

**BEFORE THE NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

INVESTIGATION INTO POTENTIAL :  
APPROACHES TO MITIGATE : DOCKET NO. IR 15-124  
WHOLESALE ELECTRICITY PRICES :

**COMMENTS ON THE STAFF LEGAL MEMORANDUM  
SUBMITTED ON BEHALF OF  
ALGONQUIN GAS TRANSMISSION, LLC, AND SPECTRA ENERGY PARTNERS, LP**

Algonquin Gas Transmission, LLC and Spectra Energy Partners, LP (collectively “Spectra Energy”), as co-developer of the Access Northeast Project (“Access Northeast”)<sup>1</sup> hereby submit comments in response to the July 10, 2015 New Hampshire Public Utilities Commission (“Commission”) Staff Legal Memorandum titled “Gas Capacity Acquisitions by N.H. Electric Distribution Utilities” in the captioned matter (“Staff Legal Memorandum”).

**Executive Summary**

Spectra Energy first wishes to acknowledge the good work of Staff. Spectra Energy agrees with and supports the majority of the legal conclusions while seeking to further focus certain others. Based on Staff’s good work and our independent research, Spectra Energy submits not only that it is legally permissible for New Hampshire electric distribution companies (“EDCs”) to acquire capacity in the Access Northeast project, but also that public policy and electric service reliability concerns support, if not mandate, such a strategy.

We agree with Staff’s conclusion that the **Commission may reasonably find that “provision of gas capacity to unaffiliated merchant generators does not violate the functional separation principle...in that New Hampshire EDCs would not actually acquire the gas capacity for their own use, but rather, would make such capacity available for the use of merchant generators in a bilateral transaction.”** (See Issue 1). Current facts, proposed business architecture or the law do not merit a concern regarding the separation of generation and distribution services. EDCs contracting for gas capacity would be acting in their long-standing capacity by supporting appropriate infrastructure (and not acting as power producers). As to Issue 2, we agree that **New Hampshire EDCs have the authority to acquire gas capacity.** As to Issue 3, we agree that **costs associated with gas capacity acquisition are recoverable**, and suggest modest refinements of the criteria to be used to determine whether specific costs should be recoverable by EDCs. Thus, Spectra Energy urges Staff to acknowledge that existing New Hampshire law provides a timely and efficient pathway permitting EDCs to enter into gas capacity contracts with Access Northeast.

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<sup>1</sup> Eversource Energy Service Company, a subsidiary of Eversource Energy, National Grid Transmission Service Corporation, an unregulated wholly owned subsidiary of National Grid USA, Spectra Energy Corp., and Spectra Energy Partners, LP are working to develop the Access Northeast Project.

Beyond pure legal issues, Spectra Energy wants to stress that time is of the essence. In the absence of timely decisions, the reliability of the natural gas supply to the natural gas-fired generation fleet upon which ISO New England Inc. (“ISO-NE”) relies remains an issue. The region’s electric consumers risk the loss of significant benefits (on the order of \$1 billion per year) for every winter in which new natural gas capacity that could be provided by Access Northeast is not available to electric generation. Furthermore, in the absence of additional natural gas pipeline capacity the region continues to place at risk the ability of the present and future natural gas-fired generation fleet to reliably provide the electricity upon which ISO-NE relies.

**1. Issue 1: The Electric Utility Restructuring Statute (RSA Chapter 374-F) does not prohibit EDCs from acquiring gas capacity.**

*a. Acquisition of gas capacity by an EDC does not compromise the separation of generation and transmission/distribution functions.*

The language of RSA 374-F:3, III cited by Staff provides: “Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future.” Thus, the “provision of gas capacity to unaffiliated merchant generators does **not violate the functional separation** principle...in that New Hampshire EDCs would not actually acquire the gas capacity for their own use, but rather, would make such capacity available for the use of merchant generators in a bilateral transaction.” (Emphasis added). Spectra Energy agrees.

