

**BEFORE THE NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

EVERSOURCE ENERGY - PETITION FOR :  
APPROVAL OF GAS INFRASTRUCTURE : DOCKET NO. DE 16-241  
CONTRACT WITH ALGONQUIN GAS :  
TRANSMISSION, LLC :

**ALGONQUIN GAS TRANSMISSION, LLC**  
**REPLY TO JOINT SUPPLEMENTAL BRIEFING**

Algonquin Gas Transmission, LLC (“Algonquin”) hereby submits a reply to the *Joint Supplemental Briefing of Conservation Law Foundation, NextEra Energy Resources, LLC, And Office of the Consumer Advocate Regarding Legality Of Petitioner’s Proposal* (“Joint Supplemental Briefing”).

In the Joint Supplemental Briefing, the Conservation Law Foundation, the Office of the Consumer Advocate and NextEra Energy Resources, LLC directed the attention of the Public Utilities Commission (“Commission”) to the recent decision of the Massachusetts Supreme Judicial Court (“SJC”) in *ENGIE Gas & LNG LLC v. Department of Public Utilities and Conservation Law Foundation v. Department of Public Utilities*, slip op. SJC-12051, SJC-12052 (Aug. 17, 2016) (“Massachusetts Decision”). As the Joint Supplemental Briefing acknowledges, a decision of the SJC is not binding on the Commission<sup>1</sup> and it should have no bearing on the Commission’s decision in the above-referenced docket. Algonquin urges the Commission to pursue New Hampshire’s independent proceeding to its conclusion, and to recognize that Eversource’s proposed entry into the Access Northeast Contract and the implementation of the ERSP and LGTSC are legal under **New Hampshire** law. The Massachusetts Decision should not decide **New Hampshire** law, for the reasons highlighted below.

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<sup>1</sup> Joint Supplemental Briefing, at 3.

**I. New Hampshire Electric Distribution Companies (“EDCs”) May Acquire Transmission Capacity.**

In the Massachusetts Decision, the SJC concluded that the Massachusetts Department of Public Utilities (“DPU”) has the authority to approve contracts for electricity by electric companies, and contracts for gas by gas companies, but not contracts for gas by electric companies.<sup>2</sup> The SJC’s analysis is specific to Massachusetts General Laws c. 164, § 94A and the relationship of the terms “gas or electric company” and “gas or electricity”.<sup>3</sup> This analysis has no bearing on New Hampshire law, because of the significant differences in statutory language.

As Algonquin discussed in its Initial Brief<sup>4</sup> and Reply Brief,<sup>5</sup> New Hampshire law (at RSA 374:57) specifically authorizes EDCs to acquire “transmission capacity”, and does not specify that such transmission capacity must relate to electric transmission. The relevant statutory language in New Hampshire differs significantly from the relevant statutory language in Massachusetts, and the Commission must evaluate its authority to approve the contemplated Access Northeast Contract completely independent of the Massachusetts-specific analysis of the Massachusetts Decision.

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<sup>2</sup> Massachusetts Decision, at 26.

<sup>3</sup> *Id.* at 10-26. *See also*, Massachusetts General Laws c. 164, § 94A, which provides in relevant part that “[n]o gas or electric company shall hereafter enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the department, unless such contract contains a provision subjecting the price to be paid thereunder for gas or electricity to review and determination by the department in any proceeding brought under [§ 93 or 94].”

<sup>4</sup> Algonquin Gas Transmission, LLC, Brief on Phase I Legal Issues (Apr. 28, 2016) (“Algonquin Initial Brief”), at 5-6.

<sup>5</sup> Algonquin Gas Transmission, LLC, Reply Brief on Phase I Legal Issues (May 12, 2016) (“Algonquin Reply Brief”), at 12-13.

## II. New Hampshire EDCs May “Participate In Generation” Even After The Restructuring Act’s Enactment.

The Massachusetts Decision discusses at length Massachusetts General Laws c. 164 (the “Massachusetts Restructuring Act”).<sup>6</sup> As the Joint Supplemental Briefing notes, the SJC concluded that DPU’s approval of EDC contracts for natural gas capacity would be inconsistent with the “fundamental policy embodied by the [Massachusetts Restructuring Act], namely the Legislature’s decision to remove electric distribution companies from the business of electric generation.”<sup>7</sup> In reaching this conclusion, the SJC examined the Massachusetts legislative history, which necessarily varies from the New Hampshire legislative history related to RSA Chapter 374-F (the “New Hampshire Restructuring Act”). In particular, the New Hampshire Legislature did not repeal a pre-existing statute authorizing EDCs to “participate” in electric power facilities, and as such did not “remove electric distribution companies from the business of electric generation.”

