

COMMONWEALTH OF MASSACHUSETTS

_____ )	SUPREME JUDICIAL COURT
NORTHEAST ENERGY SOLUTIONS, INC. )	FOR SUFFOLK COUNTY
Petitioner - Appellant, )	NO.:
)	
vs. )	
)	DPU No: 15-48
MASSACHUSETTS DEPARTMENT )	
OF PUBLIC UTILITIES )	
Respondent – Appellee )	
_____ )	

**PETITION FOR APPEAL BY NORTHEAST ENERGY SOLUTIONS, INC.  
PURSUANT TO G. L. c. 25, § 5, OF ORDERS OF THE DEPARTMENT OF PUBLIC  
UTILITIES APPROVING THE PETITION OF THE BERKSHIRE GAS COMPANY  
FOR APPROVAL OF A FIRM TRANSPORTATION AGREEMENT WITH  
TENNESSEE PIPELINE COMPANY, LLC, PURSUANT TO G.L. c. 164 § 94A AND  
DENYING PETITIONER’S PETITION TO INTERVENE**

Pursuant to G. L. c. 25, §5, Northeast Energy Solutions, Inc. (“NEES”) hereby appeals the final decision of the Department of Public Utilities (the “DPU”) dated August 31, 2015 (the “Final Order”) approving the above-captioned Petition as well as the Interlocutory Order of the DPU dated June 19, 2015, denying NEES’ Petition to Intervene as a full participant in the proceedings (the “Intervention Decision”). The Supreme Judicial Court should set aside the DPU’s orders because the DPU failed in its legal obligation to conduct a fair and comprehensive hearing in this matter.

**I. INTRODUCTION**

1. The Berkshire Gas Company (“Berkshire”) initiated this proceeding before the DPU seeking the DPU’s approval of a Precedent Agreement (the “Precedent Agreement”) with the Tennessee Gas Pipeline Company, LLC (“TGP”) for the transportation of gas via the

development of a proposed pipeline which will traverse through Massachusetts in a project known as the Northeast Energy Direct (“NED”). In order for the DPU to approve the Petition, Berkshire bore the burden of proving that the Precedent Agreement is consistent with the public interest, including that it “(1) is consistent with the company’s portfolio objectives[,] (2) compares favorably to the range of alternative options reasonably available to the company,” and satisfies Berkshire’s non-price objectives, including flexibility of nominations and reliability and diversity of supplies. Investigation by the Dep’t of Telecommunications and Energy Pursuant to G.L. c. 164, § 94A into the Petition of The Berkshire Gas Company, D.T.E. 04-35, at 8 (2004).

2. NEES is comprised of a coalition of members including the Towns of Lenox, Massachusetts<sup>1</sup> and Stephentown, New York, several regional land trusts, and a Member of the Commonwealth of Massachusetts House of Representatives, which members collectively represent over 101,850 individuals and ratepayers in the Commonwealth and own or hold conservation restrictions on over 50,000 acres of land, principally in the cities and towns served by Berkshire. NEES’s members include but are not limited to: the Massachusetts Land Trust Coalition, The Berkshire Natural Resources Council, The East Quabbin Land Trust, The Nashua River Watershed Association, The Franklin Land Trust, The Trustees of Reservations, The Richmond Land Trust and others. NEES’s members, by virtue of their involvement in the local economies, representation of ratepayers, residents and business owners, and ownership and conservation of land impacted by NED and the Precedent Agreement, have important economic, social and environmental interests which will be directly and substantially affected by NED and the Precedent

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<sup>1</sup> As of the 2010 census, the Town of Lenox had 5,025 residents.

Agreement. NEES was (and is) uniquely situated and qualified to provide relevant evidence and analyses to the DPU concerning the Precedent Agreement.

