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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

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ELECTRIC DISTRIBUTION UTILITIES

Comments of the Coalition to Lower Energy Costs

to Staff Memorandum:

Gas Capacity Acquisitions by N.H. Electric Distribution Utilities

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Summary of Argument.

The Staff has invited parties to comment upon its Memorandum of July 10th covering various legal issues related to the acquisition of pipeline capacity by NH EDCs. CLEC provides the following comments and analysis.

The legal authority of NH EDCs as corporations organized under the general corporation statutes of NH, is independent of whether any particular action or investment can be recovered in rates. NH corporations have broad corporate authority to take any lawful action which they themselves deem is necessary and appropriate to the conduct of their business and the welfare of the corporation. This includes the power to make contracts they deem necessary and appropriate. They do not require specific statutory leave to enter into each type of contract and they are barred from none unless their charters, articles of association, or the laws under which they were organized impose a specific limitation or restriction. There are no provisions in NH law or in the charters or articles of incorporation of any NH EDC that restrict or limit their authority to enter into contracts for pipeline capacity. They possess such authority purely by virtue of their incorporation under NH law and there is no need to find any specific statutory grant of authority to supplement this general competence.

The Restructuring statutes impose no such limitation. Gas pipeline capacity does not constitute "generation services" nor does the acquisition of such by EDCs interfere or adversely affect "market competition" for generation services. To the contrary, this Commission has an explicit duty under the Restructuring statute to assert maximum state authority over the entire electric restructuring process. That includes taking and/or authorizing such actions as necessary to harness the power of competitive markets to "develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment." The evidence in this matter demonstrates that the current lack of pipeline capacity into NE has resulted in a use (or perhaps abuse) of market competition in a way that violates every single aspect of the goals the Commission is charged to exert maximum state authority to achieve.

Markets and the ways in which they harness competition come in all forms and are never independent of the background policy and regulatory decisions that often drive infrastructure investment. Certain parties have vested economic interests in the current state of public and private investment that prevents the harnessing of competition to meet Restructuring goals. Those legislative goals are not in these parties' financial interest to achieve. This does not change the Commission's obligation to assert maximum state authority over the restructuring process to assure that the forces of market competition are harnessed, not to serve the entrenched economic interests of certain parties but, instead, the goals the legislature has charged it with achieving.

A. The Authority to Contract is Distinct From the Issue of Rate Recovery.

In analyzing the question of whether NH EDCs have legal authority to enter into contracts for pipeline capacity, it is important to separate the issue of authority to act from the ability to recover the cost of any such action in rates set by the NH PUC. Under the general regulatory scheme in NH, EDCs have the authority to take a variety of actions that may or may not be recoverable in rates. They may pay excessive salaries to their employees or make contributions to charities of management's choosing, for example, but excessive salaries and management's charitable contributions are likely to be disallowed. Nonetheless, within broad parameters, utilities retain the authority to pay excessive salaries or make charitable contributions if they deem it in their shareholders' interest to do so despite any such rate disallowance. The question of what powers and authorities EDCs have as corporations under NH law, logically precedes the issue of rate recovery.

Recognizing this logical precedence does not diminish the potent, practical disincentive to lawful yet imprudent or non-recoverable activity rate regulation provides. Utilities, of their own accord, often seek assurance of rate treatment before taking action. We assume they will do so in this case before contracting for pipeline capacity. Absent such rate recovery, they are extremely unlikely to contract for pipeline capacity or to take any number of other lawful but financially significant actions. But this is a practical constraint upon, not a legal barrier to action.

B. The Corporate Authority of EDCs Under New Hampshire Law.

NH EDCs are corporations founded under the general corporation statutes of NH. They have the authority to engage in any lawful activity absent some specific prohibition in statute to the contrary. The powers of corporations under NH law are laid out in exceedingly broad terms. They are generally empowered to take any lawful action which they themselves deem is necessary and appropriate to the conduct of their business and the welfare of the corporation. This broad grant of authority is not an accidental feature of the statutory scheme or a symptom of legislative inattention. It is, rather, a basic underpinning of free enterprise. In the case of corporations affected with the public interest, there are sometimes specific statutory conditions or restrictions (like pre-approval requirements) placed on certain corporate actions. But these are explicit exceptions to an otherwise plenary discretion to take any lawful action the corporation deems "necessary and appropriate".

