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

REPLY 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 responsive 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 ("ANE") natural gas pipeline project. Pursuant to the Commission's Order of Notice, on April 28, 2016, CLF filed briefing addressing the question whether Eversource, as an electric distribution company ("EDC"), can lawfully acquire capacity on a natural gas pipeline project, to be sold for use by electric generating units. *See* Legal Briefing of Conservation Law Foundation Regarding Legality of Petitioner's Proposal (Aug. 28, 2016) ("CLF Brief"). As set forth in CLF's Brief, Eversource's unprecedented proposal would contravene, and is prohibited by, New

Hampshire's restructuring law, RSA Chapter 374-F, and is not authorized by other New Hampshire laws, including but not limited to RSA 374:57 and provisions set forth in RSA Chapter 374-A. *Id*. at 2-12. Approval of Eversource's proposal also would violate the Supremacy Clause of the U.S. Constitution. *Id.* at 12-16.

On April 28, 2016, other parties to this proceeding also submitted briefing regarding the legality of Eversource's proposal. Pursuant to the Commission's Order of Notice, CLF hereby provides the following briefing in response to arguments raised by other parties, with an emphasis on arguments raised by Eversource.

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

The General Court, through its enactment of RSA Chapter 374-F, demonstrated a clear intent to restructure New Hampshire's electricity market by separating generation from transmission and distribution, to achieve competition and customer choice. *See* CLF Brief at 2-5. Eversource contends that its proposal would enhance reliability and, therefore, advance the restructuring policy principle set forth at RSA 374-F:3, I, which states: "Reliable electricity service must be maintained while ensuring public health, safety, and quality of life." *See* Initial Legal Memorandum of Public Service Company of New Hampshire D/B/A Eversource Energy (Aug. 28, 2016) (hereinafter "Eversource Brief") at 10. Eversource's claim, however, presupposes that its acquisition of natural gas capacity is necessary for electric reliability purposes – a question of fact which CLF and others strongly dispute.[1] More importantly, even if,

[1] Programs such as ISO New England's winter reliability program and its Pay-for-Performance designed to strengthen Forward Capacity Market performance obligations and incentives are effective tools for addressing reliability. Indeed, and importantly, an independent study conducted by the Analysis Group, Inc. on behalf of the Massachusetts Attorney General concluded that additional build-out of natural gas pipeline infrastructure is not needed to meet the region's reliability needs. Analysis Group, Inc., *Power System Reliability in New England: Meeting Electric Resource Needs in an Era of Growing Dependence on Natural Gas* (Nov. 2015), at http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf. *See also* CLF's comments of October 15, 2015

assuming *arguendo*, Eversource's proposal were to enhance reliability, the "interdependent" nature of the policy principles set forth in RSA 374-F:3, which were intended to guide implementation of statewide electric utility restructuring, preclude action advancing one policy principle (*e.g.*, reliability) from undermining attributes identified by the General Court as "key elements" of a restructured industry – namely, customer choice and the development of competitive markets – and the separation of generation from transmission and distribution required to achieve those key elements. RSA 374-F:1, I, III.

Eversource further contends that its proposal does not involve the generation business and, therefore, will not undermine the separation of generation from transmission and distribution. *See* Eversource Brief at 10. CLF disagrees. The acquisition of natural gas capacity, with the management and sale of such capacity by a Capacity Manager retained specifically to serve the interests of Eversource and affiliate EDCs, and with recovery of associated costs from electric ratepayers, far exceeds the role of electric distribution companies in exclusively providing transmission and distribution services and is related to electricity *generation* services. Indeed, in a market in which most New England generators purchase gas transportation capacity from large gas marketers through varying contract terms and types (as opposed to purchasing such capacity directly from pipeline companies),[2] Eversource would be effectively inserting itself into the role of a wholesale commodity broker of natural gas in the federally regulated gas market, with a highly attenuated nexus to retail electric rates and from a position that would be further into federal jurisdiction than would owning natural gas-fired

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and June 2, 2015, as well as the report *Solving New England's Gas Deliverability Problem Using LNG and Market Incentives* (submitted Aug. 28, 2015), in Docket IR 15-124, http://www.puc.nh.gov/Electric/Investigation_into_Potential_Approaches_to_Mitigate_Wholesale_Electricity_Prices.html

[2] *Amicus Curiae* Brief of Massachusetts Attorney General, *Engie Gas & LNG v. Dept. of Pub. Utilities, Conservation Law Foundation v. Dept. of Pub. Utilities*, Mass. Supreme Judicial Ct., Nos. SJC-12051/12052 (Apr. 8, 2016) at 14.

electricity generation. It also places the economic burden and risk on ratepayers and undermines a fully competitive market – all in direct contravention of the restructured industry envisioned by the General Court. *See* CLF Brief at 2-8.

