STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

PETITION FOR APPROVAL OF GAS INFRASTRUCTURE CONTRACT BETWEEN EVERSOURCE ENERGY AND ALGONQUIN GAS TRANSMISSION LLC

Docket No. DE 16-241

Phase I Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and, in response to the directive in the March 24, 2016 Order of Notice, inviting briefs by April 28, 2016 regarding the legality of the relief requested in this docket, the OCA states as follows:

1. Introduction

Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") instituted this proceeding on February 18, 2016 for the purpose of seeking the approval of the New Hampshire Public Utilities Commission ("Commission") of a 20-year agreement for firm gas transportation and storage services with Algonquin Gas Transmission, LLC ("Algonquin") via the Access Northeast project, a pipeline that is being jointly developed by Algonquin, National Grid and an affiliate of Eversource incorporated as Eversource Gas Transmission LLC. Eversource seeks this approval notwithstanding the fact that it is a distribution utility that is in the process of divesting its remaining generation assets after a 20-year restructuring process and, post divestiture, will have no direct need of firm gas transportation and storage in order to serve its retail customers.

The Eversource petition grows out of a previous Commission proceeding, Docket No. IR 15-124, in which the Commission investigated potential approaches to ameliorate perceived adverse wholesale electricity market conditions in New Hampshire. Among other things, the Commission noted a lack of consensus among stakeholders about whether applicable law permits an arrangement such as the one at issue here, explicitly declining to rule on any legal questions until they could be addressed in the context of a specific proposal from an electric distribution utility. *See* Order No. 25,860 (January 19, 2016) at 3. As it did in Docket IR 15-124, Eversource argued in the instant petition that the proposed contract is lawful because (1) such an arrangement does not violate the Restructuring Policy Principles of the Electric Industry Restructuring Act, RSA 374-F, (2) the corporate powers granted to Eversource pursuant to RSA 374-A "appear to encompass and authorize such contract execution," (3) the requested exercise of Commission authority is in the public interest pursuant to RSA 374:57, (4) the Eversource proposal is consistent with the planning principles set forth in RSA 378:37 and :38, and (5) the requested recovery of costs from Eversource's electric distribution customers is "allowed by and consistent with New Hampshire law, including RSA 374:57 and the provisions of RSA Chapter 374-A, as well as the Commission's plenary authority with respect to utility rates." Eversource Petition at 14.

As is explained fully below, Eversource has framed the legal issues in an incorrect fashion. The applicable legal standards, correctly framed, make clear that the Commission lacks authority to approve what Eversource is requesting here – and, further, that even if the Commission could exercise such authority as a matter of state law the Commission would be preempted from doing so in light of the Federal Power Act and decisions of the Federal Energy Regulatory Commission ("FERC"). In addition, the Eversource proposal is contrary to the

Natural Gas Act and, therefore, at the very least the Commission should await resolution of that question by the FERC.

2. <u>The Relevant Statutory Framework</u>

Determining the legality of granting the Eversource petition is strictly a matter of statutory interpretation because the authority of the Commission is exclusively "that which is expressly granted or fairly implied by statute." *Appeal of Public Service Co. of N.H.*, 130 N.H. 285, 291 (1988) (citation and internal quotation marks omitted). As a general matter, statutory construction requires application in the first instance of the "plain and ordinary meaning" of the words employed by the Legislature, but words and phrases cannot be applied "in isolation." *Appeal of THI of N.H. at Derry, LLC,* ___ N.H. ___, 131 A.3d 944, 947 (2026) (citation omitted). The decisionmaker must "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id*.

The specific principle of statutory construction applicable here is the notion that when statutes are *in pari materia*, they must be "read as part of a cohesive whole." *Williams v. Babcock*, 121 N.H. 185, 190 (1981) (citations omitted). "Statutes are *in pari materia* – pertain to the same subject matter – when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object." 2B Sutherland Statutory Construction §51.3 (2015) (also noting that "[s]tatutes need not have been enacted simultaneously or refer to one another to be *in pari materia*" and that "courts construing an ambiguous statute often look for guidance to similar acts passed at prior and subsequent sessions to which the act does not refer") (citations omitted).

Although the Electric Industry Restructuring Act adopted in 1996, RSA Chapter 374-F, is a detailed and comprehensive piece of legislation, it is by its own terms not a regulatory scheme

but rather a blueprint for transitioning electric utilities from complete vertical integration to companies that provide transmission and distribution service to customers so that they might go elsewhere for their actual electricity. *See* RSA 374-F:1 (describing the purposes of the restructuring act in terms of restructuring, transitioning and, for the Commission, "implementing a statewide electric utility restructuring plan"). In much the same way, RSA Chapter 374-A, initially adopted in 1975, nests within the Commission's overall enabling statutes by conferring certain "additional powers" in electric utilities relative to the development of "electric power facilities" as well as contracts and agreements associated with such facilities. RSA 374-A:2. Likewise RSA 374:57 along with sections 37 and 38 of RSA Chapter 378; these provisions clarify and in some limited instances extend the manner in which utilities, with Commission approval, may meet their franchised obligations to serve customers. "An amended act comprises part of the legislative history of the amending act," 2B Sutherland Statutory Construction § 51:3 (citation omitted), which means that, to the extent there is any ambiguity here each revision to the Commission's enabling statute should be understood as building upon its unrepealed predecessors. Each enactment, whether narrow in scope like RSA 374:57 or a broad policy change like the Restructuring Act, arises against the backdrop of the fundamental principles of utility regulation that have guided the Commission since its inception more than a century ago and that remain enshrined in the Commission's enabling statute.

