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IR 15-124

For a thriving New England

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October 15, 2015

Ms. Debra A. Howland, Executive Director & Secretary
N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

RE: Docket No. IR 15-124 – Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire

Dear Director Howland:

Please find enclosed for filing with the Commission an original and seven (7) copies of Comments of Conservation Law Foundation in Response to Report on Investigation into Potential Approaches to Mitigate Wholesale Electricity Prices in the above-referenced docket. A copy of this filing has this day been sent electronically to all parties on the PUC's service list.

Thank you for your attention to this matter. Please feel free to contact me at 225-3060 should you have any questions.

Sincerely,

Thomas F. Irwin
Vice President & CLF-New Hampshire
Director

TFI/dlh

Encls.

cc: IR 15-124 Service List

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NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION
IR 15-124
Investigation into Potential Approaches to Ameliorate
Adverse Wholesale Electricity Market Conditions in New Hampshire

# COMMENTS OF CONSERVATION LAW FOUNDATION IN RESPONSE TO REPORT ON INVESTIGATION INTO POTENTIAL APPROACHES TO MITIGATE WHOLESALE ELECTRICITY PRICES

Conservation Law Foundation ("CLF") appreciates the opportunity to comment on the September 15, 2015 Report on Investigation into Potential Approaches to Mitigate Wholesale Electricity Prices ("Staff Report") prepared by the Staff of the New Hampshire Public Utilities Commission. CLF considers the issues to be investigated in this docket, and any decisions this Commission subsequently makes to act upon this investigation, to be critical to the manner in which New Hampshire advances a clean energy economy that is fair, sustainable, and built on the fundamental principle of competition embedded in New Hampshire's restructuring laws.

As discussed in greater detail below, CLF is greatly concerned with and troubled by the Staff Report, including the manner in which it was developed (without independent investigation into issues and alternative solutions) and the manner in which important issues were summarily dismissed without sound factual and/or analytical bases. CLF also is concerned with opinions in the Staff Report suggesting that: electric distribution companies (EDCs) may have the legal authority – despite fundamental concepts of restructuring, and clear standards regarding federal preemption – to acquire gas pipeline capacity; that there is a *need* for major investments in new, ratepayer-funded gas pipeline capacity; and that innovative solutions capitalizing on existing storage infrastructure do not obviate the need for expensive, ratepayer-funded investments in new gas pipeline infrastructure.

## I. The Staff Report is not premised on independent investigation by Staff

CLF fundamentally objects to the nature of the Staff Report as premised solely on information submitted by stakeholders – including stakeholders with direct financial interests in the outcome of this investigation – without independent investigation. CLF understands and appreciates that EDCs are mandatory stakeholders in this proceeding, and that the Commission directed Staff to solicit their views, in addition to the views of other stakeholders. April 17, 2015 Order of Notice at 3. However, to engage in a true investigation of the issues, it was incumbent upon Staff to rigorously and independently engage with the issues that lie at the heart of this proceeding.

Of particular concern to CLF is the Staff Report's nearly wholesale adoption of facts (many of them unsupported), opinions, and perspectives asserted by proponents of state procurements of new natural gas pipeline capacity. Despite the Commission's charge to act in the best interests of ratepayers, the Staff Report makes no ascertainable effort to verify, confirm, research or otherwise analyze comments submitted by entities that are proposing to sell gas to and profit from ratepayers, or their affiliates. Rather than acknowledge that the sources of this information are entities that are, in essence, selling a product, and that therefore have an incentive to provide perspectives that favor their commercial interests, the Report's "findings" are pulled directly from the materials of these commenters with no apparent objective assessment or fact checking.

As Staff provides no independent investigation of the causes of or solutions to price volatility, the Staff Report consequently cannot rightly be said to reflect an "investigation" on these subjects.

## II. The Staff Report fails to appropriately consider and address CLF's comments

In contrast to the manner in which the Staff Report addresses comments from financially interested entities, the Report is notably critical of perspectives that express skepticism or opposition to the gas procurement proposal. With respect to CLF's comments and proposal, staff not only inaccurately characterizes various of CLF's stated positions, it uses unverified findings and statements of the gas industry proponents and their consultants to call into question CLF's perspectives and proposal seemingly without otherwise independently analyzing CLF's perspectives.

