

**BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

DE 16-241

Coalition to Lower Energy Costs Brief on the Legality of Eversource's Proposal

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I. Introduction and Background:

On February 18, 2016, Eversource Energy (“Eversource”) filed its *“Petition for Approval of Gas Infrastructure Contract between Public Service Company of New Hampshire d/b/a Eversource Energy and Algonquin Gas Transmission, LLC”* (“Eversource Petition”) in Docket DE 16-241, seeking approval of : (1) a 20-year Precedent Agreement (“ANE Contract”) with Algonquin Gas Transmission, LLC for firm gas transportation and storage services on the Access Northeast project (“ANE Project”), for use by electric generators in ISO New England; (2) an Electric Reliability Service Program (“ERSP”) to set parameters for release of capacity and sale of LNG supply available under the ANE Contract; and (3) a Long-Term Gas Transportation and Storage Contract (“LGTSC”) tariff allowing recovery of ANE Contract costs. To carry out the terms of the ERSP, Eversource would release natural gas capacity to the electric market in accordance with an Algonquin Electric Reliability Service (“ERS”) tariff subject to FERC approval.

The ANE Project is jointly owned by Spectra Energy Corporation (40%), Eversource (40%), and National Grid (20%). Spectra Energy Corporation wholly owns Algonquin Gas Transmission, LLC, the operator of the Algonquin Pipeline crossing Connecticut and Massachusetts and connecting to other pipelines in Dracut, Massachusetts.

Eversource specifically seeks approval for purchasing 37,000 MMBtu/d of pipeline capacity and 29,600 MMBtu/d of LNG storage capacity, with such total quantity representing its New Hampshire electric load-ratio share of the ANE project. Eversource alleges the ANE Project will provide 900,000 MMBtu/d of natural gas transportation and storage deliverability, comprised of: (1) a 500,000 MMBtu/d expansion of the Algonquin Pipeline occurring in annual phases from 2018 to 2020, and (2) a 400,000 MMBtu/d greenfield LNG storage facility in

Acushnet, Massachusetts, available in 2021. Eversource avers the LNG facility will provide 6,400,000 MMBtu of storage capacity, with 400,000 MMBtu/d withdrawal capability and up to 54,000 MMBtu/d liquefaction capability. Eversource alleges that liquefaction will occur during shoulder months, meaning at the maximum withdrawal rate, the LNG facility could provide 16 days' worth of supply during each of winter and summer beginning in 2021. Thus, the ANE Project would provide 900,000 MMBtu/d of transportation and storage deliverability for at most 16 winter days beginning in 2021 and 500,000 MMBtu/d of year-round transportation after 2020, with the high and volatile energy costs of winter being a prime concern of the Commission.

Eversource claims to have exclusively chosen the ANE Project through an open and transparent competitive evaluation and selection process, purportedly following the standards set forth in the Staff Memorandum (July 10, 2015), Staff Report (Sept. 15, 2015), and Commission Order No. 25,860 (Jan. 19, 2016) in Docket IR 15-124.¹ Eversource selected the ANE Project after its electric affiliates, along with National Grid, jointly issued a Massachusetts RFP on October 23, 2016 that received seven bids. Eversource's Massachusetts electric affiliates "evaluated the bids with assistance of an unaffiliated third-party, Sussex Advisors, in a three-step process."² In the last step, the two highest-scoring projects, the ANE Project and Tennessee Gas Pipeline Company, L.L.C.'s Northeast Energy Direct project ("NED Project"), were compared, with Sussex Advisors allegedly identifying the ANE Project "as the option with the highest capability to impact the reliability and pricing issues affecting the New England region."³

On March 3, 2016, the New Hampshire Public Utilities Commission ("Commission") issued an Order of Notice on the Eversource Petition setting forth the parameters of a two-phase

¹ Eversource Petition at ¶ 9.

² Eversource Petition at ¶ 14.

³ Eversource Petition at ¶ 17-18.

proceeding.⁴ The Commission would first determine the legality of Eversource's proposed contracts,⁵ and consider the following legal issues:

whether Eversource has the corporate authority to enter into the Access Northeast Contract under RSA Chapter 374-A and RSA 374:57; whether Eversource's entering into the Access Northeast Contract, development of the ERSP, and assessment of the LGTSC would violate the Restructuring Principles of RSA Chapter 374-F, or any other New Hampshire law, or any federal law, including the Federal Power Act; whether the LGTSC assessment would be permitted under RSA Chapter 374-A, RSA 374:57, and RSA Chapter 378, and Commission precedential standards for ratemaking, as just, reasonable and in the public interest; whether the RFP process presented by Eversource in support of its selection of the Access Northeast Contract comports with the requirements of N.H. Code Admin. Rules Puc 2100, Order No. 25,860, and the standards of prudence applied by the Commission for such contracting; whether the assertions made by Eversource regarding expected benefits and costs of its participation in the Access Northeast Contract are supported by the evidence, including evidence of economic, engineering, and environmental costs, benefits, and feasibility; and whether ERSP and companion FERC tariff filing comport with relevant federal law, including the Natural Gas Act, and whether FERC approval should be a condition precedent for the enactment of any Commission approval.⁶

Coalition to Lower Energy Costs ("CLEC") has been granted intervention in this proceeding and herein offers its analysis of the legality of Eversource's proposal and comments on various legal issues presented above.

