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March 17, 2020

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RE: Legal Analysis of Brookline Special Town Meeting Article 21

Dear Ms. Hurley,

In response to your request for comment, the Department of Public Utilities (the "Department") submits this memorandum with its legal analysis evaluating whether state law regarding the sale and distribution of natural gas preempts Article 21 that the Town of Brookline adopted on November 20, 2019. As explained in more detail below, Massachusetts law preempts Article 21 because it restricts the sale of natural gas to new and certain existing customers in direct conflict with the following state statutes:

1) Chapter 164 of the General Laws through which the Department comprehensively regulates the sale and distribution of natural gas in Massachusetts;

2) The franchise statutes of Boston Gas Company d/b/a National Grid ("National Grid"), which grant National Grid exclusive rights—and accompanying obligations—to sell and distribute natural gas to new and existing customers in Brookline; and

3) Chapter 3 of the Acts of 2014, which authorizes the Department to approve gas company programs designed to increase the availability, affordability, and feasibility of natural gas service for new customers, including new heating customers, in the Commonwealth.

I. Article 21's Effect on the Sale and Distribution of Natural Gas

Article 21 amends Brookline's General By-Laws to adopt a "Prohibition on New Fossil Fuel Infrastructure in Major Construction." While the amendment allows for piping to "cooking appliances" and certain other limited exceptions, it prohibits Brookline's Building Commissioner from issuing building permits for both the construction of new buildings and the significant renovation of existing buildings if those buildings include new natural gas infrastructure for heat, hot water, or certain other purposes. In effect, the amendment restricts National Grid's ability to add new customers in Brookline (particularly heating customers) and restricts National Grid's ability to serve existing customers who perform significant renovations on their buildings.

II. Standards for the Preemption of Local Law

A city or town may not exercise its powers under the Home Rule Amendment in a manner "not consistent with the constitution or laws enacted by the General Court." G.L. c. 43B, § 13; St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield ("St. George Cathedral"), 462 Mass. 120, 125 (2012). In determining whether a local ordinance or bylaw is inconsistent with a state statute, the "question is not whether the Legislature intended to grant authority to municipalities to act . . . , but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." Easthampton Savings Bank v. City of Springfield, 470 Mass. 284, 288-89 (2014) (quoting Wendell v. Attorney Gen., 394 Mass. 518, 524 (1985)). While legislative intent to preclude local action can be express or inferred (St. George Cathedral, 462 Mass. at 126), there must be a "sharp conflict" between the ordinance or bylaw and the statute to invalidate a local law. Easthampton Savings Bank, 420 Mass. at 289 (quoting Bloom v. Worcester, 363 Mass. 136, 154 (1973)). A sharp conflict "appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." Easthampton Savings Bank, 420 Mass. at 289 (quoting Grace v. Brookline, 379 Mass. 43, 54 (1979)).

The Supreme Judicial Court ("SJC") has found that in a "close case" to determine whether a local ordinance or bylaw is preempted, "the considerations influencing the decision depend on the particular circumstances" and as part of this analysis courts can consider "what has or has not been traditionally a matter of local regulation." Wendell, 394 Mass. at 525; see also Roma, III, Ltd. v. Bd. of Appeals of Rockport, 478 Mass. 580, 591 (2018). For example, in Roma, III, the SJC considered whether state statutes regulating aeronautics preempted a municipality's ability to exercise its zoning authority over the use of land for a private heliport. 478 Mass. at 580-81. The Court held that because land use regulation has long been recognized by the Legislature to be a prerogative of local government, it will not infer that the enactment of the aeronautics code reflects a clear legislative intent to preempt all local zoning. Roma, III, 478 Mass. at 591.