Through the Restructuring statute (RSA Chapter 374-F), electric generation functions were carved away from EDCs, but the historical role as the transmission and distribution entity remained. Spectra Energy acknowledges that under the law, generation and transmission/distribution services should be “functionally separated” but stresses that the acquisition of gas capacity by EDCs would not abrogate this separation. It is important to note that the EDCs would not be acquiring capacity “for the use of gas-fired generators” (as phrased in the Staff Legal Memorandum) but would be acquiring transmission capacity that would be available for release to gas-fired generators on the secondary capacity release market, at the generator’s discretion and as market forces warrant. Nothing imposes any obligation on electric generators to purchase or utilize pipeline capacity. Quite simply, the EDCs will not be participating in the generation market. The EDC contracts would anchor the development of incremental pipeline capacity for the region, which would be made broadly available first to the electric generators and secondly, to the marketplace for any shipper to utilize through an established capacity-release system authorized by the Federal Energy Regulatory Commission (“FERC”), just as electric generators currently take excess capacity available from local distribution companies (“LDCs”) on the secondary market. The model proposed simply provides a mechanism by which capacity would be made available to the generators, which, acting in their own economic interests, would participate in the market to utilize or not as they see appropriate. The decision of whether to procure and/or use the gas capacity made available for electric generation will rest firmly with generators and not with EDCs.

The EDCs for Access Northeast will be fulfilling the public servant role of executing firm pipeline capacity contracts which, in turn, will support natural gas infrastructure expansion. Simply put, significant improvement to the natural gas infrastructure will not occur absent commitments in the form of long-term firm contracts to underpin the capital expenditures required to construct large-scale projects. Electric generators have not and continue not to execute such contracts. It is clear to us that if the region wants new natural gas capacity to meet the needs of electric generation and increase electric reliability throughout the footprint of the electric grid in New England, and reduce wholesale electric prices, waiting for the generators to subscribe is not a viable solution. While ISO-NE has sought to place some burden on electric generators to take steps to shore up their reliability in the peak period, these efforts do not require or directly cause the development of effective and efficient changes in the physical plant that would be relied on to improve the reliable supply of natural gas to these facilities.

The function that EDCs would perform through the acquisition of gas capacity is fundamentally akin to transmission and/or distribution rather than generation. EDCs provide the infrastructure for distributing electricity from generators to users. The EDCs' acquisition of gas capacity is merely a mechanism for providing greater reliability of service along with further source options and alternatives and potential cost savings to ratepayers, particularly during severe weather conditions. The critical role to be played by the EDCs through entering into gas capacity agreements is in increasing the potential for enhanced transmission/distribution infrastructure (i.e., for securing and the distribution of gas) and not in generation.

*b. Other authorities and public policy factors, congruent with the goals of the Restructuring statutes, anticipate, enable, and support EDC engagement in gas capacity contracts.*

As the Staff Legal Memorandum discussed in detail and as we discuss more fully below with respect to Issue 2, New Hampshire statutes clearly allow for EDCs to engage in gas capacity contracts.

The Staff Legal Memorandum also highlights other important public policy motivations, such as a desired switch from legacy fuels such as coal and oil to cleaner-burning natural gas. There are very real economic and environmental benefits associated with the Access Northeast project as it results in a reduced carbon footprint for energy in New Hampshire and the Northeast and (by virtue of being constructed largely within existing pipeline and other rights-of-way) represents a far less impactful environmental footprint than certain alternatives currently under consideration. Most significantly, the Staff Legal Memorandum recognizes enhanced system reliability as a public policy goal consistent with the EDCs' duty to provide reliable service. Spectra Energy fully supports the proposition articulated in the Staff Legal Memorandum, that the Commission could and should find that the public policy goals (i.e., reliability, less price volatility, displacement of oil- and coal-fired plants) advanced by the EDCs' purchase of natural gas capacity generally and, we would add, the Access Northeast project specifically are "congruent with various Restructuring Policy Principles, and that these principles [are] not overridden by the single principle of generation-distribution separation..."