3. <u>Natural Gas Capacity is Not "Used and Useful" to Captive Distribution Service Customers and Does not Belong in their Rates</u>

The fundamental principle that the Commission must apply here is the statutory command to allow Eversource and all other public utilities to charge customers only rates that are "just and reasonable." RSA 378:7. "The Commission shall not include in permanent rates any return on any plant, equipment, or capital improvement which has not first been found by the

Commission to be prudent, used and useful." RSA 378:28; *see also Appeal of McCool*, 128 N.H. 124, 138 (1986) (noting that the concept of just and reasonable rates "must be understood by reference to the legitimate components of a utility's revenue requirement" as reflected in the traditional cost-of-service ratemaking formula R=O+(BxR)).

The "used" component of the "used and useful" requirement is fatal to the lawfulness of including the costs of the Access Northeast projects in electric distribution rates. "In general, *used* means that the facility is actually providing service." Regulatory Assistance Project, *Electricity Regulation in the US: A Guide* (2011) at 39;[1] *see also* Jonathan A. Lesser, "The Used and Useful Test: Implications for a Restructured Electric Industry," 23 Energy L.J. 349, 352-356 (discussing history of "used and useful" test as developed in U.S. Supreme Court jurisprudence and noting that "the definition of used and useful applied a physical test: was the resource in question in-service and providing actual physical service that were relevant for customers asked to pay for those services?"). As the OCA pointed out in its memorandum of August 10, 2015, submitted in Docket IR 15-124, "[i]nvestment in gas pipeline capacity is a speculative investment in a fuel that is not used by the investing utility, which is currently in the process of divesting itself of generation assets." OCA Memorandum in Docket No. IR 15-124 of August 10, 2015 at 9. In other words, the pipeline capacity at issue here has no more of a place in electric distribution rates than lines carrying water or telephony would.[2] To put it in the context

[1] The cited resource is available at www.raponline.org.

[2] Although the provision of distribution service to its customers does not require the use of natural gas pipeline capacity, among the generation assets currently owned by Eversource is the 414 megawatt Newington Station, originally built as an oil-fired facility but also capable of employing natural gas as a fuel. LaCapra Associates, "PSNH Generation Asset and PPA Valuation Report" (filed on March 31, 2014 in Docket IR 13-020) at 12. Eversource is in the process of divesting this as well as the remainder of its generation portfolio. Even if Eversource continues to own Newington Station and rely on it to meet its obligation to provide backup "energy service" to customers not relying on a competitive supplier, costs and investments related to fueling such a generation facility are still not properly included in distribution service rates.

of a seminal "used and useful" case, firm natural gas capacity is no more relevant to the services Eversource's captive New Hampshire customers are paying for than were the expenses of a cattle show to livestock owners forced to pay federally regulated rates for stockyard services. *See Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475-76 (1938) (excluding "stock show property" from rate base even though show was "supported by appellant in good faith an in the belief that it stimulates its business and that of livestock producers").

It matters not that issue here is a longterm contractual obligation rather than an asset to be placed in rate base. In every sense that matters, both legal and practical, the contract is as much an asset for purposes of "used and useful" scrutiny as the pipeline would be if Eversource were planning to build the pipeline itself. Just as including costs associated with uneconomical longterm power purchase obligations could be included in stranded cost charges for purposes of the 2001 PSNH Restructuring Settlement Agreement, *see Appeal of Campaign for Ratepayers' Rights*, 145 N.H. 671, 676 (2001) (noting that "used and useful" test is not constitutionally mandated), and *Public Service Co. of N.H.*, Order No. 23,443 (Docket DE 99-099, April 19, 2000) (describing various contractual obligations with affiliated owner of Seabrook nuclear power plant as well as independent power producers whose costs were approved for partial recovery as stranded costs), the costs associated with the proposed Access Northeast agreement must be evaluated for their consistency with the basic and commonsense requirement that the charges assessed to utility customers should include only those facilities and obligations attributable to the service for which they are being billed. *See Petition of Public Service Co. of N.H.*, 130 N.H. 265, 279 (1988) (noting that "used and useful" is "a constitutionally permissible legislative articulation of the perceived interests of consumers in paying directly only for the costs of a project actually in use and providing service to the public").

One of the explicit determinations Eversource requests of the Commission is that the proposed "Long Term Gas Transportation and Storage Contract tariff," provided in illustrative form as Attachment EVER-LBJ-1 to the Eversource Petition, "would properly allow for recovery of costs associated with agreements executed by PSNH for the provision of interstate pipeline transportation and gas storage services to electric generation facilities in the ISO-NE region." Petition at 15. The testimony accompanying Attachment EVER-LBJ-1 describes an "LGTSC rate" to be recovered "on the basis of a uniform cents-per-KWh rate applicable to all delivered KWh for all customer classes." Joint Testimony of Christopher J. Goulding and Lois B. Jones at 5, lines 1-3. This stands basic notions of cost-of-service ratemaking as enshrined by RSA 378:7 and encapsulated in the "used and useful" requirement on their head. In essence, Eversource is seeking to impose on all of its distribution service customers a charge for a service that is being provided to others. This is anathema to the legal principles that have guided the development of the electric industry in New Hampshire and every other state since their inception.

4. <u>The Statutes of the Seabrook Era</u>

Therefore, in light of the applicable statutory scheme, the only possible justification for imposing longterm costs associated with firm natural gas capacity on electric distribution service customers would have to arise out of some post-1913 enactment that authorizes a departure from traditional cost-of-service ratemaking principles. No such enactment exists and none of the statutes previously proffered by Eversource authorize what the distribution utility is seeking here. In fact, they preclude it.

