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 Reply 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 reply briefs by May 12, 2016 regarding the legality of the relief requested in this docket, the OCA states as follows:

1. Introduction

In its Order of Notice, the New Hampshire Public Utilities Commission ("Commission") indicated that this proceeding would be conducted in two phases, with Phase I consisting of briefing and a Commission order on whether "the Access Northeast Contract, and affiliated program elements, is allowed under New Hampshire law." By "the Access Northeast Contract" the Order of Notice was referring to the request by Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") that is the subject of this docket for permission to enter into a 20-year agreement to purchase firm natural gas capacity (on a pipeline project in which an Eversource affiliate has a 40 percent ownership interest) and recover the costs from all Eversource customers. Initial Phase I briefs were due on April 28, 2016 and were submitted (1) in support of legal authority to grant the petition by Eversource, counterparty Algonquin Gas

Transmission LLC ("Algonquin"), and the Coalition to Lower Energy Costs ("CLEC"), and (2) arguing that the Commission lacks legal authority by the OCA, ENGIE Gas and LNG LLC ("ENGIE"), NextEra Energy Resources LLC ("NextEra"), the Conservation Law Foundation ("CLF) the New Hampshire Municipal Pipeline Coalition, and the Exelon Generation Company. The Commission invited reply briefs by May 12, 2016.

As discussed fully below, none of the briefs in support of the argument that the petition is consistent with New Hampshire law refuted the central contentions of the OCA, which are that longstanding principles of utility law in this state preclude granting Eversource's request, that all subsequent enactments (including the Electric Utility Restructuring Act, RSA 374-F) either fail to authorize such a request or actually preclude it, and that federal law would preempt such an exercise of state-law authority in any event.

2. The Corporate Authority of Eversource is Irrelevant

CLEC and Algonquin argued in their briefs that Eversource's petition is consistent with New Hampshire law because entering into a long-term contract for firm natural gas capacity is within the powers vested in Eversource pursuant to its corporate charter, New Hampshire's Business Corporation Act (RSA Chapter 293-A) and RSA 295:6, which authorizes New Hampshire corporations to "make contracts necessary and proper for the transaction of their authorized business."

The OCA does claim that the transactions proposed by Eversource in this docket, including the precedent agreement with Algonquin by which Eversource proposes to acquire 20 years of firm natural gas capacity, are *ultra vires* with respect to Eversource as a corporation. Eversource is a public utility. Therefore, its corporate powers notwithstanding, Eversource is under the "general supervision" of the Commission pursuant to RSA 374:3. More significantly,

Eversource is expressly prohibited from imposing any charge on its customers that is "unjust or unreasonable, or in excess of that allowed by law or by order of the commission." RSA 374:2. Pervasive rate regulation of a company such as Eversource, whose property is "devoted to a "public use," and whose business is "affected with a public interest" is constitutionally permissible. *Munn v. Illinois*, 94 U.S. 113, 130 (1877); *State v. Maine Central R.R.*, 77 N.H. 425, 426-27 (1914).

In other words, New Hampshire law does not preclude Eversource from entering into the agreement by which it proposes to participate in the Access Northeast project. Rather, New Hampshire law precludes Eversource from including the costs associated with the contract in retail rates, for the reasons already stated in the OCA's initial brief. The resulting rates would be unjust, unreasonable and, therefore, expressly precluded by RSA 374:2 and RSA 378:7. We know this because a "just and reasonable" rate within the meaning of New Hampshire law is one that "falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation." *Appeal of Richards*, 134 N.H. 148, 162 (1991) (citation omitted). For the reasons explained by the OCA in our initial brief, firm natural gas capacity is not 'used and useful' in the provision of the distribution service which comprises Eversource's retail business. To include these costs in retail rates charged to distribution service customers would therefore be a textbook case of ratepayer exploitation.[1] Applicable corporate law offers no safe harbor in such circumstances.

[1] A different result *might* obtain if Eversource were proposing to include the Access Northeast contract in its energy service rate, which is charged on a per kilowatt-hour basis to customers who do not obtain their electricity from a competitive supplier. That is not what Eversource is proposing here, however.

3. RSA 374-A: Eversource Would Not "Participate In" a Generation Facility by Procuring Fuel for it.

RSA Chapter 374-A explicitly vests certain powers in electric utilities organized under New Hampshire law. Specifically, RSA 374-A:2, I, authorizes such utilities to "plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage lease, sell dispose of or otherwise participate in electric power facilities" and RSA 374-A:2, II, likewise authorizes such utilities to "enter into and perform contracts and agreements for such joint or separate planning, financing, construction, purchase, operation, maintenance, use, sharing costs of, ownership, mortgaging, leasing, sale disposal of or other participation in electric power facilities." Responding to the discussion of this statute that took place in the Commission's previously concluded generic investigation, Docket No. IR 15-124, several parties (including the OCA) argued in their initial briefs that this statute is inapplicable to the Eversource petition at issue here. Significantly, *no* party affirmatively argued in its initial brief that RSA 374-A applies.

However, after noting its expressed view in Docket No. IR 15-124, that RSA 374-A "may not be applicable to the instant contract," Eversource took the notably tepid position in its Phase I brief that because "other parties, including Staff" believe that RSA 374-A applies, there is an argument in favor of "potential applicability." Eversource Phase I Brief at 12. The first and most obvious point in rebuttal is that Eversource is wrong – there is no argument pending before the Commission in Phase I that RSA 374-F is applicable. Staff did not file a brief and none of the project proponents unequivocally claim RSA 374-A as a basis for the Eversource petition. For that reason alone, the Commission should not consider RSA 374-A as even a potential source of authority here.