What is perhaps most disconcerting about the Report's reaction to CLF's comments, and CLF's accompanying Skipping Stone analysis, is that CLF is merely urging a cautious approach that considers various alternative approaches and that is premised on the notion the region should maximize the utility of our existing infrastructure and seek to rely on lower cost and cleaner resources (such as efficiency and renewables) before taking the risky and unprecedented action of committing electric ratepayers to a twenty-year precedent agreement for natural gas capacity. CLF's approach would appear to be entirely consistent with the Commission's obligations to act in the best interest of the ratepayers of New Hampshire, and yet it is summarily rejected by staff in favor of wholesale adoption of the gas industry perspective.

In light of the clear premise of CLF's input, CLF is deeply troubled with the manner in which its submissions were mischaracterized. Examples of mischaracterizations of its input are numerous and include the following.

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Staff attempts to characterize CLF as inconsistent or even duplicitous in our comments on the degree to which future price uncertainty should impact any consideration of capacity procurement. Contrary to staff's portrayal, CLF is not saying simultaneously that future prices are uncertain and yet certain to be lower next year. Rather, our position is that a 20 year bet on a gas capacity contract is risky because inherent market price volatility and uncertainty over the term of that contract could sharply reduce or eliminate the savings or revenues predicted by the gas industry. Shorter term price trends are more reliable and indications currently are that prices next year will be lower.[1] With wholesale prices in 2014-15 half what they were in 2013-14[2] and prices in 2015-16 anticipated to be lower still, it would be reasonable for the Commission to conclude that the wholesale price crisis of 2013-14 may have abated and that the Commission can afford to take a more cautious and circumspect approach to identifying and pursuing the need for and nature of any further solutions.

Similarly, CLF suggested that new, market-based pipeline capacity additions could provide further relief to energy prices, as the AIM, TGP-CT Expansion and Atlantic Bridge projects are anticipated to come on line beginning in 2016. Staff inaccurately interpreted CLF to be suggesting that these additions would singularly address long-term price concerns. In fact, CLF sees these additions, in conjunction with recent ISO market adjustments, increased LNG availability, and short-term lower wholesale price trends, to suggest that there is no justification to rush to an expensive and long-term commitment to long-lived infrastructure supporting a notoriously price-volatile commodity that will compromise long-term climate goals. Staff adopts the findings of the industry-commissioned ICF study to diminish the duration of the likely benefits of these projects.

CLF noted in its comments that the industry's rosy predictions that a pipeline capacity build-out will solve the winter price spike problem may not be reliable, as peak prices in the gas pipeline and supply-rich regions of PJM and NYISO for the past two winters have exceeded the highest prices in New England. Rather than seek to ascertain whether there are lessons to be learned from the experiences of adjacent control areas, Staff ignored the issue and misconstrued CLF's statement to suggest that new pipeline would have no beneficial effect on gas or electricity prices. Rather than attempt to address the concern that the PJM and NYISO experience should engender in a regulatory body considering the purchase of gas capacity as a means to avoid winter price spikes, Staff countered by summarily relying on the CES gas-proponent study. *Id.* In fact, the CES study does not support the proposition that pipeline capacity additions ensure

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[1] See, e.g. on the retail side, recent Liberty-NH rate reductions.

[2] Staff's comparison of 2014-15 wholesale electric prices to prices in 2011-12 (see Staff Report at 35) is without merit, as 2011-12 represents an unusually mild winter and the lowest winter wholesale prices since the implementation of standard market design and is therefore an inappropriate and non-representative baseline from which to be measuring.

avoidance of price spikes. More importantly, staff's willingness to rely on the opinion and speculation of a consultant for the gas industry while ignoring the real, market-based experiences of adjacent regions suggests a bias that should call into question the objectivity and reliability of Staff's Report.

The Report is similarly dismissive of CLF's suggestion that it consider the potential role of LNG and existing LNG infrastructure to help mitigate any need for new natural gas capacity. Again, Staff provides no analysis of the beneficial role that LNG played in lowering energy prices in the winter of 2014-15 or of the potential for it to do so in the future. Indeed, staff appears willing to look beyond world trends in LNG prices (or to fail to consider them) in suggesting that high LNG prices could reappear just as readily as they went down. CLF agrees that, while it is possible that LNG prices could rise again, a careful consideration of the implications of a gas capacity procurement should involve an examination of the existing trends and opportunities in this market, as world LNG prices have plummeted below $6/mmbtu.