II. Legal Issues:

A. Summary of Argument

CLEC appreciates the substantial effort of Staff in Docket IR 15-124 and generally supports the Staff's analysis of legal issues in its July 10, 2015 legal memorandum and September 15, 2015 Staff Report regarding New Hampshire EDC authority to contract for pipeline capacity.

CLEC further notes that New Hampshire EDCs have broad corporate authority to enter contracts independent of whether such contract costs can be recovered in rates, reducing the

⁴ Order of Notice DE 16-241, at 4 (March 24, 2016).

⁵ Order of Notice DE 16-241, at 4 (March 24, 2016).

⁶ Order of Notice DE 16-241, at 3-4 (March 24, 2016).

issue of legal authority to its very core. Unless a New Hampshire corporation's charter, articles of incorporation, or the laws under which it is organized and operates impose a specific limitation, a corporation may take any lawful action which it deems necessary and proper to the conduct of its business. In this instance, no specific limitation prevents Eversource from contracting for natural gas pipeline capacity, and particularly not under the New Hampshire Electric Restructuring Statute, RSA Chapter 374-F ("Restructuring Act").

The Restructuring Act does not expressly prohibit EDCs from acquiring pipeline capacity and cannot be reasonably interpreted to imply such prohibition. The Restructuring Act must be interpreted and implemented through the lens of its ultimate aim: to reduce electric costs. A "competitive market" is merely the means to achieve lower electricity costs, and the means cannot jeopardize reliability or cause unnecessary environmental impacts. The "market" is failing on all accounts and must be harnessed to lower electric rates to just and reasonable levels. Given the market's failure, it would be unreasonable to read an implicit prohibition into the Restructuring Act when EDC acquisition of pipeline capacity will also advance other Restructuring Policy Principles regarding electric reliability and quality of life, market competition and minimal economic regulation, public benefits, regional cooperation, and environmental protection.

Given the ongoing market failure, which impedes the Restructuring Act's purpose of lowering electricity costs, CLEC urges the Commission to interpret its broad regulatory authority to find that Eversource not only should, but must, acquire pipeline capacity in these specific circumstances. Moreover, the Commission has the authority to require Eversource to act or to otherwise condition its approval of pipeline acquisition on Eversource proposing to act in a

manner that the Commission determines to be just and reasonable, prudent, wholly in the public interest, and sufficient to lower electricity costs adequately for New Hampshire ratepayers.

CLEC recommends the Commission find Eversource's evaluation and selection of the ANE Project to be entirely deficient, proven by both the sequence and nature of Eversource's own actions. Eversource attempted to use its RFP designed for Massachusetts to comply with a directive that had yet to be issued by this Commission. This is patently obvious given that Eversource admits to taking part in the *evaluation* of bids, in direct contravention to the Commission's later mandate that it not. CLEC strongly urges the Commission to adopt Staff's proposal to disallow Eversource's selection process, and to sanction an evaluation of bids by Staff fully independent of Eversource's influence. CLEC believes Staff should evaluate bids after first determining the total "need" of New Hampshire, a determination that must be colored by the fact that the Commission is the ultimate "arbiter" between consumers' interest in the lowest reasonable electricity costs and Eversource's various corporate interests, including in developing solely its own projects, like the ANE Project and Northern Pass. While Eversource's self-dealing, in defining a "need" limited to the size of its own project and then selecting only its own project, thus far may have contributed to the decision by Kinder Morgan to suspend development of its NED Project, the Commission has an ongoing duty to ensure that Eversource fairly considers all other bids, and acts in accordance with the public interest, not purely Eversource's corporate interest.

B. Eversource has Broad Corporate Authority under New Hampshire Law to Enter Any Contract not Expressly Prohibited.

Eversource is a corporation founded under the general corporation statutes of New Hampshire. The powers of corporations under New Hampshire law are laid out in exceedingly broad terms in RSA Chapter 295. Section 295:2 states:

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 that corporations:

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 statutory provisions authorize Eversource to engage in any lawful activity absent a specific legal limitation or restriction. Broad authority is not an accidental feature of the statutory scheme or a symptom of legislative inattention; it is the basic underpinning of free enterprise. In the case of corporations affected with the public interest, like Eversource, there are specific statutory restrictions (e.g., pre-approval requirements) placed on certain corporate actions, but these are explicit exceptions to the otherwise plenary discretion to take any lawful action the corporation deems “necessary and proper.”

Nothing in Eversource’s history, corporate documentation, or the laws under which it was organized imposes any limitation or restriction on Eversource’s “necessary and proper” authority to enter into contracts for pipeline capacity. Public Service Company of New Hampshire (“PSNH”), d/b/a Eversource, was originally incorporated on August 16, 1926 “under the provisions of Chapter 225 of the Public Laws of the State of New Hampshire known as the Business Corporation Law.⁷ At that time, the “objects” of the corporation included:

“To acquire by construction, purchase or otherwise, and to maintain and operate any plant or property for the production, sale and distribution of electrical energy, gas, ice, water, heat or light, and to acquire by construction, purchase or otherwise, and/or to maintain and operate any other property or business, and specifically, but without limiting the generality of the foregoing, to acquire, use and enjoy the properties, rights

⁷ State of New Hampshire, Record of Organization of Public Service Company of New Hampshire, *Articles of Agreement of Public Service Company of New Hampshire* (1926).

and franchises of existing public utilities, and to carry on the business purpose of a public utility in the State of New Hampshire and/or elsewhere[;]”⁸

“To acquire in any lawful manner, to own and/or hold ...property both real and personal, of any kind[;]”⁹ and

“To enter into, make, perform and carry out contracts of any kind for any lawful purpose without limit as to amount, with any person, firm, association, corporation, municipality, county, state, territory or government...[.]”¹⁰

The most recently recorded Amended Articles of Incorporation of PSNH set forth “Corporate Powers” as follows:

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.¹¹

Similarly, the original By-Laws of PSNH 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.”¹² The By-Laws expressly give the Board of Directors powers including “[t]o 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.”¹³

In sum, Eversource has broad corporate authority to enter into contracts for pipeline capacity as necessary and proper to the conduct of its authorized business. This general authority may only be overridden by a specific legal limitation or restriction, which does not exist in Eversource’s corporate documents or the corporate statutes under which Eversource was

⁸ *Id.* at Art. II(1) (1926).