In support of these non-existent other parties believing that RSA 374-A applies, Eversource contends that natural gas capacity "procured on behalf of an electric generator or specified generating facility . . . *could* qualify as a form of contract for 'other participation' in an electric power facility." Eversource Phase I Brief at 13 (emphasis added). But, Eversource goes on to concede, even this liberal interpretation of RSA 374-A (that contracting for fuel supply comprises "other participation" in a generation facility) does not help because its Access Northeast contract involves "capacity that is available generally for anyone" with no generator "compelled to take or use it." Eversource Phase I Brief at 14. Nevertheless, according to Eversource, the "underlying logic" of RSA 374-A is that electric distribution companies have "flexibility" under New Hampshire law "to seek solutions to electric supply issues" via "relatively broad authority to pursue support for electric power facilities and ensure a stable, adequate, and reliable supply of electric power at a reasonable cost." *Id*. at 15.

This half-hearted argument does not withstand even casual scrutiny. In the interpretation of statutes, decision-makers do not apply their view of a statute's "underlying logic" when the plain meaning is clear. *See Green v. School Administrative Unit No. 55,* 2016 N.H. LEXIS 39 at 5 ("When examining the language of a statute . . . ascribe the plain and ordinary meaning to the words used" and do not "consider what the legislature might have said or add language that the legislature did not see fit to include") (citations omitted). As a matter of plain English, by selling pipeline capacity to gas generators, Eversource would no more be "participating in" those generators' facilities than do gas stations "participat[e] in" the ownership, financing, maintenance or operation of the vehicles that purchase fuel there. Any other construction of RSA 374-A would be absurd. *See Wolfgram v. Deparment of Safety,* 2016 N.H. LEXIS 44 at 6 ("construe statutes so as to effectuate their evident purpose and to avoid an interpretation that

would lead to an absurd or unjust result") (citation omitted). Likewise, it would violate the well-established statutory construction canon of *ejusdem generis* to construe "other participation" in the manner contemplated by PSNH's quasi-argument. *See Dolbeare v. City of Laconia*, 168 N.H. 52, 55 (2015) ("The principle of *ejusdem generis* provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words").[2] RSA 374-A is simply inapplicable.

4. RSA 374:57: Natural Gas Pipeline Capacity is Not "Transmission Capacity."

RSA 374:57, adopted 14 years after the Seabrook-centered discussion that gave rise to RSA Chapter 374-A, is a somewhat different problem. By its terms, this statute applies to "[e]ach 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" and requires such a company to furnish a copy of such an agreement to the Commission so that the Commission may disallow it upon a determination that "the utility's decision to enter into the transaction was unreasonable and not in the public interest."

According to Eversource, its "transmission capacity" within the meaning of RSA 374:57 includes *natural gas* transmission capacity. In support of this creative interpretation, Eversource contends that (1) the Legislature did not specify that "transmission capacity" is limited to *electric* transmission capacity, and (2) other New Hampshire statutes (i.e., the ones applicable to least-

[2] Since RSA 374-A is not ambiguous, recourse to legislative history is unnecessary. *See Everett Ashton, Inc. v. City of Concord*, 2016 N.H. LEXIS 43 at 5 (citations omitted). However, as conclusively demonstrated by ENGIE in its brief, the legislative history of the bill that became RSA Chapter 374-A in 1975 "is replete with references to the policy the General Court actually sought to advance . . . which is authorizing investment and financing for the purpose of acquiring an ownership or entitlement interest in an actual electric generation facility." ENGIE Phase I Brief at 18-19 (noting that the technology of interest at the time consisted of "large atomic plants" including but not limited to the then-theoretical Seabrook Station) (citations omitted).

cost integrated resource planning, the siting of energy facilities, and the taxation of utility facilities) use the term "transmission" in its broadest sense to include both electricity and gas transmission. These arguments are unpersuasive.

As already pointed out by the OCA in our initial Phase I brief, the plain meaning of RSA 374:57 does not accommodate the interpretation advanced by Eversource. The statute applies by its terms only to agreements that are filed by electric utilities "with the Federal Energy Regulatory Commission pursuant to the Federal Power Act." Electric utilities do not file *natural gas* capacity contracts with federal regulators under the federal statute that regulates electricity; the Federal Power Act simply contains no such requirement (although the statute's counterpart, the Natural Gas Act, may contain such a requirement applicable to the counterparty in such an agreement). If "transmission capacity" as used in RSA 374:57 includes natural gas transmission capacity it would render the reference to the Federal Power Act meaningless, violating an established rule of statutory construction. *See Holt v. Keer*, 167 N.H. 232, 242 (2015) ("When construing a statute, . . . give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words") (citation omitted).

The fact that other statutes adopt a more generic definition of "transmission capacity" is irrelevant. A statute authorizing electric utilities to enter into contracts for the purchase of generation capacity, transmission capacity or energy is not *in pari materia* with statutes concerning the more general topics of siting and taxing utility facilities and thus there is no justification for seeking to harmonize these potentially disparate uses of the word "transmission." *See Appeal of Old Dutch Mustard Co.*, 166 N.H. 501, 509-10 (2014) ("statutes *in pari materia* should be read as a part of a unified cohesive whole") (citations omitted).

Moreover, as ably demonstrated in the ENGIE brief, to the extent "transmission" as used in RSA 374:57 is ambiguous and recourse to legislative history becomes appropriate, the legislative record conclusively demonstrates that the bill which became RSA 374:57 "had nothing to do with natural gas or the transmission or transportation of natural gas as a fuel for use in electric generating facilities." ENGIE Phase I Brief at 9. For the reasons stated at pages 7 through 11, the Commission must regard RSA 374:57 as a legislative effort to address a pressing public policy crisis – the one occasioned by the 1988 bankruptcy filing of Public Service Company of New Hampshire – by facilitating the purchase of PSNH by Northeast Utilities. Just as a similar effort to stretch the boundaries of the analogous Massachusetts statute is destined for defeat before the Supreme Judicial Court of Massachusetts,[3] so too must the Commission look elsewhere than RSA 374:57 for authority to grant the Eversource petition.