For this reason, there is no need to find specific language in NH law authorizing EDCs to purchase pipeline capacity. They have such authority unless there is some statutory prohibition, limitation or condition placed specifically on that action.

The corporate authorities of Unitil, Liberty and Public Service Company of New Hampshire, dba Eversource are grounded in Chapter 295, which states, in pertinent part;

> The rights, powers and duties set forth in this chapter are incident to all corporations legally constituted not excepted in RSA 295:1, subject to any

limitations or restrictions imposed by their charters or articles of association or the laws under which they were organized.

Section 295:6 provides;

> They may make contracts necessary and proper for the transaction of their authorized business, and no other. They shall be capable of binding themselves as sureties or guarantors for others, to the extent that such suretyship or guarantee may be necessary and proper for the transaction of their authorized business or serves to further their corporate purposes.

These broad corporate powers are an integral part of N.H.'s statutory and regulatory scheme and must be the starting point of any legal analysis of the corporate authority of NH EDCs. Absent "limitations or restrictions imposed by their charters or articles of association or the laws under which they were organized", each EDC may "make contracts necessary and proper for the transaction of their authorized business." There is nothing in the corporate history, charters or articles of association, or in the laws under which they were organized that impose any limitation or restriction on the authority of Eversource, Unitil or Liberty to enter into contracts for pipeline capacity should those corporations deem it necessary and proper for the transaction of their authorized business. To illustrate this, we review relevant portions of each of these EDC's articles of incorporation and history.

Unitil Energy Systems, Inc., was originally incorporated as the Concord Electric Company on May 31, 1901. Its "Articles of Association" state that corporation was formed "under and by virtue of the statutes of the state of New Hampshire." Article II states:

> The objects for which this corporation is established are (1) to acquire from the purchasers of all the property, rights, and franchises of Concord Land and Water Power Company under foreclosure sale held at Concord, New Hampshire, on March 6, 1901, all said property, rights, and franchises acquired by said purchasers at said sale; (2) as the successors and assigns of said purchasers, to be constituted under chapter 52 of the Laws of 1895 a corporation as of the date of said sale for all purposes, and to be vested with all the rights, powers, and privileges of said Concord Land and Water Power Company under its charter or the public laws; (3) to acquire, improve, and develop water-power on the Merrimack river in the city of Concord for hydraulic, electrical, and other purposes; (4) to generate, distribute, and deal in electric energy in all its forms; (5) to buy, own, sell, and deal in real estate and personal property in connection with the foregoing business; (6) to acquire, own and dispose of stocks and bonds in other corporations in connection with the various forms of business herein specified; and (7) to carry on such manufactures and enterprises in connection with all the foregoing purposes as may from time to time appear necessary or desirable to the corporation.

Unless there is some restriction or limitation in statute, it is the corporation which, in the first instance under the articles of incorporation, has authority to determine what contracts or other activities appear necessary and desirable to the corporation. The N.H. statutory scheme

does not seek to micro-manage corporate determinations with respect to what is needed to run or further the business objectives of corporations.

This is illustrated by a decision of the N.H. Supreme Court made in the same year Concord Electric Company (Unitil), was incorporated; 1901.[1] In that case Defendants alleged that a mortgage given by the utility was void "for want of authority on the part of the Concord Electric Company as a corporation to make it, the legislature never having given it express permission to mortgage any of its property, rights, or franchises, and the corporation itself being of such a public character that due performance of its obligations to the public" was argued to be "inconsistent with a voluntary disposition of its property, whether by way of a sale, mortgage, or other conveyance." The Supreme Court of New Hampshire disagreed:

> The Concord Electric Company was formed under the general law of the state. This provides that any five or more persons of lawful age may associate together by articles of agreement to form a corporation for certain specified purposes, and for "the carrying on of any lawful business except banking, life insurance, the making of contracts for the payment of money at a fixed date or upon the happening of some contingency, and the construction and maintenance of railroads." P. S., c. 147, s. 1. When the articles are recorded as required, and the charter fee, if any, is paid, the signers become a corporation, "and such corporation, its officers and stockholders, shall have all the rights and powers and be subject to all the duties and liabilities of other similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter." Ib., s. 4. Among the powers expressly granted to such corporations is the power to make "contracts necessary and proper for the transaction of their authorized business," and to "purchase, hold, and convey real and personal estate necessary and proper" for such purpose, not exceeding the amount authorized by their charter or by statute. P. S., c. 148, ss. 7, 8.[2]

The order also notes that the Concord Electric Company, in addition to its organization under the general law, availed itself of the authority conferred by chapter 52, Laws 1895, to become a corporation, by adopting the present name, fixing the capital stock at $400,000, and filing with the secretary of state the certificate required by that chapter.