At the national level, a new chapter in the history of the electric industry began when President Carter signed into law the Public Utility Regulatory Policies Act of 1978 ("PURPA"), P.L. 95-617, 92 Stat. 3117 (1978), which touched off the process of opening the nation's bulk

power transmission system to electricity producers other than the vertically integrated utilities that had previously enjoyed monopolies in their service territories. *See, e.g*., Reishus Consulting, "Electric Restructuring in New England – A Look Back (2015) at 3-5.[3] New Hampshire was something of a flashpoint given the controversial efforts, occurring at roughly the same time, of Public Service Company of New Hampshire ("PSNH") to develop the Seabrook nuclear power plant – a singular quest that would ultimately land PSNH in bankruptcy. *See In re Public Service Co. of N.H.*, 130 N.H. 265 (1988) (tracing history of what was then PSNH's $1.7 billion investment in Seabrook and sustaining constitutionality of statute precluding inclusion of uncommissioned plant in rate base); *Appeal of Public Service Co. of N.H.*, 130 N.H. 748, 755 (1988) (stressing that PSNH was not entitled to "plenary indemnification" from its customers as Seabrook-induced financial difficulties proliferated). Each New Hampshire enactment, from the mid-1970s forward, can and should be understood as a cumulative legislative effort to address what was then the Seabrook conundrum and to adapt New Hampshire's public policy to the changing industry realities of the changes touched off by PURPA. Accordingly, for the reasons discussed *supra*, it is appropriate and logical to consider these enactments in chronological order to arrive at a coherent view of currently applicable New Hampshire law.

A. RSA Chapter 374-A

By its terms, Chapter 374-A of the Revised Statutes Annotated confers certain "additional powers" on New Hampshire electric utilities. *See* RSA 374-A:2 (reciting that these additional powers are conferred "[n]otwithstanding any contrary provision of any general or

[3] The cited white paper was prepared for the New England States Committee on Electricity – NESCOE – and is available at http://nescoe.com/wp-content/uploads/2015/12/RestructuringHistory_December2015.pdf.

special law relating to the powers and authorities of domestic electric utilities or any limitation imposed by a corporate or municipal charter"). Paragraph I of section 374-A:2 authorizes the participation, on a joint or separate basis, in "electric power facilities or portions thereof," see also RSA 374-A:1, III (defining "electric power facilities" for this purpose as generation facilities of at least 25 megawatts and transmission facilities of at least 69 kilovolts) but this cannot be applicable here because, plainly, neither firm natural gas capacity nor a gas transmission line are an electric power facility. Paragraph II similarly authorizes electric utilities to "enter into and perform contracts and agreements" for "electric power facilities, or portions therof, or the product or service therefrom." Again, it would contravene basic notions of statutory interpretation to shoehorn a gas pipeline or capacity on such a pipeline into what is plainly a description of electric facilities.

For good reason, then, Eversource equivocates on whether RSA 374-A provides a basis for the authority it seeks here. *See* Eversource Petition at 14 (contending that RSA 374-A "*appears* to encompass and authorize such contract execution") (emphasis added). This echoes a similar equivocation offered by the Staff of the Commission. *See* Memorandum of Staff Attorney Alexander F. Speidel of July 10, 2015 in Docket IR 15-124 ("Staff Memo") at 4 ("*arguably* the contracting for gas capacity . . . on behalf of electric generators of at least 25 MW, would constitute permissible contracting under RSA 374-A:2, II for the sharing of costs") (emphasis added). The latter is a particularly strained interpretation of RSA 374-A since the plain language of this provision does not authorize electric utilities to act "on behalf of" anyone.[4]

[4] In the course of noting the existence of "scanty" legislative history to illuminate what the Legislature intended when it adopted RSA 374-A in 1975, the Staff Memo additionally suggests the "survival of RSA 374-A into the current 'restructured' age to be worthy of attention in that it potentially offers [Eversource] the ability to engage in creative approaches to towards reducing [its] customers' energy costs through the acquisition of gas capacity resources, as part of the costs of electric power facilities." Staff Memo at 5 (thus concluding that RSA 374-A "provides New Hampshire EDCs with the most foursquare statutory authorization for entering into gas capacity

The most that could be said of RSA 374-A is that it would allow Eversource, somewhat illogically in light of subsequent enactments, to develop or to participate in the development of new generation facilities along with transmission lines.

B. RSA 374:57

Adopted in 1989, RSA 374:57 is a statute phrased in the negative – i.e., it explicitly allows the Commission to disallow certain agreements entered into by electric utilities upon a finding that the transaction was "unreasonable and not in the public interest." The provision covers any agreement entered into by an electric utility "with a term of more than one year for the purchase of generating capacity, transmission capacity, or energy." With respect to agreements filed with the FERC under the Federal Power Act, RSA 374:57 is almost certainly unconstitutional. *See Hughes v. Talen Energy Marketing, LLC,* ___ U.S. ___ (2016), slip op. at 14 ("Once FERC sets such a rate . . . a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable" (quoting *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 373 (1988)).[5] More to the point, the only way RSA 374:57 could be applicable here would be for the Commission to conclude that "transmission capacity" includes *natural gas* transmission capacity.