5. <u>RSA Chapter 374-F: No Authority to be Found Here.</u>

In its brief, Eversource correctly notes that the Electric Utility Restructuring Act, RSA Chapter 374-F, is "most relevant" here because "it was the law through which electric generation was to be separated from transmission and distribution." Eversource Phase I Brief at 9-10. The Company then points out that it is in the process of divesting the last of its generation assets, with a settlement agreement calling for such divestiture pending in Docket No. DE 14-238. *Id.* at 9, n. 6.

This perspective on RSA 374-F is noteworthy for two related reasons. First, and quite reasonably, Eversource does not rely on its present ownership of Newington Station, a facility that relies in large part on natural gas as a fuel, as a legal justification for Eversource entering

[3] See, e.g., Brief of Massachusetts Attorney General in *ENGIE Gas and LNG, LLC v. Department of Public Utilities*, Case Nos. Nos. SJC-12051 *I* SJC-12502 (Apr. 8, 2016) at 29-36 (construing G.L. c. 164, § 94A). The brief is available on the relevant case information page of the Supreme Judicial Court of Massachusetts, http://www.ma-appellatecourts.org/search_number.php?dno=SJC-12052. The case was argued on May 5, 2016 and is now under advisement to the Court.

into a contract for 20 years of firm natural gas capacity. Second, and more importantly, Eversource makes the mistake of relying on the statute's enumerated policy principles, set forth in RSA 374-F:3, as a basis of legal authority for its petition. Algonquin and CLEC similarly adopt this mistaken approach.

As the OCA pointed out in its initial brief, the problem is that the policy principles are not a source of regulatory authority but are "intended to guide" the Commission in discharging statutory responsibilities that are enumerated elsewhere. *See* RSA 374-F:1, III (describing the policy principles in this fashion and noting they are "interdependent," which implies a degree of effort and policy judgment in attempting to reconcile them with one another). Pursuant to RSA 374-F:1, III, the responsibilities to which the restructuring policy principles apply are (1) implementing a statewide electric utility restructuring plan, specifically authorized by RSA 374-F:4, II, (2) establishing interim stranded cost recovery charges, specifically authorized by RSA 374-F:4 VI, (3) approving each utility's compliance filing, specifically authorized by RSA 374-F:4, III, (4) "streamlining administrative processes to make regulation more efficient," not specifically authorized but ubiquitously implicit in the Commission's authority generally, and (5) "regulating a restructured electric utility industry." Complimentary language embedded in the policy principles themselves authorizes the Commission "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." RSA 374-F:4, VIII(a). Because this language from RSA 374-F:4, VIII(a) is phrased in the conjunctive rather than the disjunctive (i.e., 'necessary to implement restructuring *and* that are substantially consistent with the principles' rather than 'necessary to implement restructuring *or* that are substantially consistent with the principles') the plain meaning of this language is that the

restructuring policy principles apply only to Commission decisions that implement restructuring. They do not provide independent authority for the Commission to expand the scope of a restructured utility's business into realms that are beyond the scope of distribution and transmission service merely because it can be argued that such an expansion is consistent with some (but not all) of the RSA 374-F:3 policy principles.[4]

Thus, for the reasons already stated in OCA's initial brief, regardless of what can be teased from the restructuring policy principles, if the Commission may authorize Eversource to purchase 20 years of firm natural gas capacity and send the bill to all of its retail customers, the source of that authority must emanate from something other than those principles. There is no such authority and, as OCA explained in its previous brief, what Eversource is seeking authority to do here contravenes longstanding principles of utility law that are intended to protect shareholders from unconstitutional confiscation of property and ratepayers from outright exploitation. *Appeal of Richards*, *supra*.

6. New Hampshire Law Does Not Obligate the Commission to Order Eversource to Acquire Firm Natural Gas Capacity.

CLEC takes Eversource's arguments one giant leap further by arguing that the Commission is not just authorized to allow an electric distribution utility to acquire firm natural

[4] It is therefore irrelevant whether Eversource's proposal violates the restructuring policy principle that "[g]eneration services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the forseeable future" pursuant to RSA 374-F:3, III. Eversource contends that its proposal is consistent with this principle because the Company is not proposing to "combine any distribution and generation functions," does not intend to engage in "generation services" and is simply "seeking to ensure long-term electric system reliability by supporting the delivery of adequate natural gas supplies to the region." Eversource Brief at 11. According to Eversource, the merchant generators that rely on natural gas as a fuel are neither required nor willing to purchase firm natural gas pipeline capacity and, therefore, "entities like Eversource are the only entities with the financial strength and vested interest in pursuing such long-term contracts." *Id*. Financial strength in this context is a synonym for "captive customers" who must rely on Eversource for transmission and distribution services. Freeing customers from such captivity, in relation to generation in all of its aspects, is the very basis of the Restructuring Act. If that isn't obvious from the language of RSA 374—F:3, III or the Restructuring Act overall, the Commission should attribute that to the Legislature simply never imagining that an electric distribution company would seek to undermine restructuring in such a fashion.