In contrast, the SJC has ruled consistently and repeatedly that the sale and distribution of natural gas is squarely within the historic purview of the Legislature, not municipalities. See Boston Gas Co. v. City of Newton ("City of Newton"), 425 Mass. 697, 699-703 (1997) (ruling that a town cannot use its limited authority to enact an ordinance governing street excavations which had practical effect of frustrating the fundamental state policy of ensuring uniform and

efficient natural gas service to the public); contrast Lanner v. Bd. of Appeal of Tewksbury, 348 Mass. 220, 228 (1964) ("Zoning has always been treated as a local matter."). Further showing that the sale and distribution of natural gas is a state issue, not subject to municipal interference, the Legislature has granted the Department the power to exempt natural gas infrastructure from local land use regulation, an area that is typically the prerogative of local government. See G.L. c. 40A, § 3 (upon the Department's determination "Land or structures used, or to be used by a [gas company] may be exempted in particular respects from the operation of a zoning ordinance or bylaw").

III. G.L. c. 164 Preempts Article 21's Regulation of Natural Gas.

Chapter 164 of the General Laws governs the sale and distribution of natural gas, and the Legislature has specifically granted the Department the authority to regulate and control this area. G.L. c. 164, § 105A. When addressing the preemptive effect of G.L. c 164, the SJC has repeatedly found that state law governing the sale and distribution of natural gas is so comprehensive that it preempts municipal regulation on this subject. See, e.g., Boston Gas Co. v. City of Somerville ("City of Somerville"), 420 Mass. 702, 704 (1995) ("The manufacture and sale of gas . . . is governed by G.L. c. 164. Given the comprehensive nature of this statute, we conclude that the Legislature intended to preempt local entities from enacting legislation in this area."); Boston Edison Co. v. City of Boston, 390 Mass. 772, 775 (1984) ("[W]e have also recognized that local laws are superseded by statutes that deal comprehensively with a Statewide problem, and that utility regulation is one type of comprehensive legislation that preempts local ordinances."). Therefore, as explained in more detail below, G.L. c 164 preempts Article 21.

A. Article 21 Prevents the Uniform Natural Gas Service G.L. c. 164 Requires.

The SJC has held that the purpose of G.L. c. 164 is "to ensure uniform and efficient services to the public." City of Newton, 425 Mass. at 699 (citing City of Somerville, 420 Mass. at 706); New England Tel. & Tel. Co. v. City of Lowell, 369 Mass. 831, 834 (1976) (emphasizing "the desirability of uniformity of standards applicable to utilities regulated by the Department of Public Utilities"). In a recent analysis of a City of Boston ordinance purporting to regulate the inspection, maintenance, and repair of natural gas leaks, the Superior Court noted that SJC precedent makes clear that non-incidental local laws affecting the sale and distribution of natural gas are "preempted because they would 'undermine the fundamental State policy of ensuring uniform and efficient utility services to the public' embodied in Chapter 164" Boston Gas Co. v. City of Boston ("City of Boston"), 1784CV02241, 2018 WL 4198962, at*1 (MA Super. Ct. July 16, 2018) (quoting City of Newton, 425 Mass. at 703; City of Somerville, 420 Mass. at 706).

Article 21 restricts natural gas service to new and certain current natural gas customers in Brookline. By definition, Brookline's proposed regulation of natural gas would impose non-uniform service among its residents with new customers forced to become residential non-heating customers (Rate Class R-1), rather than having the option to become residential heating customers (Rate Class R-3). Article 21 prevents the uniform service that G.L. c. 164 requires and, therefore, Article 21 is preempted by the well-established, comprehensive scope of G.L. c. 164.

B. Article 21 Frustrates the Legislative Intent of G.L. c. 164.

Brookline has attempted to frame Article 21 as outside state authority because the bylaw is a "behind-the-meter" measure.[1] Essentially, Brookline claims that it does not interfere with the scope of G.L. c. 164 because it regulates only the customers' piping that comes after the meter, beyond the distribution system, and outside the gas company's responsibility.

This argument is ineffective because it is the Department through its legislatively delegated authority that determines where a gas company's responsibilities end. While a gas company's obligations typically end at the meter,[2] the Department has imposed certain obligations that go behind the meter. For example, a gas company that replaces a meter must examine the downstream customer piping for leaks (see, e.g., National Grid Procedure No. CMS03006, Changing Gas Meters CMS04003). Further, a company relighting gas appliances in conjunction with a meter turn on must check each appliance for overall condition and any leaks prior to relighting it (see, e.g., National Grid Procedure No. CMS04001, Relighting Gas Appliances).