⁹ *Id.* at Art. II(2)

¹⁰ *Id.* at Art. II(4).

¹¹ State of New Hampshire, Record of Organization of Public Service Company of New Hampshire, *Amended Articles of Agreement of Public Service Company of New Hampshire*, at Art. II (1991).

¹² By-Laws of Public Service Company of New Hampshire, Art. V, Sec. 3.

¹³ *Id.* at Sec. 3 (3).

organized. As explained below, no specific limitation or restriction exists in the public utility laws under which Eversource operates, including the Restructuring Act. Eversource's filing of a proposal in this docket is irrefutable evidence that it does in fact deem the ANE Contract necessary and proper for its transaction of authorized business. Thus, Eversource has corporate authority to contract for pipeline capacity.

This conclusion is bolstered by a decision of the New Hampshire Supreme Court regarding a challenge to the Concord Electric Company's (now Unitil) grant of a mortgage. In *American Loan Trust Co. v. General Electric Co.*, the challengers alleged that the mortgage 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 "inconsistent with a voluntary disposition of its property... ." ¹⁴ The Court disagreed, stating:

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. ¹⁵

Eversource has the same "necessary and proper" authority to enter contracts today that the Concord Electric Company did when it was incorporated in 1901.

¹⁴ *American Loan Trust Co. v. General Electric Co.*, 71 N.H. 192, 195 (1901).

¹⁵ *Id.* at 199-200 (emphasis added).

CLEC emphasizes again that Eversource's legal authority to contract for pipeline capacity is general corporate authority independent of the issues particular to the regulation of public utilities, including rate recovery. There are many lawful actions that an EDC may have the corporate authority to take but which the Commission may judge unreasonable, imprudent, or not in the public interest. The Commission may also find that the financial liability for any utility action should be fairly allocated to shareholders, not ratepayers. This is part of utility regulation, not general corporate regulation. CLEC also emphasizes that its support for finding that Eversource has the legal authority to contract for pipeline capacity is not CLEC's endorsement of Eversource's specific proposal as it relates to being reasonable, prudent, in the public interest, and otherwise sufficient.

C. New Hampshire Law Does Not Limit the Authority of Eversource to Contract for Pipeline Capacity and Requires the Commission to Approve Eversource's Authority to Purchase Pipeline Capacity.

There is no explicit prohibition in the New Hampshire statutory scheme for regulating public utilities which forecloses EDCs from purchasing pipeline capacity. Neither is there an explicit grant of authority for EDCs to purchase pipeline capacity. The issue is whether such prohibition or grant should be implied from the general principles of the Restructuring Act or other portions of the statutory scheme. CLEC agrees with the Staff that Chapter 374-F can be reasonably read to allow New Hampshire EDCs to acquire gas pipeline capacity for ultimate use by electric generators because such an arrangement does not conflict with any particular Restructuring Policy Principle and will foster achievement of the overall goals of the Restructuring Policy Principles when they are read in harmony. Moreover, as colored by the stated purpose of restructuring, "to reduce costs for all consumers of electricity by harnessing the

power of competitive markets,”¹⁶ CLEC believes that it may be unreasonable for the Commission to interpret the Restructuring Act as implicitly precluding Eversource’s proposal, especially given the Commission’s recognition of the “cost and price volatility issues currently affecting wholesale electricity markets in New Hampshire”¹⁷ and universally attributed to gas pipeline constraints.

The primary purpose of the Restructuring Act is as follows:

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.¹⁸

This is the lens through which all interpretation and implementation of the Restructuring Act must be done. A “competitive market” is not the aim of restructuring; it is merely the legislatively defined means to achieve reduced costs for electricity consumers. Safe and reliable electric service is not restructuring’s objective either; rather, safe and reliable electric service is an independent standard which must not be compromised by the “competitive market.” Finally, restructuring is not designed to protect the environment while keeping electricity costs as low as possible; rather, it is designed to reduce electricity costs with minimum adverse environmental impacts.

Those who argue that Eversource’s proposal violates the letter and spirit and the Restructuring Act because it is a “government subsidy” that is “interfering” with the competitive market cannot see the forest for the trees. The “free market” has recently produced the highest

¹⁶ New Hampshire Statutes, RSA 374-F:1.

¹⁷ Order of Notice IR 15-124, at 1.

