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 TO EVERSOURCE AND ALGONQUIN'S OPPOSITIONS TO JOINT SUPPLEMENTAL BRIEFING OF CONSERVATION LAW FOUNDATION, NEXTERA, OFFICE OF THE CONSUMER ADVOCATE REGARDING LEGALITY OF PETITIONER'S PROPOSAL

On August 22, 2016, the undersigned submitted Joint Supplemental Briefing in light of the decision of 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), invalidating an order of the Department of Public Utilities that authorized the acquisition of natural gas capacity by electric distribution companies ("EDCs"). The Joint Brief pointed out that the SJC decision is significant both because (1) it reflects the decision of the highest court in a sister state that, in a restructured electricity market, an EDC may not acquire gas capacity at ratepayer expense; and (2) Eversource made clear in its petition and prefiled testimony that the viability of its Access Northeast project depends upon its acceptance throughout New England.

Eversource filed its opposition on August 26, 2016, arguing that the SJC decision is of no import in this proceeding because of differences in the New Hampshire and Massachusetts restructuring acts and that the invalidation of the Eversource scheme by the largest proportional state in New England is, remarkably, "no evidence or suggestion that regional support for Access Northeast, including the participation of Massachusetts, cannot or will not occur." (Eversource Opposition at 3.) On August 29, 2016, Algonquin Gas Transmission, LLC ("Algonquin") filed its opposition, arguing similarly to Eversource that the SJC decision is of no import, but in

addition that a section of the SJC decision that the undersigned did not rely upon does not support the Joint Brief. While the responses to the oppositions seem fairly evident, we briefly address each point below.

I. Delays in completing the restructuring of New Hampshire's electric market in no way alter the fundamental purpose of the Restructuring Act's separation of regulated transmission and distribution from competitively-supplied energy generation.

Eversource contends that RSA 374-A survived passage of the New Hampshire Restructuring Act and that New Hampshire's delays in effectuating restructuring support the notion that restructuring in New Hampshire is somehow fundamentally different than restructuring in Massachusetts. Neither point has merit. First, the undersigned explained in their underlying briefs that RSA 374-A does not give Eversource authority to purchase natural gas capacity for electric generation. *See* CLF Principal Brief at 9-11; CLF Reply Brief at 6-8; OCA Principal Brief at 8-10; NextEra Principal Brief, Section I.D; NextEra Reply Brief, Section II.

Second, Eversource's argument that New Hampshire's delays in effectuating restructuring are relevant to the interpretation of the Restructuring Act ignores (1) the purpose and text of the Restructuring Act which restructured New Hampshire's electricity market by separating generation from transmission and distribution and requiring competition for energy supply (*see, e.g.*, RSA 374-F:1; 374-F:2,II; 374-F:3), (2) the Commission's prior decisions articulating what the New Hampshire Restructuring Act means (*see, e.g., Proceeding Regarding the Sale of Seabrook Station Interests*, Order 24,050 at 3 (September 12, 2002) ("Consistent with the Electric Utility Restructuring Act, RSA 374-F, and other applicable statutes, the Restructuring Agreement provided for the . . . transformation of PSNH from a traditional, vertically integrated electric utility into a company that would provide its retail customers solely with energy distribution services."), and (3) the fact that the Commission – at Eversource's

request – recently approved a settlement agreement pursuant to which Eversource will finally divest all of its generation assets, thereby *completing* the restructuring of New Hampshire's electric market. *See* Order No 25,920 (approving settlement agreement for divestiture of Eversource's generation assets and determination of stranded costs). As to the latter point, Eversource itself has acknowledged that divestiture of its generating assets will allow New Hampshire to finally complete restructuring.[1] That Eversource overlooks this essential recent development and cites the long path to the completion of restructuring as a means to somehow differentiate New Hampshire's underlying policies and purposes for restructuring its electric market defies logic.

While the language of New Hampshire's and Massachusetts' restructuring acts is not identical, the fundamental policies and purposes embodied in both (that is, separation of transmission and distribution from generation, and full competition for energy supply) are the same. The fundamental point of the SJC's decision in *ENGIE* is thus directly on point: the acquisition of gas capacity by an EDC is antithetical to the principles of a restructured energy market.[2]

---

[1] In its closing statements in the divestiture proceeding, Eversource stated, in pertinent part: "[T]he company requests that the Commission expeditiously approve this settlement as filed and without additional conditions, and permit the process of restructuring in New Hampshire to move efficiently toward completion." *See* NHPUC DE 14-238 Hearing Transcript, Feb. 4, 2016 at 63. In that same docket, Eversource similarly stated in correspondence to the Commission:

> In 1996, the Legislature expressly found that, "It is in the best interests of all the citizens of New Hampshire that the general court, the executive branch, and the public utilities commission work together to establish a competitive market for retail access to electric power as soon as is practicable … ." 1996 N.H. Laws 129:1, V. In 2014 N.H. Laws 310:1the Legislature again expressly desired resolution of the issues regarding divestiture of PSNH' generation assets via settlement. The Litigation Settlement fulfills these myriad statutory directives, is in the public interest, and after twenty years effectuates the "Purpose" of the Legislature set forth in the Electric Restructuring Act to "harness the power of competitive markets."