Notably, in the course of the Commission's generic investigation in IR 15-124, Eversource described RSA 374:57 as "more relevant" than RSA 374-A discussed *supra*. *See* Comments of Public Service Company of New Hampshire d/b/a Eversource Energy Re: Staff's July 10, 2015 Memorandum ("Eversource Memo") in Docket IR 15-124 at 11. Eversource

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activities"). It suffices to say here that the survival of RSA 374-A through subsequent legislative reevaluation of the powers and responsibilities of electric utilities, particularly by the Legislature that adopted the Restructuring Act in 1996, does not and cannot shed light on what the 1975 Legislature that actually adopted RSA 374-A intended.

[5] This April 19, 2016 decision of the U.S. Supreme Court is available on the Court's web site at http://www.supremecourt.gov/opinions/15pdf/14-614_k5fm.pdf.

argued there that "transmission capacity" as used in RSA 374:57 is "not necessarily limited" to electric transmission capacity. *Id*. at 12-13. Although PSNH points to other statutes where the term "transmission" is supposedly used in a manner that covers both electric and gas facilities, fatal to the claimed ambiguity here is the reference in RSA 374:57 to agreements filed with the FERC under the Federal Power Act. If the Legislature had intended this provision to authorize electric utilities to enter into contracts with natural gas companies, there would have been a corresponding reference to agreements filed with the FERC under the Natural Gas Act.

C. RSA 378:37 and :38

When the Legislature initially enacted RSA 378:37 and :38 in 1990, it did two things: (1) adopted a general statement of "energy policy" in section 37, and (2) required each electric and gas utility to submit a least-cost-integrated resource plan to the Commission at specified intervals, the content of which is specified in detail by the statute. Neither section expands the scope of what a utility may do, or what the Commission may allow a utility to do; it merely specifies, in effect, that when exercising responsibilities and authorities permitted by other aspects of New Hampshire law, each utility must plan on a least-cost integrated basis and in a manner "pursuant to" the section 37 energy policy. Assuming without conceding that the acquisition of firm natural gas capacity by an electric distribution company is consistent with the commitment in section 37 to "reliability and diversity of energy sources," there is simply nothing here that allows a utility to expand the scope of their businesses and require customers to pay for services that are unrelated to that which is covered by their utility franchises.

D. Electric Utility Restructuring Act, RSA 374-F

The last refuge, then, is the possibility that when the Legislature ordered the restructuring of the electric industry in 1996 via the adoption of RSA Chapter 374-F, the Electric Utility

Restructuring Act, in the course of reducing the scope of what electric utilities may do in New Hampshire the Legislature in one respect decided to expand the realms in which they may operate on a regulated basis. Nothing in the Restructuring Act, either as originally adopted or as subsequently amended, authorizes what Eversource is proposing here, either directly or by implication. In fact, to the extent the Restructuring Act speaks to this issue it should be understood as precluding an electric distribution utility from entering into a contract for firm natural gas capacity.

In structural terms, the Restructuring Act is built around one fundamental legislative command, set forth in RSA 374-F:4, I, that the Commission "require the implementation of retail choice of electric suppliers for all customer classes of utilities providing retail electric service under its jurisdiction . . . at the earliest date determined to be in the public interest by the Commission."[6] The remainder of section 4, as it applies to Eversource, required unbundled rates (paragraph I), mandated certain compliance filings (paragraph III), authorized stranded cost recovery (paragraph V), and permitted an interim stranded cost recovery charge "to facilitate the rapid transition to full competition" applicable to the first two years after compliance filings (paragraphs VI and VII). None of these provisions can reasonably be understood as requiring or even authorizing Eversource to acquire firm natural gas capacity on behalf of its choice-enjoying retail customers.

[6] Section 4 established a firm deadline of July 1, 1998 for restructuring absent legislative approval of an extension or a finding that delay was required, *inter alia*, "due to events beyond the control of the Commission." Such events arrived, in the form of federal litigation that blocked implementation of the restructuring plan issued by the Commission in 1997. Ultimately, as to Eversource, the litigation was resolved and restructuring went forward pursuant to the PSNH Restructuring Settlement Agreement approved by the Commission in Docket No. DE 99-099 via Order No. 23,443, *supra*, and its *sequelae*. In due course, the company then known as PSNH divested its interest (owned through an affiliate) in the Seabrook nuclear power plant. At the direction of the Legislature, divestiture of PSNH's remaining generation assets was put on hold for several years; a settlement agreement providing for the divestiture of the remainder of these assets, to which OCA is signatory, is presently before the Commission in Docket No. DE 14-238. As a result of the Restructuring Agreement approved in Order No. 23,443, PSNH's service territory was opened to retail competition in 2001.

Paragraph VIII of RSA 374-F:4 is the only possible exception. It provides that the Commission is "authorized to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in this chapter." Ultimately, however, even this catch-all provision cannot be understood as authorizing what Eversource is seeking permission to do in this docket.

In literal terms, the restructuring of PSNH – i.e., the advent of a regime whereby PSNH's retail customers could choose a competitive energy supplier and avoid procuring anything other than transmission and distribution service from PSNH – occurred in 2001. Therefore, nothing that Eversource might do or seek to do today could reasonably be deemed as "necessary to implement restructuring" as the term was functionally defined in the 1996 enactment. Even if "restructuring" could be understand to include the full divestiture of PSNH's generation portfolio, a process still awaiting completion in Docket No. DE 14-238, there is no logical or causal connection between selling off generation assets and the procurement of fuel for use (presumably) by the future owner of one of those assets (Newington Station).

Some participants in Docket No. IR 15-124 took the position that the Restructuring Policy Principles, which are set forth in RSA 374-F:3, justify an acquisition by an electric distribution utility of firm natural gas capacity, and are likely to do so again in light of the representations in the Eversource petition that its proposal will "directly and effectively address" the "detrimental impact" natural gas capacity constraints have had on "electricity prices and reliability." Eversource Petition at 3. There are two distinct flaws in such an argument.

