

**BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

EVERSOURCE ENERGY - PETITION FOR :
APPROVAL OF GAS INFRASTRUCTURE : DOCKET NO. DE 16-241
CONTRACT WITH ALGONQUIN GAS :
TRANSMISSION, LLC :

**ALGONQUIN GAS TRANSMISSION, LLC
BRIEF ON PHASE I LEGAL ISSUES**

Algonquin Gas Transmission, LLC (“Algonquin”) hereby submits its Phase I initial brief in connection with the above-referenced proceeding.

BACKGROUND

On February 18, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) filed a petition (“Petition”) with the New Hampshire Public Utilities Commission (“NH PUC” or the “Commission”) for approval of a proposed 20-year contract between Eversource and Algonquin for natural gas capacity on Algonquin’s Access Northeast Project (the “Access Northeast Contract”); an Electric Reliability Service Program (“ERSP”) to set parameters for the release of capacity and liquefied natural gas (“LNG”) to electric generators; and a Long-Term Gas Transportation and Storage Contract tariff (“LGTSC”) for Eversource rates on all retail electric customers served by Eversource, to provide for recovery of costs associated with the Access Northeast Contract.

Many of the issues to be evaluated in this proceeding were also evaluated in an investigation by Commission staff (“Staff”) associated with Docket No. 15-124, *Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire* (“Docket No. 15-124”). Specifically, many of the Phase I legal issues discussed in this brief were discussed in an August 10, 2015 Staff Legal Memorandum titled “Gas Capacity Acquisitions by N.H. Electric Distribution Utilities” in Docket No. 15-124 (“Staff Legal

Memorandum”).¹ While Staff left room for further analysis by the Commission, the Staff Legal Memorandum noted that the Commission “could rule that [electric distribution company (“EDC”)] acquisition of natural gas capacity for the benefit of gas-fired generators does not violate” RSA Chapter 374-F and its requirement that generation and transmission/distribution functions be separated.² As discussed further below, Staff identified two statutes as potential sources of EDC corporate authority to enter into contracts for natural gas capacity: RSA 374-A:2 and RSA 374:57.³ Finally, Staff recognized that the Commission could find that EDC costs associated with natural gas capacity contracts are recoverable in rates, and set forth a preliminary framework through which the Commission may make that assessment.⁴ In the September 15, 2015 Report on Investigation into Potential Approaches to Mitigate Wholesale Electricity Prices in Docket No. 15-124 (“Staff Final Report”), Staff reaffirmed its legal analysis in the Staff Legal Memorandum.⁵

In its Order No. 25,860, the Commission accepted the Staff Final Report and indicated that the legal issues would be further analyzed in the context of a specific petition for approval of a contract for natural gas capacity.⁶ On February 18, 2016, Eversource submitted such a petition.

¹ The Staff Legal Memorandum evaluated three issues: 1) whether the Electric Utility Restructuring statute (RSA Chapter 374-F) prohibits EDCs from acquiring natural gas capacity; 2) whether New Hampshire EDCs have the corporate power to acquire natural gas capacity; and 3) whether New Hampshire EDCs may recover the costs associated with natural gas capacity acquisition in rates.

² Staff Legal Memorandum, at 3.

³ *Id.* at 4-5.

⁴ *Id.* at 6-8.

⁵ Staff Final Report, at 10.

⁶ Docket No. 15-124, *Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire*, Order No. 25,860 (Jan. 19, 2016).

On March 24, 2016, the Commission issued an Order of Notice (“Order of Notice”) in the above-referenced proceeding. The Order of Notice set forth the relevant issues as follows:⁷

1. whether Eversource has the corporate authority to enter into the Access Northeast Contract under RSA Chapter 374-A and RSA 374:57;
2. whether Eversource’s entering into the Access Northeast Contract, development of the ERSP, and assessment of the LGTSC would violate the Restructuring Principles of RSA Chapter 374-F, or any other New Hampshire law, or any federal law, including the Federal Power Act;
3. whether the LGTSC assessment would be permitted under RSA Chapter 374-A, RSA 374:57, and RSA Chapter 378, and Commission precedential standards for ratemaking, as just, reasonable and in the public interest;
4. whether the RFP process presented by Eversource in support of its selection of the Access Northeast Contract comports with the requirements of N.H. Code Admin. Rules Puc 2100, Order No. 25,860, and the standards of prudence applied by the Commission for such contracting;
5. whether the assertions made by Eversource regarding expected benefits and costs of its participation in the Access Northeast Contract are supported by the evidence, including evidence of economic, engineering, and environmental costs, benefits, and feasibility; and
6. whether ERSP and companion FERC tariff filing comport with relevant federal law, including the Natural Gas Act, and whether FERC approval should be a condition precedent for the enactment of any Commission approval.

