

**BEFORE THE 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 Gas Capacity Contract with Algonquin Gas Transmission, LLC,
Gas Capacity Program Details, and Distribution Rate Tariff for Cost Recovery**

**REPLY BRIEF
OF THE NEW HAMPSHIRE MUNICIPAL PIPELINE COALITION**

The New Hampshire Public Utilities Commission's ("Commission") March 24, 2016 Order of Notice authorized parties to submit legal briefs regarding the legality of the Public Service of New Hampshire's d/b/a Eversource ("Eversource" or "Company") proposal, by April 28, 2016, and reply briefs by May 12, 2016. The New Hampshire Municipal Pipeline Coalition ("Coalition") hereby submits the following reply brief to respond to certain issues raised by other parties.

I. INTRODUCTION

In its Initial Brief, the Coalition submitted that Eversource's proposed Access Northeast ("ANE") project contract between Eversource and Algonquin Gas Transmission, LLC ("Algonquin") (the "ANE Contract") is not authorized by New Hampshire statutes and that there is no legal justification for making the fundamental changes to the existing regulatory regime as proposed by Eversource. The Coalition further submits, following review of Eversource's Initial Legal Memorandum ("Eversource Memorandum"), (as well as the comments of other parties) that (i) Eversource has not demonstrated any statutory authority for the Commission to approve the ANE Contract (ii) there is no need for the proposal and (iii) the proposal is preempted by federal law.

II. EVERSOURCE HAS NOT DEMONSTRATED ANY STATUTORY AUTHORITY FOR APPROVING THE ANE CONTRACT

As set forth in the Coalition’s Initial Brief, New Hampshire’s current regulatory scheme does not provide any legal basis for the ANE Contract. *See* Coalition Initial Brief at 2. As noted below, Eversource’s attempt to interpret the statutes to suggest otherwise contravenes the plain meaning of the statutory language as written, and is an attempt to extend the scope of legally permissible action by Eversource.

A. RSA 374:1, :2 and RSA 378:37, :38

The crux of Eversource’s position is that the current regional market landscape for energy prices relating to electric generation provides electric distribution companies (“EDCs”) with the requisite legal authority to enter into contracts for natural gas capacity. At the outset of its initial legal brief, the Company asserts that its plan to procure natural gas capacity to address a fundamental regional need for additional gas supply is consistent with the “general obligation of EDCs in New Hampshire to ensure that they are capable of providing safe and reliable service at just and reasonable rates”, as provided for in RSA 374:1,:2. Eversource Memorandum at 7. According to Eversource, this obligation specifically entails that EDCs “plan for adequate resources to meet the expected demands of their customers”, as provided for in RSA 378:37,:38. *Id.* To that extent, Eversource states that it has “engaged in a meaningful assessment of the energy supply options for the region as contemplated in RSA 378:38, III, and has found that there is a need to protect and enhance the supply.” *Id.* at 8. Eversource further cites RSA 378:38, VI to demonstrate that the ANE Contract permissibly contemplates the various long and short term impacts to the state, and RSA 378:38, VIII to demonstrate how the ANE Contract is consistent with the State Energy Strategy. *Id.* at 8-9.

Notwithstanding Eversource's wishful thinking, the fact remains that nothing in the aforementioned statutes would allow Eversource to charge customers for services unrelated to its core business. As the Office of the Consumer Advocate ("OCA") explained, neither RSA 378:37 or RSA 378:38 "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." OCA Phase I Brief at 11.

Moreover, Eversource's reference to market need is not the relevant inquiry for purposes of establishing legal authority, as discussed *infra*. Rather, raising need at this stage of the regulatory process, even if true (which the Coalition does not concede), could not justify the application of otherwise clearly inapplicable statutes. In short, Eversource has incorrectly endeavored to justify the ANE Contract under the umbrella of general EDC planning obligations, and in doing so improperly conflates market need and the legal authority of the EDCs.¹

B. RSA 374-F ("Restructuring Act")

Eversource suggests that EDCs are not reengaging in the generation business by entering into gas capacity contracts such as the ANE Contract since they will not be "engaging in the production, manufacture, or generation of electricity for sale wholesale or retail." Eversource Memorandum at 10. The Company insinuates that they are only *introducing* a new fuel resource

¹ That the Company has consistently conflated its notion of perceived need and benefits is fittingly illustrated in its explanation of the purported environmental benefits of the ANE Contract: "[H]aving an adequate supply of natural gas for electric generation will help assure that there is reliable electric power as older, less efficient generating facilities retire, and will thus assist in encouraging environmental improvement consistent with RSA 374-F:3, VIII." Eversource Memorandum at 12.

to the market that would provide “long-term reliability benefits and cost savings to Eversource electric customers”, and not *requiring* or obligating generators to purchase the additional capacity. Eversource Memorandum at 11.

