

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA,)
Plaintiff,)
)
-and-)
)
MASSACHUSETTS PORT AUTHORITY,)
Plaintiff in Intervention,)
)
v.	C.A. No. 16-11470-RGS)
)
NSTAR ELECTRIC COMPANY d/b/a)
EVERSOURCE ENERGY, HARBOR)
ELECTRIC ENERGY COMPANY, and)
MASSACHUSETTS WATER RESOURCES)
AUTHORITY,)
)
Defendants.)
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STIPULATION AND ORDER

WHEREAS, the United States of America, on behalf of the U.S. Army Corps of Engineers (“Corps”), filed the Complaint in this civil action (the “Action”) against NSTAR Electric Company d/b/a Eversource Energy (“NSTAR”), Harbor Electric Energy Company (“HEEC”), and the Massachusetts Water Resources Authority (“MWRA”) (collectively, the “Defendants”), alleging that the Defendants violated Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404(s) of the Clean Water Act, 33 U.S.C. § 1344(s);

WHEREAS, the Complaint concerns Corps permit number MA-BOSS-890530-R-89 (the “Permit”), issued in 1989, which allowed for the installation and operation of a submarine 115kV electric cable beneath Boston Harbor from Boston Edison Company’s K Street substation in South Boston to Deer Island for the purpose of powering the construction and operation of the

Deer Island Waste Water Treatment Plant;

WHEREAS, the Defendants are the permittees or co-permittees, or the successors-in-interest to the permittees or co-permittees, on the Permit;

WHEREAS, in 1989-1990, an electric transmission cable (the “Existing Cable”) was installed from Boston Edison Company’s K Street substation in South Boston beneath Boston Harbor to Deer Island, crossing two federal channels, the Reserved Channel and the Main Ship Channel;

WHEREAS, within the Reserved Channel, the Existing Cable was installed adjacent to shipping berths, including Berths 10 and 11, that are part of Conley Container Terminal, which is owned and operated by Massachusetts Port Authority (“Massport”);

WHEREAS, Massport has intervened as a plaintiff in this Action;

WHEREAS, the United States and Massport (jointly, the “Plaintiffs”) contend that, within some or all of the Reserved Channel and the Main Ship Channel, the Existing Cable was installed, and is still located, at shallower depths than those required by the Permit; that such installation violated and continues to violate Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404(s) of the Clean Water Act, 33 U.S.C. § 1344(s); and that the Defendants are liable for those violations;

WHEREAS, the MWRA has filed cross-claims against NSTAR and HEEC for: (1) a declaratory judgment regarding the MWRA’s, NSTAR’s, and HEEC’s respective rights and obligations under an Interconnection and Facilities Support Agreement that MWRA entered into with NSTAR and HEEC in 1990 (the “Interconnection Agreement”); (2) indemnification, should MWRA be held liable on any of the Plaintiffs’ claims in the Action; and (3) Unfair and Deceptive Trade Practices in violation of Mass. Gen. Laws ch. 93A;

WHEREAS, NSTAR and HEEC have filed cross-claims against the MWRA for: (1) a declaratory judgment regarding the Defendants' rights and obligations under the Interconnection Agreement; and (2) contribution from the MWRA should NSTAR and HEEC be held liable on any of the Plaintiffs' claims in this action (these cross-claims and those asserted by the MWRA against NSTAR and HEEC are herein referred to collectively as the "Cross-Claims");

WHEREAS, Congress has authorized the Corps, in partnership with Massport, to carry out the \$310 million Boston Harbor Deep Draft Navigation Improvement Project (the "Deep Draft Project"), the purpose of which is to deepen portions of Boston Harbor, including the Reserved Channel and the Main Ship Channel, to accommodate larger container ships;

WHEREAS, those larger container ships are expected to dock at Conley Container Terminal's Berths 10 and 11, which will be deepened by Massport ("Massport's Berth Projects") in coordination with the Deep Draft Project;

WHEREAS, the Plaintiffs assert that the Deep Draft Project cannot proceed with the Existing Cable in its current location given the risk of injury to the Existing Cable and/or dredging vessels and persons aboard those vessels;

WHEREAS, this Stipulation and Order is intended to constitute a complete and final settlement of the Plaintiffs' claims against the Defendants as set forth in the Complaint;

WHEREAS, the Parties agree that settlement of the Plaintiffs' claims against the Defendants is in the public interest and that entry of this Stipulation and Order is the most appropriate means of resolving those claims; and

WHEREAS, the Court finds that this Stipulation and Order is reasonable and fair, and that it adequately protects the public interest in accordance with the Rivers and Harbors Act and the Clean Water Act and all other applicable federal law.

