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**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT  
No. SJC-12738**

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**TOWN OF SUDBURY,  
PLAINTIFF-APPELLANT**

**v.**

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY  
AND NSTAR ELECTRIC COMPANY D/B/A EVERSOURCE ENERGY,  
DEFENDANTS-APPELLEES**

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**ON APPEAL FROM JUDGMENT OF THE LAND COURT**

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**CONSOLIDATED REPLY BRIEF OF PLAINTIFF-APPELLANT, TOWN  
OF SUDBURY, TO BRIEFS OF DEFENDANTS-APPELLEES**

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## INTRODUCTION

Plaintiff-Appellant, Town of Sudbury (“Town”), files this consolidated reply to the briefs of the Defendants-Appellees, Massachusetts Bay Transportation Authority (“MBTA”) and NStar Electric Company d/b/a Eversource Energy (“Eversource”). In its initial brief, the Town presented the reasons why the Town stated a valid claim upon which relief can be granted under the common law prior public use doctrine, why the Land Court erred in dismissing its complaint to allow a purported “private” inconsistent use, and why the Court properly rejected the remaining arguments the MBTA and Eversource cited in support of their motions to dismiss. The arguments and counterarguments on these issues are set forth in the respective briefs of the parties. The Town files this reply for further clarification refuting the MBTA and Eversource’s claim that this case involves an inconsistent “private” versus “public” use, and to correct the MBTA’s misstatements on pp. 35-36 of its brief that the Town itself would be in violation of the prior public use doctrine if the Court were to apply the doctrine to prevent the MBTA from using its inactive railroad right of way for a public electric utility/“rail trail” project.

## ARGUMENT

### I. THE PROPOSED TRANSMISSION LINE PROJECT IS A PUBLIC USE

In its Initial Brief, the Town provided a comprehensive overview of the common law prior public use doctrine, which holds that public land taken or acquired for a particular public use cannot be diverted to an inconsistent public use without plain and explicit authorizing legislation. Brief of Plaintiff-Appellant, Town of Sudbury at 21- 25. The Town also presented its argument that the Land Court erred in its failure to reject the claims of the MBTA and Eversource that Eversource is a private corporation whose actions do not constitute a public use for purposes of invoking the prior public use doctrine. Brief of Plaintiff-Appellant, Town of Sudbury at 30.

In response, the MBTA focuses on whether Eversource is a public or private entity and overlooks consideration of the electric transmission line as a public use. Brief of Defendant-Appellee Massachusetts Bay Transportation Authority at 30-32. Eversource, however, contends that the proposed transmission line project is a private use and that “the general public will have no common right to access or utilize the Proposed Transmission Line.” Brief of Appellee NSTAR Electric Company d/b/a Eversource Energy at 7-8.

Each Appellee conveniently ignores the long history of public utility law holding that the transmission of electricity is a public use and is intended for the

public benefit. It is a fundamental principle of public utility ratemaking that public utilities may recover their costs because they engage in a public use. See e.g., Bluefield Waterworks Co. v. Pub. Serv. Comm'n of West Virginia et al., 43 S.Ct. 675 at 693 (1923)(“The return [on a public utility company’s assets] should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate...to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.”); and Pub. Serv. Line Co. of New Mexico v. Fed. Energy Regulatory Comm'n et al. 653 F.2d 681, 683 (1981) (“As a general proposition, a regulated utility is allowed to recover from ratepayers all expenses incurred...plus a reasonable return on capital invested in the enterprise and allocated to public use.”)

Ratemaking authority for Eversource’s project as proposed rests with ISO New England Inc. (“ISO-NE”) and the Federal Energy Regulatory Commission (“FERC”). See Eversource’s Response to Information Request in consolidated proceedings of the Electric Facilities Siting Board (“EFSB”) and Massachusetts Department of Public Utilities (“D.P.U.”), RR-EFSB-23(R-1), EFSB 17-2/D.P.U. 17-82/17-83.<sup>1</sup> Eversource is authorized to recover costs for the transmission line from ratepayers and has already recovered certain project costs pursuant to the

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<sup>1</sup> The Town requests that the Court take judicial notice of public filings in these State administrative proceedings. True and complete copies of the cited filings are contained in the Addendum to this Reply Brief.