Eversource’s repeated justification that generators are under no obligation to purchase capacity, ergo, Eversource is not participating in generation services, cannot be accepted given that Eversource’s proposal is inconsistent with the restructuring of electric markets and with the Restructuring Act’s stated purpose of facilitating competitive markets.² Whether or not the generators participate, the ANE Contract is anticompetitive with unfair subsidies and advantages “selected natural gas energy suppliers” at rate payer expense. *See* NextEra Energy Resources, LLC (“NEER”) Principal Brief at 18-21.

Further, as discussed in the Coalition’s Initial Brief, additional gas resources as contemplated by the ANE Contract are unnecessary in light of the existing regulatory framework that allows generators to directly contract for gas supply. *See* Coalition Initial Brief at 4. Eversource mistakenly avers that “[] gas-fired generators have no cause to contract for capacity to assist in the development of incremental gas capacity in the region because they have no ready means under existing market rules of recovering their costs for such capacity, nor any incentive to increase the supply of inexpensive natural gas that may reduce their profit margins.”

² RSA 374-F:1, I states in pertinent that: “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...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, II states in pertinent that “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."

Eversource Memorandum at 7. Eversource misstates the current fundamental market rules and requirements. In regional restructured markets, gas fired generators have strict incentives to keep generating plants operating to serve regional power needs and have a choice of many fuel types and sources. There is no need for Eversource to reenter the market in any form “to save the day.” The reentry of utilities into a restructured energy market is exactly what restructuring was designed to prevent. Coalition Initial Brief at 3.³

Moreover, Eversource’s proposal to recover costs from customers further demonstrates how they have inappropriately combined generation and distribution services. Net costs or credits for costs associated with generation of electric power will be passed onto all Eversource customers—thereby inextricably intertwining generation services and customer distribution costs. Eversource is essentially exercising its existing monopoly distribution function to add an entirely new unrelated generation cost related to its ratepayers. The Coalition concurs with ENGIE Gas & LNG LLC (“ENGIE”) that the effect of assessing generation related costs then to distribution customers is “...the functional equivalent of bundling distribution costs and those generation costs”—and therefore violates the separation principle. ENGIE Brief at 22.

Finally, Eversource’s cost recovery proposal is unlawful because public utilities may only include in rates charges that the Commission has found to be “prudent, used, and useful” as set

³ The Coalition comments in its Initial Brief on this point were the subject of an April 28, 2016 Staff letter. Staff sought to clarify what it perceived as a selective quotation made by the Coalition. To be clear, the Coalition did not intend to selectively reference Staff in its Initial Brief and further context would have been helpful. Having said that, the Coalition submits that the Commission should reasonably conclude that the Company’s proposal will violate the Restructuring Act’s principal of separation of distribution and generation.

forth in RSA 378:28.⁴ The ANE Contract by definition fails to meet this standard, as it involves adding natural gas capacity designed for the use of gas-fired generators, not EDC customers.

C. RSA 374-A

Eversource maintains that RSA 374-A, which in part allows EDCs to enter into contracts for types of “other participation in electric power facilities”, is not directly applicable to the ANE Contract because “[] the ANE Contract is for capacity that is available generally to anyone, but with a preference for electric generators, yet no generator would be compelled to take or use it...[] and there is no direct link between the capacity on the ANE Project and any particular electric power facility.” Eversource Memorandum at 14.

Nevertheless, the Company concludes that the logic and intention of this statute supports providing EDCs with relatively broad authority so they have the flexibility to seek solutions to electric supply issues, and claims that this statutory authority remains intact because the legislature did not alter it upon passing RSA 374-F. *Id.* at 14-15.

The Coalition submits that the Restructuring Act effectively did repeal previously enacted statutes such as RSA 374-A, and agrees with NEER that the Restructuring Act was “intended to occupy the field of EDC authority concerning its entanglement with generation resources”, as clearly demonstrated by the sole carve out for ownership of “small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs.” (RSA 374-F:3, III.) NEER Principal Brief at 28. Moreover, the Coalition also concurs with the Conservation Law Foundation (“CLF”), noting how relying on statutes enacted before, and that are more general than the Restructuring Act, violates well-established rules of statutory

⁴ RSA 378:28, titled “Permanent Rates” states in pertinent that “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.”

interpretation if these statutes are “[] used to achieve a result that conflicts with the language and intent of the more recent, more relevant provisions of New Hampshire’s restructuring law.” CLF Legal Briefing at 8 (citations omitted).

D. RSA 374:57

Eversource submits that RSA 374:57⁵ provides additional statutory support for the legality of the ANE Contract since RSA 374:57 allows utilities to contract for “generating capacity, transmission capacity or energy” and the ANE Contract is for “transmission capacity”. Eversource Memorandum at 15. Eversource’s claim is without merit.

