THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DE 16-241

Public Service Company of New Hampshire d/b/a Eversource Energy
Petition for Approval of a Gas Capacity Contract with Algonquin Gas Transmission, LLC,
Gas Capacity Program Details, and Distribution Rate Tariff for Cost Recovery

LEGAL BRIEFING OF CONSERVATION LAW FOUNDATION REGARDING LEGALITY OF PETITIONER'S PROPOSAL

Pursuant to the New Hampshire Public Utility Commission's ("Commission") March 24, 2016 Order of Notice in the above-captioned matter, Conservation Law Foundation ("CLF") hereby submits the following briefing relative to the legality of the proposal by Petitioner Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") that is the subject of this docket.

I. INTRODUCTION

On February 18, 2016, Eversource filed a petition seeking Commission approval of a precedent agreement for firm gas transportation and storage services between Eversource and Algonquin Gas Transmission, LLC ("Algonquin") relative to the proposed Access Northeast natural gas pipeline project. The contract for which Eversource seeks approval is unprecedented, representing the first time an electric distribution company ("EDC") in New Hampshire has sought to acquire capacity on a natural gas pipeline, to be sold for use by electric generating units. As set forth below, Eversource's proposal directly contravenes New Hampshire's electric restructuring law and is not supported by other New Hampshire laws. Furthermore, its approval by the Commission would violate the Supremacy Clause of the U.S. Constitution.

II. NEW HAMPSHIRE'S RESTRUCTURING LAW, RSA CH. 374-F, PROHIBITS EVERSOURCE, AS AN EDC, FROM ACQUIRING GAS PIPELINE CAPACITY

In 1996, the General Court enacted RSA Chapter 374-F to restructure New Hampshire's electric markets. As discussed below, the General Court enacted the state's electric restructuring law for the express, overriding purposes of establishing a fully competitive market and consumer choice, based on a structure in which electric generation is separated from electric transmission and distribution. Twenty years later, following Eversource's agreement to proceed with divestiture of its generating assets (pending the Commission's approval in Docket No. 14-238), and with New Hampshire on the verge of finally achieving a fully restructured market, Eversource proposes a contract that is grossly inconsistent with New Hampshire's electric restructuring law.

A. The General Court, Through RSA Chapter 374-F and Recent Action, Has Evinced a Clear Intent to Restructure New Hampshire's Electric Market Through the Separation of Generation From Transmission and Distribution and to Achieve Competition and Customer Choice

Originally enacted in 1996, New Hampshire's Electric Utility Restructuring law, RSA 374-F, is premised on the foundational principles of, and the unambiguous purpose of establishing, a competitive market and increased consumer choice with electric generation separated from transmission and distribution services. In describing the purpose of the restructuring law, the General Court made plain:

> The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. The overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. *Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services.*

RSA 374-F:1,I. In further describing the law's purpose, the General Court emphasized the importance of establishing a competitive electric market by invoking the New Hampshire Constitution and the benefits that would flow from competition:

> A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

RSA 374:F:4,II.

Consistent with its stated overriding purpose, RSA 374-F:3 sets forth "Restructuring Policy Principles" that, as stated in RSA 374-F:1,III, are intended to guide the implementation of a statewide electric utility industry restructuring plan and the promotion and regulation of a restructured electric utility industry. Not surprisingly, these "interdependent policy principles," RSA 374-F:1,III, reinforce the essential elements of competition, customer choice and a restructured industry, as follows:

- RSA 374-F:3,II, titled "CUSTOMER CHOICE," states in pertinent part: "Allowing customers to choose among electricity suppliers will help ensure fully competitive and innovative markets." It proceeds to discuss the importance of customers being provided a variety of choices, including choice among generation sources.
- RSA 374-F:3,III, titled "REGULATION AND UNBUNDLING OF SERVICES AND RATES," which states, *inter alia*: "When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. *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." (Emphasis added).

