STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY

Docket No. DE 16-241

Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC

REPLY TO JOINT SUPPLEMENTAL BRIEFING OF CONSERVATION LAW FOUNDATION, NEXTERA ENERGY RESOURCES, LLC, AND OFFICE OF THE CONSUMER ADVOCATE REGARDING LAWFULNESS OF PETITIONER'S PROPOSAL

On August 12, 2016, the Conservation Law Foundation, NextEra Energy Resources, LLC, and the Office of Consumer Advocate (collectively, the "Supplemental Briefing Parties"), filed a joint supplement to the legal briefs each had filed in this proceeding. The stated purposes of the submission were to apprise the Commission of 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) and to argue that the opinion provides "persuasive precedent" relative to the legal issues in this proceeding. Coalition to Lower Energy Costs ("CLEC")[1] herein offers a brief response to this Supplemental Briefing.

In general , the contentions of the Supplemental Briefing Parties are legally and practically incorrect. Further, the decision of the SJC is neither "on point" nor precedential, and,

[1] Coalition to Lower Energy Costs is a New England-wide organization of energy consumers, labor unions, chambers of commerce and trade associations, including many businesses in New Hampshire, which seeks to lower the cost of electricity and gas and to increase the use of renewables and energy efficiency in New England. CLEC considers adequate natural gas pipeline capacity into New England (and into New Hampshire) to be essential to each of these vital objectives. See energycostcrisis.com.

due to some unique jurisprudence, cannot be considered "persuasive." The Commission should resist the suggestion by these parties to ignore the law, conduct no factual analysis and just tag along. The Commission should deny the relief sought by the Supplemental Briefing Parties.

I. EDCs Are Authorized Under New Hampshire Law to Make Pipeline Reservations

The Supplemental Briefing Parties are simply wrong with respect to the legal authority of New Hampshire EDCs. The legal weaknesses of their arguments begin with the fact that, while both New Hampshire and Massachusetts have enacted statutes "about" electric restructuring, the statutes are both dramatically different and fit within distinctive schemes of public utility regulation and deregulation. Of particular significance are the provisions of RSA Chapter 374-F and RSA 374-A, which explicitly permit New Hampshire electric distribution companies ("EDCs") to "plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities." RSA 374-A:2, I. Thus, even if the Commission were to conclude after hearing, argument and factual analysis (a conclusion CLEC would argue to be factually incorrect) that reservation of gas pipeline capacity is part of the generation function, New Hampshire restructuring law specifically permits generation involvement by EDCs. This is entirely consistent with the legislative finding in RSA 374-F:1, I that "[t]he 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."

Moreover, even if we overlook the failure of the Supplemental Briefing Parties to dispatch RSA 374-A:2, I , their legal argument fails by not beginning its statutory construction

analysis with the legislatively-granted charter of the Petitioner. Whether it is lawful for an EDC to purchase gas pipeline capacity where the organic utility statutes (allegedly) are silent on the question depends first on the utility's legislative charter. Typically in New England legislative charters predate commission statutes and allow the utility to do any lawful act. As CLEC has argued in this proceeding, this is precisely the circumstance with Public Service Company of New Hampshire. CLEC, Brief on the Legality of Eversource's Proposal, DE 16-241, at 6-10 (April 28, 2016). Reserving capacity on gas pipelines is lawful for New Hampshire citizens, so the resulting statutory analysis should be whether a subsequently adopted statute, such as the Commission's organic statute or the restructuring statute, expressly prohibits such activity by an EDC. No such prohibitions exist. The pertinent question then becomes whether electric customers can be charged for EDC reservation of pipeline capacity from which customers benefit. Statutory divestiture and deregulation of generation does not necessarily answer this question. Instead, this would appear to be within the discretion of the Commission in ensuring just and reasonable, (i.e., lower) rates for consumers, and in protecting the public interest.

II. The Effort by Massachusetts and Others to Support a Pipeline Solution Continues

The arguments of the Supplemental Briefing Parties are also factually incorrect in asserting that the SJC decision destroys the regional effort to reduce the regional gas basis differential by cooperating to support additional gas pipeline capacity into New England. Clearly, the *Engie* decision represents a setback in the efforts of Massachusetts, through the leadership efforts of the Governor of Massachusetts, the Department of Energy Resources ("DOER"), and the DPU, to contribute to a regional natural gas infrastructure solution.