gas capacity, but that the Commission *must* actually *order* such utilities to take such steps given that "[e]lectric rates today are unreasonably high and volatile due to a recognized market failure, and service is jeopardized by insufficient pipeline capacity." CLEC Brief at 21. To support this argument in favor of a regulatory mandate, CLEC relies on RSA 374:1 (requiring public utilities to furnish "reasonably safe and adequate and in all other respects just and reasonable" service), RSA 374:3 (vesting the Commission with "the general supervision of all public utilities"), RSA 378:37 (declaring state's energy policy to be, *inter alia*, "to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources"), RSA 363:17 (instructing Commission to serve as "arbiter" of utility shareholder and ratepayer interests); RSA 365:5 (authorizing Commission investigations of utilities), RSA 365:40 (requiring utility compliance with "every order made by the commission"), and RSA 374:7 (vesting in the Commission authority "to order all reasonable and just improvements and extensions in service or methods"). Assuming *arguendo* that the affordability and reliability crisis posited by CLEC exists, the nearly limitless authority CLEC imputes to the Commission is inconsistent with longstanding interpretations of applicable statutes.

Indeed, the very "seminal" cases relied upon principally by CLEC, CLEC Brief at 22 and 23, makes this clear. In *State v. New Hampshire Gas and Electric Co*., 86 N.H. 16 (1932), the New Hampshire Supreme Court considered much of the authority invoked here by CLEC and nevertheless reversed an order of the Commission that "apparently proceeded upon the erroneous assumption that the grant of power to withhold approval to any requested utility action requiring such approval, by implication, authorized it to enjoin such action as well as any conduct in furtherance thereof." *Id*. at 30. In *Appeal of Public Service Co. of N.H*. 141 N.H. 13 (1996), the

Court agreed that electric utility franchises are not exclusive as a matter of law, in part because "legislative grants of authority to the PUC should be interpreted in a manner consistent with the State's constitutional directive favoring free enterprise" as distinct from monopolies. *Id*. at 19. Taken together, these cases paint a portrait of a regulatory agency whose authority is limited and an industry that the Legislature expects to rely substantially on competitive forces (duly harnessed) rather than regulatory fiat. Given the well-established principle that the Commission's authority is limited to "that which is expressly granted or fairly implied by statute," *Appeal of Public Service Co. of N.H.*, 130 N.H. 285, 291 (1988) (citing *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982)), *see also Petition of Boston & Maine R.R.*, 82 N.H. 116, 116 (1925) (same), the Commission must reject the proposition that it is authorized, much less required, to order Eversource or any other electric distribution utility to expand the scope of its business into a competitive realm and recover the associated costs from the captive customers of its natural monopoly involving poles and wires.[5]

7. A Non-bypassable Charge Would Illegally Create Captive Default Energy Service Customers.

In its brief, Eversource contends that its plan to "procure gas capacity to ensure reliability of supply and to protect [its] customers from the continuing harm of high and volatile market prices driven by the scarcity of available pipeline capacity . . . is fully consistent and supportive of the state's policies." Eversource Brief at 4. This characterization belies a critical, underlying reality. Eversource's proposed cost recovery mechanism – called Long-Term Gas Transportation

[5] In addition to claiming that Eversource has presented the Commission with a "false choice" between its Access Northeast and nothing, and arguing therefore that the Commission should order Eversource (and presumably New Hampshire's other electric distribution companies as well) to seek firm natural gas capacity anew, CLEC Brief at 25-26, CLEC contends that Eversource used a flawed RFP (request for proposals) process that requires a skeptical and independent analysis, *id*. at 26-29. The OCA regards this question as beyond the scope of the Phase I briefing as set forth in the Order of Notice, but we reserve the right to address this issue at an appropriate juncture. The contention of CLEC that Eversource's "self-dealing is not in the public interest and may have contributed to the decision [by] Kinder Morgan to suspend its development of the NED [Northeast Direct pipeline] project," *id*. at 30, requires serious consideration in due course.

and Storage Contracts ("LGTSC") – would be a non-bypassable charge that would hold all of its delivery service customers captive for a period of twenty years or more.

Eversource witnesses Christopher Goulding and Lois Jones have testified that their employer ""will net the costs of the ANE Contract against revenues received through capacity release and sales of liquefied natural gas ("LNG") inventory to certain parties in the New England region. The net costs (or credits) will be recovered (or credited) through a uniform cents-per-KWh rate on *all* retail electric customers served by Eversource." Joint Testimony of Christopher J. Goulding and Lois B. Jones at 3, lines 6-10. (emphasis added). Customers of competitive suppliers will not be able to avoid this charge..

The LGTSC has three cost components: (1) transportation,[6] (2) storage[7] and (3) administration.[8] Such costs all relate to the generation of electricity and are properly recovered in the default energy service rate.. Costs associated with default service are recovered through the generation charge on residential customer bills. The Restructuring Act bestowed upon utility customers the power of customer choice so that such customers could choose to stay on Eversource's default energy service rate or contract with a competitive supplier for the provision of electric generation. If a customer opts to receive generation service from a competitive supplier, Eversource still delivers the energy supply to the customer and charges the customer for that delivery service in the bill. Here, Eversource seeks to add a non-bypassable charge called the "LGTSC rate [that will be] collected on the basis of a uniform cents-per-KWh rate applicable to

[6] "The Transportation component includes a reservation charge for the pipeline capacity and variable and fuel charges for transporting gas from one point to another." *Id*. at 3, lines 21-22 and 4, line 1.

[7] "The Storage component includes a reservation charge for the maximum quantity of gas that can be withdrawn from the LNG storage facility. Storage costs also include the cost of liquefaction and vaporization and the cost of the gas commodity. Withdrawals from storage are subject to an inventory financing charge at the Company's monthly short-term debt rate." *Id*. at 4, lines 1-5.