ISO-NE Transmission, Markets and Services Tariff approved by FERC. See Eversource Response to Information Request EFSB 17-2/D.P.U. 17-82/17-83.

An underlying goal of FERC policy over interstate transmission lines is to serve the public interest. 16 U.S.C. §824 (“It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest...”). In carrying out its regulation of utility ratemaking over interstate transmission and wholesale power, FERC is “required to set rates at levels that accommodate both investor and consumer interests, sufficient to allow a public utility to perform its ‘public duties;’ such duties arguably include maintenance and, in some instances, construction of transmission networks vigorous enough to meet the reliability and capacity demands of consumers in competitive markets.” Patrick J. McCormick III & Sean B. Cunningham, *The Requirements of the Just and Reasonable Standard; Legal Bases for Reform of Electric Transmission Rates*, 21 Energy L.J.389 at 397 (2000).

In addition, under its authority to regulate interstate transmission and wholesale power, FERC has issued orders governing open access to transmission lines as being in the public interest. See, e.g., FERC Order No. 888 (April 24, 1996), 75 FERC ¶61,080. FERC has also included in its transmission planning and cost allocation requirements the consideration of public policy requirements in the development of regional transmission facilities, to ensure just and reasonable rates

and to prevent undue discrimination by public utility transmission providers. See, e.g., FERC Order No. 1000 (July 21, 2011), 136 FERC ¶ 61,051. FERC is also currently considering the scope and implementation of its electric transmission incentives regulations and policy. 166 FERC ¶61,208, Docket No. PL19-3-000 (March 21, 2019) (exploring Section 219 of the Federal Power Act which directed FERC to promulgate a rule providing incentive-based rates for electric transmission for the purpose of benefitting consumers through increased reliability and lower costs of power and to allow the recovery of all prudently incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act).

The Appellees also fail to give due consideration to the undisputable fact that to obtain siting approval from the Commonwealth to construct the transmission line, Eversource must show that the project will serve the public convenience and is consistent with the public interest. G.L. c. 164, §72. The entire premise of the Department of Public Utilities' ("Department") role in reviewing construction of transmission lines is the public service to be provided by electric transmission. New England Power Co. v. Bd. of Selectmen of Amesbury, 389 Mass. 69, 76-77 (1983), quoting Pereira et al. v. New England LNG Co., Inc. ("The Legislature, in vesting over-all responsibility for the regulation of transmission lines in State agencies and particularly in the Department, has



recognized “the absolute interdependence of all parts of the Commonwealth and of all of its inhabitants in the matter of availability of public utility services, and [has given] to the Department the power to take action necessary to insure that all may obtain a reasonable measure of such vital services.”).

Moreover, Eversource also has the ability to utilize the power of eminent domain to construct its transmission projects. G.L. c. 164, §72. The General Court has recognized the public nature of transmission lines by granting electric companies the authority to take property necessary for the line. See G.L. c. 164, §72 (“The department may by order authorize an electric company, distribution company, generation company, or transmission company or any other entity to take by eminent domain under chapter 79 such lands, or such rights of way or widening thereof; or other easements therein necessary for the construction and use or continued use as constructed or with altered construction of such line along the route prescribed in the order of the department.”). It is axiomatic that the authority granted to electric companies to take property by eminent domain is premised on the public use of the property. See, e.g., Mississippi Power & Light Co. v. Louis A. Conerly, et al., 460 So.2d 107 (1984) (request for condemnation of property for construction of transmission line denied as no Mississippi customer would be served by transmission line and thus there was no public necessity for the taking of the particular property.) Eversource also has the ability to seek a zoning

exemption from the Department when constructing transmission lines (which it is seeking in D.P.U 17-82). G.L. c. 40A, §3 (public service corporations may be exempt from local zoning for the present or proposed use of the land or structure if the Department finds it is reasonably necessary for the convenience or welfare of the public.)