However, the SJC decision does not finally resolve the issue of whether or how Massachusetts may participate. For instance, it is possible that enabling legislation, like that enacted in Maine, Rhode Island and Connecticut, may be considered during the upcoming sessions of the Massachusetts General Court. Alternatively, the Governor, DOER, or DPU may explore alternative regulatory mechanisms under state or federal law to achieve the same policy goals.[2] It is too early to know what course of action will be pursued by these agencies, the Massachusetts EDCs, Massachusetts local gas distribution companies ("LDCs") or Spectra Energy,[3] to advance the goal of expanding the natural gas pipeline infrastructure into New England. This is not a static, "zero/one" circumstance; these are private companies and public officials trying all available means to resolve a serious problem.

Moreover, the argument that the Massachusetts SJC decision kills the Access Northeast project overlooks other pertinent facts. First, as Dr. Silkman's testimony shows, if only smaller increments of pipeline capacity are built, the consumer benefit of these small, earlier tranches is far greater than those of later tranches, and may justify investment with fewer regional participants. CLEC, Direct Testimony and Exhibits of Competitive Energy Services, IR 15-124, at 35 (June 2, 2015). Access Northeast presently would consist of 500 MMcf /day of expanded gas pipeline and 400 MMcf of LNG storage. The new pipeline capacity would be phased in

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[2] SNL Financial reported on August 31, 2016 a statement released by the Baker Administration: "The Department of Public Utilities respects the Supreme Judicial Court's decision," Lorenz said, "and while the federal government remains the deciding authority on pipeline siting decisions, the Baker-Polito Administration believes meeting the region's energy demands without raising costs for consumers requires additional natural gas along with the wind and hydroelectric power provisions recently signed into law."

[3] In response to the SJC ruling a Spectra representative stated: "[w]e are committed to assuring that Access Northeast remains on track to meet strong demand in Massachusetts and New England to bring to the region the energy that is so desperately needed[]" and "our work to obtain contract approval will continue throughout the New England states. As we evaluate our path forward in Massachusetts, we remain confident that the Access Northeast project will ultimately provide substantial benefits for consumers across the New England region." State House News Service, *"Spectra Committed to Pipeline Project, Utilities Withdraw DPU Filings"* (August 23, 2016).

three tranches of varying size and dates of commercial operation. This clearly indicates the possible construction of one, two or three expansions. Depending on the ultimate economics, New Hampshire might choose to allow participation in one or more of the tranches.

Second, New England LDCs and others had executed precedent agreements on the now-cancelled Tennessee Gas Pipeline Northeast Energy Direct ("NED") project. This shows a still unmet market demand of some 552 MMcf/day. Assuming that some of this demand is for Western Massachusetts LDCs, (Berkshire and Columbia) which cannot be served physically by Access Northeast, the strong possibility nonetheless remains that about 400 MMcf of LDC and other non-generator demand could be met by Access Northeast.

Figure 1 – NED Market Path Component[4]

Shipper	Shipper 1 %pt.	Primary Term (Yrs)	TO (Dth/d
Boston Gas CompanyDBA National Grid	LDC	20	151,962
Liberty Utilities (EnergyNorth Natural Gas) Corp.	LDC	20	115,000
Bay State Gas Company d/b/a Columbia Gas of Massachusetts	LDC	20	114,300
UIL Holdings Corporation	Holding Corp.	20	70,000
The Narragansett Electric Company DBA National Grid	LDC	20	35,000
The Berkshire Gas Company	LDC	20	28,840
The Southern Connecticut Gas Corporation	LDC	20	15,000
Irving Oil Terminals Operations Inc.	Industrial End-User	15	10,160
Connecticut Natural Gas Corporation	LDC	20	10,000
City of Westfield Gas & Electric Light Department	Municipal Light Department	20	2,000
		Total:	**552,262**

While Spectra had proposed Access Northeast to serve only generation, this Commission is well aware, and the testimony of Dr. Silkman of Competitive Energy Services for CLEC in this proceeding and others clearly shows, that additional gas into New England lowers the marginal

[4] Tennessee Gas Pipeline Company, L.L.C., *Application for a Certificate of Public Convenience and Necessity (Northeast Energy Direct Project)*, Exhibit 1, page 2, FERC Docket CP16-21 (filed November 20, 2015).

cost of generation by reducing the basis differential, whether the gas is used ultimately for heating or generation. The integration of LDC and other demand into the Access Northeast development analysis increases the possibility that a purchase of gas pipeline capacity for New Hampshire consumers will be part of a multiple-party regional solution.