The Order of Notice sets forth a two-phase proceeding. In the first phase (“Phase I”), “the Commission will review briefs submitted by Eversource, Staff and other parties regarding whether the Access Northeast Contract, and affiliated program elements, is allowed under New Hampshire law.”⁸ Following an affirmative decision on the Phase I legality question, the Commission would open a second phase of the proceeding (“Phase II”) “to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by Eversource’s proposal.”⁹ Consistent with these instructions, this brief addresses the topics

⁷ Order of Notice (Mar. 24, 2016) (available at: http://www.puc.state.nh.us/Regulatory/Docketbk/2016/16-241/ORDERS/16-241_2016-03-24_OON.PDF), (“Order of Notice”) at 3-4.

⁸ *Id.* at 4.

⁹ *Id.*

designated 1, 2, and 3 above. Algonquin expects to provide a more fact-specific discussion (*e.g.*, on the benefits of the Access Northeast Contract) during Phase II later in this proceeding.

ARGUMENT

I. EVERSOURCE HAS THE CORPORATE AUTHORITY TO ENTER INTO THE ACCESS NORTHEAST CONTRACT.

a. Eversource's general corporate authority, and its responsibilities as an electric distribution company, permit it to enter into the Access Northeast Contract

The original 1926 charter of Public Service Company of New Hampshire (“PSNH”), now known as Eversource, organized the corporation under the generally applicable corporate laws of that time.¹⁰ As it was amended through the years (most recently in 1991), the PSNH charter continued to specify that the corporation had been formed under New Hampshire’s generally-applicable corporate laws, for the purpose of serving as an electric utility:

The objects for which this corporation is established are to carry on the business of an electric utility within the state of New Hampshire or elsewhere, and to transact any and all lawful business for which corporations may be incorporated under New Hampshire Revised Statutes Annotated Chapter 293-A.¹¹

Known as the New Hampshire Business Corporations Act (“BCA”), RSA Chapter 293-A provides that “[u]nless its articles of incorporation provide otherwise” a New Hampshire corporation has the power to “do all things necessary or convenient to carry out its business and affairs, including without limitation” purchasing and disposing of property and making contracts.¹² Nothing in the original PSNH charter, or the 1991 charter, would suggest that Eversource does *not* have this general corporate authority. To the contrary, to the extent that the

¹⁰ Articles of Agreement of Public Service Company of New Hampshire (Aug. 16, 1926), (available at: <https://www.sos.nh.gov/imaging/10402791.pdf>), at 1 (noting that the purpose of the document was to form “a corporation under the provisions of Chapter 225 of the Public Laws of the State of New Hampshire known as the Business Corporation Law.”).

¹¹ Amended Articles of Incorporation of Public Service Company of New Hampshire (May 14, 1991), (available at: <https://www.sos.nh.gov/imaging/10403245.pdf>), Art. II.

¹² RSA 293-A:3.02(a).

contract before the Commission is necessary and/or convenient for Eversource to carry out its affairs, the BCA authorizes such contract.

Furthermore, as an EDC, Eversource has the general duty to provide “[r]eliable electricity service...while ensuring public health, safety, and quality of life”¹³ and to “furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.”¹⁴ As the parties will more fully discuss in Phase II of these proceedings, the Access Northeast Contract will assist Eversource in fulfilling its statutory obligations by ensuring reliability, enhancing customer service and mitigating price volatility while minimizing customer risk and maintaining the competitive market. As the Access Northeast Contract is consistent with Eversource’s general corporate authority and its statutory duties as an EDC, more specific statutory authority is not necessary.

b. New Hampshire statute specifically authorizes EDCs to acquire “transmission capacity” including natural gas transmission capacity.

