest in marketing its product free from competition, see Hardin v. Kentucky Utilities Co., 390 U.S. 1, 6, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968)). As we said in Sierra Club, "[Statutory] broadening [of] the categories of injury that may be alleged in support \*\*2146 of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738, 92 S.Ct., at 1368. Whether or not the principle set forth in Warth can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

\* \* \*

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

*It is so ordered.*

\*579 Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III-A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." Sierra Club v. Morton, 405 U.S. 727, 735, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). This component of the standing inquiry is not satisfied unless

"[p]laintiffs ... demonstrate a 'personal stake in the outcome.' ... Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " Los Angeles v. Lyons, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (citations omitted).

While it may seem trivial to require that Ms. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante*, at 2138, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see Sierra Club v. Morton, *supra*, 405 U.S., at 735, n. 8, 92 S.Ct., at 1366, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, *ante*, at 2139-2140, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986) ("[R]espondents ... undoubtedly have alleged a sufficient 'injury in fact' in that \*580 the whale watching and studying of their members will be adversely affected by continued whale harvesting").

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III-B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), or Ogden seeking an

injunction to halt Gibbons' steamboat operations, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, \*\*2147 and I do not read the Court's opinion to suggest a contrary view. See Warth v. Seldin, 422 U.S. 490, 500, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *ante*, at 2145-2146. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person ... to enjoin ... the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation." 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence\*581 of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judg-

ments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III-A, and IV of the Court's opinion and in the judgment of the Court.

Justice STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion\*582 that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

## I

In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." \*\*214816 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing,<sup>FN1</sup> and the Court reiterates that holding today. See *ante*, at 2137.

FN1. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); United States v. Students Challenging Regulatory Agency Pro-



112 S.Ct. 2130

Page 19

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

cedures (SCRAP), 412 U.S. 669, 686-687, 93 S.Ct. 2405, 2415-2416, 37 L.Ed.2d 254 (1973); Japan Whaling Assn. v. American Cetacean Society, 478 U.S. 221, 230-231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986).

The Court nevertheless concludes that respondents have not suffered “injury in fact” because they have not shown that the harm to the endangered species will produce “imminent” injury to them. See *ante*, at 2138. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, \*583 therefore, the “imminence” of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante*, at 2138-2139, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about “the proper and properly limited role of the courts in a democratic society,” we have long held that “Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party.” Warth v. Seldin, 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The plaintiff must have a “personal stake in the outcome” sufficient to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions.” Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). For that reason, “[a]bstract injury is not enough. It must be alleged that the plaintiff ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged statute or official conduct.... The injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural,’ or ‘hypothetical.’ ” O’Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (quoting Golden v. Zwickler, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete ad-

verse effect from the challenged action was speculative. See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 158-159, 110 S.Ct. 1717, 1724-1725, 109 L.Ed.2d 135 (1990); Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983); O’Shea, 414 U.S., at 497, 94 S.Ct., at 676. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential\*584 source of “speculation” in this case is whether respondents’ intent to study or observe the animals is genuine.<sup>FN2</sup> In my view, Joyce Kelly and Amy Skilbred have \*\*2149 introduced sufficient evidence to negate petitioner’s contention that their claims of injury are “speculative” or “conjectural.” As Justice BLACKMUN explains, *post*, at 2152-2153, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

<sup>FN2</sup>. As we recognized in Sierra Club v. Morton, 405 U.S., at 735, 92 S.Ct. at 1366, the impact of changes in the esthetics or ecology of a particular area does “not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened....” Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents’ interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts

112 S.Ct. 2130

Page 20

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913  
(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

of this case had shown repeated and regular visits by the respondents, cf. *ante*, at 2146 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is \*585 promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante*, at 2140-2142. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante*, at 2142. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As Justice BLACKMUN explains, *post*, at 2156-2157, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

## II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of

statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.*, at 285, 69 S.Ct., at 577, and therefore presume that " 'legislation of Congress, unless a \*586 contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,' " \*\*2150 *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (quoting *Foley Bros.*, 336 U.S., at 285, 69 S.Ct., at 577).