As discussed in Algonquin’s Initial Brief,<sup>8</sup> New Hampshire EDCs are explicitly authorized to “participate” in activities related to electric power facilities. Specifically, New Hampshire EDCs have the power to:

[J]ointly or separately plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within or without the state...

[E]nter 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... including, without limitation, contracts and agreements for the payment of obligations imposed without regard to the operational status of a facility or facilities....

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<sup>6</sup> Massachusetts Decision, at 26-37.

<sup>7</sup> Massachusetts Decision, at 27. *See also*, Joint Supplemental Briefing, at 2.

<sup>8</sup> Algonquin Initial Brief, at 6-8.

Even if the Commission concluded that the Access Northeast Project would constitute EDC involvement in the generation of electricity,<sup>9</sup> such involvement is specifically allowed in New Hampshire. As such, the Commission cannot rely upon a Massachusetts court's interpretation of a Massachusetts law (which lacked an analog to the New Hampshire grant of authority to "participate" in electric power facilities) in rendering its Phase I decision. To do so would ignore New Hampshire statute.

### **III. Status of the Access Northeast Project.**

The Joint Supplemental Briefing indicated that the Massachusetts Decision is relevant to the above-captioned docket for two reasons. The first reason, the relevance of a Massachusetts court's interpretation of Massachusetts law to the Commission's interpretation of New Hampshire law, is discussed above. The second reason given by the Joint Supplemental Briefing is that "PSNH's and Algonquin's proposal is part of a larger, regional scheme that was intended to include electric distribution companies in Massachusetts."<sup>10</sup> While Massachusetts may now lag behind the efforts underway in other New England states to move forward decisively in securing the region's energy future, Algonquin is committed to ensuring that Access Northeast remains on track.

New Hampshire and each of the other New England states is progressing under its own statutory authority, request for proposal process, or proceeding to evaluate what statutory basis it has to approve contracts for the Access Northeast Project. These efforts have always been and should continue to be independent of the evaluations of the other New England states. Access Northeast is working with each state as they progress through their individual processes and is

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<sup>9</sup> As discussed in the Algonquin Initial Brief at pages 8-9, acquisition of natural gas capacity by Eversource would not compromise the separation of generation and transmission/distribution functions under the New Hampshire Restructuring Act.

<sup>10</sup> Joint Supplemental Briefing, at 3.

mindful that each state will pay for its pro rata share of the project. As such, status of project approvals in Massachusetts should not matter to the reviews ongoing in Connecticut, Rhode Island, Maine and New Hampshire.

Furthermore, as the role of Massachusetts in the larger Access Northeast Project has not been briefed in New Hampshire, it should not be a factor in the Commission's forthcoming decision on the legality of Eversource's petition. The Order of Notice that initiated the above-captioned docket bifurcated the proceeding into two phases. "In the first phase [{"Phase I"}], the Commission will review briefs submitted by Eversource, Staff and other parties regarding whether the Access Northeast Contract, and affiliated program elements, is allowed under New Hampshire law."<sup>11</sup> Only after a decision confirming the legality of the Access Northeast proposal will the Commission "open a second phase [{"Phase II"}] of the proceeding to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by Eversource's proposal."<sup>12</sup> Briefing on Phase I issues concluded in mid-May and a Phase I decision has not yet been issued. There has been no briefing or discovery in New Hampshire on Phase II issues which is where, if at all, the role of Massachusetts in the Access Northeast Project would be considered, and should not play a role in the Commission's consideration of Phase I.

#### **IV. CONCLUSION**

For all of the foregoing reasons, and the reasons stated in its Phase I Initial Brief and Reply Brief, Algonquin urges the Commission to recognize that Eversource's proposed entry into the Access Northeast Contract and the implementation of the ERSP and LGTSC are legally permitted under New Hampshire and federal law, and requests that the Commission proceed to Phase II of this proceeding.

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<sup>11</sup> Order of Notice (Mar. 24, 2016), at 4.

<sup>12</sup> *Id.*

Respectfully submitted,  
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Its Attorneys

Dated: August 29, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply has this day been sent via electronic mail or first class mail to all persons on the service list.

*Emilee Mooney Scott*  
Emilee Mooney Scott

Dated: August 29, 2016