- RSA 374-F:3,V, titled "UNIVERSAL SERVICE," stating that "[d]efault service should be procured through the competitive market" and establishing the requirement that EDCs provide customers renewable energy source (RES) options and educational materials related to those options. RSA 374-F:3,V(c), (f).
- RSA 374-F:3,VII, titled "FULL AND FAIR COMPETITION," stating: "Choice for retail customers cannot exist without a range of viable suppliers. The rules that govern market activity should apply to all buyers and sellers in a fair and consistent manner in order to ensure a fully competitive market."
- RSA 374-F:3,VIII, titled "ENVIRONMENTAL IMPROVEMENT," which reinforces the importance of competition, stating that "[i]ncreased competition in the electric industry should be implemented in a manner that supports and furthers the goals of environmental improvement," and emphasizing environmental regulation for all electricity generators "to promote full, free, and fair competition."
- RSA 374-F:4,IX, titled "RENEWABLE ENERGY RESOURCES," stating in part: "To encourage emerging technologies, restructuring should allow customers the possibility of choosing to pay a premium for electricity for renewable resources . . . ."
- RSA 374-F:4,XI, titled "NEAR TERM RATE RELIEF," stating: "The goal of restructuring is to create *competitive markets* that are expected to produce lower prices for all customers than would have been paid under the current regulatory system." (Emphasis added).

- RSA 374-F:4,XIII, titled "REGIONALISM," stating in pertinent part: "New England Power Pool (NEPOOL) should be reformed and efforts to enhance competition and to complement industry restructuring on a regional basis should be encouraged."
- RSA 374-F:3,XIV, titled "ADMINISTRATIVE PROCESS," stating in pertinent part: "The market framework for *competitive electric service* should, to the extent possible, reduce reliance on administrative process. New Hampshire should move deliberatively to replace traditional planning mechanisms *with market driven choice as the means of supplying resource needs.*" (Emphasis added).
- RSA 374-F:3,XV, titled "TIMETABLE," stating in pertinent part: "The commission should seek to implement *full customer choice* among electricity suppliers in the most expeditious manner possible . . . ." (Emphasis added).

See also RSA 374-F:4,I,VI (relative to implementation of restructuring, authorizing the Commission to require implementation of retail choice of electric suppliers and to take certain actions "to facilitate the rapid transition to full competition. . . .").

Most recently, in furtherance of advancing competition and the separation of electric generation from transmission and distribution, last session the General Court enacted SB 221, enabling Eversource – with the Commission's approval and oversight, and with multiple parties reaching a settlement now under review in Docket No. DE 14-238 – to proceed toward divestiture of its generating assets and to thereby complete restructuring in New Hampshire.

B. Eversource's Proposal is Prohibited by RSA Chapter 374-F Because it Contravenes the Clear Intent to Establish a Restructured Market that Achieves Competition and Customer Choice

Eversource's proposal to acquire gas pipeline capacity would violate the essential requirement that electric generation be separated from electric transmission and distribution.

Indeed, RSA Chapter 374-F recognizes only one exception to the overarching requirement that generation and transmission/distribution be separated from one another. Specifically, RSA 374-F:3,III, discussed above, states in pertinent part:

> REGULATION AND UNBUNDLING OF SERVICES AND RATES. When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. 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. *However, distribution service companies should not be absolutely precluded from owning small scaled distributed generation resources as part of a strategy for minimizing transmission and distribution costs.*

(Emphasis added). As the statute makes clear, the exception to the separation of generation from transmission/distribution applies *only* to (1) small scaled distributed generation owned by an EDC that (2) is part of an EDC's strategy to minimize costs of transmission and distribution. RSA 374-F:3,III. Here, there can be no dispute that Eversource's proposal to acquire pipeline capacity does not qualify within the above exception.[1] Because, pursuant to the statutory rule of construction "expressio unis est exclusion alterius,"[2] no other exceptions exist, Eversource's proposal is simply prohibited.[3]

[1] In Docket No. IR 15-124, the Commission's Staff acknowledged this fact in a memorandum assessing the legal authority of EDCs to acquire pipeline capacity, stating: "An acquisition of gas capacity, of the type referred to by certain stakeholders, most certainly does not qualify as a small-scale distributed generation resource." Docket No. IR 15-124, Staff Memorandum (July 10, 2015) at 2. Nor would such acquisition be part of a strategy for minimizing transmission and distribution costs.