¹⁸ New Hampshire Statutes, RSA 374-F:1, I. (emphasis added).

and most volatile electricity prices in the nation; the region's least inefficient, highest cost, and most polluting coal- and oil-fired generators are back in the "market" again; the Winter Reliability Program oil subsidy has been approved by FERC through at least 2018 to ensure the lights stay on; and emissions are higher than they could be, and rising, because of insufficient pipeline capacity. The means have failed to achieve the ends by any measure, while jeopardizing safe and reliable electric service and reversing environmental progress. Rather than abandoning the competitive market as the means to lower electric costs, however, CLEC urges that the Commission use the Restructuring Act to fix the recognized market failure and appropriately "harness the power of competitive markets" to lower electricity costs by finding that Eversource can and must purchase pipeline capacity. Today, pipeline capacity is as essential as poles and wires to delivering low-cost electricity. In the future, it will be even more important, as renewable energy is increasingly integrated, and less efficient oil and coal units are displaced.

The "interdependent policy principles" enumerated in 374-F:3 "are intended to guide the New Hampshire public utilities commission ... in regulating a restructured electric utility industry."¹⁹ These guideposts must be considered together, harmoniously, with the ultimate goal of restructuring in mind: reducing electric costs. As such, they must be interpreted when ambiguous to effectuate that purpose. If, for example, a specific Restructuring Policy Principle can be interpreted to reduce costs to electric ratepayers, it would be unreasonable to interpret it otherwise. Of course the burden of proving that electric costs will actually be reduced is one that must be met with sufficient evidence and subject to the Commission's best judgment concerning an uncertain future.

Under this analytical framework, CLEC believes the Staff's July 10, 2015 Memorandum in IR 15-124 correctly focuses on various Restructuring Policy Principles and reasonably

¹⁹ New Hampshire Statutes, RSA 374-F:1, III.

concludes that Eversource's proposal directly conflicts with none of them. Moreover, the context provided by all of the Restructuring Policy Principles supports a reasonable interpretation that Eversource may contract for pipeline capacity as a means to lower electricity costs.

Relevant Restructuring Policy Principles include:

- Reliable electricity service must be maintained while ensuring public health, safety, and quality of life.²⁰
- 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.²¹
- 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.²²
- 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.²³
- 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.²⁴

The major legal issue arising from these Restructuring Policy Principles appears to be quite narrow: does the purchase of pipeline capacity by Eversource violate the Restructuring Policy

²⁰ New Hampshire Statutes, RSA 374-F:3, I

²¹ New Hampshire Statutes, RSA 374-F:3, III

²² New Hampshire Statutes, RSA 374-F:3, VI

²³ New Hampshire Statutes, RSA 374-F:3, XII

²⁴ New Hampshire Statutes, RSA 374-F:3, VIII

Principle condition that “generation services should be subject to market competition and minimal economic regulation?”

The term “generation services” is not defined, but the common use of the phrase would not include gas pipeline capacity. 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 and efficient generator operations. Gas pipelines, as stand-alone investments, may be used by generators or any other eligible customer under applicable tariffs. Eversource’s intention to make increased gas pipeline capacity *available* to generators in the market does not turn an investment in gas pipeline capacity into “generation service.”

There are many types of infrastructure that enable the operation of generators for which generators themselves are not required to bear the financial risk of ownership or development. Transmission lines are essential to generator operation, but are not considered generation resources or “generation service.” Internet and phone service, public roadways, sewer and water, and a host of other services are not independently funded by each generator who seeks to use them and are not made “generation services” simply because society or individual entrepreneurs make them “available” to generators.

Eversource does not propose to “bundle” gas pipeline capacity with particular generators and their generation services, i.e., production and sale of electricity. Neither does Eversource propose to require generators to purchase or use natural gas capacity as a condition to receiving necessary transmission service. 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 pipeline 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 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 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 Act. Because pipeline capacity is not “generation service” and there will be no discrimination on access to pipeline capacity when offered to the market, there is no direct conflict between the Restructuring Policy Principle that generation services be subject to competition and Eversource’s proposal to purchase of pipeline capacity to be made available to generators.

“Market competition” is similarly undefined by the Restructuring Act. That lack of definition is both understandable and unavoidable; market structures and competition are constantly evolving. The history of the ISO New England markets specifically and the electric industry generally has been one of continual evolution both in terms of defining the parameters within which the market operates and defining role of competition within the market, including the continual redefinition of the “products” competitors are expected to deliver. Arguments that “market competition” implies a specific market structure, product definition, regulatory framework, or the presence or absence 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.”²⁵ That process continues and the charge remains the same. The only certainty today is that the market, as currently defined, has failed to deliver reduced

²⁵ New Hampshire Statutes, RSA 374-F:3, XIII.

costs to electric ratepayers, while at the same time jeopardizing safe and reliable electric service and certainly not while minimizing environmental impact.

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”²⁶ 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”²⁷ 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 10-20 year firm contract basis, but does not enable them to effectively recover those costs in the short term wholesale electric markets, the competition sought to be achieved among generators of different technologies cannot be harnessed to lower electricity costs.

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 reach every customer.

Nothing in the Restructuring Act 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-

²⁶ New Hampshire Statutes, RSA 374-F:1, I.

²⁷ Id.

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 consumers through corporations such as utilities affected with the public interest is a common element in all post stone-age markets.

Currently constrained natural gas infrastructure obviously benefits certain competitive generators that burn oil, coal, or LNG, or that 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 interests of particular competitive providers who find the failure of restructuring to harness competition to be in their financial interest.