Section 7(a)(2) provides, in relevant part:

"Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate<sup>FN3</sup>], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section...." 16 U.S.C. § 1536(a)(2).

<sup>FN3</sup>. The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U.S.C. § 1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed.Reg. 19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

Nothing in this text indicates that the section applies in foreign countries.<sup>FN4</sup> Indeed, the only geo-

graphic reference in \*587 the section is in the “critical habitat” clause,<sup>FN5</sup> which mentions “affected States.” The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed.Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

<sup>FN4</sup>. Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: “Each Federal agency” shall consult with the Secretary and ensure that “any action” does not jeopardize “any endangered or threatened species” or destroy or adversely modify the “habitat of such species.” See Brief for Respondents 36; 16 U.S.C. § 1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. 911 F.2d 117, 122 (CA8 1990); see also *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 282, 287-288, 69 S.Ct. 575, 578-579, 93 L.Ed. 680 (1949) (statute requiring an 8-hour day provision in “[e]very contract made to which the United States ... is a party” is inapplicable to contracts for work performed in foreign countries).

<sup>FN5</sup>. Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the “endangered species clause”), and (2) are not likely to destroy or adversely affect the habitat of such species (the “critical habitat clause”).

That interpretation is sound, and, in fact, the Court of Appeals did not question it.<sup>FN6</sup> There is, moreover, no indication that Congress intended to give a different geographic scope to the two clauses in § 7(a)(2). To the contrary, Congress recognized that

one of the “major causes” of extinction of \*588 endangered species is the “destruction of \*\*2151 natural habitat.” S.Rep. No. 93-307, p. 2 (1973); see also H.Rep. No. 93-412, p. 2 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2990; *TVA v. Hill*, 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

<sup>FN6</sup>. Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are “severable,” at least with respect to their “geographical scope,” so that the former clause applies extraterritorially even if the latter does not. 911 F.2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to “any foreign country (with its consent) ... in the development and management of programs in that country which [are] ... necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title.” 16 U.S.C. § 1537(a). It also directs the Secretary of the Interior, “through the Secretary of State,” to “encourage” foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. § 1537(b). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species “in interstate or foreign commerce.” §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this



112 S.Ct. 2130

Page 22

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence \*589 of economic growth and development untempered by adequate concern and conservation,” and that these species “are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” §§ 1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country.<sup>FN7</sup>

<sup>FN7</sup>. Of course, Congress also found that “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements],” and that “encouraging the States ... to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments....” 16 U.S.C. §§ 1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F.2d, at 122-123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

Justice **BLACKMUN**, with whom Justice **O'CONNOR** joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact-sufficient to survive summary judgment-both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for “procedural” injuries. I fear the Court seeks to impose fresh limitations on the constitutional \*\*2152 authority of Congress to allow \*590 citizen suits in the federal courts for injuries deemed “procedural” in nature. I dissent.

## I

Article III of the Constitution confines the federal courts to adjudication of actual “Cases” and “Controversies.” To ensure the presence of a “case” or “controversy,” this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) “fairly traceable to the defendant's allegedly unlawful conduct” and that is (3) “likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

## A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a “genuine issue” of material fact as to standing. *Fed. Rule Civ. Proc. 56(c)*. This is not a heavy burden. A “genuine issue” exists so long as “the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This Court's “function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.*, at 249, 106 S.Ct., at 2511.

The Court never mentions the “genuine issue” standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, “affidavits or other evidence showing, through specific facts” the existence of injury. *Ante*, at 2137. The Court thereby confuses respondents' evidentiary burden (*i.e.*, affidavits asserting “specific facts”) in withholding a summary judgment motion under *Rule 56(e)* with the standard of proof (*i.e.*, the existence of a



112 S.Ct. 2130

Page 23

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

“genuine issue” of “material fact”) under Rule 56(c).

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Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least “questionable” (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.<sup>FN1</sup> *Ante*, at 2138. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

<sup>FN1</sup>. The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in “mitigating the negative impacts to the wildlife involved.” *Ibid*. In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: “The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system.” *Id.*, at 215. It adds: “The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife.” *Id.*, at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment “showed that the [Mahaweli] project could affect several endangered species.” *Id.*, at 159.