CLF submitted its Skipping Stone report – addressing the potential for existing LNG storage infrastructure to significantly mitigate any future need for natural gas capacity – in an effort to prompt real consideration in this proceeding of viable alternatives to big pipeline build-out. The proposal calls for LDCs to enter into short-term contracts for LNG covering only the winter period, in lieu of long term contracts for gas pipeline capacity. The timing of CLF's commissioning of the report and this proceeding were unfortunately not aligned and the report was not completed until late in this process. Nonetheless, Staff had an opportunity to review the report and to interview its author. Unfortunately, staff chose to give the report limited credence and offered largely critical comments of it despite professing insufficient time to become familiar with it.

The Skipping Stone report accurately identifies the gas "problem" at issue as one of insufficient gas to meet demand, and is clear in identifying the solution as one of increased deliverability, not new pipeline capacity as urged by industry. Nonetheless, the Staff Report gratuitously and misleadingly attempts to equate CLF's perspective on the problem as consistent with the gas industry, reflecting a fundamental misunderstanding of the Skipping Stone report.

The most concerning aspect of the Staff Report's criticisms of the Skipping Stone report is its heavy reliance on industry-supplied data to counter the report's assertions. Staff repeatedly cites to an ICF International report commissioned by Kinder Morgan to suggest that the Skipping Stone report may be flawed for having underestimated the number of days on which demand for natural gas will exceed pipeline capacity. Again in this instance, Staff emphasizes industry estimations of gas demand and pipeline capacity, without any apparent attempt to corroborate with other sources or otherwise fact-check.

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CLF's review of the Kinder Morgan/ICF report suggests that it contains limitations that may have affected its calculations of peak day demand. The report's assumption of .8% growth in electric demand each year between now and 2035, appears to be inconsistent with ISO-NE's most recent load forecast which calls for electric load to remain flat through 2024.[3] ICF's estimate of output from the Everett Distrigas LNG import facility is based upon that facility's historical sendout and does not appear to account for Everett's recent contracts for 9.5 Bcf/yr of sendout for 2015-16 and its long-term contract for 3 Bcf/yr of sendout for the period 2016-2024. Additionally, ICF's estimation of 3.95Bcf/d of pipeline and LNG supplies to New England also appears to under-estimate the supplies likely to be available as of 2020. EIA data suggests that, with the additions of AIM, TGP-CT and Atlantic Bridge as of 2017, available supplies by 2020 should exceed 4.2Bcf/d. The Staff Report provides no indication that Staff undertook to verify the accuracy of ICF long-term predictions.

## III. Pursuant to New Hampshire's restructuring law, EDCs cannot lawfully acquire gas pipeline capacity

Originally enacted in 1996, New Hampshire's Electric Utility Restructuring law, RSA 374-F, is premised on the foundational principles of, and the unambiguous purpose of establishing, competitive markets in which electric generation is separated from transmission and distribution services. As RSA 374-F:1,I states:

> 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.

*See also* RSA 374-F:2 (emphasizing competitive markets); RSA 374-F:3,III ("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."). More recently, in furtherance of advancing competition and the separation of electric generation from transmission and distribution, the General Court recently enacted SB 221, enabling Public Service Company of New Hampshire ("PSNH") – with

[3] See e.g. http://www.iso-ne.com/system-planning/system-forecasting/energy-efficiency-forecast.

the Commission's approval and oversight, and with multiple parties reaching a settlement now under review in DE 14-238 – to proceed toward divestiture of its generating assets and to thereby complete restructuring in New Hampshire.