See NHPUC DE 14-238, Jan. 26, 2016 cover letter from Eversource to NHPUC.

[2] Contrary to Algonquin's opposition (Algonquin Opp. at 1), the undersigned have not asserted that the SJC decision in *ENGIE* decides the issue in New Hampshire. In arguing that the SJC decision in *ENGIE* "should have no bearing

II. Having represented to the Commission that the proposed pipeline is contingent on its approval in the other New England states, Eversource cannot now credibly suggest that Massachusetts' invalidation of the proposal is meaningless.

Eversource's second point – that the SJC decision means nothing because the interpretation of the legality of its contract is unaffected by the failure of its scheme in Massachusetts – ignores its own petition and testimony. *See, e.g.*, Prefiled Testimony of James Daly, p.34, lns. 3-5 ("Will the Commission's approval of the proposed ANE Contract be contingent on approvals in other states? A. Yes, effectively."); Petition at 13 (the Access Northeast project is regionally scaled and "will require other New England states to take responsibility for a proportional share of the costs of the project"). Eversource has also argued that its EDC-funding proposal is necessary because entities that actually use the gas (*e.g.*, gas generators) are unwilling to take on the risk of investing in a pipeline. (*See, e.g.*, Daly Prefiled, p.10, ln.12: ratepayer funding is necessary because of "the uncertainty of cost recovery.")

Having represented to the Commission that it is relying upon an approach that requires regional EDC ratepayer funding to support the economics of the ANE project, Eversource's disavowal of the importance of the loss of its largest jurisdiction rings hollow.

Eversource also suggests that "though the SJC's decision will change the means by which Massachusetts contributes its share, it does not change the end result – there is no doubt that Massachusetts needs to participate in some manner and that New Hampshire's share should be unaffected by the SJC ruling." (Eversource Opposition at 4.) Eversource's suggestion that New Hampshire's share of the cost would be unaffected by the SJC ruling is directly at odds with its

---

on the Commission's decision in [this] docket", however, Algonquin goes too far. As we stated in our Joint Brief, the decision of the highest court in a sister state determining that the same proposed project is unlawful in a restructured energy market is at a minimum persuasive authority. Indeed, the Commission will recall that during the initial case conference in this matter, counsel for Eversource asserted that the Commission should look to the protective order decisions from the Massachusetts DPU as persuasive authority in how the Commission ought to rule on similar issues in this docket.

testimony:

> If other approvals do not follow in one or more New England states, Access Northeast will need to make a determination whether to proceed with fewer precedent agreements; to reconfigure the project and renegotiate the existing precedent agreements; or terminate the project.

(Daly Prefiled, p.35, lns. 12-15.)

III. Algonquin's assertion that the SJC decision invalidated the ANE proposal based on Massachusetts Chapter 164 is irrelevant.

Algonquin begins its argument by asserting that the SJC decision's analysis of Chapter 164, §94-A "has no bearing on **New Hampshire** law, because of the significant differences in statutory language." (Algonquin Opp. at 2) (Emphasis in original). Significantly, the Joint Brief did not focus on §94-A and the SJC's analysis thereof. The focus of the Joint Brief, of course, is the SJC's analysis of the ANE proposal in the context of a restructured energy market and, specifically, that placing the risk of generation investment on EDC ratepayers is inconsistent with the fundamental purpose of restructuring. *See, e.g.*, *ENGIE Gas & LNG LLC et al. v. Dept. of Pub. Util.*, slip op. at 26 – 37.

* * *

For the foregoing reasons, as well as those set forth in the undersigned's briefing to this Commission, the undersigned respectfully request that the Commission reach the same conclusion as the SJC in *ENGIE* and determine that PSNH's Petition is not authorized under New Hampshire law and should be dismissed.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

/s/Thomas F. Irwin, Esq.
V.P. and CLF New Hampshire Director
27 N. Main Street
Concord, New Hampshire 03301

(603) 225-3060
tirwin@clf.org

NEXTERA ENERGY RESOURCES, LLC,
By its attorneys,

Christopher T. Roach
William D. Hewitt
Roach Hewitt Ruprecht Sanchez & Bischoff, LLP 66 Pearl Street, Suite 200
Portland, Maine 04101
(207) 747-4870
croach@roachhewitt.com
whewitt@roachhewitt.com

OFFICE OF THE CONSUMER ADVOCATE

/s/ Donald M. Kreis

Donald M. Kreis
Consumer Advocate
21 South Fruit Street, Suite 18 Concord, New Hampshire 03301
(603) 271-1174
donald.kreis@oca.nh.gov

Dated September 1, 2016

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 1st day of September, 2016.

/s/ Donald M. Kreis

Donald M. Kreis