Regardless, Brookline's attempt at an end run around the Department's authority is preempted because Article 21's effect frustrates the legislative goal of uniform gas service. Like Brookline, the City of Boston attempted to use "local permitting" to avoid G.L. c. 164's jurisdiction. City of Boston, 2018 WL 4198962, at*1. In that case, the Superior Court explained that municipalities cannot impose requirements that "are 'inconsistent' with the requirements of Chapter 164 and currently enforced, on a statewide level by the Department . . . ." *Id.* That court cited SJC precedent to explain that the City of Boston "couch[ing] its inconsistent obligations as 'permitting' requirements does not make them any less objectionable, or any less subject to preemption, because the net effect on [the gas company] is the same as if the obligations had been imposed directly." Id. (citing City of Newton, 425 Mass. at 699-706; New England Legal Found. v. Massachusetts Port Auth., 883 F.2d 157,174 (1st Cir. 1989). A municipality may not use local bylaws to frustrate the intent of the Legislature where it has made a policy choice to implement one comprehensive regulatory approach. See Doe v. City of Lynn, 472 Mass. 521, 533 (2015) (finding city ordinance restricting residence of sex offenders inconsistent with "totality" of a comprehensive state statutory scheme). In short, Brookline has attempted to restrict National Grid's natural gas sales by placing constraints on customers' gas piping. Chapter 164 of the General Laws and SJC precedent, however, make clear that Brookline cannot directly order National Grid to restrict its sale of natural gas, and Brookline cannot do indirectly what it is forbidden to do directly. See All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 685–86 (2010) (citing New England Legal Found, 883 F.2d 157 at 174 (ruling that Massport's regulations were preempted by Federal law and finding that an entity

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1 Brookline refers to "behind the meter" as the "customer side of the meter."

2 See, e.g., Boston Gas Company, d/b/a National Grid, Terms and Conditions Tariff M.D.P.U. No. 4.3, Section 6.1 (in which the Department places the general obligation to furnish, maintain, and operate behind-the-meter piping on the customer) (available at https://www.mass.gov/service-details/natural-gas-tariffs-and-delivery-rates).

cannot do indirectly what it is forbidden to do directly). For all these reasons, G.L. c. 164 preempts Article 21.

IV. National Grid's Legislatively Granted Franchise Preempts Article 21's Regulation of Natural Gas.

Article 21's restriction of natural gas service to new and certain existing customers is preempted by the Legislature's grant of National Grid's exclusive franchise to provide natural gas service to Brookline. Additionally, Article 21 is also preempted because it attempts to alter National Grid's franchise, and the Legislature (through its direct action or delegation) has the sole authority to grant, amend, modify, or revoke a franchise.

A. History of National Grid's Franchise in Brookline.

National Grid's predecessor in interest, Brookline Gas Light Company, was established via special legislative act in 1853 for the purpose of "selling gas in the Town of Brookline." St. 1853, c. 17.[3] This incorporation was explicitly subject to R.S. 1836, cc. 38, 44, which established that the incorporation "may be revoked by the Legislature, for any cause, which they shall deem sufficient." R.S. 1836, c. 38, §§ 1, 36.

In General Laws Chapter 155, Section 3, the Legislature also addressed its authority over franchises, stating, in relevant part, that:

> Every act of incorporation passed since March eleventh, eighteen hundred and thirty-one, shall be subject to amendment, alteration or repeal by the general court. All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them.