THEREFORE, upon consent of the Parties by their authorized representatives, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. INSTALLATION OF NEW CABLE AND REMOVAL OF EXISTING CABLE

1. HEEC will install a new submarine electric cable from NSTAR's K Street substation in South Boston to Deer Island (the "New Cable"). The New Cable will cross land in South Boston, including Conley Container Terminal property, and then enter Boston Harbor from the southeast corner of the Conley Container Terminal property, just north of Castle Island. The New Cable will be installed at least 75 feet below Mean Lower Low Water: (a) where it crosses the Main Ship Channel, including its side slopes; and (b) for a distance of 500 feet extending east of the easterly limit of the Main Ship Channel. The New Cable will cross the Main Ship Channel perpendicularly to the maximum extent feasible, so as to minimize its length in the Main Ship Channel. The New Cable will be installed outside the President Roads Anchorage. The drawing attached hereto as Exhibit A generally depicts the planned location of the New Cable.

2. Massport and HEEC agree to negotiate a separate agreement in good faith whereby Massport will grant a non-exclusive easement on Conley Container Terminal property sufficient to permit the New Cable to cross that property, in a location acceptable to Massport and subject to an agreement between Massport and HEEC on terms and conditions mutually agreeable to Massport and HEEC.

3. HEEC will provide the Plaintiffs and the MWRA with copies of all submissions to the Massachusetts Energy Facilities Siting Board, the Massachusetts Department of Public Utilities, and any other permitting authority or agency, made by or on behalf of HEEC in connection with the New Cable. Such copies will be provided simultaneously with the

submissions.

4. The following deadlines shall apply:
 - a. HEEC will provide the Corps (with copies to Massport and the MWRA) with drawings and GPS coordinates for the requested location of the New Cable, for final review and approval by the Corps, by June 1, 2017.
 - b. HEEC will apply for all necessary federal, state, and local permits to install the New Cable, including a permit from the Corps, by July 1, 2017.
 - c. HEEC will provide the Plaintiffs and the MWRA with a final set of design drawings and specifications for the installation of the New Cable, stamped by a licensed professional engineer, after obtaining all necessary approvals but before beginning construction, by August 1, 2017.
 - d. HEEC will install the New Cable, fully in service and with electricity running to Deer Island, by December 31, 2019.
 - e. Within thirty (30) days after the New Cable is installed, HEEC will provide the Plaintiffs and the MWRA with a final set of electronic as-built drawings and detailed drawings, including a multi-beam survey, certified by a licensed engineer on behalf of HEEC, showing the location (vertical and horizontal) of the New Cable and that the New Cable complies with all permitting requirements.
 - f. HEEC will remove the Existing Cable as follows (“Existing Cable Removal”):
 - i. By February 28, 2020, HEEC will de-energize the Existing Cable.
 - ii. The parties agree that the section of the Existing Cable located in the Reserved Channel, the Turning Basin, the Main Ship Channel, and the

section of the harbor between the east side of the Main Ship Channel and the point 500 feet east thereof shall be defined as the “Western Section,” while the remainder of the Existing Cable shall be defined as the “Eastern Section.”

- iii. HEEC will remove all oil from the Western Section by February 28, 2020.
- iv. HEEC will remove all oil from the Eastern Section by May 31, 2020.
- v. HEEC will remove the Western Section by May 31, 2020.
- vi. If all required permitting authorities and agencies approve, HEEC will abandon the Eastern Section in place. If HEEC fails to obtain all required permits for abandonment, HEEC will remove the Eastern Section by May 31, 2021.
- vii. HEEC will obtain all federal, state, and local permits required to perform the Existing Cable Removal, including a modification of the Permit to effectuate the terms of this Stipulation and Order. The modified Permit shall not include the MWRA.

5. Beginning July 1, 2017, HEEC will file monthly reports with the Court detailing the status of the work to be performed under this Stipulation and Order.

6. If HEEC fails to meet any of the deadlines set forth in paragraph 4 above, and that failure causes a delay in the Deep Draft Project and/or Massport’s Berth Projects with financial consequences to either or both Plaintiffs, NSTAR and HEEC agree that they will be liable to the Plaintiff(s) for all actual damages resulting from such delay, including, but not limited to, (a) daily labor costs incurred by the Plaintiff(s) suffering financial consequences, and (b) delay costs

charged to the Plaintiff(s) suffering financial consequences by any and all contractors. Such remedy will be in addition to any and all other remedies that may be available to the Plaintiffs.