The question now is not whether allowing Eversource to purchase pipeline capacity will indirectly adversely affect competition itself, but rather whether allowing Eversource to purchase pipeline capacity is a reasonable or necessary way to correct a known market failure, or "harness competition," to effectuate the Restructuring Act's goal of reducing electric costs. CLEC emphasizes, 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 to be made by the

Commission. 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 goal the Restructuring Act sought to achieve by harnessing competition. Upon review of the evidence presented in this matter regarding the current functioning of the market, and in consideration of “the overall public policy goal of restructuring,” CLEC believes the Commission is 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 the Restructuring Act.

D. Given the Opportunity to Rectify New Hampshire’s High Energy Costs, the Regulatory Scheme Applicable to Utilities Supports the View that Utilities are Obligated to Purchase Pipeline Capacity. The Commission has the Commensurate Duty to Require the Utilities to Do So.

As discussed above and as the various studies and analyses referenced in the Staff Report in Docket 15-124 demonstrate, the structure of the electric power industry in New England creates significant dependency on natural gas for electricity. Constrained natural gas pipeline capacity creates significantly higher delivered natural gas prices, and since natural gas is the marginal fuel around 70% of the time, higher wholesale electricity prices. Lack of pipeline capacity prevents generators from having sufficient access to extremely affordable Marcellus Shale gas, and in turn, forces reliance on higher-priced, more polluting dispatchable fossil fuels (not renewables or efficiency), like coal, oil, LNG (when available), propane, and kerosene, which further drives up electricity prices. That natural gas pipeline capacity into New England is currently constrained is obvious based on recent winter experience and the over 35 studies

coming to that conclusion, dating back as far as 2001²⁸ and still being produced today. The obvious remedy is to expand pipeline capacity into New England such as through the state-by-state procurement processes underway in all New England states except Vermont.

Under these circumstances, what are the obligations of the EDCs and the Commission under New Hampshire's regulatory structure? The short answer is that EDCs are obligated to rectify the problems investigated in IR 15-124 and the Commission determines to exist, and the Commission is required to provide assurance that these obligations are met.

The legal system under which the Commission regulates public utilities in New Hampshire provides ample authority for the Commission to require Eversource to purchase the "right" amount of pipeline capacity or otherwise condition its approval of Eversource purchasing any pipeline capacity on Eversource purchasing an amount the Commission determines to be just and reasonable and otherwise in the public interest. Assuming the Commission agrees that Eversource purchasing pipeline capacity is not prohibited by any law and must reasonably be interpreted to support the goal of restructuring and achievement of the Restructuring Policy Principles read in harmony, the Commission should find that it has inherent and plenary authority to order Eversource to acquire pipeline capacity.

The foundational element of the Commission's broad regulatory authority is to ensure that public utilities "furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable."²⁹ The Commission has "general supervisory" authority over all public utilities "so far as necessary to carry into effect the provisions of this

²⁸ ISO New England commissioned Levitan & Associates to study the risks and effects of pipeline capacity constraints on power generation, and Levitan & Associates produced a series of five studies from 2001 to 2004: a Phase 1 Study, a Phase 2 Study, and Phase 1 Update, and Multi-Regional Assessment, and the Cold Snap Study.

²⁹ New Hampshire Statutes, RSA 374-1.

title.”³⁰ One such overarching provision is the state’s energy policy “to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources ... with consideration of the financial stability of the state’s utilities.”³¹ As between the interests of consumers in the lowest reasonable cost and the interest of utilities, including their financial stability, the Commission is the ultimate “arbiter.”³² The Commission has broad powers of inquiry and investigation as to any and all acts, omissions, or proposals of a public utility, and must exercise them with regard to any act, omission, or proposal of a public utility that may be “in violation of any provision of law or order of the commission.”³³ In turn, utilities are mandated to “obey, observe, and comply with every order made by the commission[.]”³⁴ Specifically, the Commission has the power to “investigate and ascertain ... the methods employed by public utilities in manufacturing, transmitting or supplying gas or electricity for light, heat or power... and, after notice and hearing thereon, shall have power to order all reasonable and just improvements and extensions in service or methods.”³⁵ The power to order improvements in service or methods is especially critical to the Commission when it has determined that the energy policy of the state (“to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost”) is not being achieved because public utility service is not “reasonably safe and adequate and in all other respects just and reasonable.”³⁶ The Commission’s specific remedial authority includes the right for the Commission “to lay the facts before the attorney general, and to direct him immediately to begin an action in the name of the state praying for appropriate relief by mandamus, injunction

³⁰ New Hampshire Statutes, RSA 374-3.

³¹ New Hampshire Statutes, RSA 378-37 (emphasis added).

³² New Hampshire Statutes, RSA 363-17.

³³ New Hampshire Statutes, RSA 365-5.

³⁴ New Hampshire Statutes, RSA 365-40.

³⁵ New Hampshire Statutes, RSA 374-7.

³⁶ New Hampshire Statutes, RSA 374-1.

or otherwise”³⁷ when it is of the “opinion” that a public utility “is failing or omitting, or about to fail or omit, to do anything required of it by law or by order of the commission”³⁸ or “is doing anything, or about to do anything, or permitting anything, or about to permit anything, to be done contrary to, or in violation of, law or any order of the commission.”³⁹ Moreover, the Commission has broad power to grant utilities permission to act, when it finds that “engaging in business, construction or exercise of right, privilege or franchise would be for the public good”⁴⁰ and the Commission “may prescribe may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest.”⁴¹

Taken together, these statutory directives set forth the Commission’s supreme goal to regulate utility behavior to ensure that service and rates are adequate and just and reasonable. Electric rates today are unreasonably high and volatile due to a recognized market failure, and service is jeopardized by insufficient pipeline capacity. Accordingly, the Commission must approve the ability of Eversource to acquire pipeline capacity to “harness the power of markets” to lower electric costs to just and reasonable levels. If the Commission determines that Eversource’s proposal is insufficient to adequately lower electricity costs, it may require Eversource to act alternatively or otherwise condition its approval of Eversource acquiring pipeline capacity on Eversource: (1) first determining the “right” amount of pipeline capacity, pursuant to a truly competitive process in which the Staff controls the process and independently evaluates bids, and (2) then proposing the purchase of the “right” amount of capacity based on Staff’s determination of what is needed.