The acquisition of gas pipeline capacity by New Hampshire EDCs would violate the essential requirement that electric generation be separated from transmission and generation as well as the goal of establishing a competitive energy market (*e.g.*, one that does not involve ratepayer subsidies for electric generation). Indeed, RSA 374-F recognizes only one exception to the overarching requirement that generation and transmission/distribution be separated from one another. Specifically, RSA 374-F:3,III states in pertinent part:

> REGULATION AND UNBUNDLING OF SERVICES AND RATES. When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. 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 scaled distributed generation resources as part of a strategy for minimizing transmission and distribution costs.*

(Emphasis added). As the statute makes clear, the exception to the separation of generation from transmission/distribution applies *only* to (1) small scaled distributed generation owned by an EDC that (2) is part of an EDC's strategy to minimize costs of transmission and distribution. RSA 374-F:3,III. Pursuant to the statutory rule of construction "expressio unis est exclusion alterius" (meaning "the expression of one thing in a statute implies the exclusion of another"), no other exceptions exist. *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (*quoting St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12 (1996).

In light of the foregoing, New Hampshire's restructuring law simply provides no exception applicable to the acquisition of pipeline capacity by EDCs. As the Commission's Staff determined in its July 10, 2015 memorandum assessing the legal authority of EDCs to acquire pipeline capacity, "[a]n acquisition of gas capacity, of the type referred to by certain stakeholders, most certainly does not qualify as a small-scale distributed generation resource." Staff Memorandum of July 10, 2015 at 2. Nor would such acquisition be part of a strategy for minimizing transmission and distribution costs. Accordingly, any such acquisition would contravene the plain language and clear intent of the restructuring statute and, not fitting within the sole exception provided by RSA 374-F:3,III, must be prohibited.

Despite the foregoing, Commission Staff in their July 10, 2015 Memorandum, and in the Report, suggest that various restructuring policy principles could provide a legal basis for the acquisition of pipeline capacity by EDCs. CLF disagrees. In the first instance, contrary to Staff's suggestion, nothing in New Hampshire's restructuring statute suggests that various restructuring policy principles enumerated in RSA 374-F:3 can be invoked to contravene the unambiguous, overarching goals of competition and the separation of electric generation from transmission/distribution. Moreover, such policy principles are to be viewed as "interdependent," RSA 374-F:1,III, meaning that one policy principle cannot be used to undermine or contravene another policy principle. Finally, assuming *arguendo* that individual restructuring policy principles *could* be invoked to contravene competition and the fundamental principle of separating generation from transmission/distribution, the various policy principles identified and superficially discussed in the Report do not justify reversing course on restructuring New Hampshire's electric market.[4]

Finally, Commission Staff in their July 10, 2015 Memorandum, and in the Report, suggest that various New Hampshire statutes *beyond* RSA Chapter 374-F could provide a legal basis for the acquisition of pipeline capacity by EDCs, apparently notwithstanding the unambiguous language and policy objectives of the restructuring statute. Again, CLF disagrees. The various other statutes precede, and are more general than, RSA Chapter 374-F and cannot be used to achieve a result that conflicts with the language and intent of the more recent, more relevant provisions of New Hampshire's restructuring law. *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152 (1978) ("When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion.") (*citing* C.D. Sands, Sutherland Statutes and Statutory Construction sec. 51.05 (4th ed. 1973).[5]

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[4] Among the numerous restructuring policy principles catalogued by Staff as potentially providing a basis to authorize EDCs to acquire pipeline capacity, Staff references RSA 374-F:VIII, titled "ENVIRONMENTAL IMPROVEMENT." Specifically, Staff's Report quotes this statutory provision as follows: "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." Report at 10 (*quoting* RSA 374 –F:3,VIII). The Report presumably is suggesting that the acquisition of gas pipeline capacity by EDCs may be an "innovative market-driven approach" within the meaning of the statute. In quoting the statute, however, the Report omits critical qualifying language, namely the very next sentence of RSA 374-F:3,VIII, which states: "Such market approaches may include valuing the costs of pollution and using pollution offset credits." The acquisition of gas pipeline capacity is in no way similar to the types of innovative, market-based approaches to directly addressing pollution contemplated by the General Court.