[8] "Administration costs would encompass fees paid to the Capacity Manager and consulting fees or other similar costs incurred by the Company to effectuate the contract." *Id*. at lines 5-7.

all delivered KWh for *all* customer classes,"id. at 5, lines 1-3 (emphasis added), thus holding customers of competitive suppliers captive. There is no way for such customers to avoid the LGTSC, even though such customers are also paying a competitive supplier for the generation service. Such customers would, in effect, be cross-subsidizing customers who remain on Eversource's default energy service rates.

Five years ago, the Commission considered a proposal from PSNH in Docket No. DE 10-160 for a non-bypassable charge to collect a portion of PSNH's energy service costs from all customers, regardless of whether they had migrated to competitive suppliers. At issue were both the legality of such an approach and its reasonableness, given the potential for customer migration to require remaining energy service customers to shoulder the fixed costs largely attributed to the utility's non-divested fossil and hydro generation assets.

Such fixed costs included depreciation, property taxes and the debt service component of the capital structure that supported PSNH's generation system. Order No. 25,256 (Docket DE 10-160; July 26, 2011) at 6. Commission Staff argued that "the imposition of a non-bypassable charge as proposed by PSNH would dampen the attractiveness of low rates offered by competitive suppliers and deter PSNH customers from electing competitive supply," calling such a proposal "anti-competitive." *Id*., at 25. The Commission agreed with Staff, ruling that the "the creation of a non-bypassable charge for these purposes is contrary to principles of the restructuring statute, the most important of which is to reduce costs for all consumers of electricity by *harnessing the power of competitive markets*, RSA 374-F:1." *Id*. at 29 (emphasis added). Moreover, the Commission ruled that "imposition of such a charge is contrary to the principles of customer choice and minimization of customer confusion, RSA 374-F:3, II, and full and fair competition, RSA 374-F:3, VII." *Id*. Now, five years later, Eversource is yet again

asking this Commission to ignore those policy principles of the Restructuring Act, and approve the LGTSC, thus holding the customers of competitive suppliers captive.

Similarly, the Public Utilities Commission of Ohio ("PUCO") recently approved power purchase agreements ("PPAs") for certain generation assets owned by FirstEnergy Solutions ("FirstEnergy") and American Electric Power Generation Resources, Inc., ("AEP") between such Companies' affiliates, which included a non-bypassable PPA Rider that would be charged to both retail customers receiving default service and those that contracted with competitive suppliers.[9] While such PPAs were before PUCO, the Electric Power Supply Association ("EPSA") filed complaints pursuant to FERC Order 697[10] against FirstEnergy and AEP individually, requesting that FERC rescind the waiver of its affiliate power sales restrictions that it previously granted FirstEnergy and AEP for the aforementioned transactions. *See Electric Power Supply Assn. v. First Energy Solutions Corp.*, 155 FERC ¶ 61,101 (2016), and *Electric Power Supply Assn. v. AEP Generation Resources, Inc*., 155 FERC ¶ 61,102 (2016). FERC granted EPSA's complaints and found that both FirstEnergy and AEP's Ohio retail ratepayers were "captive to the extent they are subject to the non-bypassable charge" because when the circumstances "demonstrate that a retail customer has no choice but to pay the costs of an

[9] *See In the Matter of the Application of Ohio Edison Co., Cleveland Elec. Illuminating Co., and Toledo Edison Co., for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Order and Opinion, Case No. 14-1297-EL-SSO (Mar. 31, 2016) (*FE Ohio Regulated Utilities Electric Security Plan Application); see also In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Order and Opinion, Case No. 14-1693-EL-RDR *et al*., (Mar. 31, 2016).

[10] "In Order No. 697, the [FERC] explained that 'its fundamental goal in categorizing certain customers as 'captive' is to protect customers served by franchised public utilities from inappropriately subsidizing the market-regulated or non-utility affiliates of the franchised public utility or otherwise being financially harmed as a result of affiliate transactions and activities." "The [FERC] added that '[w]here customers are served under market-based regulation as opposed to cost-based regulation, it is presumed that the seller has no market power over a customer and that the customer has a choice of suppliers; thus there is less opportunity for a customer to involuntarily be in a situation in which its rates subsidize or support another entity.'" *See Electric Power Supply Association v. First Energy Solutions Corporation*, 155 FERC ¶ 61,101 (2016); *See also Electric Power Supply Association v. AEP Generation Resources, Inc.*, 155 FERC ¶ 61,102 (2016) (citing FERC Order No. 687-A, FERC Stats. & Regs. ¶ 31,268 at P 198).

affiliate transaction, they effectively are captive with respect to the transaction." Here, New Hampshire retail customers who have contracted with competitive suppliers will also be held captive if required to pay the LGTSC. Commission approval of the LGTSC, and allowing Eversource to apply it to all of its transmission and distribution customer bills, would send confusing price signals to electricity buyers and undermine public confidence in the electric utility industry. Approval of such would also re-bundle generation and distribution services, impermissibly and "effectively eliminating fair market competition for generation services." Order No. 25,256, *supra*, at 5. The LGTSC cost recovery mechanism is a non-bypassable charge that has a captive customer effect violating the letter and spirit of the New Hampshire Restructuring Act and FERC Order 697, and is therefore unjust and unreasonable and otherwise contrary to New Hampshire and federal law.

8. Gas Pipeline Transportation Costs are Wholesale Energy Costs and Do Not Belong in Retail Distribution Rates.

Algonquin argues in its brief that "[b]y making firm natural gas capacity commitments on a project that *directly* delivers natural gas to [merchant] generators," Eversource and other electric distribution companies are acting to discharge their responsibility to "provide reliable service to customers at rates that are just and reasonable." Algonquin Brief at 17 (emphasis in original). This reflects an incorrect view of the nature of the service electric distribution companies provide to their retail customers.