[2] The statutory rule of construction "expressio unis est exclusion alterius" provides that "the expression of one thing in a statute implies the exclusion of another." *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (*quoting St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12 (1996).

[3] It also is noteworthy that in 2008, the General Court enacted RSA Chapter 374-G specifically addressing, and encouraging, the investment by public utilities in distributed energy resources, including renewable and clean distributed energy resources. RSA 374-G:1 *et seq.* That the General Court has *not* explicitly authorized public utilities to engage in the activities here proposed by Eversource is significant, and is further evidence that approving Eversource's proposal would fly in the face of existing New Hampshire law.

In addition to violating the principle of separating generation from transmission and distribution required by restructuring, Eversource's proposal also would greatly undermine RSA Chapter 374-F's significant and often-stated purpose of establishing a fully *competitive* market – i.e., a market in which ratepayers do not subsidize, or otherwise assume economic risks associated with, the generation of electricity. Here, Eversource seeks permission to acquire pipeline capacity to be used solely for the generation of electricity, and to pass along associated costs to ratepayers. In doing so, it seeks to directly influence electric generation and associated markets, and at the risk of ratepayers both in terms of rates and potential stranded costs.

Finally, Eversource's proposal will undermine RSA Chapter 374-F's important purpose of encouraging customer choice. As discussed above, New Hampshire's restructuring law requires public utilities to provide customers renewable energy source options, RSA 374-F:3,V(f), and specifically states: "To encourage emerging technologies, restructuring should allow customers the possibility of choosing to pay a premium for electricity from renewable resources . . . ." RSA 374-F:3,IX. Pursuant to Eversource's proposal, costs associated with the acquisition of pipeline capacity would be passed along to *all* Eversource customers, including customers who have chosen to purchase renewable energy from other suppliers. Imposing the cost of pipeline capacity – i.e., the costs of acquiring non-renewable fossil fuels for electric generation – will undoubtedly be objectionable to customers who have specifically chosen to purchase renewable energy and may discourage such customers from continuing to voluntarily pay for the resource of their choice—renewable energy—because they are having the cost of another resource imposed involuntarily upon them. It may also discourage other customers from choosing to purchase renewable energy in the first instance. Not only may the Eversource proposal directly and adversely affect customer choice, the ratepayer burden proposed by

Eversource also may undermine public policy goals of advancing the development of renewables.

In light of the foregoing, because it contravenes the explicit terms of New Hampshire's restructuring law, as well as the principles and goals that underlie that law – the separation of electric generation from transmission/distribution, a fully competitive market, and customer choice – Eversource's proposal is legally invalid and must be rejected.

III. NO STATUTES BEYOND RSA 374-F PROVIDE A LEGAL BASIS FOR EVERSOURCE'S PROPOSED ACQUISITION OF GAS PIPELINE CAPACITY

In Docket No. IR 15-124, Commission Staff suggested in their July 10, 2015 Memorandum, and in their final report, that various New Hampshire statutes *beyond* RSA Chapter 374-F could provide a legal basis for the acquisition of pipeline capacity by EDCs, apparently notwithstanding the unambiguous purposes and reinforcing policies of the restructuring statute, as discussed above. In this docket, Eversource similarly attempts to rely on New Hampshire law beyond RSA 374-F – namely, RSA 374:57 – as enabling it to proceed with its proposed contract. *See* Eversource Petition at 14, ¶ 28. However, the various other statutes relied upon by Staff and Eversource were enacted *before*, and are more general than, RSA Chapter 374-F.[4] Accordingly, pursuant to well-established rules of statutory interpretation, including case law addressing RSA Chapter 374-F, such other laws cannot be used to achieve a