III. The *Engie* Decision Has No Precedential or Persuasive Effect

Lastly, the SJC decision is neither precedent nor persuasive. As noted above, the subject (gas pipeline reservations) is the same, but the statutes and statutory schemes are quite different. Obviously, a Massachusetts Supreme Judicial Court decision cannot be binding precedent for this Commission, as New Hampshire is a separate sovereign state. See BLACK'S LAW DICTIONARY, 9th Ed. at 1298 (defining the term "binding precedent"). And several reasons exist why the decision does not constitute "persuasive precedent," as a decision which, because of its reasoning, is entitled to careful consideration. See BLACK'S LAW DICTIONARY, 9th Ed. at 1298 (defining the term "persuasive precedent").

For example, the Massachusetts DPU correctly argued on appeal that its Order was not the result of an adjudicatory proceeding and merely established a process for the EDCs to propose to purchase gas pipeline capacity, and that the Court should await a more substantive adjudication to which judicial deference to agency statutory interpretation should also apply. The Court acknowledged these principles, but decided it knew the correct answer to all possible future arguments and decided the case. Three of the Court's seven justices, each of whom participated in the decision, then retired before the decision issued. To describe the Court's unnecessary urgency and decisional circumstances as unusual would understate the obvious. A

more prudent course might be to consider Massachusetts' energy policy, politics, and related jurisprudence to be unique.

This is not a small point. The proper course in the DPU case, where the relevant statutes lay silent, would have been for the DPU to have taken evidence on specific EDC gas reservation proposals and the complex federal (FERC regulation of gas and electricity markets), regional (ISO New England electricity market operation) and state circumstances and, based on that evidence and legal argument, decide whether, as opponents have urged this particular purchase comported with Massachusetts law and was in the public interest. For example, the SJC decision asserted that placing the "risk" of pipeline reservations on consumers is antithetical to the intent of Massachusetts' restructuring statutes. Evidence would have shown that Massachusetts consumers already are burdened by $1 billion or more in higher retail gas and wholesale electricity costs in the existing infrastructure by the absence of adequate pipeline capacity.

Moreover, the risk of that unnecessary burden is an unintended direct consequence of electric industry restructuring, and the market response of constructing some 25 natural gas-fired power plants that were more efficient and could "out-compete" the inefficient coal- and oil-fired power plants owned by utilities at the time and financed on the backs of ratepayers. Without a corresponding market incentive to provide sufficient fuel to these generators, the region's new power plants are grossly under-utilized in winter, as New England must revert to the use of the very power plants we sought to displace through electric restructuring—less efficient, more polluting, and costlier remnants of vertical integration like Merrimack Station. There is no known evidence that this phenomenon and the consumer burden it created were intended consequences of electric restructuring. This is the very sort of analysis that might have provided a basis for the DPU to conclude in construing its organic statute, that EDC reservation of gas

pipeline capacity was lawful and in the public interest specifically because it advances the public policy goal of electric industry restructuring to promote a functioning competitive market. The SJC never addressed this question. If this had occurred and the SJC nonetheless had invalidated the DPU decision, the reasoning of that decision might indeed be worthy of consideration. That is not the course the Court chose. The difference is significant.

IV. Conclusion

Wherefore the Coalition to Lower Energy Costs urges the Commission to reject the arguments of the Supplemental Briefing Parties and to deny the relief that they have requested.

Respectfully submitted this 1st day of September, 2016,

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Certificate of Service

I hereby certify that on this 1st day of September, 2016, a copy of the within Reply was sent to the Service List via electronic mail.

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