I think a reasonable finder of fact could conclude

from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the “actual or imminent” injury standard. The Court dismisses **\*\*2153** Kelly's and Skilbred's general statements **\*592** that they intended to revisit the project sites as “simply not enough.” *Ibid*. But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits “prov[e] nothing,” *ibid.*, the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (“Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury”) (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309-310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a “description of concrete plans” or “specification of *when* the some day [for a return visit] will be,” *ante*, at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See Whitmore v. Arkansas, 495 U.S. 149, 155-156, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); Los Angeles v. Lyons, 461 U.S., at 105, 103 S.Ct., at 1667 (harm dependent on police's arresting plaintiff again **\*593** and subjecting him to chokehold); Rizzo v. Goode, 423 U.S. 362, 372, 96 S.Ct. 598, 605, 46 L.Ed.2d 561 (1976) (harm rested upon “what one of a small, unnamed minority of policemen might do to

them in the future because of that unknown policeman's perception of departmental disciplinary procedures"); *O'Shea v. Littleton*, 414 U.S. 488, 495-498, 94 S.Ct. 669, 675-677, 38 L.Ed.2d 674 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden v. Zwickler*, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14-year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not necessarily render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she **\*\*2154** would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

#### **\*594 2**

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante*, at 2139. To support that conclusion, the Court mischaracterizes our decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), as establishing a general rule that "a plaintiff claiming injury from environmental damage must use

the area affected by the challenged activity." *Ante*, at 2139. In *National Wildlife Federation*, the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. 497 U.S. at 888, 110 S.Ct. at 3188. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, e.g., *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his Government's participation in the eradication of all the Asian elephants in another part of the world. *Ante*, at 2139. I am unable to see how the distant location of the destruction necessarily (for purposes of ruling **\*595** at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility ... that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante*, at 2146 (KENNEDY, J.,

concurring in part and concurring in judgment).

### B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75, and n. 20, 98 S.Ct. 2620, 2630-2631, and n. 20, 57 L.Ed.2d 595 (1978) (plaintiff must show “substantial likelihood” that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the “action agencies” (e.g., AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly\*\*2155 bound by being subject to petitioner Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).<sup>FN2</sup> And he has previously \*596 taken the same position in this very litigation, having stated in his answer to the complaint that petitioner “admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act].” App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play “Three-Card Monte” with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

<sup>FN2</sup>. This section provides in part:

“(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required....”

The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed.Reg. 19928 (1986) (“Several

commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as ‘non-binding guidelines’ that would govern only the Service's role in consultation.... The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7”).

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner's regulation), the plurality concludes that “there is no reason they should be obliged to honor an incidental legal determination the suit produced.” *Ante*, at 2141. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.<sup>FN3</sup> Under \*597 principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

<sup>FN3</sup>. For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as “counsel” to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that “ ‘[a]n extension is necessary for the Department of Justice to consult with ... the Department of State [on] the brief.’ ” See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

“[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully en-



titled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record.” *Souffront v. Compagnie des Sucreries de Puerto Rico*, 217 U.S. 475, 487, 30 S.Ct. 608, 612, 54 L.Ed. 846 (1910).

This principle applies even to the Federal Government. In *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. “Thus, although not a party, the United States plainly had a sufficient ‘laboring\*\*2156 oar’ in the conduct of the state-court litigation to actuate principles of estoppel.” *Id.*, at 155, 99 S.Ct., at 974. See also *United States v. Mendoza*, 464 U.S. 154, 164, n. 9, 104 S.Ct. 568, 574, n. 9, 78 L.Ed.2d 379 (1984) (Federal Government estopped where it “constituted a ‘party’ in all but a technical sense”). In my view, the action agencies have had sufficient “laboring oars” in this litigation since its inception to be bound from subsequent \*598 relitigation of the extraterritorial scope of the § 7 consultation requirement.<sup>FN4</sup> As a result, I believe respondents’ injury would likely be redressed by a favorable decision.