III. RSA 374:57 DOES NOT AUTHORIZE EVERSOURCE TO ACQUIRE NATURAL GAS PIPELINE CAPACITY OR TO PROCEED WITH OTHER ASPECTS OF ITS PROPOSAL

Eversource relies heavily on RSA 374:57 as providing authority for its proposed natural gas pipeline acquisition and associated elements of its proposal. Enacted in 1989 (well in advance of New Hampshire's restructuring law), RSA 374:57 states a follows:

> **Purchase of 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.

Eversource, joined by Algonquin Gas Transmission, LLC ("Algonquin"), contend that the proposed purchase of gas pipeline capacity – even though intended to be sold as fuel for the generation of electricity – constitutes "transmission capacity" within the meaning of RSA 374:57. *See* Eversource Brief at 16; Algonquin Brief on Phase I Legal Issues (April 28, 2016) ("Algonquin Brief") at 6. More specifically, they contend that "transmission capacity" is not limited to *electric* transmission capacity but also includes natural gas pipelines. Their argument must fail.

First, the plain language of RSA 374:57 in no way supports the notion that the General Court, in addressing the purchase of capacity by *electric utilities*, contemplated the purchase of capacity on pipelines – whether natural gas or oil – for sale to others. Rather, in light of the

context of the statute (*i.e.*, addressing *electric utilities*), the term "transmission capacity" can reasonably be interpreted only to mean *electric transmission* capacity (*i.e.,* the type of transmission directly related to the services of electric utilities). This interpretation is strongly supported by the General Court's explicit reference to agreements "filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act" and the noticeable absence of any reference to agreements filed with FERC pursuant to the Natural Gas Act. RSA 374:57. As the Office of the Consumer Advocate notes: "If the Legislature had intended [RSA 374:57] 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." *See* Phase I Brief of the Office of the Consumer Advocate (April 28, 2016) at 11.

In attempting to argue that "transmission capacity" within the meaning of RSA 374:57 includes transmission of natural gas, Eversource contends:

> RSA 378:38, regarding the content of a utility's least cost integrated resource plan, requires every "electric and natural gas utility" to include "an assessment of distribution and transmission requirements" in its plan. RSA 378:38, IV. The statute's language indicates that the "transmission" analysis applies to both natural gas and electric "transmission" and supports the conclusion that the Legislature views the term as applicable to both.

See Eversource Brief at 16. Eversource's argument, however, rests on a flawed interpretation of RSA 378:38. Specifically, the plain meaning of RSA 378:38 does *not* support the notion that subsection IV, relied upon by Eversource, applies to natural gas utilities. To the contrary, RSA 378:38 establishes a duty on the part of "each electric and natural gas utility" to file least cost integrated resource plans with the commission, with each such plan including enumerated elements "*as applicable*." (Emphasis added). Among those enumerated elements, the statute requires plans to include, *as applicable*:

> IV. An assessment of distribution and transmission requirements, including an assessment of the benefits and costs of "smart grid" technologies, and the institution or extension of electric utility programs designed to ensure a more reliable and resilient grid to prevent or minimize power outages, including but not limited to, infrastructure automation and technologies.

RSA 378:38, IV. With its references to smart grid technologies and electric utility programs, the language in subsection IV clearly applies only to electric utilities. Other statutes on which Eversource relies – statutes not involving the regulation of utilities by the Commission, such as RSA Chapter 162-H (facilities siting) and RSA 83-F:1 (taxation of utility property) – are inapposite.