While Eversource’s general corporate and EDC statutory authority renders specific statutory authority unnecessary, New Hampshire statutes do specifically authorize EDCs to acquire “transmission capacity”:

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 no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. 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.¹⁵

¹³ RSA 374-F:3, I.

¹⁴ RSA 374:1.

¹⁵ RSA 374:57.

In the context of the above statute, the term “transmission capacity” is not defined. The Staff Final Report notes that “[g]iven that the plain language of the statute does not specify the type of capacity (the term ‘capacity’ being in common use in both the gas and electric industries), the Commission could rule that gas capacity purchases were contemplated by [RSA 374-57], and therefore allowed.”¹⁶ Algonquin agrees, and urges the Commission to find that RSA 374-57 authorizes EDCs to purchase natural gas transmission capacity. As there is no prohibition on an EDC acquiring natural gas capacity, and there are both legal authority and strong public policy reasons to allow the EDCs to purchase gas transmission capacity, the term “transmission capacity” should be read to include natural gas transmission capacity.

c. New Hampshire EDCs have the statutory authority to “participate in electric power facilities...”

As set forth in detail in the Staff Legal Memorandum and Staff Final Report, New Hampshire EDCs are specifically authorized by statute to “participate” in certain activities relative to electric power facilities. Specifically, “[n]otwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities or any limitation imposed by a corporate or municipal charter” domestic electric utilities have the power:

To jointly or separately plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of *or otherwise participate in electric power facilities* or portions thereof within or without the state...

To enter into and perform contracts and agreements for such joint or separate planning, financing, construction, purchase, operation, maintenance, use, sharing costs of, ownership, mortgaging, leasing, sale, disposal of *or other participation in electric power facilities...* including, without limitation, contracts and agreements for the payment of obligations imposed without regard to the operational status of a facility or facilities....¹⁷

¹⁶ Staff Final Report, at 11.

¹⁷ RSA 374-A:2 (emphasis added).

Algonquin stresses that the Access Northeast Contract does not constitute any participation in electric generation and the release of such capacity through the ERSP is not direct participation. As more fully set forth in section II(a) below, the Access Northeast Contract, ERSP and LGTSC maintain the required statutory separation¹⁸ between transmission and generation functions.

Eversource is specifically authorized by statute to “enter into and perform contracts” related to “participation in electric power facilities....”¹⁹ Consistent with Staff’s analysis in the Staff Legal Memorandum, Algonquin urges the Commission to find that “the contracting for gas capacity from pipeline and/or LNG enterprises...would constitute permissible contracting...for the sharing of costs of, and a form of other participation in” electric power facilities as authorized under RSA 374-A:2, II.²⁰ Further, Algonquin urges the Commission to find that (consistent with the Staff Legal Memorandum) “actual transfer of such capacity rights, and the payment therefor, would arguably be allowable sharing in the costs of, or otherwise participating in, such electric power facilities under RSA 374-A:2, I.”²¹ This participation would *not* constitute the performance of a generation function by Eversource, but merely the facilitation of access to adequate fuel for unaffiliated electric power generators.

Eversource’s authority to enter into contracts related to electric power facilities was not disturbed by the later passage of the Restructuring Statute (RSA 374-F). As noted in the Staff Legal Memorandum, RSA 374-A was enacted in 1975, two decades before the Restructuring Statute.²² It is significant that the Restructuring Statute did not repeal RSA 374-A, and absent a

¹⁸ RSA 374-F:3, III (requiring electric generation services to be “at least functionally separated from transmission and distribution services”).

¹⁹ RSA 374-A:2, II.

²⁰ Staff Legal Memorandum, at 4.

²¹ *Id.*

²² *Id.*, at 5.

specific repeal the Commission should not strip RSA 374-A of its function or find that RSA 374-A was repealed by implication. “In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”²³ Here, the two statutes are reconciled by permitting EDC participation in certain natural gas capacity contracts related to electric power facilities. Further, it is a well-recognized canon of statutory construction that a more specific statute (*i.e.*, authorizing various types of EDC “participation” in electric generation facilities) controls over the more general statute (*i.e.*, requiring separation between generation and transmission).²⁴

II. THE ELECTRIC UTILITY RESTRUCTURING STATUTE (RSA CHAPTER 374-F) DOES NOT PROHIBIT EVERSOURCE FROM ACQUIRING NATURAL GAS CAPACITY.

a. Acquisition of natural gas capacity by Eversource would not compromise the separation of generation and transmission/distribution functions.