## **2. Issue 2: New Hampshire EDCs do have the power to acquire gas capacity.**

- a. The Staff Legal Memorandum identifies several critical and persuasive authorities that confirm that the EDCs have authority to acquire gas capacity.*

EDCs have ample authority to enter into the contemplated natural gas capacity contracts. The EDCs, as utilities, have the general duty to “furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.” RSA 374:1. Further, EDCs must provide “[r]eliable electricity service...while ensuring public health, safety, and quality of life.” RSA 374-F:3, I. This focus on furnishing services that are reliable as well as reasonably safe and adequate represents the strongest of public policy mandates in support of EDC entry into capacity contracts which in turn further the interests of the State and the ratepayers.

Acquisition of gas capacity by EDCs is a permissible means of ensuring reliability and enhancing customer service that minimizes customer risk, and mitigates against price volatility all the while assisting in the development of the competitive market. It is clearly in the public interest. The most critical public interest served by Access Northeast is increased system, supply and service reliability with minimal environmental impact. Without an increase in gas pipeline capacity, there will simply not be enough gas to serve both heating systems and electric power generators on cold winter days or times when historic production is interrupted or taken offline.

New England generation is very dependent on natural gas for fuel. Currently, there is approximately 16,000 MW of generation interconnected to the gas pipeline system. However, on the coldest days last winter there was only about 3,500 MW of generation running on natural gas. Fortunately some of the 16,000 MW of generation can also run on backup fuel oil (about 6,000 MW). However, there is still a significant gap in fuel available for generation. This gap has been recognized as a challenge to electric reliability by ISO-NE. That gap will only continue to grow as the region increases reliance on natural gas as non-gas generation retires.

The constrained infrastructure has a direct effect on power costs. Natural gas-fired generators typically rely on interruptible and released capacity to supply their facilities. When generators are unable to acquire capacity on the secondary market or schedule interruptible transportation, they are forced to acquire supply on the spot market. The same competition for the scarce interruptible pipeline capacity places upward pressure on spot prices for natural gas.

This problem or challenge will only be exacerbated as nuclear, coal and oil power plants retire and current transmission and/or natural gas source areas remain confined. Acquisition of pipeline capacity by EDCs will help ensure that Access Northeast, with its diverse sources, is indeed built with sufficient capacity allocated to electric generation. In addition, even if and when other energy alternatives come on line, the capacity created by additional natural gas pipeline capacity can serve as a reliability back-up to the intermittent nature of energy alternatives.

Acquisition of pipeline capacity by EDCs will not harm the competitive market. The recognition of the potential for EDCs to enter into gas capacity contracts has no designs for specific generation-related outcomes, but leaves all generation on the same footing without altering

generators' bidding behavior in FERC-regulated electricity markets. The proposal merely makes a much-needed asset available to the market whose market participants will act in their individual economic interests in determining whether to utilize that asset. What generation results and how those generators bid their energy into the wholesale market are and will be unaffected by such capacity purchases. In the end, it is important to again note that gas capacity would be available for purchase by generators, but the decision to actually acquire and use such gas capacity would be at the discretion of the generator as market forces warrant.

Furthermore, as the Staff Legal Memorandum points out, New Hampshire statute explicitly contemplates the ability of EDCs to enter into capacity contracts:

Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the commission... The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest.

RSA 374-57. In the context of the above statute, the term "transmission capacity" is not defined. As there is no prohibition on an EDC acquiring gas capacity, and there is both legal authority and strong public policy reasons to allow the EDCs to purchase gas transmission capacity, the term "transmission capacity" should be read, as Staff suggests, to include gas transmission capacity.

### **3. Comments on Issue 3: New Hampshire EDCs can recover the costs associated with gas capacity acquisition in rates under RSA Chapter 378 and allied statutes.**

#### *a. Investment in Gas Capacity is Recoverable.*

Spectra Energy agrees with the Staff Legal Memorandum's conclusion that investment in gas capacity qualifies as an investment for which rate recovery is appropriate. EDCs have a responsibility to provide reliable service to customers at rates that are just and reasonable. By making firm natural gas capacity commitments, the EDCs can respect this mandate by ensuring that existing and new natural gas generators have access to natural gas whenever it is needed. This obligation to ensure reliability is increasingly important as fewer and fewer alternative sources of generation (e.g., coal, oil) are available due to retirements. Thus, just as the costs associated with EDC investments to improve the electric transmission and distribution system that improve reliability are appropriately recovered from ratepayers, the costs associated with investments in natural gas transmission capacity that improve reliability of the electric system are also appropriately recovered from ratepayers.