[4] For example, RSA 374:57 was enacted in 1989, well before RSA Chapter 374-F. Titled "Purchase of Capacity," it states in pertinent part: "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 . . . ." This provision cannot serve as a valid legal basis for EDCs to purchase generation capacity. Quite to the contrary, as it relates to the purchase of generation capacity, it conflicts with and has been superseded by the more recent, more specific provisions of RSA Chapter 374-F restructuring the electric market to separate generation from transmission and distribution.

result that conflicts with the language and intent of the more recent, more relevant provisions of New Hampshire's restructuring law.[5]

IV. EVERSOURCE AND OTHER EDCS LACK CORPORATE POWERS TO ACQUIRE GAS PIPELINE CAPACITY

For the reasons discussed above, New Hampshire's restructuring statute precludes the acquisition of gas pipeline by Eversource and other New Hampshire EDCs. Accordingly, the Commission need not go any further than the above analysis. However, to the extent it considers the question whether Eversource and other New Hampshire EDCs have the corporate power to purchase gas pipeline capacity, CLF provides the following analysis.

In Docket No. IR 15-124, Staff's memorandum suggests that RSA 374-A:2, enacted in 1975, may provide corporate powers on the part of New Hampshire EDCs to acquire natural gas capacity. First and foremost, such a result would violate the well-established rules of statutory interpretation discussed above.[6] However, even if, assuming *arguendo*, RSA 374-A:2 could be interpreted as still providing New Hampshire EDCs certain corporate powers relative to generation assets, it does not provide corporate powers relative to the purchase of natural gas for electric generation. According to RSA 374-A:1, "'Electric power facilities' means generating units rated 25 megawatts or above and transmission facilities rated 69 kilovolts or above planned

[5] *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152 (1978) ("When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion.") (*citing* C.D. Sands, Sutherland Statutes and Statutory Construction sec. 51.05 (4th ed. 1973).*See also In re N.H. Public Utilities Comm'n Statewide Elect. Utility Restructuring Plan*, 143 N.H. 233, 240-41 (1998) (citing the principles, in interpreting RSA 374-F and RSA 362-C:6, that "when conflict exists between two statutes, [the] later statute prevails" and that "when [the] natural weight of competent evidence shows that latter statute's purpose was to supersede former, [the] latter controls even absent explicit repealing language.") (citations omitted); *Appeal of Pennichuck Water* Works, 160 N.H. 18, 34 (2010) ("The Utilities' argument is also contrary to our well settled rule of statutory construction 'that in the case of conflicting statutory provisions, the specific statute controls over the general statute.'") (*quoting Appeal of Plantier*, 126 N.H. 500 (1985)).

[6] *See* n.5, *supra.*

to be placed in service in New England after June 24, 1975." Natural gas pipeline capacity, as a means of securing fuel for electric generation, does not constitute an electric power facility within the meaning of RSA Chapter 374-A.

Staff's efforts to read a novel and unintended meaning into RSA 374-A:2 is universally belied by statutory context, which reflects the history and regulatory treatment of the electric utility industry in this state. The statutory provisions governing the "Regulation of Domestic Electric Utilities," RSA 374-A:6, and the "Regulation of Foreign Electric Utilities," RSA 374-A:7, subject such utilities, based on their ownership, operation of, or interest in "any electric power facilities" to certain regulatory requirements, including those applicable to the construction, operation, and use of "such electric power facilities." There is no regulatory jurisdiction provided relative to foreign or domestic electric utilities that have interests in natural gas facilities or capacity. The same is true as regards RSA 374-A:2, and A:3, which are fashioned in a manner parallel to RSA 374-A:6 and A:7. As A:6 and A:7 pertain to the regulation of foreign and domestic electric utilities, so A:2 and A:3 pertain to the "Powers of Domestic Electric Utilities" and the "Powers of Foreign Electric Utilities." The plain meaning of these provisions is clear on its face and expressly pertains to the rights such electric utilities may have to participate in "electric power facilities" – *not natural gas facilities or capacity*.[7]

[7] As Staff correctly notes in their July 10, 2015 memorandum (at 1), the New Hampshire Supreme Court first looks to the plain language of the statute, and interprets statutes within their overall scheme and context. *See Appeal of Old Dutch Mustard Co.*, 99 A.3d 290, 293-94 (N.H. 2014):