In 1996, New Hampshire’s electric power market was restructured and electric generation was separated from transmission. Algonquin recognizes that the Restructuring Statute provides that “[g]eneration 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.”²⁵ The acquisition of natural gas capacity by Eversource would not abrogate this separation.

The Access Northeast Contract, ERSP and LGTSC simply provide a mechanism by which natural gas capacity would be made available to the generators, which, acting in their own

²³ *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (holding that the Equal Employment Opportunity Act had not implicitly repealed the statute authorizing the Bureau of Indian Affairs to afford a preference to certain Native American job applicants).

²⁴ *See, id.* at 550-51 (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”).

²⁵ RSA 374-F:3, III,

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 natural gas capacity made available for electric generation by Eversource will rest firmly with generators and not with Eversource. The critical role to be played by Eversource through entering into natural gas capacity agreements is in increasing the potential for enhanced transmission and distribution pipeline infrastructure and not in generation.²⁶

The Staff Final Report re-affirmed the position articulated in the Staff Legal Memorandum regarding the legal authority that may allow EDCs to enter into natural gas capacity contracts, specifically that “the Commission could conceivably hold that RSA 374-F allows” EDCs to enter into natural gas capacity contracts with natural gas pipeline operators.²⁷ Algonquin agrees that the Commission could hold that RSA 374-F would allow the Access Northeast Contract, and Algonquin urges the Commission to reach that conclusion.

b. The Access Northeast Contract is consistent with the Restructuring Policy Principles of the Restructuring Statute.

The Access Northeast Contract, ERSP and LGTSC would not abrogate the functional separation principle of the Restructuring Statute, nor any of the other “Restructuring Policy Principles.”²⁸ In fact, the Access Northeast Contract, ERSP and LGTSC would further many of these specific statutory objectives. Notably, the first Restructuring Policy Principle is system reliability: “[r]eliable electricity service must be maintained while ensuring public health, safety,

²⁶ See Staff Legal Memorandum, at 3 (noting that an EDC “could argue that provision of gas capacity to unaffiliated merchant generators does not violate the functional separation principle of RSA 374-F:3, III in the first instance, 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.”).

²⁷ Staff Final Report, at 10 (emphasis in original).

²⁸ See generally, RSA 374-F:3.

and quality of life.”²⁹ The Access Northeast Contract, ERSP and LGTSC would confer important reliability benefits by ensuring that an increased natural gas supply is available directly to natural gas-fired generators.³⁰ Even before Entergy announced the planned retirement of the 680 MW Pilgrim Nuclear Power Station, ISO New England Inc. (“ISO-NE”) predicted that natural gas will represent nearly 57% of generation by 2024, compared with 44% today.³¹ The Access Northeast Project will increase available capacity on the Algonquin and Maritimes & Northeast Pipelines, which together are directly connected to 60% of ISO-NE’s natural gas-fired electric generation fleet. As demand continues to increase for a constrained supply of natural gas, the Access Northeast Contract will alleviate these constraints.

While Algonquin recognizes that some natural gas-fired generators are also capable of running on oil,³² Algonquin submits that dual-fuel capability does not address the fundamental problems posed by lack of natural gas capacity. Significant supply constraints exist all winter, which may force dual-fuel generators to rely on oil for extended periods. As Staff recognizes, the “resulting increase in dependence on back-up fuel for generation can also present reliability risks and pricing consequences, as demonstrated by the difficulties of replenishing oil supplies in winter 2013/14...”³³ Oil is typically more expensive than natural gas, and (as discussed further below) causes far greater environmental harm when used to generate electricity. While it is possible (though not certain) that dual-fuel capability may avert or minimize catastrophic blackouts and brownouts should a grid reliability problem occur, it is not an adequate or

²⁹ RSA 374-F:3, I.

³⁰ See Staff Legal Memorandum, at 3 (“The Commission may find that a proposal by an EDC to acquire incremental gas capacity, for the use of gas-fired generators, could enhance power system reliability (especially in winter when existing gas capacity is constrained), and thus help the EDC meet its duty to provide reliable service under RSA 374:1.”).