The first flaw is that the requirements of RSA 374-F:4, VIII are stated in the conjuctive: to be authorized under the Restructuring Act, charges and/or service provisions must be both

substantially consistent with the Restructuring Act's policy principles *and* necessary to implement restructuring. As already explained, restructuring has long since been implemented and thus substantial consistency with the policy principles is insufficient.

The second flaw is that what Eversource is proposing here is not substantially consistent with the policy principles. Most of them are plainly not implicated – e.g., customer choice, open access to transmission and distribution facilities, universal service, benefits for all consumers (defined as not "benefit[ting] one customer class to the detriment of another"), reducing market barriers to energy efficiency, near-term rate relief (since anything that might occur in 2016 is no longer "near term" in relation to the 1996 enactment), regionalism (defined as reforming the New England Power Pool and coordinating with other states' restructuring efforts), increasing administrative efficiency and expeditious implementation. With one exception, the remainder are actually *violated* by what Eversource is proposing.[7]

Specifically, to force customers to subsidize natural gas generation (by making fuel supplies available because wholesale competition has thus far led natural gas generators to spurn committing to firm capacity) is to undermine the RSA 374-F:3, VII principle of "full and fair

[7] The exception is the first policy principle – that of "system reliability." *See* RSA 374-F:3, I (specifying that "[r]eliable electricity service must be maintained while ensuring public health, safety, and quality of life"). The Eversource petition refers to natural gas capacity constraints that have had a "detrimental impact . . . on electricity prices and reliability." Eversource Petition at 3, citing the Commission's Order of Notice in Docket IR 15-124. But claimed reliability benefits are notably absent from the evidence accompanying the Eversource petition. Specifically, the prefiled testimony of Kevin R. Petak purports to provide "an independent assessment of the potential impacts of the proposed Access Northeast gas infrastructure project on New England's natural gas and electric markets." Prefiled Testimony of Kevin R. Petak at 4, lines 15-16. Mr. Petak unambiguously takes the position that Access Northeast "would generate significant cost savings to New England electric consumers by reducing the price of natural gas delivered to New England power generators," *id*. at 5, lines 11-12, but when it comes to reliability his claims are measured indeed. *See id*. at 6, lines 10-21 and 7, lines 1-2 ("Access Northeast *could* enhance New England's grid reliability and complement the ISO-NE's market improvements to incentivize generation availability . . . [and by] providing secure fuel supplies to these generators, *could* significantly improve electric reliability across the grid and *potentially* help the region avoid costly load shedding measures under extreme circumstances") (emphasis added). Just as OCA will challenge Eversource's bold claims of wholesale price benefits, we will through discovery explore the far more measured and equivocal contentions of Eversource's witness concerning reliability benefits. The point here is that the Petition facially makes very little in the way of claims when it comes to the Restructuring Policy Principle of system reliability.

competition" requiring "a range of viable suppliers" and market rules that "apply to all buyers and sellers in a fair and consistent manner." Even assuming that natural gas supply constraints have had a detrimental effect on natural gas generators' ability to compete with other energy sources, the basic idea of the Restructuring Act is to bring such market realities to bear on electric customers rather than to counteract them. Similarly, the RSA 374-F:3, VIII and IX principles of "environmental improvement" and "renewable energy resources" are not advanced by forcing customers to subsidize increased reliance on natural gas, a fossil fuel, at the potential expense of renewables and/or demand-side measures.

The most grievous inconsistency between what Eversource is proposing and the Restructuring Policy principles concerns stranded costs. "Recovery of Stranded Costs" is one of the enumerated principles; the treatment of this issue in the Restructuring Act makes clear the Legislature's concern about imposing strict limitations on stranded cost recovery. *See* RSA 374-F:3, XII(a) ("It is the intent of the legislature to provide appropriate tools and reasonable guidance to the commission in order to assist it in addressing claims for stranded cost recovery and fulfilling its responsibility to determine rates which are equitable, appropriate, and balanced and in the public interest"). Defined explicitly and in great detail for purposes of the Restructuring Act, "Stranded costs" are:

> costs, liabilities, and investments, such as uneconomic assets, that electric utilities would reasonably expect to recover if the existing regulatory structure with retail rates for the bundled provision of electric service continued and that will not be recovered as a result of restructured industry regulation that allows retail choice of electricity suppliers, unless a specific mechanism for such cost recovery is provided. Stranded costs may *only* include costs of:
>
> (a) Existing commitments or obligations incurred prior to the effective date of this chapter [in 1996];
>
> (b) Renegotiated commitments approved by the commission;

(c) New mandated commitments approved by the commission, including any specific expenditures authorized for stranded cost recovery pursuant to any commission-approved plan to implement electric utility restructuring in the territory previously serviced by Connecticut Valley Electric Company, Inc.;

(d) Costs approved for recovery by the commission in connection with the divestiture or retirement of Public Service Company of New Hampshire generation assets pursuant to RSA 369-B:3-a; and

(e) All costs incurred as a result of fulfilling employee protection obligations pursuant to RSA 369-B:3-b.

RSA 374-F:2, IV (emphasis added). Although Commission approval here could arguably bootstrap Eversource's proposed charge as a "new mandated commitment," the costs fail the first test in the definition – that they be unrecoverable "as a result of restructured industry regulation that allows retail choice of electricity suppliers." *See Public Service Co. of N.H.,* Order No. 23,305 in Docket DE 11-184 (Dec. 20, 2011) at 40 (concluding that newly incurred, above-market purchased power costs are not "within the strict definition" of stranded costs because "they are not costs that are unrecoverable due to the deregulation of generation").