One key policy principle of New Hampshire's Restructuring Act is to unbundle generation service from distribution service; and therefore, wholesale costs from retail costs. Wholesale costs are costs incurred for the purpose of generating electricity, and passed through to consumers in the wholesale rate. *See e.g., Indiana Mun. Power Agency v. FERC*, 56 F.3d 247 (CADC 1995). This Commission once ruled that natural gas pipeline transportation charges are

"legitimate stranded costs," i.e., sunk generation costs tethered to the wholesale rate. *Re Statewide Electric Utility Restructuring Plan*, Order No. 22,511, 82 NH PUC 93, 99 (1997). Similarly, the wholesale rate that electric generators receive for energy sold in the ISO-NE energy markets is largely based on the assumed fuel price that electric generators pay for their fuel supply used to generate electricity. In New England, merchant generators "submit energy market supply offer[s] that [are] intended to reflect the short run marginal costs of operating…resource[s] in the energy market." *Offer Caps in Markets Operated By Regional Transmission Organizations and Independent System Operators*, Comments of ISO New England Inc. Internal Market Monitor, Dkt. No. RM16-5-000, (Apr. 4, 2016). The ISO-NE Internal Market Monitor ("IMM") receives electric generator supply offers and "calculates a Reference Level that is reflective of each resource's short run marginal cost, based on financial offer parameters that can be updated by the participant each day, *including fuel price expectations*, and based on approved physical characteristics." (Italics added for emphasis.) *Id*., at 6, *citing* Market Rule 1, Appendix A, Section III.A.7.5.

The IMM is a product of deregulation in New England, including New Hampshire's Restructuring Act. The purpose of the IMM is to ensure competitiveness in the New England energy and capacity markets. One way the IMM ensures such competitiveness as well as just and reasonable rates is by reviewing electric generator supply offers. For instance, when the IMM reviews a supply offer, itutilizes fuel price indices to determine a merchant generator's fuel costs. "[F]or natural gas-fired resources, a day-ahead fuel price index for the transportation pipeline on which the resource is located is used as a proxy for a participant's fuel costs, and the same index, updated in advance of the operating day, is used for purposes of establishing Reference Level fuel prices for the Real-Time Energy Market." *Id*. There are times when a merchant generator

may believe that "the index price does not reflect the cost that it will pay for fuel for a particular day" and if that occurs, "it may submit a fuel price adjustment request, which … is submitted through an automated system and evaluated through the automated system to ensure it is within a range of reasonableness when measured against values created by ISO-NE's proprietary model." *Id*. If Eversource's Petition is approved, merchant generators that are situated near or along the Access Northeast pipeline that decide to procure natural gas capacity from Eversource will influence the fuel price and distort the wholesale energy price.

9. ISO-NE Market Reforms are Effectively Protecting Ratepayers Throughout New England

After the polar vortex caused natural gas prices to spike during the Winter of 2013, the NEPOOL Markets Committee sought to repair the flaw in ISO-NE's market design. NEPOOL and ISO-NE recognized that basing capacity payments on a resource's "availability" was a problem and did not create the proper incentive for resources to be available during capacity scarcity conditions. *ISO New England Inc., and New England Power Pool, Filings of Market Rule Changes To Implement Pay For Performance in the Forward Capacity Market*; Transmittal Letter on Behalf of ISO-NE, Dkt. ER14-2419-000 (Jan. 17, 2014). The solution reached was to design and implement market reforms that "provide incentives for resources to perform—to actually deliver energy or reserves—during scarcity conditions." *Id*., at 12. The first measure involved changes to what are referred to as Reserve Constraint Penalty Factors ("RCPFs"). RCPFs are rates, in dollars per megawatt-hour, that are used within ISO-NE's real-time energy dispatch and pricing algorithm to reflect the value of Operating Reserve Shortages. ISO-NE Tariff § 1.2.2. Moreover, they act as a cap on the price that ISO-NE may pay to procure additional reserves; and reaching the cap signals when the system is in reserve deficiency. *Id*. FERC was enthusiastic about the changes to the RCPFs, making them effective on December 3,

2014, "because the immediacy of energy market price signals provides strong incentives to gas-fired generators to *bolster fuel availability*, the Reserve Constraint Penalty Factor changes should help address in the near-term the gas-electric coordination issues that have contributed to resource non-performance." *ISO New England Inc. and New England Power Pool*, 147 FERC ¶ 61,172 (2014) at ¶ 109. (Emphasis added). The RCPFs constitute the first wave of ISO-NE market reforms and have been in effect for just over one year.

The second phase, Pay For Performance, is a two-settlement capacity market design and has three "fundamental market design principles:" (1) "a well-designed market must pay more for better performance and less for worse performance;" (2) generators "and not consumers—must bear the risk and the rewards associated with their resources' performance"; and (3) the market design "is resource neutral." *ISO New England Inc., and New England Power Pool, Filings of Market Rule Changes To Implement Pay For Performance in the Forward Capacity Market*; Transmittal Letter on Behalf of ISO-NE at 21, Dkt. ER14-2419-000 (Jan. 17, 2014). ISO-NE's capacity market is what is known as a Forward Capacity Market. Most RTOs and ISOs, including ISO-NE, forecast their control area's requisite capacity, i.e., its installed capacity requirement, three years into the future and design the market accordingly in hopes of yielding that installed capacity requirement in the resulting auction. Electric generators that expect to be constructed, interconnected and operational three years into the future, bid to sell capacity into ISO-NE's capacity market.