³¹ ISO-NE, 2015 Regional System Plan (Nov. 5, 2015), at 127.

³² Staff Final Report, at 17-18.

³³ *Id.* at 18.

economically and environmentally appropriate substitute for firm availability of natural gas, nor is it consistent with developing and implementing a viable plan for the region's energy future.

The Access Northeast Contract, ERSP and LGTSC would support environmental improvement³⁴ by preventing a wintertime shift towards legacy fuels. The transition from coal and oil to natural gas for electric power generation in New England has provided enormous environmental benefits. In 2005, natural gas represented 37% of energy generation, with coal and oil providing a collective 14%.³⁵ By 2014, natural gas provided 43% of power generation, with coal and oil providing only 7%.³⁶ Due to this “shift in the fuel mix” (*i.e.*, transition from coal and oil-fired units to natural gas), NO_x emissions decreased by 65%, SO₂ emissions decreased by 92% and CO₂ emissions decreased by 35% from 2005 to 2014.³⁷ These trends are poised to continue as coal and oil generation units are retired and more natural gas generation units are built. This beneficial trend toward natural gas and away from legacy fuels like coal and oil can only continue, however, if there is actually enough natural gas to power the generation fleet. While December, January and February are high-demand months for electricity, they are also high-demand months for natural gas. Consequently, the generation fuel mix shifts away from natural gas and toward coal and oil in the winter³⁸ because electric power generators have historically not secured firm pipeline transportation capacity and thus cannot access the gas they

³⁴ RSA 374-F:3, VIII.

³⁵ ISO-NE, 2014 ISO New England Electric Generator Air Emissions Report (Jan. 2016) (“2014 Emissions Report”) (available at: http://www.iso-ne.com/static-assets/documents/2016/01/2014_emissions_report.pdf), at 2.

³⁶ *Id.*

³⁷ *Id.* at 1.

³⁸ *Id.* at 13; *see also* Remarks by Gordon van Welie, President & CEO, ISO-NE, Northeast Forum on Regional Energy Solutions (Apr. 23, 2015) (available at: http://www.iso-ne.com/static-assets/documents/2015/04/northeast_forum_on_regional_energy_solutions_van_welie_remarks_and_slides_042320_15.pdf), at 2 (“When natural gas supply to generators is constrained, the ISO must commit other generating resources to maintain system reliability, and these resources are often coal- and oil-fired power plants.”).

need to run on the coldest winter days. As a result, emissions are increased absent adequate supplies of natural gas.

While an application is presently pending before FERC that would allow preferential capacity release to generators as a class,³⁹ such preferential release would work with the ERSP that will encourage competition *among* generators, consistent with the Restructuring Principles of open access to transportation and distribution facilities⁴⁰ and full and fair competition.⁴¹ As Eversource noted in its Petition, the “ERSP will utilize a Capacity Manager, to be selected following a competitive bidding process, to administer the release of the contracted gas capacity to the market.”⁴² For both long and short-term releases, capacity will be released to the generator bidding the highest price in a competitive process.⁴³ The ERSP will therefore encourage competition among generators, consistent with the Restructuring Principles.

III. STATE APPROVAL OF THE ACCESS NORTHEAST CONTRACT, ERSP and LGTSC IS NOT PREEMPTED BY FERC’S JURISDICTION UNDER FEDERAL LAW

a. State approval of the Access Northeast Contract , ERSP and LGTSC are not preempted by FERC’s jurisdiction under the Federal Power Act.

Under the Federal Power Act (“FPA”), FERC has exclusive jurisdiction over “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.”⁴⁴ The FPA defines “sale of electric energy at wholesale” as

³⁹ Petition, Testimony of J. Daly, at 60-62.

⁴⁰ RSA 374-F:3, IV.

⁴¹ RSA 374-F:3, VII.

⁴² Petition, at 11.

⁴³ Petition, Testimony of J. Daly, at 63.