³⁷ New Hampshire Statutes, RSA 374-41.

³⁸ Id.

³⁹ Id.

⁴⁰ New Hampshire Statutes, RSA 374-26.

⁴¹ Id.

This conclusion is amplified by highly relevant case law regarding the Commission’s broad authority and responsibility to act. *State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 163 A. 724 (1932) is a seminal case defining the parameters of Commission authority. The Court began by explaining that the Legislature reinvented the regulatory paradigm when it created the Commission (then the public service commission): “It created the public service commission as a state tribunal imposing upon it important judicial duties and endowing it with large administrative and supervisory powers.”⁴² It next explained that “[t]he paramount object of the Legislature was to assure to the public adequate utility service at fair rates.”⁴³ Based on this paramount object, the Commission has two basic classes of authority on which the base regulatory orders. In the first class, the Commission has “plenary authority” to make orders “directly affecting service and rates.”⁴⁴ In the second class, the Commission has authority to issue orders granting or withholding approval of proposed utility action when those orders “are designed indirectly to assure their [referring to service and rates] permanence and stability, as well as their adequacy and fairness.”⁴⁵ In this instance, Eversource’s proposal is fundamentally about service and rates—can Eversource charge electric ratepayers for pipeline capacity in order to lower their electric rates and improve service? As such, the Commission has “plenary authority” to employ its “large administrative and supervisory powers” to issue an order requiring Eversource action in furtherance of its “paramount object” of assuring adequate utility service at fair rates. Even though Eversource has proposed the action in question, it has done so in light of a Commission investigation and order, not sua sponte or unilaterally. Moreover, the Commission’s power is not fairly limited to approving or disapproving Eversource’s request

⁴² *State v. New Hampshire Gas & Electric Co.*, 163 A. 724, 731 (1932) (citation omitted and emphasis added).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

because Eversource’s proposal is not expressly prohibited by statute.⁴⁶ Upon judicial determination that the factual cause of inadequate service and unfair rates is lack of adequate pipeline capacity, the Commission has the authority and obligation to order Eversource to act accordingly to promote the public good. Thus, if the Commission finds that rates are unreasonably high in winter and that the best solution is EDC purchase of pipeline capacity, in a certain amount subject to certain conditions, there can be no question of the Commission authority to act.

In another seminal case, *Appeal of Public Service Co. of New Hampshire*, 141 N.H. 13, 676 A.2d 101 (1996), the Court approved retail competition in PSNH’s service territory based in significant part on recognition of the Commission’s authority to accommodate changing circumstances. The Court held that under the relevant statute “the PUC is both authorized and obligated to grant a competing electric utility franchise when it determines that such grant would serve the public good.”⁴⁷ The Court premised its decision on a finding that regulatory policy owing to the practical necessities of the 1930s “was not intended to bind future generations to a policy based on the perceived technological and economic limitations of that day.”⁴⁸ The Court noted that “[t]he orders of the PUC have likewise recognized that the monopoly status enjoyed by certain public utilities is conditioned on continued subservience to the public good”⁴⁹—a concept it found was necessarily adaptable to changed societal circumstances. The Court stated “[a] more succinct encapsulation of our holding today is difficult to imagine” than: “[t]he law was designed for the benefit of the public and not of the utilities, although it inevitably operates to the advantage of both. The utility has no vested right to its monopoly. It must meet

⁴⁶ *Id.*

⁴⁷ *Appeal of Public Service Co. of New Hampshire*, 141 N.H. 13, 676 A.2d 101, 103 (1996).

⁴⁸ *Id.* at 104.

⁴⁹ *Id.* at 105.

competition whenever, for any reason, the public good will be thereby promoted.”⁵⁰ Propounding further, the Court stated: “[t]his derivation of monopoly can only mean that if the economic underpinnings of monopoly were to change, the commission could reassess what the public good required.”⁵¹ The powerful holding and reasoning of this case apply with equal force in this proceeding, despite this proceeding not involving a competing service franchise. Circumstances have clearly changed in New England’s electric market. The economic underpinnings of the market no longer apply in the face on such an obvious market failure as natural gas generators having no incentive or obligation to purchase sufficient pipeline capacity. The Commission has the authority and obligation to reassess what the public good requires, and in this instance, to order Eversource to acquire a sufficient amount of pipeline capacity to assure adequate utility service at fair rates.

The Legislature clearly entrusted the Commission, an agency of particular expertise, to make broad policy decisions with regard to the public good and public interest. “The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy to the informed judgment of the [PUC] and not to the preference of reviewing courts.”⁵²

There is no doubt that Eversource disagrees with CLEC. Eversource believes the Commission should approve its acquisition of pipeline capacity because there is a public need, but that it can only approve what Eversource has determined to be in the public interest. Consider where such an argument, if accepted, might lead. Imagine that New England is

⁵⁰ *Id.* (citation omitted).