3. Notwithstanding NEES's obvious interests, the DPU wrongfully excluded NEES from any meaningful participation in proceeding, including by preventing NEES from accessing unredacted versions of the most important evidence in the record (including the Precedent Agreement itself), participating in discovery, offering evidence or testimony, or cross-examining witnesses at the hearing. Having effectively excluded NEES (and others) from the process, the DPU acceded to Berkshire's demands for an abbreviated and expedited process even though Berkshire's request in this regard was premised on demonstrably false assertions. With unprecedented swiftness, truncated proceedings, and based on a one-sided, unchallenged and completely undeveloped record consisting almost entirely of Berkshire's "say-so," the DPU approved Berkshire's Petition.
4. The DPU's decision must be set aside because the DPU denied NEES due process and conducted a fundamentally unfair and procedurally defective process. The DPU unlawfully abused its discretion and arbitrarily and capriciously deprived NEES of its right to participate in the proceedings and contribute to the development of a complete and accurate record from which the DPU could make a reasoned and supportable decision. As a result of the DPU's unlawful decisions to exclude NEES from the proceedings and improperly abbreviate the hearing, the DPU so fundamentally corrupted the adjudicatory process to render it unfair and the record incomplete, misleading, and predisposed in Berkshire's favor, such that the DPU's Final Order was arbitrary, capricious, not based on substantial evidence and, therefore, invalid.

## **II. PARTIES**

5. NEES is a Corporation duly organized under the laws of Massachusetts. NEES has standing to pursue this appeal as a party aggrieved from the decision of the DPU denying it full intervener status. Cablevision Sys. Corp. v. Dep't of Telecom. & Energy, 428 Mass. 436, 437 (1998) (“It is well established, however, that a petitioner would have standing to appeal pursuant to G.L. c. 25, § 5, if the department improperly denied it full intervener status.”).
6. The DPU is an agency of the Commonwealth established pursuant to G. L. c. 25, §1.

## **III. PROCEDURAL HISTORY**

7. On April, 21 2015, “Berkshire” filed with the DPU its Petition for Approval of the Precedent Agreement. The matter was given docket number 15-48 before the DPU.
8. On April 29, 2015, the Department issued a Notice of Filing and Public Hearing and set a deadline of May 22, 2015 for petitions for leave to intervene in the proceeding.
9. NEES timely filed a petition for leave to intervene as a full participant (the “Original Petition”), pursuant to 220 C.M.R. 1.03, on May 22, 2015.
10. On May 28, 2015, NEES filed a Motion for Leave to Amend Petition for Leave to Intervene and Amended Petition for Leave to Intervene.
11. On May 29, 2015, the Hearing Officer issued her Ruling denying NEES’s Petition and granting it only limited participant status.
12. On June 1, 2015, NEES appealed the Hearing Officer’s Decision to the full Commission.
13. On June 1, 2015, NEES filed its Notice of Intent to offer testimony.
14. On June 11, 2015, NEES sought relief in this Court (SJ-2015-0219) in the form of a stay of the proceedings pending outcome of its appeal to the full Commissions or, in the event

the Commission denied NEES's appeal, a stay to allow NEES to appeal the Commission's decision.

15. On June 19, 2015, the Commission denied NEES's appeal and affirmed the Hearing Officer's decision granting NEES only limited participant status.
16. On June 24, 2015, the Supreme Judicial Court (Lenk, J.) denied NEES's request for a stay, ruling that NEES did not have standing to pursue an appeal of the denial of NEES's Petition to Intervene until the DPU issued a final order on Berkshire's Petition.
17. On August 31, 2015, the DPU issued its Final Order approving Berkshire's Petition.

#### **IV. JURISDICTION**

18. The Supreme Judicial Court has jurisdiction to adjudicate this Petition and order the relief requested pursuant to G. L. c. 25, §5.