The Two Settlement Market Design of Pay for Performance includes a forward price — "paid to resources having a Capacity Supply Obligation during the commitment period in the Capacity Base Payment"; *id*. at 22, and a forward position which requires the merchant generator "to offer [its] MW amount of the Capacity Supply Obligation in both the Day-Ahead Energy

Market and the Real-Time Energy Market during the commitment period" and cover its "share of the [control area's] total energy and reserve requirements during [capacity] scarcity conditions." *Id*. If a resource fails to perform its entire Capacity Supply Obligation relative to its pro rata share of the system's requirements during a scarcity condition, it does not receive its entire Capacity Performance Payment. A resource is only paid for the amount of capacity it actually supplies during a capacity scarcity condition.

FERC has approved the Pay For Performance market reform and ordered that ISO-NE phase in the market mechanism by June 2018. Year after year since the polar vortex, ISO-NE and NEPOOL have produced and implemented the FERC-approved Winter Reliability Plan as a reliability place-holder and to secure adequate firm fuel inventories in the winter until Pay For Performance comes online. The Winter Reliability Plan is set to expire with the onset of Pay For Performance, but since its adoption New England has not incurred the same magnitude of price spikes or shortage events that occurred during the Winter of 2013, which seems to make further out-of-market solutions unnecessary and undesirable to a restructured electric market.[11]

The full effect of NEPOOL and ISO-NE's market reforms have not yet been felt across the region. Reliability stands as the primary reason the market reforms were filed and approved by the FERC. It would not be prudent for this Commission to approve Eversource's Petition, for such a transaction could undermine the effectiveness of ISO-NE's Pay For Performance mechanism before it has even been given a chance to succeed. The Company's incentives are improper. Pay For Performance was designed to incentivize gas-fired electric generators to

[11] ISO NEWSWIRE: "*Winter 2015/2016 recap: New England power system performed well and prices remained low*", Thurs., Apr. 21, 2016 at 3:21PM. http://isonewswire.com/updates/2016/4/21/winter-20152016-recap-new-england-power-system-performed-wel.html; ISO NEWSWIRE: "*Monthly wholesale electricity prices and demand in New England, March 2016*", Thurs., Apr. 21, 2016 at 4:19PM. http://isonewswire.com/updates/2016/4/21/monthly-wholesale-electricity-prices-and-demand-in-new-engla.html ("March wholesale power prices were lowest since 2003")

purchase and have fuel available so that such generators could provide reliable electric generation during scarcity conditions. By approving a retail electric utility's contract with a transportation company for firm interstate pipeline capacity, the PUC would circumvent the FERC-approved Pay For Performance market mechanism and cause generators that are too far in proximity to benefit from Eversource's ERSP to be irreparably harmed.

10. Eversource's Petition is preempted because the cost of gas-fired electric generator fuel is tethered to the wholesale rate of electricity

Algonquin argues that because the Access Northeast Contract, ERSP and LGTSC do not require generators to acquire capacity released by Eversource and do not dictate the price at which generators that acquire capacity released by Eversource offer electricity or capacity in the ISO-NE energy markets, the Eversource Petition is not preempted. Algonquin Brief at 14. Moreover, Algonquin asserts that the Commission's approval of the Eversource Petition would "not adjust the *per se* just and reasonable ISO-NE clearing prices." *Id*.

Both Algonquin and Eversource contend that the U.S. Supreme Court's recent *Hughes v. Talen Energy Marketing* decision, which deemed Maryland's regulatory interference in the PJM wholesale market to be preempted, is sufficiently narrow and limited as to leave the kind of program contemplated by the Eversource petition unscathed. They are wrong and their arguments ignorethe adverse market effects that approval of the Eversource petition would have.

Approval of Eversource's Petition would violate the pellucid terms of the FPA. "[M]easures aimed at interstate purchasers and wholesales for resale" are field-preempted by the FPA because the preferential release and supply of fuel to one class of natural gas-fired generators is directly tethered to such generators' participation in the wholesale electric market. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1600 (2015); *Hughes v. Talen Energy Marketing, et, al*., 578 U.S. ___ (Apr. 19, 2016); *see also Schneidewind v. ANR Pipeline Co*., 485 U.S. 293,

306-308 (1988) (holding preempted a state law capping a natural gas company's equity levels that were "directed at" suppressing wholesale rates). "Although *Oneok*…involved the [Natural Gas Act ("NGA")] rather than the FPA, the relevant provisions of the two statutes are analogous." Hughes, slip op. at 13 n. 10. The U.S. Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Id*.

The full amount of electric capacity produced in the ISO-NE control area by natural gas-fired generating facilities is 12,426 MW. Testimony of James M. Stephens at 40. Under the terms of the ERSP, Eversource and Algonquin will be able to subsidize up to 57 percent of natural gas-fired generating facilities' regional electric capacity supply obligation, or 7,082.82 MW. *Id*. If the fuel supply for merchant generators producing 7,082.82 MW situated near or along the Algonquin pipeline is preferentially subsidized and the fuel supply for the remaining gas-fired electric generation fleet producing 5,715.19 MW in the ISO-NE control area is not, ISO-NE's Internal Market Monitor will have no choice but to mitigate the supply offers provided. For instance, the IMM will either mitigate up gas generator supply offers that are subsidized or mitigate down gas generator supply offers that are unsubsidized, so that unsubsidized gas generators can clear the market and do not suffer from a revenue shortfall. This is exactly the adjustment of *per se* unjust and unreasonable clearing prices that the Supreme Court's holding in *Hughes* prevents. The issues that arise in this docket are not a carbon copy of those that were before the Court in *Hughes*. However, like the subsidy at issue in *Hughes*, the preferential release of ratepayer subsidized fuel to natural gas generators is tethered to the

generation of electricity and the wholesale rate. Such a subsidy need not mirror perfectly that issued in Maryland in order to share the same fate.[12]