[5] *See also In re N.H. Public Utilities Comm'n Statewide Elect. Utility Restructuring Plan*, 143 N.H. 233, 240-241 (1998) (citing the principles, in interpreting RSA 374-F and RSA 362-C:6, that "when conflict exists between two statutes, [the] later statute prevails" and that "when [the] natural weight of competent evidence shows that latter statute's purpose was to supersede former, [the] latter controls even absent explicit repealing language.") (citations omitted); *Appeal of Pennichuck Water* Works, 160 N.H. 18, 34 (2010) ("The Utilities' argument is also contrary to our well settled rule of statutory construction 'that in the case of conflicting statutory provisions, the specific statute controls over the general statute.'") (*quoting Appeal of Plantier*, 126 N.H. 500 (1985)).

## IV. Authorizing EDCs to acquire gas pipeline capacity would violate the Supremacy Clause of the U.S. Constitution

Authorizing EDCs to acquire gas pipeline capacity to promote the development of interstate natural gas infrastructure and thereby decrease regional wholesale natural gas and electric prices would constitute the intentional distortion of FERC-regulated markets and is barred under the Supremacy Clause of the U.S. Constitution. Through the Federal Power Act and the Natural Gas Act, Congress has vested in FERC the exclusive authority to regulate wholesale energy rates. *See* 16 U.S.C § 824(a) and 15 U.S.C. § 717 *et seq.*; *New York v. F.E.R.C.*, 535 U.S. 1, 20 (2002). The NGA and FPA together have long been recognized as a comprehensive scheme of federal regulation of all wholesale sales of energy in interstate commerce that serves, pursuant to the Supremacy Clause of the U.S. Constitution, to preempt state regulation of the same. *See Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). Not only is "direct state regulation of the prices of interstate wholesales of [energy]" preempted, "state regulations which would indirectly achieve the same results" are likewise infirm. *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91(1963). Whether a state action falls within a preempted field of regulation depends on "the target at which the state law aims." *Oneok Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015). As the regulatory approach that Staff's Report proposes is expressly intended to affect interstate wholesale markets, it is impermissible.

The federal courts of appeal have repeatedly held that state acts that intervene in the wholesale markets are preempted. As Staff is aware, state programs in Maryland and New Jersey aimed at enhancing access to certain types of generation were recently struck down. Staff Report at 13, referencing *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014) and *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 81 (3d Cir. 2014). Staff appears to propose that there should be "'dual responsibility' by both the FERC and states in wholesale market oversight," *id.*, but there plainly is no such thing. Where the state's express purpose is to affect wholesale market prices, the Supremacy Clause allows no space for state authority.[6] Exclusive jurisdiction is just that – exclusive.

Staff's proposed approach could interfere with the efforts of FERC and ISO-NE to regulate both electric price and reliability. While Staff states that it "cannot predict how FERC would approach an innovative program" such as the one it advocates, *id.*, Staff proposes infringing upon core areas of FERC's regulation. Indeed, ISO-NE already plans a number of measures to address the underlying causes of the price volatility that characterized the winter of 2013/2014, including the Forward Contract Market (FCM) Pay for Performance (PFP) regime that FERC has approved and that stakeholders have noted in this docket, as well as energy market offer flexibility and the

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[6] This is also the case if the state's purpose is couched in reliability terms.

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FCM sloped demand curve. *See* ISO-NE 2014 Regional System Plan. The ISO plans various other improvements including enhanced rules governing dispatch in the Day-Ahead Energy Market and Real-Time Energy Market, *id.*, while in RM14-2 FERC has revised its regulations to better coordinate the scheduling of wholesale natural gas and electricity markets. Despite Staff's stated distaste for the state of the law as recently affirmed by the Third and Fourth Circuits, under current law the regulatory approach advanced in the Staff Report violates the Supremacy Clause for many of the same reasons as the Maryland and New Jersey programs – including that FERC, through its own actions and the delegated acts of ISO-NE, is already taking steps within the scope of the authority it exerts pursuant to the Commerce Clause to address the causes of winter price volatility. In addition, as Staff points out, Staff Report at 13, FERC has a well-established regulatory regime governing open access under the Natural Gas Act.

Staff's legal analysis on the issue of preemption is flawed and its desire for co-extensive regulation simply without basis. Authorizing EDCs to acquire gas pipeline capacity is barred under this nation's preemption law.

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Again, CLF appreciates the opportunity to provide these comments. In light of the foregoing, CLF urges the Commission not to advance the recommendations of the Staff Report.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By: Thomas F. Irwin

Thomas F. Irwin
Greg Cunningham