⁵¹ *Id.* at 106.

⁵² *In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 992 A.2d 740, 748 (2010) (citations omitted).

afflicted with a serious harm to its economy and environment via repeated winters of high and volatile energy costs not suffered by other regions of the nation. There is no doubt that the inherent police power of sovereign states, including New Hampshire, might be used to mitigate both the harms and their causes. Questions of federalism, supremacy of federal law, and authority under state law certainly would certainly require consideration. But, assuming satisfactory answers to these legal questions, would we then accept as valid legal argument that only the solutions voluntarily offered by public utilities could be approved by New Hampshire? Would New Hampshire's only alternative be outright approval or rejection and continued suffering of the harms?

What if the solutions offered by the public utility were tainted by the secondary and tertiary effects, the scope and extent thereof not being fully known, of self-dealing with affiliates? Would the only choice then be to impose such dubious solutions on the consumers who believed the police power protected them or to reject the solutions and thereby sanction continuing harm to consumers? Further amplify the hypothetical to include a demand by the public utility that its determination of the amount of "need" preempts alternative conclusions as to what is in fact needed, and that its proposal must fill "need" in full or not at all. Is the police power so weak that New Hampshire has no option but to accept this false choice? Are the concerns raised by these questions simply washed away because the public utility baldly asserts that a request for proposals in which its own employees evaluated the proposals of the utility affiliate and its competitors was competitive, transparent, and fair?

To ask these questions is to reveal the absurdity of the false choice Eversource has put before the Commission. The Commission must secure action that not only directly meets the

public need and is in the public interest, but that fully rectifies the problem sufficient with its obligation to assure adequate utility service at fair rates.

E. Eversource Did Not Use A Competitive Procurement Process.

CLEC strongly agrees with the Commission and the Staff that an essential element to protecting ratepayer interest is the requirement that all resource options selected by EDCs be obtained through a transparent and competitive procurement process. Eversource failed to follow the Staff's and Commission's specific directives by flaunting its insufficient Massachusetts RFP and evaluation process in this proceeding. CLEC also strongly agrees with Staff's recommendation expressed at the Pre-hearing Conference on April 13, 2016, that Eversource's Petition should not be dismissed outright, but that the proposals it received should be independently evaluated by Staff with its proposed consultant. This need is not diminished by Kinder Morgan's recent announcement to suspend the development of the NED Project; to the contrary, Kinder Morgan's sudden announcement makes it more important than ever for a truly independent analysis of all competing proposals to ensure that New England achieves the "right" amount of capacity.

The timing of Eversource's concerted actions is telling. Eversource has been acutely aware of the Staff's strong preference for a truly transparent and competitive procurement process since the issuance of the Staff Report on September 15, 2015. In addition to finding the NED Project to be more economic than the ANE Project, Staff stated:

In the event the New England states decide as a group to proceed with the procurement of incremental pipeline capacity on a regional basis, Staff strongly recommends that procurement not be based on the results of pipeline open seasons. Given that the capacity purchased by EDCs will be paid for by the customers of those companies and not by the shareholders, Staff believes that it is incumbent on regulators to ensure that the needed capacity be allocated among pipeline projects through an open and transparent process that is demonstrably competitive and results in the lowest possible cost to consumers.

Because most of the largest EDCs in New England are affiliated with the sponsors of one of the competing pipeline projects, we believe it will be difficult if not impossible for EDCs to make a convincing case that pipeline open seasons qualify as fair, open and transparent competitive processes. For this reason, Staff believes it is imperative that the states develop and post for comment an alternative competitive solicitation process (i.e., a Request for Proposals). In Staff's opinion, the terms and conditions for a gas capacity RFP including the criteria for bid evaluation should be the responsibility of the states assisted by an independent consulting firm with extensive expertise in gas and electricity procurement matters.⁵³

Absent a demonstrably competitive solicitation, Staff foresees a significant risk that the negotiations between a project sponsor and potential customers will not be at arms-length and thus will not produce the most advantageous cost and commercial terms for consumers. We also foresee the prospect of lengthy and costly delays due to litigation initiated by aggrieved project sponsors.

On October 23, 2015, Eversource jointly issued with National Grid its RFP in direct response to the Massachusetts Department of Public Utilities' "*Order Determining Department Authority Under G.L. C. 164, § 94A*" in docket 15-37, with knowledge of New Hampshire Staff's strong preference for actual transparency and competition, but without knowledge of the Commission's ultimate decision regarding a procurement process. Eversource seems to have viewed the RFP as a pure formality even in the state for which the RFP was designed. In response to NextEra data request NEER-2-36 in MA D.P.U. 15-181 Eversource states: "The Department's decision in D.P.U. 15-37 influenced both National Grid and Eversource to issue a confirming RFP on October 23, 2016." While Eversource may have been procedurally "confirming" to the Massachusetts Department of Public Utilities that it had already (pre-RFP) chosen the "right" project, which just happened to be the project of which it is a 40% owner, Eversource could not possibly have been able meet the procedural requirements not yet elucidated by this Commission.

In January of 2016, the Commission issued Order 25,860 "*Order Accepting Staff Report and Stakeholder Comments, and Outlining Review Process for Any Petitions for Capacity*

⁵³ Staff Report, IR 15-124 at 7.