Further, there was a clear understanding when Massachusetts restructured the electric industry in 1997 that in exchange for the public service they would continue to provide, electric companies, subject to oversight by the Commonwealth, would be able to maintain a monopoly over customers in their service territory. G.L. c. 164, §1B(a). A specific goal of the Electric Restructuring Act of 1997 was to enhance the reliability of the interconnected regional transmission system, “since reliable electric service is of utmost importance to the safety, health and welfare of the commonwealth’s citizens and economy.” St. 1997, c. 164, §1(h). NSTAR Electric’s own comments to the Department regarding a 2004 inquiry into transmission line construction or alteration describe the evolution of the electric utility industry in Massachusetts and the public policy behind the Electric Restructuring Act of 1997 to provide safe, reliable and economic electric service to all customers desiring electricity. Transmission Line Construction Investigation, D.T.E. 04-92, Comments of NSTAR Electric at 2-3 (December 3, 2004). Eversource acknowledges in these

comments the “rigorous protections to ensure the preeminent rights of electric companies to place their facilities in public ways, to obtain the rights needed for such locations and to acknowledge the franchise rights of such electric companies.” Id.

For all of the above reasons, together with the reasons set forth on pp. 29-32 of the Town’s initial brief, there can be no question that the project, which involves the construction of a transmission line to address the purported reliability needs of the regional transmission system, is of a public nature and involves a public, not a private use.

## II. THE TOWN HAS NOT VIOLATED THE PRIOR PUBLIC USE DOCTRINE

On p. 35 of its brief, the MBTA repeats a mistaken premise in footnote 4 of the Land Court’s decision on appeal, that application of the prior public use doctrine under the circumstances of this case would “give rise to a significant number of lawsuits challenging the public disposition” of land to private parties. The MBTA repeats the mistaken assertion without addressing the fact that the Town definitively refuted it at p. 33, footnote 4 of the Town’s initial brief. There are specific statutory and constitutional requirements in place which prevent a public entity from disposing of real estate for a purpose contrary to the purpose for which it was acquired. Application of the common law prior public use doctrine to the MBTA under the particular circumstances of this case would not give rise to a

significant number of lawsuits involving the public disposition of real estate because the typical disposition is already subject to specific statutory and constitutional requirements. See, e.g., requirements cited at Plaintiff-Appellant's Brief at p. 33, footnote 4.

The MBTA simply ignores the Town's citations on this issue and seeks to bolster the mistaken premise by asserting that the Town itself is in violation of its "expansive view" of the prior public use doctrine in issuing "Grants of Location authorizing Eversource to install electric utility lines underneath municipal public ways," and in granting an easement authorizing Eversource to install electric utility lines across a Town-owned parcel on which a fire station is located. See Brief of Defendant-Appellee, MBTA, at p. 35. This argument is incorrect and misleading. The "Grants of Location" cited by the MBTA are specifically authorized by the Legislature. See, e.g., G.L. c.166, §§21-22 (authorizing grants of location for construction of electric transmission lines and authorizing consent of municipal officers to construct or alter transmission lines). The "easement" the MBTA refers to has no relevance in this case because 1) there is no evidence the easement is inconsistent with the purpose for which the Town may have acquired the property, and 2) there is no evidence the use would preclude the continued use of the property for a fire station. Here, the Town has established that the proposed use of the MBTA's inactive rail line for a public electric utility/"rail trail" project is

inconsistent with the express public purpose for which the property was acquired and would physically preclude a return to the prior public use for which it was acquired. The prior public use doctrine is clearly applicable under the particular circumstances of this case and the Town's complaint should not have been dismissed.

### CONCLUSION

For the reasons set forth in the Town's initial brief, and the grounds set forth in the foregoing reply brief, the Town respectfully requests that the Land Court's Order Allowing the Defendants' Motion to Dismiss, and Judgment, be reversed.

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**CERTIFICATE OF COMPLIANCE**

I, George X. Pucci, certify that the foregoing Appellant’s brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 2,173 total non-excluded words as counted using the word count feature of Microsoft Word 2013.

/s/ George X. Pucci  
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**CERTIFICATE OF SERVICE**

Pursuant to Mass. R. A. P. 13(d), I hereby certify, under the penalties of perjury, that on April 23, 2019, I electronically filed the foregoing document with the Massachusetts Appeals Court. I certify that the following counsel of record are registered as Filers and that they will be served by the Electronic Filing Service:

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