THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

IR 15-124

ELECTRIC DISTRIBUTION UTILITIES

Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire

Comments of Tennessee Gas Pipeline Company, L.L.C.

on Staff Legal Memorandum

August 10, 2015

In a memorandum dated July 10, 2015 in this docket ("the Memorandum") Staff Attorney Alexander Speidel examined whether New Hampshire electric distribution companies ("EDCs") have authority under existing New Hampshire law to enter into contractual arrangements to acquire gas pipeline capacity to benefit their customers. Staff welcomed comments on the Memorandum and said they should be emailed to Mr. Speidel by August 10, 2015. Tennessee Gas Pipeline Company, L.L.C. ("TGP") offers the following comments on the Memorandum.

The Memorandum indicates that it is leaving aside the issue of federal preemption and that Staff is of the opinion that EDC participation in gas capacity acquisition should be voluntary, not mandated by the Commission, because it poses less of a litigation risk on preemption than a state-mandated program. The Memorandum also says that it is focusing on

potential legal issues the Commission would face in deciding whether to approve an EDC petition to acquire gas capacity and to recover related costs. TGP agrees that this was an appropriate focus for the Memorandum.

Staff begins its analysis by reviewing whether the electric utility restructuring statute, RSA 374-F, prohibits an EDC from undertaking a gas capacity acquisition and reviews the restructuring policy principles in the law. One of those principles, as Staff notes, is that generation services should be subject to competition and minimal regulation and at least functionally separated from transmission and distribution, but that distribution companies are not precluded from owning small scale distribution resources. According to Staff, this principle must be read in conjunction with the principle that reliable electric service must be maintained and the authorization for a nonbypassable system benefits charge that is, by specific wording in the law, "not necessarily limited to" the programs listed in the law (low income, energy efficiency, PUC assessment, etc.). While TGP agrees that it is important to focus on the restructuring principles it believes that the acquisition of gas capacity and subsequent sale of that capacity to electric generators through a competitive, arms-length process would not put an EDC in the position of owning generation, nor would it compromise the provision that generation services be subject to competition and minimal regulation. Thus while it is important for the Commission to consider these issues carefully TGP does not believe this principle would be in conflict with a gas capacity acquisition program.

As the Memorandum notes, the restructuring law requires that New Hampshire work with other New England states to accomplish the goals of restructuring and to assert the maximum state authority over the restructuring process. One of the policy principles in the restructuring law includes a reference to the preference for innovative market-driven approaches to reduce

adverse environmental impacts. TGP submits that a gas capacity acquisition program done in conjunction with other New England states would satisfy these goals. By encouraging the use of natural gas fired facilities instead of other fossil fired facilities, the gas acquisition program would be consistent with the restructuring principle noted above in that it would reduce adverse environmental impacts associated with combusting oil and coal to generate electricity.

The Memorandum goes on to note that because an EDC proposal to acquire capacity could enhance power system reliability, provide public benefits and serve as an element of regional cooperation to reduce capacity constraints, the Commission could conclude that the restructuring law does not preclude such a purchase and that it would not violate the principle of functional separation of generation and distribution. Citing the default service provision in the restructuring law (which gives the Commission authority to approve alternative means of providing default service[1]) the Memorandum notes that if the Commission were to determine that a gas capacity acquisition program was designed to benefit default service customers by providing lower costs, and that it was therefore in the public interest, such a program could withstand a legal challenge under the restructuring law. TGP agrees with this analysis.

The Memorandum also analyzed the EDCs' authority under RSA 374-A, a law originally enacted in 1975, authorizing electric utilities to participate in electric power facilities. As the Memorandum notes, this law, which includes the phrase "[n]otwithstanding any contrary provision of a general or special law", gives EDCs the power to share costs of and participate in electric generation or portions thereof, and that contracting for gas capacity would constitute

[1] RSA 374-F:3, V(3) states: "Notwithstanding any provision of subparagraphs (b) and (c), as competitive markets develop, the commission may approve alternative means of providing transition or default services which are designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, if the commission determines such means to be in the public interest."

such permissible sharing of costs. TGP agrees with the Memorandum's assertion that because this law was not repealed when the restructuring law was enacted, the Commission may rely on this as authority for the EDCs to enter into such contracts. The Memorandum also noted the section of law, RSA 374:57,[2] that gives EDCs the authority to enter into an agreement to purchase capacity and energy. Because this law does not define capacity or energy, it is fair to interpret it to allow the purchase of either gas or electric capacity. This law goes on to say that the Commission has the authority to disallow amounts paid by an EDC under such an agreement if it was unreasonable and not in the public interest. While the Memorandum did not say this, TGP suggests that authorizing the Commission to disallow recovery impliedly authorizes the Commission to allow an EDC to recover such amounts if it were reasonable and in the public interest. See *Blair v. Manchester Water Works*, 103 N.H. 505, 506 (1961); see also *In re Pinetree Power, Inc.* 152 N.H. 92 (2005).