⁴⁴ 16 U.S.C. § 824(b).

the “sale of electric energy to any person for resale.”⁴⁵ Supreme Court case law establishes that state actions with a *direct* effect on wholesale energy prices are preempted by the FPA.⁴⁶

The Supreme Court’s recent decision in *Hughes v. Talen Energy Marketing, LLC* reiterates and clarifies the scope of FERC preemption under the FPA, and suggests that the Commission’s approval of the Access Northeast Contract, ERSP and LGTSC would not be preempted.⁴⁷ *Talen* arose out of a state of Maryland program that solicited proposals for construction of new in-state generation, and selected CPV Maryland, LLC (“CPV”) as the winning bidder.⁴⁸ The program required CPV to sell its generation capacity into the electric capacity auction administered by PJM Interconnection, LLC (“PJM”, the regional transmission organization serving Maryland and several other states), and for EDCs to pay CPV the difference between its bid price for electric capacity and the PJM market-clearing price provided that CPV’s capacity cleared the PJM capacity auction.⁴⁹ Other electric generators argued that this program was preempted by the FPA as interfering with wholesale electric rates. In a decision narrowly tailored to the program in question, the Supreme Court agreed:

FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity to PJM, and has deemed the clearing price per se just and reasonable. Doubting FERC’s judgment, Maryland—through the contract for differences—requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM. By adjusting an interstate wholesale rate, Maryland’s program invades FERC’s regulatory turf.⁵⁰

The Court, however, was careful to note the limited scope of its holding:

⁴⁵ 16 U.S.C. § 824(d).

⁴⁶ *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982).

⁴⁷ *Hughes v. Talen Energy Marketing, LLC*, No. 14-614 (U.S. April 19, 2016).

⁴⁸ Slip. Op. at 6-7.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 12.

We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures “untethered to a generator’s wholesale market participation.” Brief for Respondents 40. So long as a State does not condition payment of funds on capacity clearing the auction, the State’s program would not suffer from the fatal defect that renders Maryland’s program unacceptable.⁵¹

The Access Northeast Contract, ERSP and LGTSC for which Eversource seeks approval presents a situation clearly distinguishable from that presented in *Talen*. First, approval of the Access Northeast Contract, ERSP and LGTSC does not directly interfere with FERC-regulated markets, as the Maryland order did in *Talen*. The Access Northeast Contract, ERSP and LGTSC do not require generators to acquire capacity released by Eversource and do not dictate the price at which generators that acquire released capacity from Eversource offer electricity or capacity in the ISO-NE energy markets, a fact that was critical to the *Talen* decision. Moreover, the Access Northeast Contract, ERSP and LGTSC do not adjust the *per se* just and reasonable ISO-NE clearing prices.

Second, even though the ERSP would be a state-approved program such state program would not be preempted by the FPA. Many state programs may indirectly lower the price of energy (*e.g.*, through tax breaks or other financial incentives for renewable energy or energy conservation projects) and such programs have not historically been preempted under the FPA and are not now preempted under *Talen*.⁵² “Nothing in [*Talen*] should be read to foreclose Maryland and other States from encouraging production of new or clean generation through

⁵¹ *Id.* at 15.

⁵² *Id.* at 15.

measures ‘untethered to a generator’s wholesale market participation.’”⁵³ Similarly, nothing in *Talen* should be read to foreclose New Hampshire and the other states in the region from approving contracts and affiliated programs that encourage availability of natural gas in the region, untethered from generators’ wholesale electric market participation.⁵⁴

b. State approval of the Access Northeast Contract, ERSP and LGTSC is not preempted by FERC’s jurisdiction under the Natural Gas Act.

The Natural Gas Act (“NGA”) applies to:

the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation...⁵⁵

FERC has jurisdiction over these areas by virtue of the NGA. In fact, in recognition of FERC’s jurisdiction over these areas, Algonquin has begun the process of seeking FERC approval of certain aspects of the overall Access Northeast Project and related tariff provisions.⁵⁶ Other aspects will be submitted for FERC approval in due course.

Commission approval of Eversource’s petition, however, would not be preempted under FERC’s NGA jurisdiction. Similar to its consideration of pipeline capacity contracts entered into by local gas distribution companies (“LDCs”), approval of the Access Northeast Contract is within the Commission’s jurisdiction and not preempted by the NGA. Similarly, as described in Section IV below, the Commission has jurisdiction to authorize, and the NGA does not preempt,

⁵³ *Id.*

⁵⁴ See also, *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir, 2014) (while holding that a New Jersey program very similar to Maryland’s was preempted, noting that the FPA “grants FERC exclusive control over whether interstate rates are ‘just and reasonable,’ but FERC’s authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates.”).