We will find the same general grants of authority are applicable to both Liberty and Eversource.

Liberty Utilities (Granite State Electric) Corp. was originally incorporated as Grafton County Electric Light & Power Co. on September 9, 1912. Its "Articles of Association" state that corporation was formed "under the provisions of Chapter 147 of the Public Statutes of New Hampshire." Article II states in pertinent part:

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[1] At the time of its formation, the applicable New Hampshire laws governing corporate powers and authority were found in Chapters 147 and 148.

[2] AMERICAN LOAN TRUST CO. a. v. GENERAL ELECTRIC CO., 71 N.H. 192, 199-200 (N.H. 1901) (emphasis added).

> The objects for which this corporation is established are (1) to acquire the property, rights and franchises of the Mascoma Electric Light & Gas Company. . . (2) to generate, 'manufacture and distribute electricity and gas for lighting, heating, power or mechanical purposes, in Grafton County, New Hampshire, in Windsor County Vermont, or in any other locality in which the corporation may determine to carry on its business; (3) to acquire, hold and dispose of all such real estate, interests in real estate and personal property in connection with the foregoing objects, as may be necessary or convenient in the carrying on of said business; (4) to acquire, own and dispose of stocks, bonds and other securities of other corporations of a similar nature, including water & power companies; (5) to construct plants and works and to do whatever may be necessary for the generation, manufacture, utilization and disposition of by-products connected with the foregoing business; and (6) to carry on such manufactures and enterprises in connection with all the foregoing purposes as may, from time to time, be deemed necessary or desirable by the corporation.
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> (emphasis added)

With respect to Eversource, Public Service Company of New Hampshire , dba Eversource was originally incorporated on August 16, 1926. Its "Articles of Agreement" state that corporation was "under the provisions of Chapter 225 of the Public Laws of the State of New Hampshire known as the Business Corporation Act." Article II states in pertinent part:

> The objects for which this corporation is established are to carry on the business of any electric utility within the state of New Hampshire or elsewhere, and to transact any and all lawful business for which corporations may be incorporated under New Hampshire revised Statutes Annotated Chapter 293-A.[3]

Similarly, original bylaws of Public Service Company of New Hampshire provide that its Board of Directors "may exercise all such powers of the corporation, and do all such lawful acts and things as are not by law, the Articles of Agreement or by these By-Laws required to be exercised or done by the incorporators or stockholders." (Article V, Section 3) The By-Laws also expressly give the Board of Directors powers including "To purchase, or otherwise acquire for the corporation, any property, right or privilege which the corporation is authorized to acquire at such price or consideration, and generally on such terms or conditions as it shall think fit."

Looking at these broad general powers; powers and authorities common to all NH corporations; it is difficult to argue that these corporations do not have basic authority to enter into contracts for pipeline capacity if they deem it necessary and appropriate to the conduct of their authorized business. This basic, general authority may only be overridden by some specific

[3] Public Service Company of New Hampshire amended its Articles of Incorporation in 1991 to reflect the reorganization of the company in light of the company's bankruptcy and discharge. The corporate powers, however, remain as set forth in the original Articles of Agreement "To carry on the business of an electric utility within the state of New Hampshire or elsewhere, and to transact any and all lawful business for which corporations may be incorporated under New Hampshire Revised Statutes Annotated Chapter 293-A."

statutory limitation or prohibition. We emphasize again, that this question is independent of the issue of rate recovery. There are any number of lawful investments or actions an EDC may have authority to make or take that the Commission may judge imprudent or otherwise find that shareholders, rather than ratepayers, should bear the cost of.

We turn next to the statutory scheme in search of any express prohibition or limitation on the general authority of NH EDCs to enter into such contracts.

C. The Restructuring Act Does Not Restrict or Limit the Authority of EDCs to Contract for Pipeline Capacity.

There is no explicit prohibition which forecloses EDCs from purchasing pipeline capacity in the New Hampshire statutory scheme. The issue is whether such prohibition should be implied from the general principles of Restructuring, or from other portions of the statutory scheme.