> We use the same principles of construction when interpreting both statutes and regulations. *Id.* We first look to the language of the statute or regulation itself, and, if possible, construe that language according to its plain and ordinary meaning. *Id.; Marino*, 155 N.H. at 713, 928 A.2d 818. When the language of the statute or regulation is clear on its face, its meaning is not subject to modification. *Marino*, 155 N.H. at 713, 928 A.2d 818. We will neither consider what the legislature or commissioner might have said nor add words that they did not see fit to include. *Id.* Furthermore, we interpret statutes and regulations in the context of the overall statutory and regulatory scheme and not in isolation. *Id*. Our goal is to apply statutes

Similarly, RSA 374:57, governing the "Purchase of Capacity," defines the requirements of electric utilities that enter into certain agreements relative to the purchase of "generating capacity, transmission capacity, or energy" *but not gas pipeline capacity*. In this way, the statutory plain language throughout the entire field of electric utility regulation in New Hampshire directly controverts Staff's interpretive machinations.

For the above reasons, RSA Chapter 374-A does not establish corporate powers on the part of Eversource, as a New Hampshire EDC, to enter the contract it proposes. Nor does RSA 374:57 provide a basis for such corporate powers. *See* this section and note 4, *supra.*

V. NEW HAMPSHIRE LAW DOES NOT AUTHORIZE EVERSOURCE AND OTHER EDCS TO RECOVER COSTS ASSOCIATED WITH THE ACQUISITION OF GAS PIPELINE CAPACITY

As discussed above, New Hampshire restructuring law precludes Eversource and other New Hampshire EDCs from acquiring gas capacity, obviating the need for further analysis. To the extent the Commission nonetheless considers whether, as a matter of law, Eversource can recover costs associated with its proposed acquisition of pipeline capacity, CLF provides the following analysis.

In Docket No. IR 15-124, Staff's memorandum discussed various statutes as potentially providing New Hampshire EDCs the ability to recover costs associated with gas capacity acquisition from ratepayers. Staff's memorandum first identified provisions within RSA Chapter 374-A as a potential basis for recovering costs through rates. *See* Staff Memorandum at 6. For

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and regulations in light of the legislature's or commissioner's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory and regulatory scheme. *Id.*

the reasons discussed in Part IV of this brief, *supra*, RSA Chapter 374-A is inapplicable and cannot be invoked as a basis for recovering gas acquisition costs through rates.

Staff's memorandum also discussed RSA 374:2 (a generic provision related to charges, enacted in 1951), RSA Chapter 378 (generally applicable to rates and charges), and RSA 374:3-a (a generic provision related to alternative forms of regulation, adopted in 1994), as providing potential grounds for New Hampshire EDCs to recover gas acquisition costs from ratepayers.[8] In light of well-settled rules of statutory construction, these provisions do not, in the face of more recent and more substantively specific legislation (i.e., New Hampshire's restructuring law and the associated separation of generation from transmission and distribution services), authorize Eversource and other New Hampshire EDCs to recover costs related to generation (e.g., gas pipeline capacity acquisitions) from ratepayers.[9]

VI. AUTHORIZING EVERSOURCE TO ACQUIRE GAS PIPELINE CAPACITY WOULD VIOLATE THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

During the prehearing conference in this docket on April 13, and in its Application (*see* 13), Eversource has repeatedly referred to this project as a "regional solution." This description aptly suggests what the precedent agreement and related arrangements constitute: measures with the express intent of affecting regional – i.e. *interstate* – wholesale electricity prices. In its Application (at 3), Eversource explains that it is pursuing this regional solution "[i]n recognition

[8] *Id.* at 6-7.