⁵⁵ 15 U.S. Code § 717(b).

⁵⁶ See generally, e.g., FERC Docket No. PF16-1, *Algonquin Gas Transmission, LLC, submits its Request for Approval of Pre-Filing Review for its proposed Access Northeast Project*; FERC Docket No. RP16-618, *Algonquin Gas Transmission, LLC submits tariff filing per 154.204: Bidding Requirements Waiver for State-Regulated Electric Reliability Programs*.

cost recovery by the EDC. Further, through the ERSP, Eversource would release natural gas capacity for use by generators in accordance with Algonquin's tariff that is subject to FERC's NGA jurisdiction and, therefore, such releases would not be preempted under the NGA. Additionally, the Access Northeast Contract, ERSP and LGTSC do not impose additional burdens on the sale in interstate commerce of natural gas for resale; any sales of natural gas, including LNG, will be for end users of natural gas (*i.e.*, generators) and not for resale or will be regulated by FERC under the NGA. The Access Northeast Contract does not relate to importation of natural gas. Instead, the Access Northeast Contract, ERSP and LGTSC will facilitate the transfer of natural gas capacity to electric power generators. Finally and most importantly, as noted above, the aspects of the overall Access Northeast Project, ERSP and LGTSC that touch upon FERC jurisdiction are already properly before FERC.⁵⁷

The Supreme Court recently reaffirmed that the NGA “was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.”⁵⁸ Where both state and FERC authority may exist, the Supreme Court has proceeded “cautiously, finding pre-emption only where detailed examination convinces [the Court] that a matter falls within the pre-empted field as defined by [the Court's] precedents.”⁵⁹ The Commission should exercise its authority to approve Eversource's Petition, which authority is not preempted by the Natural Gas Act.

⁵⁷ *Id.*

⁵⁸ *ONEOK, Inc. v. Learjet, Inc.*, No. 13-271, slip op at 10 (U.S. April 21, 2015), (quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947)).

⁵⁹ *Id.* at 10-11.

IV. THE LGTSC ASSESSMENT SHOULD BE PERMITTED AND RECOGNIZED AS JUST, REASONABLE AND IN THE PUBLIC INTEREST.

Eversource may recover in rates those returns on investments found by the Commission to be “prudent, used, and useful.”⁶⁰ As Staff acknowledged in its Legal Memorandum, “[b]road discretion is assigned to the Commission in the fixing of rates” and evaluation of prudence of EDC costs.⁶¹ In its Final Report, Staff noted that EDCs would bear the burden of showing that increased costs would be justified, and that in evaluating such costs:

Staff would expect the Commission to apply the traditional ratemaking criteria of least-cost procurement, prudence, and allocation fairness to any surcharge sought by an EDC for gas capacity activities, and that any surcharge should be justified by a proposing EDC under a specific statutory provision, or provisions, of New Hampshire law.⁶²

Algonquin agrees that costs incurred by Eversource related to the Access Northeast Contract should be recoverable in rates if they are prudent, just and reasonable as such criteria are typically evaluated by the Commission.

EDCs have a responsibility to provide reliable service to customers at rates that are just and reasonable.⁶³ By making firm natural gas capacity commitments on a project that *directly* delivers natural gas to the generators, the EDCs can further respect this mandate by ensuring that existing and new natural gas generators have access to natural gas when it is needed most. This reliability is increasingly important as fewer and fewer alternative sources of generation (*e.g.*, coal, oil, nuclear) 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 electric consumers, the costs associated with investments in

⁶⁰ RSA 378:28; RSA 374-A:6, III.

⁶¹ Staff Legal Memorandum, at 6.

⁶² Staff Final Report, at 12.

⁶³ RSA 374:1; RSA 374-F:3, I.

natural gas transmission capacity that improve reliability of the electric system are also, subject to Commission review, appropriately recovered from electric consumers. In contrast, projects that do not actually deliver natural gas the last mile directly to the generators' meter but that are designed instead to deliver natural gas to one delivery point in hopes that it reaches some generators and impact price, is short-sighted and unnecessarily puts electric consumers at risk for financial benefits that may fall well short of the intended goal.