A final point the Commission should consider in construing the Restructuring Act as applied to the instant petition is that, even if the words used by the Legislature were less clear and it became necessary to limn the purposes of the statute, these too make obvious that what Eversourse is proposing is contrary to the Act. The Legislature did not leave the purposes of the statute to guesswork; it stated those purposes explicitly in RSA 374-F:1. According to the lawmakers who added the Restructuring At to New Hampshire law, "[t]hje most compelling reason to restructure the New Hampshire electric utility is to reduce costs for all consumers *by harnessing the power of competitive markets*" (emphasis added). "The power of competitive markets" to reduce electric costs lies in transferring from consumers to investors in newly unregulated companies the risk that generation and generation-related assets, including pipeline

transmission capacity, will prove to be uneconomical relative to other options. The Restructuring Act explicitly invoked the language in the New Hampshire Constitution describing "[f]ree and fair competition in the trades and industries" as "an inherent and essential right of the people" that must be "protected against all monopolies and conspiracies which tend to hinder or destroy it." *Id*. at II (quoting N.H. Constitution, Part II, Article 83). While we do not go so far as to contend that what Eversource is proposing here amounts to an unconstitutional competition-hindering conspiracy, it is obvious from the constitutional reference that the Legislature intended to free consumers from a long history of serving as the plenary indemnifiers of utility shareholders.

Under the Restructuring Act, the *only* vehicle by which a utility may add otherwise-unrecoverable costs to its rates is via stranded cost recovery – in concept, a temporary and transitional phenomenon that should not be a permanent feature of electric rates in either explicit or implicit form. Therefore, to add a pseudo-stranded cost recovery charge to retail electric rates in the manner proposed by Eversource here would amount to an affirmative violation of the Restructuring Act. Obviously, the idea that the Restructuring Act somehow authorizes these charges in circumstances where the law would otherwise preclude them cannot withstand scrutiny.

The cumulative impact is clear. The basic principles of New Hampshire utility law, first adopted in 1911 and constant since then, render inappropriate the inclusion of firm natural gas capacity in rates paid by customers to their monopoly provider of electric distribution services. Every subsequent enactment is either silent as to this principle or augments it, and in a restructured environment it is up to the federally regulated wholesale electricity market to

address any problems related to the availability of fuel for one class of merchant generators. New Hampshire law absolutely prohibits the Commission from granting the Eversource petition.

5. The Commission is Preempted from Granting the Eversource Petition pursuant to the Federal Power Act and the Natural Gas Act

A. Overview

Even if it were otherwise, for the reasons that follow a thicket of federal issues loom that either require the Commission to reject the petition or strongly suggest the Commission should stay its hand and await decisions of the FERC.

In restructured electric markets, natural gas pipeline transportation costs incurred by electric utilities to supply gas-fired electric generating facilities with fuel are wholesale costs that are properly recovered through wholesale rates and thus fall under the jurisdiction of the FERC. New England electric prices are largely set by the marginal costs of gas-fired electric generating facilities. The cost of natural gas purchased and borne by merchant generators is passed through as a significant portion of the wholesale rate of energy and capacity in the real-time and day-ahead energy markets, the forward capacity market, and the forward reserve market administered by the regional transmission organization ISO New England ("ISO-NE"). The parameters of these markets have been vetted and deliberated at length by over 400 members of the New England Power Pool ("NEPOOL"), reviewed by the attorneys and technical staff of ISO-NE, and subsequently filed pursuant to section 205 of the Federal Power Act at the FERC.

Over the last two years, NEPOOL and ISO-NE have adopted reforms to the energy and capacity markets to address reliability concerns.[8] The FERC approved the most recent reforms in November 2015, *see ISO New England Inc. and New England Power Pool*, 153 FERC ¶ 61,223

[8] Reserve Constraint Penalty Factors, discussed *infra*. Docket No. ER14-2419-000; Two-settlement Forward Capacity Market process (Pay for Performance), also discussed *infra*. *ISO New England Inc. and New England Power Pool*, 147 FERC ¶ 61,172 (2014).

(2015), just as Algonquin was submitting the Access Northeast application for pre-filing review with the FERC. Similarly, the major reforms to the Forward Capacity Market become effective in June 2018, which is also the same year and projected month that Access Northeast would become operational. Having an electric utility release capacity from the newly completed Access Northeast pipeline primarily and discriminatorily to electric gas generating facilities prior to giving ISO-NE market reforms time to have their intended effects is the equivalent of committing to a longterm loan to purchase a new car while awaiting repairs to one's existing vehicle.

According to witness James Daly, Eversource intends to coordinate with electric distribution utilities in Massachusetts (both those affiliated with Eversource as well as with National Grid) to release their purchased Access Northeast pipeline capacity via an Electric Reliability Service Program ("ERSP") administered by a designated capacity manager. Testimony of James G. Daly at 60, lines 19-22. These releases will coincide with the Forward Capacity Market's bidding windows. *See* Attachment EVER-JGD-5. What Mr. Daly unabashedly describes as a "state-approved program," Daly Testimony at 60, line 22, interferes with and conflicts with the administration of the forward capacity market and therefore impermissibly "invades FERC's regulatory turf." *Hughes*, *supra*, slip op. at 12.