The Staff memorandum correctly focuses on the general principles enunciated for restructuring in RSA 374F:3. CLEC believes that the Staff has cited most of the relevant portions of this statute for analysis as follows:

> Reliable electricity service must be maintained while ensuring public health, safety, and quality of life.[4]
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> Generation 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 foreseeable future. However, distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs.[5]
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> • • •
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> A non bypassable and competitively neutral system benefits charge applied to the use of the distribution system may be used to fund public benefits related to the provision of electricity. Such benefits, as approved by regulators, may include, but not necessarily be limited to, programs for low-income customers, energy efficiency programs, funding for the electric utility industry's share of commission expenses pursuant to RSA 363-A, support for research and development, and investment in commercialization strategies for new and beneficial technologies.[6]

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[4] New Hampshire Statutes, RSA-F:3, I
[5] New Hampshire Statutes, RSA 374-F:3, III
[6] New Hampshire Statutes, RSA 374-F:3, VI

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> New Hampshire should work with other New England and northeastern states to accomplish the goals of restructuring. Working with other regional states, New Hampshire should assert maximum state authority over the entire electric industry restructuring process.[7]

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> Continued environmental protection and long term environmental sustainability should be encouraged…As generation becomes deregulated, innovative market-driven approaches are preferred to regulatory controls to reduce adverse environmental impacts.[8]

CLEC believes that the information presented in this case establishes that, should it be determined a purchase of pipeline capacity by EDCs does not violate the general stricture that "Generation services" be subject to competition, the sections of the statute dealing with the maintenance of reliability, coordination with other states, environmental sustainability, and allowance for non-by-passable system benefits charges, provide ample policy rationale and procedural scope for New Hampshire to undertake the EDC contract proposals put forward in this case, either singly or in conjunction with other states. The legal issue is therefore a very narrow one; does the purchase of pipeline capacity by EDCs violate the injunction that "generation services" be "subject to market competition."

"Generation services" are not defined in New Hampshire statutes. The typical understanding of the phrase "generation services", however, would not include gas pipelines. Gas pipelines, as stand-alone investments, may be used by generators, or may be used by any other eligible customer under applicable tariffs. Although the intention of an EDC purchase would be to have increased gas pipelines *available* to generators in the market, that does not turn gas pipelines into generation. A gas pipeline in itself is not a generation resource of any type. At most, it is a component of basic infrastructure that may enable more reliable generator operations.

There are many types of infrastructure that enable the operation of generation resources that generators themselves are not required to bear the financial risk of ownership or development of. Transmission lines are also essential to generator operation, but are not considered generation resources. Internet and phone service, public roadways, sewer and water, and a host of other services too numerous to mention are not independently funded by each generator who seeks to use them and are not considered "generation services" because society or individual entrepreneurs make them "available" to generators. To the extent parties seek to argue that "unbundling" is an issue, that concern only applies to EDCs and only in the context of "generation services". There is no intent, and no possibility under the EDC plans as currently proposed for an EDC to "bundle" gas pipeline with particular generators, to require a particular generator to purchase pipeline or to make electric transmission service (the only statutorily valid

[7] New Hampshire Statutes, RSA 374-F:3, XII
[8] New Hampshire Statutes, RSA 374-F:3, VIII

concern) dependent upon the purchase or use of pipeline capacity. There may subsequently be rules established by FERC which require or further incent generators to purchase pipeline transportation capacity made available to the market by EDC contracts, but access would continue to be non-discriminatory and would not constitute a bundling of ownership between generation assets and pipeline capacity in a vertically integrated (EDC) utility structure. To the extent generators purchase such capacity and include its costs as part of their competitive bids to be recovered in the market, such pipeline capacity is still not thereby rendered "generation" or "generation service". In any event, ownership or control of gas pipeline capacity by generators in the competitive market is not a matter of interest to the restructuring statute.

Because 1.) pipeline capacity is not generation or generation services; and 2.) there will be no discrimination or restrictions on access to these non-generation assets when offered to the market, there is no direct conflict between 1) the requirement that generation services be subject to competition and 2) the purchase of pipeline capacity by New Hampshire EDCs.