[9] *See* n.5, *supra*. Beyond the plain lack of authority to recover costs associated with the acquisition of pipeline capacity, investing ratepayer dollars in pipeline infrastructure could conflict with axiomatic principles of utility rate regulation, including that the Commission set rates that are "just and reasonable." Given the ebb and flow of market prices, it is likely that ratepayer dollars committed to acquire pipeline capacity would have such indirect and speculative returns that any benefits would be inherently difficult to attribute to the ratepayer investment itself. Moreover, the approach would burden non-gas electric customers—a very large class of customers in New Hampshire—with paying for gas pipeline capacity that has no direct nexus to their energy use.

of the significant natural gas capacity constraints in New England – constraints that were identified in the Commission's order of notice and confirmed through the Staff's investigation in Docket No. IR 15-124 – and the detrimental impact these constraints have on electricity prices and reliability." Accordingly, the gas capacity contract proposed here aims squarely at affecting wholesale electricity prices throughout ISO-New England. In contrast to any hypothetical claim that the proposed measures are intended to directly benefit retail prices – which are properly within the state's regulation – the only direct effect proposed here on retail prices is to *increase* them through a universal customer charge – *not to decrease them*.

It is not a surprise that Eversource seeks to affect wholesale prices through the gas capacity contract proposed here. The Commission's Order of Notice in Docket No. IR 15-124 specifically identified "price volatility in gas markets in the winter months in our region, which…have resulted in sharply higher wholesale electricity prices" as a concern, and welcomed utilities to propose "potential means of addressing these market problems."[10] In turn, Commission Staff proposed a host of novel legal theories, many of which are described herein, in an effort to circumvent the obvious limitations faced by the Commission – limitations that include not only state law obstacles but also that the Commission's express desire to address regional wholesale prices (and only thereby New Hampshire retail rates) conflicts with the Supremacy Clause. Accordingly, the approvals Eversource now requests in this proceeding are extra-legal both for the reasons identified above, and because they seek to subvert authority properly within the federal realm. The fact that Commission-jurisdictional retail rates may subsequently be affected by this manipulation of wholesale natural gas and electricity prices does not rescue the scheme from federal preemption.

[10] Order of Notice at 2-3.

The Supremacy Clause of the U.S. Constitution withholds from this Commission the authority to grant Eversource approvals to ameliorate wholesale market conditions by directly affecting wholesale prices for electric power, as Eversource seeks to do. Such powers are reserved for the Federal Energy Regulatory Commission ("FERC"), which under the Federal Power Act ("FPA") and the Natural Gas Act ("NGA") maintains exclusive jurisdiction over wholesale rate-setting.[11] The FPA and NGA together have long been recognized as a comprehensive scheme of federal regulation of all wholesale sales of energy in interstate commerce that serves, pursuant to the Supremacy Clause, to preempt state regulation of same.[12] The federal wholesale rate scheme "leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result."[13]

The state action proposed is clearly impermissible because its unambiguous target is wholesale rates. Whether a state action falls within a preempted field of regulation depends on "the target at which the state law aims."[14] Authorizing an EDC to acquire gas pipeline capacity to promote the development of interstate natural gas infrastructure, and thereby to decrease regional wholesale natural gas and electric prices would constitute the intentional distortion of FERC-regulated wholesale rates and is prohibited.[15] It is well-established that "[s]tates may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates…"[16] Thus, even in setting retail rates, a state may not

[11] *See* 16 U.S.C § 824(a) and 15 U.S.C. § 717 *et seq*.; *Hughes v. Talen Energy Mktg*., 136 S. Ct. 1288, *1 (2016); *New York v. FERC*, 535 U.S. 1, 20 (2002).
[12] *See Public Utils. Comm'n v. Attleboro Steam & Elec. Co*., 273 U.S. 83 (1927); *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 300 (1988).
[13] *N. Nat. Gas Co. v. State Corp. Comm'n of Kan*., 372 U.S. 84, 91 (1963).
[14] *See Hughes*, 136 S. Ct. at *12-13 (quoting *Oneok v. Learjet*, 135 S. Ct. 1591, 1599-1600 (2015)).
[15] *See New York*, 535 U.S. at 20.
[16] *Id.* (rejecting a scheme approved by the Maryland Public Utilities Commission that infringed FERC's

seek to subvert or alter FERC-approved wholesale rates with which it finds flaw.[17] The federal courts have repeatedly held that state acts that intervene in wholesale energy markets are preempted.[18] Where the express goal is to affect wholesale market prices, as it is here, the Supremacy Clause allows no space for state authority.[19] Exclusive jurisdiction is just that – exclusive.