As proposed, the ERSP has other adverse implications. For instance, section 4(b) of the Natural Gas Act makes it unlawful for any company subject to the jurisdiction of the FERC to "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, facilities, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b). A natural gas capacity release is subject to the capacity release rules in

FERC Order 712.[9] As proposed, the ERSP turns these rules on their head. Eversource admits that FERC's approval of an Order 712 waiver pertaining to Algonquin's tariff filing is required and is a condition precedent to the Commission approval of the ERSP as proposed. *See* Daly Testimony at 65, lines 4-13. Not surprisingly, the plan has expectedly encountered significant resistance at FERC. The federal agency suspended Algonquin's tariff filing and determined that it "may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful." *Algonquin Gas Transmission, LLC,* Order Accepting and Suspending Tariff Record and Establishing a Technical Conference, 154 FERC ¶ 61,269 (2016).

B. The Federal Power Act

State-law measures "aimed at interstate purchasers and wholesales for resale" are preempted by the Federal Power Act. *Oneok Inc. v. Learjet, Inc*. 135 S.Ct. 1591, 1600 (2015) (construing the Natural Gas Act); *Hughes*, slip op. at 13, n. 10 (noting that the relevant provisions of the Federal Power Act and the Natural Gas Act are "analogous" and the Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa"). If the Commission were to make the mistake of construing New Hampshire law as encouraging or even allowing what Eversource is proposing here, the result would be precisely the sort of forbidden state-law measure referenced in *Oneok* and *Hughes* – each a recent decision of the U.S. Supreme Court reflecting a heightened degree of sensitivity to such state transgressions.

Eversource proposes to lower wholesale electric prices by subsidizing and selling fuel to natural gas-fired generating facilities that are situated near or along the Algonquin pipeline. The cost of fuel will be passed through to customers in the wholesale rate that clears the ISO-NE

[9] Order No. 712 is entitled "Promotion of a More Efficient Capacity Release Market" and is actually an initial order, 123 FERC ¶ 61,286 (2008), and two subsequent rehearing orders, 125 FERC ¶ 61,216 (2008) (Order 712-A) and 127 FERC 61,051 (2009) (Order 712-B).

markets and then Eversource will recover its costs in administering the ERSP through the Long-Term Gas Transportation and Storage ("LGTSC") tariff, a variable retail distribution rate passed through to its customers. Eversource ratepayers would pay for the wholesale costs of fuel used for electric generation across two ratemaking mechanisms: (1) in the wholesale cost of energy and capacity and (2) through the LGTSC tariff reflecting the demand charges attributed to capacity releases made by Eversource to electric generators situated near or along the Algonquin pipeline. Eversource essentially proposes to shift a portion of the wholesale cost of fuel to the retail rate. Such a proposal is in blatant contravention of the Federal Power Act.

FERC has plenary authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The agency's core regulatory responsibility in the electric realm is to regulate "[a]ll rates and charges made, demanded, or received by a public utility for or in connection with" interstate transmissions or wholesale sales, and "all rules and regulations affecting or pertaining to such rates or charges," ensuring that such are "just and reasonable." 16 U.S.C. 824d(a); 824d(b) and 824e(a). "[T]he law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale.'" *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 766 (2016).

Currently, the fuel prices paid by electric generators are passed through as part of the wholesale cost of energy and paid by consumers in retail energy rates. By subsidizing fuel for one category of natural gas-fired generating facilities (only those facilities that are situated near or along the Algonquin pipeline), Eversource will be marking other natural gas-fired generating facilities as non-competitive and further harming the economic viability of renewable, nuclear and coal sources throughout the control area that are seeking to clear ISO-NE's markets. Out-of-

market subsidies for a category of generators is, in a sense picking winners and losers, haves and have-nots.

In *Oneok, Inc. v. Learjet, Inc*., the U.S. Supreme Court considered whether FERC's jurisdiction over practices affecting wholesale rates for natural gas preempted the application of state antitrust law to a practice that affected both wholesale and retail rates. *Oneok*, 135 S.Ct. at 1599. The Court emphasized that preemption in these circumstances depends on "the target at which the state law aims." *Id*. The Court concluded that the challenged state-law antitrust claims were not preempted because antitrust laws "are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace." *Id*. at 1601. The Court noted that claims in *Oneok* sought "to challenge the background marketplace conditions that affected both jurisdictional rates," rather than "to regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." *Id*. at 1602.

Unlike the state antitrust claims in *Oneok*, Eversource's Petition *zeros in* on suppressing prices and distorting the results of ISO-NE's energy and capacity markets. Eversource has modeled the ERSP to mirror the "actual dates" of ISO-NE's Forward Capacity Market auctions. See Attachment EVER-JGD-5 at 2. Such an elaborate plan hinging on the clearing prices and schedule of the Forward Capacity Market triggers FERC field preemption.

Earlier this month, the U.S. Supreme Court released its second energy law opinion this year, clarifying in *Hughes v. Talen Energy Marketing* how, in light of concerns about capacity development, state regulation can disrupt wholesale capacity markets and invade the regulatory territory reserved for FERC under the Supremacy Clause and the Federal Power Act. The Court considered whether Maryland exceeded its authority to incentivize the construction of electric generation within its borders when it caused a selected generator to bid into, clear and distort

PJM Interconnection's wholesale electric capacity market. *See* Hughes, slip op. at 6-9 (describing challenged Maryland initiative). A unanimous Court held that Maryland's law is preempted by FERC's authority under the FPA because a State may not condition the payment of power purchase agreement funds on whether a merchant generator clears the Forward Capacity Market. *Id*. at 15. In similar fashion, Eversource proposes here to rely under color of state law on resource participation in ISO-NE's capacity market to suppress energy and capacity prices and recover its costs pertaining to the Access Northeast transaction.