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[3] Per Chapter 417 of the Acts of 1903, as amended by St. 1905, c. 421, Brookline Gas Light Company was among those companies that consolidated to become Boston Consolidated Gas Company. Boston Consolidated Gas Company was authorized to acquire the "property, locations, rights, licenses, powers, privileges and franchises" of the consolidating companies. St. 1905, c. 417, § 3. The consolidation of Brookline Gas Light Company into Boston Consolidated Gas Company was amended by Chapter 421 of the Acts of 1905, which provided that, upon acquisition of the property consolidating gas companies, Boston Consolidated Gas Company would be "entitled to all those rights, powers and privileges set forth in chapter thirty-four of the Revised Laws and in any amendments thereof . . . ." As required by statute, Boston Consolidated Gas Company filed its acceptance of its charter with the Board of Gas and Electric Light Commissioners on June 12, 1905 (Bd. of Gas and Elec. Light Comm'rs 1905 Annual Report at 5-6). The statute allowed the merger to take place, including revised stock issuance. Boston Consolidated Gas Company became Boston Gas Company in 1955. Boston Gas Company adopted the doing business as designation "Keyspan Energy Delivery New England" in 2000, and then "National Grid" in 2008.

G.L. c. 155, § 3 (emphasis added).

The Legislature also amended the Declaration of Rights of the Constitution of the Commonwealth in 1918 to add Article 59, which states: "Every charter, franchise or act of incorporation shall forever remain subject to revocation and amendment." Const. Amend. Art. 59. The amendment was ratified and adopted by the people in mid-term elections held on November 5, 1918. Debates, Mass. Const. Convention 1917-1918, vol. 3, c. 34, at 386.

Therefore, through multiple laws, the Legislature has expressly retained the sole right (through its direct action or a delegation of its authority) to revoke, amend, or alter National Grid's franchise to provide natural gas service to customers in Brookline, and the Legislature has not delegated its authority on this issue to Brookline.

B. Article 21 Conflicts with National Grid's Franchise Duties and Obligations.

A franchise is the right of a gas company granted by special act or organization under the general statutes to provide natural gas service "for a particular locality and to exercise the special rights and privileges in the streets and elsewhere which are essential to the proper performance of its public duty and the gain of its private emoluments and without which it could not exist successfully." Attorney Gen. v. Haverhill Gas Light Co. ("Haverhill"), 215 Mass. 394, 399 (1913) (citations omitted). The franchise holder, as a public service corporation, has the "duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them." Haverhill, 215 Mass. at 396 (quoting Weld v. Gas and Elec. Light Comm'rs, 197 Mass. 556, 557 (1908) (emphasis added). A public service corporation, by accepting the rights and privileges conferred by its act of incorporation and by entering into the enjoyment of its franchise undertakes to perform all the public duties required of it. Haverhill, 215 Mass. at 400. This obligation to provide service is apparent in G.L. c. 164, § 92, which explains a person's right to petition the Department to order the gas company in the town where that person lives to show cause why natural gas service has not been provided and, if appropriate, to order the gas company to supply service upon legal and reasonable terms.[4]

In short, National Grid's franchise gives it the right to be the only company that distributes natural gas in Brookline. The franchise also obligates National Grid to serve current and new Brookline customers and to do so without discriminating between customers who desire service.

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[4] The Department has found that a gas company's obligation to serve a new customer is conditioned on (1) the gas company having sufficient capacity to do so without reducing service to existing customers and (2) the new customer paying the cost for installation of suitable gas distribution facilities for service, so that existing customers do not subsidize the cost of the service extension. Arnold/Hawkins v. Boston Gas Co., D.P.U. 93-AD-16, at 9 (1994); Boston Gas Co., D.P.U. 88-67, Phase I, at 372 (1988); Riverdale Mills Corp., D.P.U. 85-130, at 12 (1985).

Article 21 prevents National Grid from meeting its legislatively required franchise obligation to serve Brookline customers. Under Article 21, National Grid cannot provide natural gas to certain current and new customers, such as new customers who seek natural gas only for heating. Additionally, to the extent it allows new customers to receive gas only for "cooking appliances," while existing customers who do not perform significant renovations can receive natural gas for heating, as well, Brookline has prevented National Grid from meeting its franchise obligation to provide natural gas "with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them." Haverhill, 215 Mass. at 396. Further, by dictating that certain customers in Brookline cannot obtain natural gas service, Article 21 has in effect amended National Grid's franchise obligations. This directly conflicts with the franchise the Legislature granted National Grid and the Legislature's exclusive power (through its direct action or delegation) to revoke, amend, or alter National Grid's franchise to provide natural gas service to Brookline.