FERC maintains oversight responsibility for wholesale rates of electricity and natural gas, including the amelioration of electric power price volatility. FERC implements its authority in this area through a host of measures including but not limited to ISO-New England's Forward Contract Market (FCM) Pay for Performance (PFP) regime, the Winter Reliability Program, enhancements to electric-gas coordination, dispatch protocols in the Day-Ahead and Real-Time Energy Markets, energy market offer flexibility and the FCM sloped demand curve.[20] Commission approval of a "regional solution" designed to address regional price volatility would thus infringe an area of federal regulation that has not only been expressly reserved for FERC, but that in actual practice has been comprehensively occupied by FERC.

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wholesale electric rate authority in the PJM region).

[17] *Hughes*, 136 S. Ct. at *14 ("a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.") (quoting *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988), which in turn was quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)).

[18] *See, e.g.*, *Hughes*, 136 S. Ct. at *13-15 (state utility commission may not disregard FERC wholesale rate scheme in its effort to increase available generation capacity); *Northern Natural Gas Co. v. State Corp. Comm'n of Kan*., 372 U.S. 84, 89 (1963) (state regulation of pipelines' gas purchases preempted because it "invade[s] the exclusive jurisdiction which the Natural Gas Act has conferred upon [FERC]"); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 185 (1983) (state law prohibiting producers from passing on production taxes preempted because it "trespasse[s] upon FERC's authority"); *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 309 (1988) (state securities regulation directly affecting wholesale rates and gas transportation facilities preempted because it regulates "matters that Congress intended for FERC to regulate").

[19] *See, e.g.*, *Hughes*, 136 S. Ct. at *12-14. This must be the case regardless of whether the state's purpose is couched in reliability terms. *See id.*

[20] FERC is also responsible for natural gas pipeline certifications.

In Docket No. IR 15-124, Staff admitted that they "[could] not predict how FERC would approach an innovative program" such as one approving an EDC's request to acquire an interest in an interstate natural gas pipeline for the express purpose of reducing regional wholesale electricity prices by enhancing the availability of natural gas supply.[21] Yet as a legal matter there is little question – Congress has assigned to FERC exclusive authority to ensure just and reasonable wholesale rates.[22] State infringement in this area is illegal, and no amount of wishful thinking can alter this fact.[23]

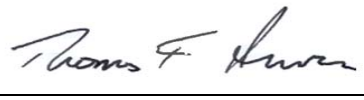
VII. CONCLUSION

The Eversource proposal to acquire natural gas pipeline capacity at the expense of New Hampshire's electric ratepayers for the purpose of ameliorating regional wholesale price volatility is prohibited under state restructuring law as well as the state's overall electric power regulatory scheme, in addition to federal preemption law. To the extent that the Commission desires to affect retail electric rates, it has the authority to accomplish that goal in many ways, including through the implementation of energy efficiency measures and the siting of new generation.[24] CLF urges the Commission to pursue permissible means to accomplish its goals and to reject the illegal measures proposed by the Petitioner.

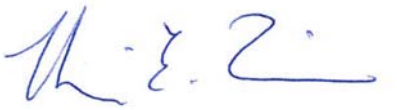
[21] Staff Report at 13 (Sept. 15, 2015).
[22] *See* n.11, *supra*.
[23] Good intent also has no impact on the legal question. *See Hughes*, 136 S. Ct. at *13.
[24] *See Hughes*, 136 S. Ct. at *2. While the siting of generation in New Hampshire is regulated by the Site Evaluation Committee, the PUC plays a key role on that body.

Respectfully submitted,

CONSERVATION LAW FOUNDATION



Thomas F. Irwin, Esq.
V.P. and CLF New Hampshire Director



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Dated: April 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has been sent by email to the service list in Docket No. DE 16-241 on this 28th day of April, 2016.

Melissa E. Birchard