II. COSTS OF THE CABLE PROJECT

7. The Plaintiffs shall not bear any of the cost to permit, install, and maintain the New Cable or any of the cost to permit and remove the Existing Cable.

8. This Stipulation and Order does not address, and nothing herein shall be construed to address, the merits of the Cross-Claims or the issue of who among the Defendants is responsible for: (a) the costs of geotechnical studies and/or borings of the proposed position for and alignment of the New Cable in the Main Ship Channel; (b) the costs for designing, manufacturing, and installing the New Cable; or (c) the costs of removing the Existing Cable. Neither this Court nor the Plaintiffs take any position on that issue. The Court shall continue to exercise its jurisdiction over the Cross-Claims.

III. INDEMNIFICATION

9. With the exception of existing or future claims between or among the Defendants themselves, NSTAR and HEEC accept all risk of loss associated with installing the New Cable and removing the Existing Cable.

10. The Defendants agree and acknowledge that the Plaintiffs will not be liable for any damage or injury (including personal and/or bodily injury) resulting from either the New Cable, including its installation, or the Existing Cable, including its removal. NSTAR and HEEC agree to indemnify and hold the Plaintiffs harmless from any such damage or injury, and to defend Massport against any claims for any such damage or injury.

IV. ACTS OF GOD

11. NSTAR and HEEC shall perform the actions required in this Stipulation and

Order within the time limits set forth herein, unless the performance is prevented or delayed solely by an Act of God which cannot be overcome by due diligence. An "Act of God" is any misadventure or casualty that happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of humans and without human intervention, that materially affects NSTAR and/or HEEC's ability to perform their obligations hereunder. An Act of God does not include normal precipitation or climate events.

12. If NSTAR and/or HEEC believes that an Act of God has materially affected its ability to timely perform any action required herein, it shall notify the Plaintiffs and the MWRA in writing within seven (7) calendar days thereafter. Such notice shall include a detailed description of the following:

- a. what action has been materially affected;
- b. the specific Act of God;
- c. the length or estimated duration of the delay; and
- d. any measures taken or planned by NSTAR and/or HEEC to prevent or minimize the delay, and a schedule for the implementation of such measures.

13. Failure to timely and completely notify the Plaintiffs about an Act of God shall constitute a waiver of any claim that performance has been delayed or prevented by that Act of God.

14. If the Plaintiffs determine that an Act of God has occurred and has materially affected NSTAR and/or HEEC's performance hereunder, the deadline for the affected action shall be extended by the amount of time of the delay caused by the Act of God. NSTAR and HEEC shall coordinate with the Plaintiffs to determine when to begin or resume any operations affected by an Act of God.

V. STIPULATED PENALTIES

15. If NSTAR and/or HEEC fails to timely fulfill any requirement of this Stipulation and Order, that Defendant(s) shall pay a stipulated penalty to each Plaintiff for each such violation as follows:

For Days 1-30 of non-compliance:	\$5,000 per day
For Days 31-60 of non-compliance:	\$10,000 per day
For Day 61 and beyond of non-compliance:	\$15,000 per day

Such payments shall be made without demand on or before the last day of the month following the month in which the stipulated penalty accrued. No stipulated penalties may be assessed against the MWRA.

16. Any disputes concerning the amount of stipulated penalties or the underlying violation that gives rise to the stipulated penalties shall be resolved upon motion to this Court.

17. The filing of a motion requesting that the Court resolve a dispute shall stay that Defendant's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Stipulation and Order. In the event that the Defendant does not prevail on the disputed issue, stipulated penalties shall be paid by that Defendant as provided in this Section.

18. If NSTAR or HEEC demonstrates to the Court that a delay or other non-compliance was due to an Act of God (as defined in this Stipulation and Order), or otherwise prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

19. In the event that a stipulated penalty payment is applicable and not made on time,

interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

VI. SCOPE OF STIPULATION AND ORDER

20. In exchange for the Defendants' performance of obligations promised herein, the Plaintiffs agree to stay their claims against the Defendants effective as of the date on which the Court enters this Stipulation and Order. The Plaintiffs reserve the right to move for a lift of the stay should one or more Defendants violate any term or condition of this Stipulation and Order, including, but not limited to, any deadline set forth herein.