As set forth in CLF's Brief, the plain language of RSA 374:57 does not provide authority for Eversource's proposal. *See* CLF Brief at 11. Moreover, RSA 374:57 cannot be invoked in a manner that conflicts with the subsequently enacted, more specific terms of New Hampshire's restructuring law. *Id.* at 8-9 (Part III).[3]

IV. RSA CHAPTER 374-A DOES NOT PROVIDE AUTHORITY FOR EVERSOURCE TO ACQUIRE NATURAL GAS PIPELINE CAPACITY OR TO PROCEED WITH OTHER ASPECTS OF ITS PROPOSAL

While Eversource does not rely predominantly on provisions in RSA Chapter 374-A as the basis for its authority to proceed with the acquisition of natural gas pipeline capacity, it contends that provisions in that Chapter are nonetheless applicable and supportive of such

[3] As set forth in CLF's Brief, well-established rules of statutory interpretation preclude prior, more general legislative enactments being interpreted and applied to conflict with subsequently enacted, more specific laws. *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)).

authority. *See* Eversource Brief at 12 - 13. *See also* Algonquin Brief at 6-7. Pursuant to both the plain meaning of the relevant statutory provisions, and the superseding effect of RSA Chapter 374-F, no such authority exists.

Eversource argues that it is a "domestic electric utility" within the meaning of RSA 374-A:1, II and that, therefore, its proposed action "continues to support the underlying logic and policy of RSA chapter 374-A, that is, to provide flexibility to EDCs to seek solutions to electric supplies by giving them relatively broad authority to pursue support for electric power facilities. .. ." *See* Eversource Brief at 15. As set forth in CLF's Brief, the plain language of RSA Chapter 374-A does not support this argument, as the term "electric power facilities" does not include natural gas facilities or capacity. *See* CLF Brief at 9- 11. Moreover, even if, assuming *arguendo*, "electric power facilities" could be interpreted to include natural gas facilities or capacity, provisions set forth in RSA Chapter 374-A that contemplate electric utilities engaging and/or participating in electricity generation have been superseded by New Hampshire's restructuring law, RSA 374-F.[4] *See* note 3, *supra*. Eversource's contention that RSA Chapter 374-F, relative to restructuring, is "permissive" and therefore does not conflict with and impliedly repeal RSA Chapter 374-A, *see* Eversource Brief at 14, n. 11, grossly and inaccurately discounts the significance of New Hampshire's restructuring law.[5]

[4] For example, RSA 374-A:1, IV defines "Electric utility" as meaning: "any individual or entity or subdivision thereof, private, governmental or other, including a municipal utility, wherever resident or organized, primarily engaged in the *generation* and sale or the purchase and sale of electricity or the transmission thereof, for ultimate consumption by the public." (Emphasis added). *See also* RSA 374-A:2, I, II (describing activities related to "generation" as included among the additional powers of domestic electric utilities). Because, subsequent to RSA Chapter 374-A's enactment, the General Court restructured the electric industry to separate generation from transmission and generation (moreover, because Eversource is specifically seeking approval to exit the business of generation), it would strain credulity and frustrate the intent restructuring to rely on RSA Chapter 374-A as authority for Eversource and other EDCs to acquire natural gas capacity.

[5] *See, e.g.,* RSA 374-F:1, I ("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:4, II (mandating that the Commission "*shall* undertake a generic proceeding to develop a

V. EVERSOURCE'S GENERAL CORPORATE POWERS ARE LIMITED BY APPLICABLE STATUTES AND DO NOT PROVIDE AUTHORITY FOR ITS PROPOSED ACQUISITION OF NATURAL GAS PIPELINE CAPACITY

Algonquin and the Coalition to Lower Energy Costs contend that Eversource has authority to proceed with its proposed acquisition of natural gas capacity pursuant to its general corporate powers (interestingly, Eversource makes no such argument). *See* Algonquin Brief at 4-5; CLEC Brief at 6 – 10. It is axiomatic that whatever PSNH's charter may state, and whatever any general laws such as the New Hampshire Business Corporations Act, RSA Chapter 293-A, may provide about corporations carrying out their business and affairs, the nature and extent of Eversource's activities are limited by applicable statutes and regulations, such as RSA Chapter 374-F. Eversource's general corporate powers do not provide it the authority to proceed with the acquisition of natural gas capacity.

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

As established in CLF's initial brief, the state action proposed in this proceeding is impermissible because the unambiguous target is wholesale rates.[6] Indeed, it bears reiterating that the *only* direct effect proposed here on *retail prices* is to increase them, through a universal customer charge. Incredibly, Eversource asserts that its proposed scheme will not necessarily have the effect of reducing wholesale rates of electricity, and that in the event there were indeed wholesale rate impacts, those impacts would be merely indirect.[7] Contrary to this claim, the program that Eversource has contrived here, and the agreements for which it seeks Commission

statewide industry restructuring plan in accordance with the above principles . . . .") (emphasis added).

[6] CLF Brief at 12-13.