As Staff acknowledged in the Legal Memorandum⁶⁴ and the Final Report,⁶⁵ and as Eversource acknowledged in its Petition,⁶⁶ RSA 374-57 provides a mechanism for approval of natural gas capacity contracts. Significantly, in a review of power purchase agreements (“PPAs”) proposed by PSNH under RSA 374-57, the Commission concluded that:

market prices are not the sole or dispositive criterion for evaluating the PPAs. The legislative scheme developed over time as evidenced throughout RSA Title XXXIV [*i.e.*, New Hampshire's public utility laws, including RSA Chapter 374] sets forth a variety of purposes and factors, which expresses recurring themes favoring fuel diversity and renewables, economic development, environmental and health impacts, and energy security, and which grants substantial discretion to the Commission relative to rate setting.⁶⁷

Algonquin urges the Commission to confirm that the Access Northeast Contract, ERSP and LGTSC should be evaluated for prudence and reasonableness consistent with RSA 374-57, and in particular urges the Commission to consider non-price factors like system reliability and energy security. Algonquin further urges the Commission to undertake that evaluation in Phase II of this proceeding.

⁶⁴ See, Staff Legal Memorandum, at 5.

⁶⁵ See, Staff Final Report, at 11.

⁶⁶ Petition, at 14.

⁶⁷ Order No. 25,305, at 32-33.

The Commission’s October 2, 2015 Order No. 25,822 (“Liberty Order”) approving a Precedent Agreement between EnergyNorth Natural Gas (d/b/a Liberty Utilities, or “Liberty”) and Tennessee Gas Pipeline Company (“Tennessee”) provides a recent example of Commission approval of a natural gas pipeline capacity agreement using the traditional analysis of whether such costs are prudent, just and reasonable. The Commission’s “statutory review of the Precedent Agreement is limited to consideration of Liberty’s prudence in entering into the Precedent Agreement, and the reasonableness of the terms of the agreement.”⁶⁸ Algonquin urges the Commission to “apply the traditional ratemaking criteria”⁶⁹ to allow cost recovery for prudent, just and reasonable costs, consistent with the Liberty Order. The Commission reviewed Liberty’s methodology for comparing costs between Tennessee’s Northeast Energy Direct project (“NED”), the Spectra Energy Atlantic Bridge project and the TransCanada/Portland Gas Continent to Coast (“C2C”) project and concluded that Liberty had “appropriately considered alternatives to the capacity it contracted for in the Precedent Agreement, based on price and non-price factors.” Specifically, the Commission noted that “[t]he projected capacity costs associated with the C2C and Atlantic Bridge projects exceed the Precedent Agreement’s capacity costs, without needed upgrades to the Concord Lateral, and the capacity contracted for in the Precedent Agreement will provide greater benefits.”⁷⁰ Algonquin requests that the Commission confirm that EDCs may contract for natural gas capacity, and should evaluate the reasonableness of such transactions on the same basis that it used to evaluate the Liberty-NED deal.

⁶⁸ The Commission acknowledged that the contemplated deal “avoids immediate and costly upgrades” to the Concord Lateral that would otherwise be required to deliver natural gas to Liberty’s service territory. Liberty Order, at 28. The Commission also concluded that Liberty had adequately protected its LDC natural gas customers from costs associated with excess capacity. Liberty Order, at 29-30. For these and other reasons, the Commission approved the Precedent Agreement (as modified by settlement agreement with the Commission) as just, reasonable, and serving the public interest. Liberty Order, at 25.

⁶⁹ *Id.* at 12.

⁷⁰ Liberty Order, at 28.

CONCLUSION

For all of the foregoing reasons, Algonquin requests that the Commission recognize that Eversource's proposed entry into the Access Northeast Contract and the implementation of the ERSP and LGTSC are legal under New Hampshire and federal law, and requests that the Commission proceed to Phase II of this proceeding.

Respectfully submitted,
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Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has this day been sent via electronic mail or first class mail to all persons on the service list.



Kenneth C. Baldwin

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