<sup>FN4</sup>. The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: “ ‘The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*’ ”. *Ante*, at 2141, n. 4 (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989) ). See also *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.). The plurality proclaims that “[i]t cannot be” that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante*, at 2141, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: “When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies.” *Ante*, at 2141. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed.Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante*, at 2141. Thus, it was, to borrow the plurality's own words, “assuredly not true when this suit was filed, naming the Secretary alone,” *ante*, at 2141, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder of persons if “in the person's absence complete relief cannot be accorded among those already parties.” This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman-Green* is that the existence of federal jurisdiction “ordinarily” depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions.

Had the Solicitor General, for example, taken a position during this appeal that the § 7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

**\*599** The second redressability obstacle relied on by the plurality is that “the [action] agencies generally supply only a fraction of the funding for a foreign project.” *Ante*, at 2142. What this Court might “generally” take to be true does not eliminate the existence of a genuine issue of fact to withstand **\*\*2157** summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign

project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that “AID, for example, has provided less than 10% of the funding for the Mahaweli project.” *Ibid*. The plurality neglects to mention that this “fraction” amounts to \$170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than \$6 billion in 1986 when respondents filed **\*600** the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: “Respondents have produced nothing to indicate that the projects they have named will ... do less harm to listed species, if that fraction is eliminated.” *Ante*, at 2142. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that “[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved.” App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

“The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this pro-

112 S.Ct. 2130

Page 28

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

ject.” *Id.*, at 216.

**\*601** I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit-and it has not been disputed-that the Bureau of Reclamation was “overseeing” the rehabilitation of the Aswan project. *Id.*, at 101. See also *id.*, at 65 (Bureau of Reclamation publication stating: “In 1982, the Egyptian government ... requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project”).

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

## II

The Court concludes that any “procedural injury” suffered by respondents is insufficient to confer standing. It rejects the view that the “injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, non-instrumental” **\*2158** ‘right’ to have the Executive observe the procedures required by law.” *Ante*, at 2143. Whatever the Court might mean with that very broad language, it cannot be saying that “procedural injuries” *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as “procedural.” Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as **\*602** “procedural” injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, “procedurally” issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just

what the Court means by its intimation that “procedural” injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of “agencies' observance of a particular, statutorily prescribed procedure” would “transfer from the President to the courts the Chief Executive's most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3.” *Ante*, at 2145. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense-not of the courts-but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Court examined a **\*603** statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which “diminis[h] the effectiveness” of an international whaling convention. *Id.*, at 226, 106 S.Ct., at 2864. The Court expressly found standing to sue. *Id.*, at 230-231, n. 4, 106 S.Ct., at 2865-2866, n. 4. In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348, 109 S.Ct. 1835, 1844, 104 L.Ed.2d 351 (1989), this Court considered injury from violation of the “action-forcing” procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of



environmental impact statements.

The consultation requirement of § 7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency “a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). The Secretary is also obligated to suggest “reasonable and prudent alternatives” to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own “biological\*\*2159 assessment for the purpose of identifying any endangered species or threatened species” likely to be affected by agency action. § 1536(c)(1). After the initiation of consultation, the action agency “shall not make any irreversible or irretrievable commitment of resources” which would foreclose the “formulation or implementation of any reasonable and prudent alternative measures” to avoid jeopardizing listed species. § 1536(d). These action-forcing procedures are “designed to protect some threatened concrete interest,” *ante*, at 2143, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court’s unsupported conclusion that “[t]his is not a case where plaintiffs \*604 are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.” *Ante*, at 2142.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress’ legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See American Power & Light Co. v. SEC, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). The Court never has questioned Congress’ authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which

the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for “procedural injuries” is another way of saying that Congress may not delegate to the courts authority deemed “executive” in nature. *Ante*, at 2145 (Congress may not “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3”). Here Congress seeks not to delegate “executive” power but only to strengthen the procedures it has legislatively mandated. “We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches.” Touby v. United States, 500 U.S. 160, 165, 111 S.Ct. 1752, 1756, 114 L.Ed.2d 219 (1991). “Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.” *Ibid.* (emphasis added).