#### **V. STATEMENT OF ERRORS OF LAW BEING APPEALED BY NEES**

19. The DPU unlawfully, arbitrarily and capriciously denied NEES's Petition to Intervene as a full participant in the proceedings. NEES, through its members, is substantially and specifically affected by the proceedings in that the approval of the Precedent Agreement directly impacts their economic and environmental interests as resident landowners, affected towns, ratepayers, and participants in the local economy which will be affected by the NED and the Precedent Agreement. See G. L. c. 30A, §10; 220 C.M.R. 1.03(1)(b). The DPU abused its discretion in determining (a) that NEES was not substantially and specifically affected by the proceedings and (b) that its interests were

adequately represented by the Attorney General or the Conservation Law Foundation (“CLF”).

20. The DPU’s decision denying NEES’s request to intervene was particularly arbitrary and capricious because it applied a different standard for intervention than it applied in allowing CLF’s Petition and to similar groups in prior proceedings. Specifically, the DPU allowed CLF to intervene “because of CLF’s stated interest in the proposed pipeline, its regional implications, and the Precedent Agreement’s relationship thereto.” CLF, which represented itself to be “a non-profit, member-supported advocacy organization with over 1,600 members in Massachusetts that works to solve the environmental problems,” stated in its Petition to Intervene that it “has a substantial interest in the outcome of this proceeding, including the advancement of the objectives of the Global Warming Solutions Act (“GWSA”), G. L. c. 21N, c. 30, § 61.” The DPU’s decision to allow CLF to intervene, when it’s interests were limited to advocating in favor of limiting greenhouse gas emissions, cannot be reconciled with its decision to exclude NEES, whose members’ specific economic, social, ecological and environmental rights and interests will be directly impacted by the Precedent Agreements. Indeed, as the DPU conceded in a footnote, the DPU has allowed groups like NEES to intervene in prior proceedings. Any deviation from this policy by the DPU in this case was invalid because it was neither justified, reasoned nor explained. See Robinson v. Dep’t of Pub. Utils., 416 Mass. 668, 673 (1993) (“the requirement of “reasoned consistency” ... means that any change from an established pattern of conduct must be explained.”).
21. The DPU’s findings that the Attorney General, Department of Energy Resources (DOER), and CLF would adequately represent NEES’s interests was incorrect. Indeed,

DOER took positions contrary to NEES's interests and supported Berkshire's position. The Attorney General was concerned with the Precedent Agreement's impact on rates and CLF was concerned with the Precedent Agreement's impacts on greenhouse gas emissions. No party represented and advocated for the economic, social, ecological and environmental rights and interests of NEES and its constituent members.

22. The DPU's decision to exclude NEES from full participation in the proceedings was arbitrary and capricious and an abuse of discretion because it ignored the important contributions to the record which could be made by NEES—especially with regard to whether Berkshire could meet its burden of establishing that the Precedent Agreement compares favorably to the range of alternative options. During the hearing, Berkshire fell woefully short of meeting its burden of proof on that issue, having failed to conduct a competitive solicitation of alternative supply options, which is a *requirement* of the DPU. The DPU excused Berkshire's failures in this regard and, instead, accepted Berkshire's essentially bald and unchallenged assertions that the alternative options are not practicable. NEES's involvement in these issues would likely have dramatically altered the record evidence and compelled a different conclusion. For one, NEES was prevented from conducting discovery from Berkshire on this issue and also from cross-examining and challenging its evidence (or, more aptly, its assertions). As the DPU acknowledged, one of NEES's founding missions was to provide regulators with "alternative analyses." NEES was, and remains, well-equipped and ready to test Berkshire's assertions concerning available alternatives and to offer competent evidence and analyses contradicting those assertions. Importantly, neither Berkshire nor the DPU even considered or mentioned several alternatives to the NED project, such as another project

by TGP known as the Northampton Lateral Expansion project which was approved by FERC in 2011 and was designed to address Berkshire's purported needs. Nor, was TGP's Connecticut Expansion Project (which also is designed to provide additional supply) even considered or mentioned during the proceedings as a potential alternative. All of NEES's attempts to offer testimony during the proceedings, however, were rebuffed and Berkshire's assertions in the record remained essentially unchallenged and unopposed.