21. The Plaintiffs agree to voluntarily dismiss their claims against the Defendants with prejudice upon the later of: (a) the date the New Cable is installed and in service, and the Existing Cable is removed from Boston Harbor in compliance with all terms and conditions of the removal permit(s); or (b) the date the Cross-Claims are terminated, whether by judgment, settlement, dismissal, or otherwise.

22. Nothing in this Stipulation and Order shall constitute an admission of fact or law by any party.

23. The obligations of NSTAR and HEEC under this Stipulation and Order are joint and several.

24. Nothing herein shall limit the Corps' ability to issue, modify, suspend, revoke, or deny any permit.

25. This Stipulation and Order in no way affects or relieves Defendants of their responsibility to comply with all applicable federal, state, and local laws, regulations, and permit conditions.

26. Nothing herein shall affect the rights of either Plaintiff as against any person or entity not a party to this Stipulation and Order.

27. The Plaintiffs reserve any and all legal and equitable remedies available to enforce the provisions of this Stipulation and Order and applicable federal, state, and local laws, regulations, and permit conditions.

VII. NOTICES

28. Within 30 days after the deadline for completing any task set forth in Section I of this Stipulation and Order, NSTAR and HEEC shall provide the Plaintiffs and the MWRA with written notice stating whether that task has been completed.

29. All notices and communications required under this Stipulation and Order shall be sent by email to the Parties through the following persons:

- a. If to the United States: Matt Tessier, matthew.e.tessier@usace.army.mil; Julie Byars, julie.a.byars@usace.army.mil; Christine Wichers, christine.wichers@usdoj.gov; and Scott Schachter, scott.schachter@usdoj.gov.
- b. If to Massport: Lisa Wieland, lwieland@massport.com; Catherine McDonald, cmcdonaldferrara@massport.com; and Brian Kelly, bkelly@nixonpeabody.com.
- c. If to NSTAR and/or HEEC: Michael Perry, mperry@mgmlaw.com.
- d. If to the MWRA: Steven Remsberg, Steven.Remsberg@mwra.com; and Jonathan Ettinger, jettinger@foleyhoag.com.

VIII. COSTS OF SUIT

30. Each party to this Stipulation and Order shall bear its own costs and attorneys'

fees in this action. Should any Defendant subsequently be determined by the Court to have violated the terms or conditions of this Stipulation and Order, that Defendant shall be liable for any costs or attorneys' fees incurred by either or both Plaintiffs in any action against that Defendant for noncompliance with or enforcement of this Stipulation and Order.

IX. PUBLIC COMMENT

31. The parties acknowledge that after the lodging and before the entry of this Stipulation and Order, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Stipulation and Order if the comments received disclose facts which lead the United States to conclude that the proposed Stipulation and Order is inappropriate, improper, or inadequate. Massport and the Defendants agree not to withdraw from, oppose entry of, or challenge any provision of this Stipulation and Order unless the United States has notified them in writing that it no longer supports entry of the Stipulation and Order.

X. OTHER PROVISIONS

32. The provisions of this Stipulation and Order will apply to and be binding upon the Parties and their officers, directors, agents, employees, successors, and assigns, and any person, firm, partnership, or corporation acting in concert or participation with any of them. Any change in ownership or status of a Defendant, including but not limited to any transfer of assets or real or personal property, will not alter the Defendants' responsibilities under this Stipulation and Order.

33. This Stipulation and Order is not and shall not be interpreted to be a permit or modification of any existing permit under any federal, state, or local law or regulation.

34. Upon entry by the Court, this Stipulation and Order shall have the force and effect of an Order by the Court. Any modification of this Stipulation and Order shall be in writing, and shall not take effect unless signed by all the Parties and approved by the Court.

35. The Court will retain jurisdiction over this action for the purpose of resolving any disputes under this Stipulation and Order, effectuating or enforcing compliance with its terms, and resolving the Cross-Claims.

SO ORDERED.

Date: _____, 2017

RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

Stipulated to:

UNITED STATES OF AMERICA

By its counsel,

JEFFREY H. WOOD

Acting Assistant Attorney General

Environment and Natural Resources Division

By: 

Scott A. Schachter

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Environment and Natural Resources Division

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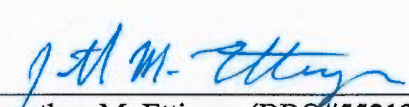
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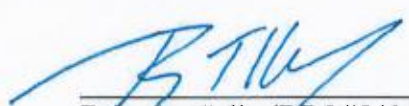
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MWRA Cable Alternatives



Figure 1
New Cable Alternative

EXHIBIT A