[7] "The fact that making incremental pipeline capacity [sic] *could* have an indirect effect on wholesale rates…" Eversource Brief at 23 (italics in original).

authorization, are specifically intended to directly affect (*i.e.*, reduce) the wholesale rates of electricity, with only indirect effects to reduce retail rates.

The program Eversource proposes would be an unmitigated failure if in fact it did not result in a reduction of wholesale rates for electric power. This alone suffices to show that the Eversource arrangements are in fact preempted, as they must be for FERC's jurisdiction to have any meaning. The federal courts have established without ambiguity that 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,"[8] and that "[s]tates may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates…"[9]

Eversource attempts to mount an *ad absurdum* argument by suggesting that finding its scheme preempted would amount to a conclusion that FERC's authority over interstate rates gives FERC boundless control over "any and every force" that influences interstate rates.[10] There are two inescapable limiting factors that fly in the face of this argument.

First, the Eversource program fails to meet the "incidental" test. The Federal Power Act ("FPA") grants FERC exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce," including both wholesale electricity rates and any rule or practice "affecting" such rates. 16 U.S.C. 824(b), 824d(a), 824e(a).[11] In *Hughes v. Talen Energy Mktg*., 136 S. Ct. 1288 (2016) ("*Hughes*") and *Oneok, Inc. v. Learjet*, 135 S.Ct. 15 (2015) ("*Oneok*"), the Supreme Court clearly articulated that FERC's exclusive jurisdiction over any rule or

[8] *N. Nat. Gas Co. v. State Corp. Comm'n of Kan*., 372 U.S. 84, 91 (1963).
[9] *Id.* (rejecting a scheme approved by the Maryland Public Utilities Commission that infringed FERC's wholesale electric rate authority in the PJM region).
[10] Eversource Brief at 23 (*quoting PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014)).
[11] The Natural Gas Act is written and interpreted similarly.

practice "affecting" wholesale rates will not preempt state action where the state action merely "incidentally" affects wholesale rates,[12] but that state action that targets wholesale rates *is not incidental* and will be preempted.[13] Because the intended target of this program is wholesale rates,[14] the Eversource scheme is preempted.

Second, and relatedly, the Eversource program fails the "indirect effect" test. In *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016), as revised (Jan. 28, 2016) ("*EPSA*"), the Supreme Court upheld FERC's authority over wholesale demand response programs, even though they involved participants traditionally identified with the retail sector, because the direct effect of the program was on wholesale rates. In making this finding, the Court explained:

> The practices at issue directly affect wholesale rates. The FPA has delegated to FERC the authority—and, indeed, the duty—to ensure that rules or practices "affecting" wholesale rates are just and reasonable. §§ 824d(a), 824e(a). To prevent the statute from assuming near-infinite breadth, *see e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695, this Court adopts the D.C. Circuit's common-sense construction limiting FERC's "affecting" jurisdiction to rules or practices that "*directly* affect the [wholesale] rate," *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 403 (emphasis added). That standard is easily met here. Wholesale demand response is all about reducing wholesale rates; so too the rules and practices that determine how those programs operate. That is particularly true here, as the formula for compensating demand response necessarily lowers wholesale electricity prices by displacing higher-priced generation bids.

EPSA, 136 S.Ct. at 764. Just as wholesale demand response was "all about reducing wholesale rates," despite the involvement of participants traditionally associated with the retail sector, the Eversource program is all about reducing wholesale rates, despite the involvement of

[12] *Hughes*, 136 S.Ct. at 1298 (2016) (citing *Oneok*, 135 S.Ct. at 1599 (whether the Natural Gas Act (NGA) preempts a particular state law turns on "the target at which the state law aims")).
[13] *Id.*
[14] CLF Initial Brief at 12-13. *See also* CLF's briefing in the investigatory docket that preceded this one, Docket No. IR 15-124.

participants, i.e., electric distribution companies, which are traditionally associated with the retail sector. If the program were to not affect wholesale rates, it will have failed its goal.

VII. CONCLUSION

For the foregoing reasons, and for the reasons set forth in CLF's initial brief, Eversource's 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 New Hampshire's restructuring law as well as the state's overall electric power regulatory scheme, in addition to federal preemption law. CLF urges the Commission to conclude that Eversource cannot lawfully proceed with its proposed Access Northeast Contract and related actions and to issue a final order disposing of this docket accordingly.

Respectfully submitted,

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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 12th day of May, 2016.

Melissa E. Birchard