Acquisitions and Associated Competitive Bidding.” Despite carefully accepting the Staff Report without making “judgments at this time regarding the factual content and policy positions[.]” the Commission took pains to outline only “one policy directive to EDCs and stakeholders related to the terms under which such acquisitions would be made[:]”

Functionally, this would tend to militate against the use of a sole-source acquisition approach by a New Hampshire EDC seeking to only acquire a gas capacity product from its competitive, unregulated affiliate. Also, there is a recognition in private industry and regulatory bodies throughout the United States that competitive bidding acquisition processes provide powerful benefits for ensuring prudence in utility expenditure and, by extension, cost savings for utility customers, through the introduction of cost discipline, open participation by competitors, and choices in product acquisition. Those benefits were identified in the Staff Report, which strongly advocated in favor of requiring that any gas capacity acquisition program by a New Hampshire EDC be predicated on competitive evaluation and selection processes undertaken by entities unaffiliated with the project sponsors. Staff Report at 11-12, and 46-47. We agree. The Commission expects that any acquisition of gas capacity by a New Hampshire EDC for the ultimate benefit of electric customers would be undertaken through an open, transparent, and competitive bidding/Request for Proposals (RFP)-type process, in which competitors of the New Hampshire EDC’s corporate affiliates or business partners would also be able to participate. Furthermore, this competitive solicitation process should be open to all categories of gas capacity product, including pipeline, Liquefied Natural Gas, and Compressed Natural Gas capacity. It would also include storage solutions to ensure maximal choice and potential cost savings. In addition, in recognition of various state gas capacity procurement efforts occurring throughout the New England region, the Commission would accept a New Hampshire EDC’s participation in another state’s RFP platform where the evaluation and selection of competing projects is the responsibility of entities that have no affiliation with any of the project sponsors.⁵⁴

Despite the explicit policy directive of the Commission, Eversource has petitioned for approval of contracts solely on the ANE Project, based on its *own evaluation* of its own and competing projects. Eversource explains that its EDCs “jointly issued an RFP with National Grid on October 23, 2015 to six interstate pipeline companies serving the New England region and two LNG providers.”⁵⁵ In a footnote, Eversource states: “[p]rior to and during the RFP process and subsequent contract negotiations, Eversource utilized a rigorous process to ensure that contract negotiations were conducted on a transparent, arms-length basis consistent with N.H. Code

⁵⁴ (emphasis added.)

⁵⁵ Eversource Petition, DE 16-241, at 7.

Admin. Rules Puc 2100.”⁵⁶ However, Eversource could not have anticipated in October of 2015 the “policy directive” that the Commission would eventually include in its January 2016 Order. This is abundantly clear given what Eversource admits in its petition: “[t]he bids were evaluated by Eversource with the assistance of Sussex Advisors in a three-step process.”⁵⁷ The fact that Eversource claims “Sussex Advisors identified the Access Northeast project as the option with the highest capability to impact the reliability and pricing issues affecting the New England region” is of no consequence. Eversource obviously took part in every step of the evaluation process, with direction over the consultant it hired. Moreover, Eversource was just procedurally “confirming” to the Massachusetts DPU what it had already determined (pre-RFP) was in its best interest.

Based on the foregoing, CLEC strongly urges the Commission to adopt the Staff’s recommendation to not dismiss Eversource’s Petition outright, but to not rely on Eversource’s RFP and evaluation process designed for Massachusetts. Rather, Staff should be charged with reviewing and evaluating the responses to Eversource’s RFP with Staff’s proposed independent consultant.

III. Conclusion.

CLEC respectfully urges the Commission to substantially adopt Staff’s legal analysis and conclusion that Eversource may acquire pipeline capacity. Eversource, as a New Hampshire corporation, has broad “necessary and proper” powers to contract for pipeline capacity absent a specific legal constraint. Such legal constraint cannot be found in New Hampshire law and especially not the Restructuring Act. The Restructuring Act certainly does not explicitly prohibit EDCs from purchasing pipeline capacity. Further, it would be unreasonable to interpret the

⁵⁶ *Id.*, at footnote 5.

⁵⁷ Eversource Petition, DE 16-241, Testimony of James Daly, at 48 (emphasis added).

Restructuring Act as implicitly prohibiting Eversource's acquisition of pipeline capacity in light of its aim to reduce electricity costs, and the that fact that the "market" as currently constructed has failed to deliver lower costs while at the same time jeopardizing reliability and increasing environmental impacts.

CLEC urges the Commission to use its extremely broad regulatory authority to "harness the power" of the market and fix the market failure causing unreasonably high energy prices in New Hampshire. The Commission should find that Eversource not only should, but must, acquire pipeline capacity.

Eversource did not comply with the Staff's and Commission's directives to competitively solicit bids in a transparent manner. It's self-dealing is not in the public interest and may have contributed to the decision for Kinder Morgan to suspend its development of the NED Project. However, there are other projects that must be fairly evaluated in light of New Hampshire's need to lower energy costs. The "public interest" requires the determination of "how much" to be made by the Commission through its Staff, completely independent of Eversource. Staff must also determine on what projects the need should be met, after independently evaluating all bids received by Eversource. The Commission is the "arbiter" between the interest of consumers in the lowest reasonable cost and the various interests of Eversource, including in the development of its projects, like the ANE Project and Northern Pass. Equipped with an independent determination of how much and on what projects, the Commission has the authority to order Eversource to act accordingly or to otherwise condition its approval of pipeline capacity acquisition on Eversource proposing to act consistent with what the Commission determines to be just and reasonable, prudent, and in the public interest.

Respectfully submitted, this 28th day of April, 2016.

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