V. Section 3 of Chapter 149 of the Acts of 2014 Preempts Article 21's Regulation of Natural Gas.

In addition to its broad regulation of natural gas under G.L. c. 164 and franchise statutes, the Legislature has enacted specific legislation promoting a policy to expand access to natural gas for new customers in Massachusetts. See St. 2014, c. 149, § 3 ("2014 Act"). By purporting to ban natural gas service to certain new and existing heating customers, Article 21 directly and impermissibly contradicts this policy established by the Legislature.

In the 2014 Act, the Legislature directed that the Department on or before January 1, 2015, authorize gas companies "to design and offer programs to customers which increase the availability, affordability, and feasibility of natural gas service for new customers."[5] 2014 Act (emphasis added). The 2014 Act further directed that the Department "shall consider programs that are likely to accelerate the conversion or expansion to natural gas usage for low-income consumers . . . , including programs that exempt new residential low-income heating customers from any new area surcharge . . . ." 2014 Act, § 3(d) (emphasis added).[6] A program in Brookline under the 2014 Act, however, would be frustrated, if not impossible, under Article 21 because National Grid could not add new heating customers. Therefore, the 2014 Act preempts Article 21.

The 2014 Act is only one piece of legislation in a near constantly evolving regulatory scheme to pursue numerous goals of the Commonwealth's energy portfolio, including reliability, reduction of greenhouse gases, and cost effectiveness for customers among others. See, e.g., St. 2016, c. 188 ("An Act to Promote Energy Diversity"). In this context, there is particular danger in the local "balkanization" that could result if individual municipalities throughout the

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5 The Department authorized the gas companies to take steps to move forward with these programs by letters issued to all the gas companies on November 6, 2014.

6 Pursuant to the 2014 Act, NSTAR Gas Company d/b/a Eversource Energy ("NSTAR Gas") submitted a pilot program, which was approved by the Department in 2017. NSTAR Gas Company, D.P.U. 16-79 (2017).

Commonwealth sought to restrict the energy resources available within their boundaries. See Boston Edison Co. v. Town of Bedford, 444 Mass. 775, 785 (2005) ("Permitting a town to manipulate the prioritization of pole removal to the disadvantage of other municipalities would threaten the provision of uniform and efficient utility services to the public"); City of Newton, 425 Mass. at 703 n.13 ("Clearly, the differences in between the municipalities in assessing costs impedes . . . uniformity . . . moreover, where the system becomes less uniform, such balkanization is likely to lead to less efficient services."); Pereira v. New England LNG Co., 364 Mass. 109, 119 (1973) (quoting New York Central R.R. v. Dep't of Pub. Util., 347 Mass. 586, 592 (1964) ("Legislature intended a broad and balanced consideration of all aspects of the general public interest and welfare and not merely an examination of the local and individual interests").

Where the Legislature seeks to specify a role for municipalities in the context of encouraging sustainable energy within its overall energy portfolio, it has done so. For example, the Legislature adopted "An Act to Promote Energy Diversity," which directs the establishment of a commercial sustainable energy program, in which municipalities may elect to participate. St. 2016, c. 188, § 2 ("Participating municipalities are specifically authorized to "collect, remit and assign betterment assessments, in return for commercial energy improvements for a benefitted property owner located within such municipality and for costs reasonably incurred in performing such acts."). In its numerous recent efforts to address the regulation of energy and energy diversity, the Legislature has not (1) reversed its stated policy of encouraging programs to "increase the availability, affordability and feasibility of natural gas service for new customers" (2014 Act) or (2) vested authority in municipalities to restrict the ability of gas companies to serve eligible customers who seek service.

VI. Conclusion

For the reasons stated above, Article 21 directly conflicts with state law regulating the sale and distribution of natural gas. Therefore, state law preempts Article 21.

Sincerely,

/s/ Shane Early

Shane Early
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