Eversource utilizes a patchwork of statutory references to justify its conclusion that the term “transmission capacity” is not restricted to electric transmission capacity. Eversource Memorandum at 16-17. Unsurprisingly, the Company was unable to find any support within 374:57 itself, as the primary thrust of the statute is to set out the filing requirements for the utility with respect to entering into certain agreements. The fact that generating and transmission capacity are mentioned is not a sufficient basis upon which Eversource can rely on in order to prove legal authority. Rather, the Coalition agrees with OCA, that since the statute only references agreements filed with FERC pursuant to the Federal Power Act (and not also the Natural Gas Act)—there is even less cause to infer that the legislature was tacitly authorizing EDCs to enter into gas capacity contracts. OCA Phase I Brief at 10. In addition, as a matter of

⁵ RSA 374:57, titled “Purchase of Capacity” states “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.”

statutory construction, the Coalition agrees with ENGIE that the legislative history of RSA 374:57 does not refer to "transmission" as the transportation of a fuel by pipeline and Eversource's attempt to dissociate "transmission" from its legislative context and define it as an isolated word is impermissible statutory construction. *See* ENGIE Brief at 11 (citations omitted).

III. EVERSOURCE HAS NOT DEMONSTRATED A NEED FOR THE ANE CONTRACT

The Company claims that regional need is "clear and proven." Eversource Memorandum at 9. As noted in the Coalition's Initial Brief, the Coalition maintains that there is no demonstrated regional need for this pipeline and associated storage facilities. *See* Coalition Initial Brief at 3. The Commission should not assume there is any need for the ANE Contract in its review of the legality of the ANE Contract proposal.

IV. THE ANE CONTRACT IS PREEMPTED BY FEDERAL LAW

Eversource asserts that the ANE Contract does not encroach upon federal jurisdictional authority and is properly within the realm of state authority that federal jurisdiction is intended to compliment, and not be exclusive of. The Company notes that Order No. 25, 860 and the Commission's Order of Notice in this docket limit the scope of legal review to state law, but nevertheless Eversource argues that "[] there is no conflict between this Commission's authority to grant the approvals sought in Eversource's petition and the jurisdiction granted to the FERC under the Natural Gas Act ("NGA") and the Federal Power Act ("FPA")." Eversource Memorandum at 18-19.

A. Natural Gas Act

Eversource reasons that the ANE Contract is not preempted by federal law because the NGA confers the ability of states to regulate retail rates and reliability of service. According to Eversource, the ANE Contract therefore may be approved by the Commission because it only

seeks cost recovery from retail customers and because they are not “[] proposing or requesting permission to purchase or sell the natural gas commodity for resale in wholesale markets, nor to engage in interstate transportation of natural gas”. Eversource Memorandum at 20.

Eversource seeks to subsidize natural gas through *preferential* capacity releases, and the Coalition concurs with the OCA’s comprehensive analysis explaining how this arrangement 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.” *See* OCA Phase I Brief at 23-25.

B. Federal Power Act

Eversource contests the possibility that the ANE Contract would risk intruding upon FERC’s exclusive jurisdiction over wholesale electric markets and refutes the applicability of certain recent Supreme Court decisions. In particular, Eversource argues that *Hughes v. Talen Energy Marketing* (U.S. Apr. 19, 2016) (“*Hughes*”) is inapposite because the Supreme Court was specifically only prohibiting state programs that disregarded interstate wholesale rates required by FERC. Eversource Memorandum at 21. From this, Eversource extrapolates that New Hampshire can still approve the ANE Contract because it “[] does not attempt to set the rates or the level of compensation any generator would receive for its sale of energy and/or capacity at wholesale, and does not require participation by any generator in any wholesale market.” *Id.* at 22. Eversource adds that the possibility of indirect effects on wholesale rates from the ANE Contract is not sufficient grounds to claim intrusion upon FERC’s jurisdiction. *Id.* at 23.

Notwithstanding Eversource’s dismissal of indirect effects, the Coalition concurs with CLF that Eversource’s proposal is preempted:

“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.” 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. 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...” CLF Legal Briefing at 14. (citations omitted).

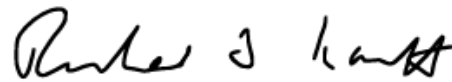
V. CONCLUSION

For the reasons set forth above, the Commission should dismiss the Eversource proposal because the ANE Contract is not legally authorized by existing New Hampshire statutes, the need for the project has not been demonstrated, and it is preempted by federal law. The Coalition respectfully requests that the Commission rule against the legality of the ANE Contract, and dismiss Eversource’s petition accordingly.

Respectfully Submitted,

New Hampshire Municipal Pipeline Coalition.

By its attorneys,

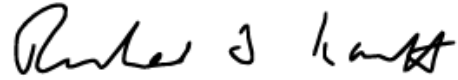


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Certificate of Service

I hereby certify that on May 12, 2016, pursuant to Puc 203.02 & 203.11, I served an electronic copy of the foregoing document on each person identified on the Commission's service list for this docket and with the Office of the Consumer Advocate, by delivering it to the email address specified on the Commission's service list for the docket.



Richard A. Kanoff