The only question that remains is whether there is an indirect but adverse impact on the competitive market from EDCs owning pipeline capacity that outweighs the benefits to ratepayers such actions would provide. We emphasize, however, that once this stage of the analysis is reached the question is no longer one of legal authority of EDCs to take such action. Because there is no bar in statute to such action, EDCs have authority to contract for pipeline capacity and the Commission has the policy and procedural authority to allow rate recovery for such action if it finds such action to be just and reasonable and prudent. These are broad policy determinations as opposed to the preceding statutory interpretation exercise. Certainly in determining the prudence of such action the Commission needs to determine whether the purchase of pipeline capacity by EDCs would help or hinder the achievement of the goals the Restructuring legislation sought to harness competition to achieve. Upon review of the evidence presented in this matter regarding the current functioning of the markets, and in consideration of "the overall public policy goal of restructuring ", CLEC believes the Commission will be compelled to conclude that the purchase of pipeline capacity by EDCs as proposed in this matter is a necessary component in "harnessing the power of competitive markets" to meet the policy goals of Restructuring.

D. The Purchase of Pipeline Capacity by EDCs Would Further the Goals of Restructuring to Harness Competition to Benefit Ratepayers.

"Market competition", like generation services, is not defined by the Restructuring statute. That lack of definition is both understandable and unavoidable; market structures and competition take multiple forms. The history of the ISO-NE markets specifically and the electric industry generally has been one of continually changing both the markets and the role of competition within them, including the continual redefinition of the products competitors are expected to deliver.[9] Arguments the "market competition" implies a *specific* market structure,

[9] The most recent iteration, PI, is just one more case study that has had competitors up in arms complaining that the product they are *now* being asked to deliver has been revolutionized in some way they could not effectively compete to deliver or, conversely, in a manner that will harm "competition" (usually read as "them") or even more strongly, is inconsistent with "competitive principles" (usually read as, "the way we would prefer to do business"). There may indeed be sound arguments that "the way we would prefer to do business" is superior to a construct like PI, but the merits of those arguments depend upon whether one or another approach does a better job at harnessing

product definition, regulatory framework , presence or lack of public or private investment, all founder against these simple historical observations. The legislature clearly viewed the development of markets as an ongoing enterprise and charged the Commission to "assert maximum state authority over the entire electric restructuring process." That process continues and the charge remains the same.

While the statute does not define "market competition" as some specific set of market rules or regulations, it is entirely clear that the legislature sought to harness competition to deliver benefits to New Hampshire's citizens. In addition to the sections of the statute cited by the Staff (above) with respect to the obligation to insure health, safety and reliability, there was a broad overall goal sought in turning to competition. 374-F:1 states:

> Purpose. –
> I. The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. The overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services. (emphasis added)

It has become abundantly clear that the absence of sufficient pipeline capacity in New England is an infrastructure deficiency that has led to a failure to harness "the power of competitive markets" to achieve the main purpose of restructuring. It is obvious that development of "a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment" ***requires*** merchant generators to have access to increased pipeline capacity. Under the present market design and industry structure that requires generators to individually fund pipeline expansion on a 10-15 year firm contract basis but does not enable them to effectively recover those costs in the short term electric markets of ISO-NE, competition is not being, and cannot be harnessed to achieve the main purpose of Restructuring.

It is not an insight unique to this case that competition in any market can only be effective when access to a certain level of underlying infrastructure and services is available. Electric transmission, public highways and law enforcement are all examples. There would be no effective "competition" in the trucking industry if every trucking firm had to build its own roads to get to every customer.

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competitive forces to deliver desired outcomes (like reliability in the case of PI), not whether some grand, indefinable and practically indefensible "principle" of unfettered competition has been violated.

Nothing in the Restructuring law implies a prohibition on public or EDC investment in common infrastructure which may set the conditions in which generators compete. FERC's Open Access rules for pipelines mean that any investment by EDCs will be governed by non-discriminatory tariffs that provide access for all eligible customers. The availability of a non-discriminatory Open Access pipeline service may or may not enable certain competitors in the marketplace to flourish or cause others to fail, just as new transmission infrastructure may cause certain generators to flourish or fail. Public policy choices often generate winners and losers in competitive markets. Competitive markets must, and continually do, adjust to public policy. Publicly funded infrastructure or infrastructure funded by corporations such as utilities affected with the public interest is a common element in all post stone-age markets.

The current constrained gas infrastructure obviously benefits certain competitive parties who burn oil or coal, or who otherwise enjoy the profits generated by New England's relative economic disadvantage to neighboring regions. The availability of Open Access pipeline capacity to the market may create different winners and losers, but that policy decision should not be held hostage to the entrenched interest of particular competitive providers who find the failure of restructuring to harness competition effectively to be in their financial interest.

Respectfully submitted, this 10th day of August, 2015

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