Hughes likens Maryland's program to the state determinations that the Court abrogated in *Mississippi Power & Light v. Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), in which Mississippi and North Carolina each "determined that FERC had failed to ensure the reasonableness of a wholesale rate" and refused to allow the local utilities retail cost recovery on their FERC-approved wholesale rates. *Hughes* at 13. In *Hughes*, it is clear that Maryland did not interfere with a utility's right to retail cost recovery of the wholesale rate; however, Maryland did interfere with and distort the outcome of PJM's capacity auction by requiring the program-selected electric generator to bid into PJM's capacity auction, clear that auction, and receive a portion of its contract payment as plus or minus the difference between its auction clearing price and the contract price. Any "targeted" release of natural gas capacity to electric generating facilities timed to proceed in parallel with ISO-NE's Forward Capacity Market surely achieves a similar result. The Court in *Hughes* reasoned that "*Mississippi Power & Light* and *Nantahala* make clear that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in state generation." *Id.* at 14.

In a restructured market, the wholesale rate resulting from FERC-approved ISO-NE auctions is the filed rate. *See id.* (citing *Mississippi Power & Light*). Under the filed rate doctrine, "interstate power rates filed with FERC or fixed by FERC must be given binding effect by State utility commissions determining intrastate rates." *Nantahala*, 476 U.S., at 962. "The filed rate

[12] Subsidizing 54-57 percent of the electric capacity made available by natural gas-fired electric generating facilities in the ISO-NE control area and in turn irreparably harming the other 43-46 percent will harm the integrity of the region's wholesale electric markets.

doctrine is rooted in [*Montana-Dakota Co. v. Pub. Serv. Co*., 341 U.S. 246 (1951)] holding that the courts have no authority to alter the 'just and reasonable' rate determined by the FERC." *Appeal of Northern Utilities*, 136 N.H. 449, 453 (1992). Once FERC sets the wholesale rate, "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress['s] desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala*, 476 U.S., at 966.

In *Appeal of Northern Utilities*, the Commission argued that FERC had the authority to waive the application of the filed rate doctrine. *Appeal of Northern Utilities*, 136 N.H. 449, 455. The New Hampshire Supreme Court held that even FERC could not effect such a waiver, explaining that "[j]ust as the FERC-approved rates are binding upon States, FERC-approved rates are binding upon the FERC because Congress established a bright line beyond which the FERC cannot step." *Id*., *see also Appeal of Sinclair Machine Prods, Inc*., 126 N.H. 822 (1985) (Commission preempted from disallowing portions of wholesale costs approved by FERC). While the Commission may not be directly withholding or preventing a utility from recovering the filed rate if it approves Eversource's petition, it would be "disregarding" the FERC-approved rate, the same way the Maryland Public Service Commission did in *Hughes*. Such approval, therefore, would suffer the same fate as the Maryland regulators' action did.

11. The Electric Reliability Service Program is unduly discriminatory and preferential in violation of Section 4 of The Natural Gas Act

Algonquin contends that state approval of the Eversource Petition would not raise preemption issues under the Natural Gas Act. To the contrary, what Eversource is proposing is fundamentally at odds with this federal statute as administered by the FERC.Specifically, the Electric Reliability Service Program as proposed is unduly discriminatory and preferential in

violation of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, and is contrary to FERC's regulations governing the allocation of released firm interstate pipeline capacity. Eversource is seeking to subsidize only the natural gas-fired generators that are situated near or along the Algonquin pipeline, and in accordance with the aforementioned statutory provision, the proposal is unduly preferential and prejudicial to any merchant generator that is not fueled by natural gas and any natural gas-fired generating facility that is not situated near or along the Algonquin pipeline.

The Eversource and Algonquin subsidy is specifically harmful to the Granite Ridge Energy Center, a 745 megawatt natural gas-fired generating facility owned by Champion Energy Services, a subsidiary of Calpine, located in Londonderry. The facility is situated along and purchases fuel from the Tennessee Gas Pipeline. Granite Ridge Energy Center is just one example of a local generating facility that will not have access to the subsidized fuel that Eversource seeks to sell. In fact, relying on information provided in the testimony of Eversource witness Stephens, it appears that at least 43 percent of the electric capacity associated with gas-fired generating facilities in the ISO-NE control area will not have the opportunity to purchase the natural gas capacity that Eversource seeks to sell in preferential fashion. See Stephens Testimony at 40. All of the natural gas-fired electric generators situated near or along the Tennessee, Iroquois, and PNGTS pipelines will not be able to bid on the natural gas capacity that Eversource seeks to make available for release, leaving such natural gas-fired generating facilities (that have a total electric capacity supply obligation of 5,715.19 MW) harmed by an unduly discriminatory and preferential, and otherwise unlawful natural gas capacity release program.

12. Conclusion

For the foregoing reasons, the Commission cannot grant the Eversource petition. As demonstrated here, in the OCA's initial brief, and for the reasons suggested by the other parties in opposition to the petition, what Eversource is proposing here is fundamentally inconsistent with both state and federal law.

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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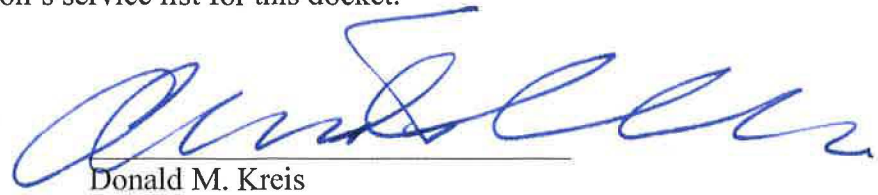
May 12, 2016

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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