\*605 Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. INS v. Chadha, 462 U.S. 919, 953-954, n. 16, 103 S.Ct. 2764, 2785-2786, n. 16, 77 L.Ed.2d 317 (1983); American Power & Light Co. v. SEC, 329 U.S., at 105-106, 67 S.Ct. at 142-143. The Court’s intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court’s suggestion compelled by our “common understanding of what activities are appropriate to legislatures, to executives, and to courts.” *Ante*, at 2136. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements,\*\*2160 this Court has acknowledged “it is now well settled that NEPA itself does not mandate particular results [and] simply



112 S.Ct. 2130

Page 30

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

(Cite as: 504 U.S. 555, 112 S.Ct. 2130)

prescribes the necessary process,” but “*these procedures are almost certain to affect the agency's substantive decision.*” Robertson v. Methow Valley Citizens Council, 490 U.S., at 350, 109 S.Ct., at 1846 (emphasis added). See also Andrus v. Sierra Club, 442 U.S. 347, 350-351, 99 S.Ct. 2335, 2337, 60 L.Ed.2d 943 (1979) (“If environmental concerns are not interwoven into the fabric of agency planning, the ‘action-forcing’ characteristics of [the environmental-impact statement requirement] would be lost”). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch—Congress—that certain procedures are directly tied to protection against a substantive harm.

\*606 In short, determining “injury” for Article III standing purposes is a fact-specific inquiry. “Typically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” Allen v. Wright, 468 U.S., at 752, 104 S.Ct., at 3325. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In all events, “[o]ur separation-of-powers analysis does not turn on the labeling of an activity as ‘substantive’ as opposed to ‘procedural.’” Mistretta v. United States, 488 U.S. 361, 393, 109 S.Ct. 647, 665, 102 L.Ed.2d 714 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled “procedural” in nature.

### III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

I dissent.

U.S.Minn.,1992.

Lujan v. Defenders of Wildlife

504 U.S. 555, 112 S.Ct. 2130, 34 ERC 1785, 119 L.Ed.2d 351, 60 USLW 4495, 22 Env'tl. L. Rep. 20,913

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June 5, 2012

**VIA E-MAIL**

Ms. Margaret Carter  
Clerk  
United States Court of Appeals  
For the First Circuit  
John Joseph Moakley  
United States Courthouse  
1 Courthouse Way, Suite 2500  
Boston, MA 02210

**Re: Beyond Nuclear et al. v. U.S. Nuclear Regulatory Commission et al., Case No. 12-1561**

Dear Ms. Carter:

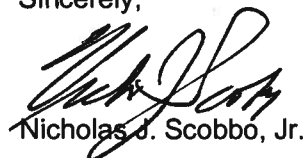
I represent the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), the Taunton Municipal Lighting Plant ("Taunton"), and the Hudson Light & Power Department ("Hudson") ("Joint Intervenors") in the above-captioned matter. On June 5, 2012, the Joint Intervenors electronically filed a Motion for Intervention in accordance with Federal Rule of Appellate Procedure 15(d).

Pursuant to Federal Rule of Appellate Procedure 26.1, any non-governmental party to a proceeding in a court of appeals must file a Corporate Disclosure Statement. F. R. App. P. 26.1(a). The Corporate Disclosure Statement must identify any parent corporation and any publically held corporation that owns 10% or more of its stock or states that there is no such corporation. *Id.*

Please note that the Joint Intervenors are governmental parties, and thus are not required to file a Corporate Disclosure Statement. Specifically, MMWEC is a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts. St. 1975, c. 775, § 2. MMWEC has no stock. Taunton and Hudson are departments of the City of Taunton, Massachusetts, and the Town of Hudson, Massachusetts, respectively, and both are duly organized Massachusetts municipal lighting plants operating in accordance with G.L. c. 164, §§ 34 – 69.

Should you have any questions, please contact me. Thank you.

Sincerely,



Nicholas J. Scobbo, Jr.