Specifically, EDCs may recover in rates those returns on investments found by the Commission to be "prudent, used, and useful." RSA 378:28; RSA 374-A:6, III. Under RSA 374-F:3, VI "[a] nonbypassable and competitively neutral system benefits charge applied to the use of the distribution system may be used to fund public benefits related to the provision of electricity." As discussed in significant detail above, EDC contracts for natural gas capacity are prudent as they will enhance the reliability of the electric system and reduce prices and the price volatility of electric service; thereby, providing public benefits related to the provision of electricity.

In view of the mandate that the EDCs maintain reliability of the electric system and the importance of capacity agreements by and between the EDCs and the natural gas transmission sources to advance this mandate, the capacity agreements are clearly designed to (and will in fact) address reliability. In that sense, these arrangements are similar to others for which the Commission has allowed recovery. *See* Docket No. DE 09-035, Settlement Agreement on Permanent Distribution Service Rates (Apr. 30, 2010) at pp. 8-9.<sup>2</sup>

*b. Specific Comments on Recovery Factors*

While the precise methodology for determining which costs are recoverable will be subject to ongoing review, Spectra Energy offers the following preliminary comments on specific factors identified by Staff.

*i. Demonstration of cost-benefit advantages.*

Spectra Energy agrees with the need to demonstrate a cost-benefit advantage for EDC customers. A study completed by ICF International shows that the business case for customers is significant, estimating that “a project like Access Northeast could save New England electric consumers \$780 million to \$1.2 billion per year over its first ten years of operations.”<sup>3</sup> Indeed, having more capacity to make natural gas supply available to meet the demand of generators on a firm basis will reduce the price of natural gas, thereby decreasing the wholesale price of electricity. Thus, these capacity agreements will serve to favorably impact the price of electricity to the ultimate consumer. Meanwhile, the price of inaction is billions of dollars out of consumers’ pockets and the risk of electricity and heat not being available when people need them most.

Spectra Energy recommends that costs and benefits be presented via a review of multiple cost-benefit measures, rather than based on a singular measure such as stranded/deferred costs or other costs in isolation. Furthermore, EDCs should retain the flexibility to present such cost-benefit analyses in a manner consistent with their corporate planning processes, rather than follow a particular methodology prescribed by the Commission.

*ii. Determination of whether rate recovery is just and reasonable.*

Spectra Energy agrees with the Staff Legal Memorandum’s conclusion that the costs that the EDCs are seeking to recover must be just and reasonable and prudently incurred. The New Hampshire Supreme Court in *Legislative Utility Consumers’ Council v. Public Service Co.*, 119 N.H. 332 (1979) offers contrasting examples of costs that were deemed recoverable, and costs not deemed recoverable. Costs associated with acquiring and selling natural gas capacity are central to the EDC’s mission of providing reliable and safe service and would clearly be recoverable. Though the New Hampshire Supreme Court has held that “[p]roperty not devoted to the production and delivery of energy to the consumer is not includable in the rate base...” (*id.* at 354), the nature of the property in question that is associated with Access Northeast (i.e. contractual capacity rights) is distinguishable from the property at issue in *Legislative Utility*

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<sup>2</sup> Available at: <http://www.puc.state.nh.us/Regulatory/CASEFILE/2009/09-035/LETTERS,%20MEMOS/09-035%202010-04-30%20FINAL%20SETTLEMENT%20FILING.PDF>.

<sup>3</sup> Access Northeast Project – Reliability Benefits and Energy Costs Savings to New England at 14, ICF International (Feb. 18, 2015) (“ICF Study”).

*Consumers' Council.* The New Hampshire Supreme Court held that PSNH was not entitled to recover costs related to its investment in an appliance business, because the court could “envision no set of circumstances where it could be said that the company’s pursuit of an appliance business is devoted to meeting the energy needs of its customers.” *Id.* By contrast, an EDC’s investment in increased pipeline capacity would clearly be devoted to facilitating the availability of gas for electric generators, thereby allowing such generators to meet the energy needs of EDC customers.