23. The DPU's decision to exclude NEES from full participation in the proceedings was arbitrary and capricious because NEES could have exposed during the hearing a conflict of interest inherent in Berkshire's position relative to the Precedent Agreement. Specifically, Berkshire failed to disclose (and NEES was precluded from cross-examining or offering its own evidence) that Berkshire is, in fact, an investor in the NED project with much at stake in its approval. Shortly before filing its Petition with the DPU, Berkshire took the unprecedented approach of imposing a moratorium on new natural gas accounts in its service territory and then, not surprisingly, used the need to lift that moratorium as a justification for the DPU to approve the Precedent Agreements and the NED project. This tactic has raised widespread public concern concerning Berkshire's motives. NEES could have exposed during the proceedings that Berkshire actually imposed the moratorium as leverage to protect its previously undisclosed financial investments in the NED project. Moreover, the impact of the acquisition of Berkshire's parent company, UIL, by Iberdrola, a Spanish conglomerate, ever examined in the context of the durability of the agreement under a new business combination.



24. The DPU arbitrarily and capriciously denied NEES access to the full record, instead limiting its access to redacted versions of the record evidence. Importantly, the key provisions of the Precedent Agreement were nearly entirely redacted. Indeed, The DPU's decision limiting access to the record evidence completely undermined NEES's ability to analyze Berkshire's petition and effectively advocate for its members.
25. The DPU arbitrarily and capriciously determined that NEES should not be allowed to intervene on the grounds that NEES does not have a long history of intervening in DPU proceedings. The age of an entity seeking intervention or the number of prior proceedings in which it has intervened has no bearing on whether it is "substantially and specifically" affected by the proceedings at hand and is not a valid basis to deny intervention. NEES's right to intervene derives from the manner in which this particular proceeding impacts its members' rights and interests and not from its interests (or lack thereof) in any prior unrelated proceedings. Indeed, the State of Maine, United States Department of Energy and Federal Energy Regulatory Commission ("FERC") have all recognized NEES's interests in the NED and related projects and allowed NEES to Intervene in similar proceedings before those bodies. NEES was the only party participating in these other related proceedings which uniquely enabled it to bring information to the DPU that would be helpful to its proceeding. However, not having access to vital contractual details and being excluded from full participation, NEES was unable to conduct analysis and bring its unique perspective to the DPU and fully protect its rights.

**PRAYER FOR RELIEF**

**WHEREFORE**, Northeast Energy Solutions, Inc. respectfully requests that the Court:

1. Set aside the Final Order; and/or
2. Set aside the Intervention Decision; and/or
3. Remand this case to the Department for *de novo* proceedings; and/or
4. Grant such further relief as the Court deems just and proper.

Respectfully Submitted,

**NORTHEAST ENERGY SOLUTIONS, INC.**

By its counsel:



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Dated: September 21, 2015

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Respondent – Appellee	)	

**CERTIFICATE OF GOOD CAUSE FOR PETITION  
APPEALING D.P.U. 15-48 FINAL ORDER**

Pursuant to G.L. c. 25, § 5, Northeast Energy Solutions, Inc., by its undersigned counsel, certifies that it is of the opinion that there are such probable grounds for appeal as to make it a fit subject for judicial inquiry, and that this appeal is not intended for delay.

NORTHEAST ENERGY SOLUTIONS, INC.

By Its Counsel:



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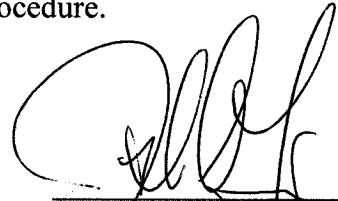
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CERTIFICATE OF SERVICE

I hereby Certify that I have this day served the foregoing documents upon the persons on the Service List in the above captioned proceeding in the manner required by the Department of Public Utilities’ Rules of Practice and Procedure.



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