C. The Natural Gas Act

Eversource's Petition must also be rejected because the Electric Reliability Service Program as proposed is unduly discriminatory and preferential in violation of Section 4 of the Natural Gas Act and is contrary to FERC's regulations governing the allocation of released firm interstate pipeline capacity. The ERSP is Eversource's plan to select a Capacity Manager and sign an Asset Manager Agreement ("AMA") with the entity to "facilitate the transfer of procured capacity to electric generators on a priority basis." Daly Testimony at 61. Section 4(b) of the Natural Gas Act ("NGA") makes it unlawful for any utility subject to the jurisdiction of the FERC to "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b).

Eversource seeks to subsidize only the natural gas-fired generators that are situated along or near the Algonquin pipeline. Therefore, the proposal is unduly preferential and prejudicial under section 4(b) to any merchant generator that is not fueled by natural gas and any natural gas-fired generating facility that is not along or situated near the Algonquin pipeline.

The ERSP is contrary to FERC's Capacity release regulations requiring that "[t]he pipeline must allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of the release. If more than one person offers the highest rate and meets the terms and conditions of the release, the released capacity may be allocated on a basis provided in the pipeline's tariff." 18 C.F.R. § 284.8(e). Under the ERSP, natural gas capacity would be unduly preferentially released to natural gas-fired generating facilities regardless of the highest bidders. No local distribution companies, industry or any other companies or utilities would be permitted to participate in the ERSP, thus pulverizing the intent of FERC's capacity regulations into miniscule morsels of insignificance too small for the naked eye to see or too inconvenient for Eversource and Algonquin to abide by.

Eversource and Algonquin seek to have the ERSP approved by FERC because of an exemption available in the capacity release regulations for state-approved natural gas retail access programs. Under this exemption, natural gas local distribution companies release capacity to competing retail suppliers or marketers who directly serve customers that reside in such local distribution companies' service areas. *See* Georgia Public Service Comm'n, 110 FERC ¶ 61,048 (2005). Other entities have obtained waivers of FERC's capacity release rules if such entities are selling assets or affiliates that have contracted for natural gas capacity, so that such entities may get out from under any excess procurement of natural gas capacity expediently.[10] FERC has not approved of a so-called retail access program remotely similar or identical to the ERSP and it never intended the retail access program exemption to apply to electric utilities seeking to release

[10] See *Talen Energy Marketing, LLC et al*., 153 FERC ¶ 61,319 (2015) (granting waiver of the capacity release regulations related to the sale of a gas-fired generation facility); *Range Resources—Appalachia, LLC, et al*., 153 FERC ¶ 61,294 (2015) (granting waiver of the capacity release regulations related to the sale of production assets and related assets); *QEP Marketing Co., Inc., et al*., 153 FERC ¶ 61,280 (2015) (granting waiver of the capacity release regulations related to the sale of a processing plant and a gathering system); *Southern Union Co*., 145 FERC ¶ 61,165 (2013) (granting waiver of the capacity release regulations related to the sale of a local gas distribution company); *Virginia Power Energy Marketing, Inc*., 145 FERC ¶ 61,066 (2013) (granting waiver of the capacity release regulations related to the exit from a natural gas marketing and trading business).

natural gas capacity to merchant generators participating in the wholesale electric market for the purpose of suppressing wholesale electric prices in an unduly discriminatorily and preferential manner. The FERC has taken note of such reckless disregard for the NGA's provisions in Docket No. RP16-618-000, in which Algonquin filed a revised tariff record seeking an exemption from the statutory framework of the NGA and its capacity release regulations for the ERSP.

Algonquin made this filing on February 19, just one day after Eversource filed its petition in the instant docket.[11] On March 31, FERC issued an Order suspending the tariff record and establishing a technical conference to be held on May 9. FERC's initial review revealed that Algonquin's proposal to adopt the ERSP "raises numerous issues that are best addressed at a technical conference.[12] Nevertheless, it is Algonquin's position that the Commission should rush to consider Eversource's filing even though the PUC's federal counterpart is slowing this process down to look at this proposal more carefully. *See* Letter of April 1, 2016 of Kenneth C. Baldwin to Debra A. Howland, filed in Docket DE 16-241, at 1-2 (requesting on behalf of Algonquin that the Commission expedite both phases of the proceeding so as to "reach a decision as close to October 1 as possible"). At the very least, this should raise alarm bells on the second floor of 21 South Fruit Street.

6. Conclusion

As explained above, the relief requested in the Eversource Petition – an order guaranteeing 20 years of plenary indemnification of Eversource shareholders by Eversource's New Hampshire customers for a 20 year-commitment to natural gas pipeline capacity on a project an Eversource facility co-owns – is relief the Commission cannot lawfully grant. It is

[11] The OCA has intervened in the referenced FERC proceeding to protect the interests of New Hampshire's residential ratepayers, but believes nevertheless that the Commission need not ignore this significant legal flaw in the deal between Eversource and Algonquin.

[12] *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,269, P 35 (2016).

forbidden by New Hampshire law and preempted by federal law requiring that state authorities allow wholesale electricity markets to do the job they were called upon to do as the result of industry restructuring.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Dismiss the Eversource petition in its entirety with prejudice, and

B. Grant any other such relief consistent with such dismissal as it deems appropriate.

Respectfully submitted,

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April 28, 2016

Certificate of Service

I hereby certify that a copy of this Brief was provided via electronic mail to the individuals included on the Commission's service list for this docket.

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