

**BEFORE THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**Re: Public Service Company of New Hampshire d/b/a Eversource Energy**

**Petition for Approval of Gas Capacity Contract with Algonquin Gas Transmission, LLC,  
Gas Capacity Program Details and Distribution Rate Tariff for Cost Recovery**

**Docket DE 16-241**

**Initial Brief of Exelon Generation Company, LLC  
Regarding Legality of Eversource Proposal**

Pursuant to N.H. CODE ADMIN. R. Puc 203.32 and pursuant to the Order of Notice issued in the above-captioned proceeding on March 24, 2016, Exelon Generation LLC (“**ExGen**”)<sup>1</sup> respectfully submits this initial brief in opposition to the February 18, 2016 Petition for Approval of Gas Capacity Contract with Algonquin Gas Transmission, LLC, Gas Capacity Program Details, and Distribution Rate Tariff for Cost Recovery (the “**February 18 Petition**” or “**Petition**”) submitted by Public Service Company of New Hampshire d/b/a Eversource Energy (“**Eversource**”). In accordance with the Order of Notice, ExGen’s initial brief addresses only issues regarding the legality of the February 18 Petition.<sup>2</sup>

**I. INTRODUCTION**

At the center of this proceeding is the use of electric distribution tariffs to support the development of an investor-owned pipeline transmission project, known as the Access Northeast Project (the “**Project**”). The Project’s developers include Algonquin Gas Transmission, LLC (“**Algonquin**”), a subsidiary of Spectra Energy Corporation, National Grid and Eversource, parent company of the Public Service Company of New Hampshire. A review of the Staff

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<sup>1</sup> ExGen submitted a timely Petition to Intervene in this proceeding on April 11, 2016. ExGen was granted intervenor status in this proceeding on April 22, 2016 in Order No. 25,886.

<sup>2</sup> ExGen does not agree that the assertions made by Eversource regarding the alleged benefits and costs of its February 18 Petition are adequately supported by the evidence and reserves the right to address those issues if the Commission should determine, notwithstanding ExGen’s objections, that the February 18 Petition is lawful.

Report and the comments filed in Docket Number IR 15-124 makes clear that the primary justification advanced for using electric distribution tariff charges to support the Project is to suppress wholesale gas and power prices in ISO-New England through what amounts to a subsidy and a preference subsidy funded by the citizens of New Hampshire and other New England states.<sup>3</sup>

In April 2015, the New Hampshire Public Utilities Commission (“**Commission**”) commenced a proceeding, docketed as Docket No. IR 15-124, to investigate “potential approaches involving New Hampshire’s electric distribution utilities (EDCs) to address cost and price volatility issues currently affecting wholesale electricity markets in New Hampshire.”<sup>4</sup> Stating its “fundamental duty to ensure that the rates and charges assessed by EDCs are just and reasonable,” the Commission expressed its desire to consider “the potential development of additional natural gas resources for the benefit of the electricity supply in our region.”<sup>5</sup> In that proceeding, Commission Staff reviewed the comments submitted by all interested parties. On September 15, 2015, Commission Staff released a Staff Report with its findings. In its Report, among other things, Staff expressed doubt that the Access Northeast Project “was conceived with the primary goal of enhancing grid reliability.”<sup>6</sup> The Staff Report states:

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<sup>3</sup> Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire, IR 15-124, Staff Report at 20-21 (Sept. 15, 2015) (hereinafter “Staff Report”); Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC, Direct Testimony James G. Daly at 4, 6:17-19, 11:1-3, 60-63 (Feb. 2, 2016) (hereinafter “Testimony of James G. Daly”), *see also* February 18 Petition at 3-5 (seeking “recovery of costs associated with the ANE Contract” and anticipating “price relief” will result from approval of the Petition); Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC, Attachments K Petak, ATTACHMENT EVER-KRP-2, ICF Report “Access Northeast Project – Reliability Benefits and Energy Cost Savings to New England Consumers” at 23-24 (Feb. 18, 2016) (hereinafter “Attachments K Petak”).

<sup>4</sup> Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire, IR 15-124, Order of Notice at 1 (Apr. 17, 2015).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Staff Report at 18.