In addressing the issue of whether EDCs could recover the costs associated with gas capacity acquisition in rates, the Memorandum notes the provision in RSA 374-A:6 that requires that the Commission include in the rate base any investments made under RSA 374-A and says that a recurring expense for gas capacity reservation could qualify as an investment for inclusion in rate base. The Memorandum also cites RSA 374:2, which provides that all charges by a public utility must be just and reasonable and not more than allowed by law and the Commission. TGP concurs with the Staff's reading of these statutes and supports the Memorandum's statement that the Commission has broad discretion in the fixing of rates. While

[2] This law states: "Each 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 shall furnish a copy of the agreement to the commission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest."

the Memorandum also notes the New Hampshire Supreme Court's decision in *Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332, 354 (1979)[3] holding that property that is not devoted to the production and delivery of energy to the consumer can not be included in rate base, it concludes that reliance on the default service authority in RSA 374-F:3, V(e) noted above could justify the gas capacity purchase as being in the public interest and justifying cost recovery. As the Memorandum notes, such gas capacity purchases would not just benefit default service customers, they would also benefit customers taking supply from competitive suppliers in that the capacity purchases help to lower electricity prices more generally in New England. Purchasing capacity under this program would clearly be devoted to the production and delivery of energy to consumers and thus not inconsistent with the provision in the *Legislative Utility Consumers' Council* decision noted above. TGP agrees that the Commission's authority to approve alternative means of providing default service and mitigate against price volatility gives it broad authority when it comes to the provision of default service (RSA 374-F:3, V(e)), and such authority includes participation in the gas acquisition program.

The Memorandum also cites to RSA 374:3-a, which gives the Commission authority to approve alternative forms of regulation as long as they result in just and reasonable rates and provide the utility an opportunity to realize a reasonable return on its investment. TGP submits that this is yet another statute that adds to the menu of authorities the EDCs and the Commission

[3] In this case the Court upheld the Commission's decision to allow inclusion in rate base of charges for construction work in progress, recognizing "the wide regulatory discretion that the legislature delegated to the commission in RSA ch. 378…" 119 N.H. at 347. The Court determined that the company's appliance business was not devoted to the production and delivery of energy to consumers and therefore should not be included in rate base because that business had been terminated and was therefore a nonrecurring investment. The Court determined, however, that the error of including it did not require reversal or remand. This case contains a number of references to the breadth of the Commission's authority: "The statutory scheme for public utility regulation mandated by the legislature in RSA ch. 378 clearly expresses an intent that the commission be afforded wide parameters within which to exercise its judgment." 119 N.H. at 352.

has available to justify review and approval of an EDC's acquisition of gas capacity as a means of addressing deficiencies in the wholesale market that result in price spikes for EDC customers.

TGP agrees with Staff's analysis of the statutory authority possessed by the Commission and the EDCs under New Hampshire law. In addition to the statutes which the Memorandum cites to support the authority of EDCs and the Commission to undertake this program, TGP would point to the provision in the purpose clause of the restructuring law that identifies the "development of competitive markets for wholesale and retail electricity services" as being "key elements in a restructured industry…" RSA 374-F:1, I. There is also the provision in the restructuring law that requires EDCs to "work to reduce rates for all customers." RSA 374-F:3, XI. Under RSA 374:26 the Commission has broad authority to prescribe terms and conditions that it considers to be in the public interest for the exercise of being a public utility. Moreover, under RSA 374-F:8 the Commission has the duty and responsibility to advance the interests of New Hampshire with respect to wholesale electric issues. Finally, there is the recognition of the Legislature articulated in RSA 369:1, II that the transition to competitive markets for electricity is a "complex endeavor" that "requires the development of creative and flexible mechanisms…"

In support of Staff's conclusion that the Commission has broad regulatory authority and broad discretion to act in the public interest, TGP points to a long line of New Hampshire Supreme Court cases that recognize the Commission's broad authority. See, for example, *Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306, 308 (1966); *Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539 (1980); *Harry K. Shepard, Inc. v. State*, 115 N.H. 184, 185 (1975).

The Memorandum laid out a list of preliminary criteria for the assessment of whether a proposal by an EDC for the acquisition of gas capacity and recovery of related costs would be in

the public interest and result in just and reasonable rates. Those criteria included: there must be a clear, verifiable cost-benefit advantage for EDC customers, which could include a focus solely on default service customers or could include all EDC customers; gas capacity arrangements must be done at arm's length in compliance with affiliate transaction rules, through an RFP selection process to insure compliance with least cost and reliability criteria; there must be a demonstration that such an arrangement would not result in undue harm to competitive markets; and there must be a demonstration that the arrangement is unlikely to result in stranded or deferred costs for customers.

TGP wants to take this opportunity to commend Staff for laying out some preliminary criteria for the Commission's evaluation of an EDC petition for approval of acquisition of gas capacity resources for provision to merchant generators. TGP agrees that providing such criteria to EDCs in advance will assist them in structuring this program and provide all stakeholders with guidance on how the process should be conducted and evaluated by the Commission. TGP believes that the criteria Staff has listed, which the Memorandum indicated are "subject to future expansion", are a good foundation for a further discussion on the parameters of this program. TGP plans to review the anticipated September Staff report with regard to this issue and provide more detailed comments in its October response.

TGP appreciates the opportunity to provide comments on the Memorandum and looks forward to continuing to work with Staff and the parties on the important issues raised by this docket.