Spectra Energy also agrees that EDC transactions for natural gas capacity should be accomplished at arm’s length and in compliance with affiliate transaction rules. Affiliate relationships among EDCs and potential bidders should be addressed through the existing standards of conduct. FERC’s requirements are comprehensive with respect to affiliate relationships on natural gas pipelines. Furthermore, these relationships will also be subject to specific state rules. As a result, extensive protections will be in place to govern the conduct of affiliates and prevent undue preferences.

Given the above safeguards and the absence of a legal mandate for an RFP, Spectra Energy submits that an RFP is not required, necessary or in the best interest of the State and its residents. FERC’s general policy requires capacity to be allocated to the person offering the highest rate. FERC, however, has previously allowed exemptions from the posting and bidding requirements, including where the capacity is released pursuant to a state-approved retail access program and “is committed to be used for its original purpose, to serve the LDC’s customers.” FERC Order 712. The Commission has authorized releases of capacity as part of state-approved retail access programs on a number of occasions. Similarly, FERC could exempt, through regulations or a case-specific waiver, a state-approved electric reliability program from its posting and bidding requirements in releases designed to serve the EDC ratepayers that are financially supporting the construction of such capacity. It is also well-established that FERC regularly approves unique terms of service in agreements with shippers who support the significant investment in the development and construction of incremental projects. FERC has determined that such provisions do not present a risk of undue discrimination because they reflect the unique circumstances needed to construct incremental capacity. Nevertheless, it must be reiterated here, nothing in the proposal forces an electric generator to take capacity.

Engaging in the additional step of conducting an RFP would only serve to delay the availability of adequate natural gas capacity. For every year that a project like Access Northeast is unable to complete its certificate authorization process with secured customers supporting the project before FERC, ratepayers remain exposed to the risks to the reliability of the electric grid due to the failure of electric generators to have available pipeline capacity to run when called upon. At the same time, these ratepayers continue to pay electricity rates that are higher and less predictable than need be. Thus, Spectra Energy recommends that the Commission accept EDC contracts for filing so that review and approval may be obtained no later than the end of this calendar year. To that end, Access Northeast is in a position to proceed to accommodate this requested timeframe. Even with this expeditious schedule, customers will not see the benefits of incremental gas capacity until 2018. Time is of the essence as New Hampshire customers are bearing the full risk of marketplace imbalances in the interim.

iii. No re-integration nor market distortion.

As noted in more detail in connection with Issue 1 above, market distortion would not result, as not one penny of these costs go into that market unless a generator decides to participate. In this sense, the project functions no differently than any LDC releasing capacity to a generator now.

iv. No new stranded/deferred costs

Spectra Energy anticipates that the costs to the EDCs of natural gas capacity contracts will be offset by corresponding sales of this capacity to natural gas generators and other third parties. To the extent the funds received from the generators for the purchase of this capacity from the EDCs fall short of the costs incurred by the EDCs to secure this capacity, the overall decrease in electricity prices combined with the significant but unquantified benefit of enhanced reliability will offset the EDC's costs associated with the capacity contract. Thus, obviating the possibility that these contracts will create new stranded/deferred costs.

**Concluding Thoughts**

Again, Spectra Energy thanks the Staff for the opportunity to comment on the Staff Legal Memorandum. Spectra Energy not only believes that New Hampshire law allows EDCs to acquire gas capacity and to recover such costs in its rates, but also that public policy and energy supply concerns demand that EDCs be allowed to acquire gas capacity. Spectra Energy further believes that in the absence of a legal mandate for an RFP process, the State, its residents and its ratepayers are best served by allowing EDCs to present contracts for gas capacity for action by the Commission without conducting an RFP so long as such transactions are conducted at arms' length and in compliance with affiliate transaction rules (to the extent applicable). Time is of the essence, and each winter that New Hampshire and the northeast proceed without a truly adequate natural gas capacity, the likes of which can be addressed by Access Northeast, not only endangers service reliability to all consumers in the State, but also exposes the customers to very real pricing and cost disadvantage.

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