In addition, Staff does not understand the sponsors' argument that the project was conceived with the primary goal of enhancing electric grid reliability by providing fuel assurance to gas generators. As Spectra itself acknowledges, the regional power system already has 6,000 MW of gas-fired generation with dual-fuel capability to protect against gas supply interruptions, or 1,000 MW more than Spectra contends is needed to supply load reliably. In addition, ISO-NE's Pay-for-Performance capacity market redesign, which is expected to become fully operational in June of 2018, will provide both financial incentives and penalties to existing generators to improve generator performance during times of system emergencies and new generators to acquire dual-fuel capability. To be clear, Staff is not suggesting that construction of the Access Northeast project, or for that matter the NED and PNGTS projects, will not enhance reliability. They will. Rather, we question Access Northeast's focus on system reliability at a time when ISO-NE has only recently received FERC approval of its Pay-for-Performance program, which was designed to address among other things the reliability risks associated with New England's growing dependence on natural gas and attendant vulnerability to interruptions in gas supply. The Pay-for-Performance program will provide strong incentives for the installation and operation of dual-fuel capable generation to improve gas generator performance – if a dual-fuel generator cannot get natural gas (or if the price of natural gas is too high), the generator can instead use fuel oil or LNG as back-up fuel sources to meet its capacity obligations. While the resulting increase in dependence on back-up fuel for generation can also present reliability risks, as demonstrated by the difficulties of replenishing oil supplies in winter 2013/14, Staff believes the system of incentives and penalties that constitute the Pay for Performance capacity market redesign will compel dual-fuel generators to address these risks through appropriate fuel supply planning.<sup>7</sup>

Many parties submitted comments on the Staff Report, and the Commission completed the activity in that docket on January 19, 2016 by issuing Order Number 25,860, its Order Accepting Staff Report and Stakeholder Comments, and Outlining Review Process for Any Petitions for Capacity Acquisitions and Associated Competitive Bidding.

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<sup>7</sup> *Id.*

Eversource filed its Petition with the Commission on February 18, 2016 seeking approval of: (1) a 20-year interstate pipeline transportation and storage contract providing natural gas capacity for potential use by electric generation facilities in the New England region (“**Access Northeast Contract**”); (2) an Electric Reliability Service Program (“**ERSP**”) to set parameters for the release of capacity and the sale of LNG supply made available to electric generators through the Access Northeast Contract; and (3) a Long Term Gas Transportation and Storage Contract (“**LGTSC**”) tariff for Eversource rates, to be applied through a uniform cents-per-kWh rate on all retail electric customers served by Eversource, in order to provide for recovery of costs associated with the Access Northeast Contract. Eversource filed supporting testimony and related exhibits with the February 18 Petition. If the Commission approves Eversource’s Petition, Eversource states that it would release the natural gas capacity to the electric generation market in accordance with an Algonquin Electric Reliability Service tariff that has yet to be approved by the FERC.

Significant questions remain regarding whether any such tariff will or could be approved by FERC. In connection with the Project, Algonquin sought to amend its FERC Gas Tariff (“**Tariff**”) on February 19, 2016 to exempt from FERC’s capacity release bidding requirements certain capacity releases of firm transportation by electric distribution companies that are participating in state-regulated electric reliability programs.<sup>8</sup> Dozens of parties intervened and many parties lodged protests, including ExGen, arguing that the purpose of the requested Tariff revisions is to effectuate an unjust, unreasonable and unduly discriminatory price suppression

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<sup>8</sup> Algonquin Gas Transmission, LLC February 19, 2016 Tariff Filing (FERC Gas Tariff, Sixth Revised Volume No. 1), FERC Docket No. RP16-618 .

effort that FERC should not and cannot approve.<sup>9</sup> FERC suspended Algonquin’s tariff filing for the maximum period permitted by law on April 15, 2016 and directed that a technical conference be held to address the issues raised by Algonquin’s filing and by the parties protesting that filing.<sup>10</sup> The technical conference is scheduled for May 9, 2016.

Eversource asserts that approval of its Petition is the solution to “high and volatile winter period wholesale and/or retail electricity prices” because it addresses the “wholesale market imbalance of supply and demand for natural gas.”<sup>11</sup> The Project purportedly will, among other things, provide increased natural gas deliverability to the New England region to support electric generation, including most directly, the gas-fired electric generating plants on the Algonquin and [Maritimes & Northeast Pipeline] systems.<sup>12</sup> This, Eversource contends, will lead to “price relief” for consumers.<sup>13</sup>

Eversource avers that the Project is designed to provide 500,000 MMBtus/day of incremental gas transportation capacity and 400,000 MMBtus/day of incremental liquefied natural gas (“LNG”) storage deliverability.<sup>14</sup> Under the proposed Access Northeast Contract, Eversource would hold contractual entitlements for firm gas transportation and storage deliverability up to a Maximum Daily Transportation Quantity of 66,600 MMBtus/day or 7.4% of the total capacity of the project. Eversource states that this contract quantity reflects the

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<sup>9</sup> *Algonquin Gas Transmission, LLC*, RP16-618, Joint Protest of Exelon Corporation and Nextera Energy Resources, LLC, Request for Summary Rejection and Alternative Motion for Maximum Suspension and Request for a Technical Conference (Mar. 2, 2016).

<sup>10</sup> *Algonquin Gas Transmission, LLC*, RP16-618, Notice of Technical Conference (Apr. 15, 2016).

<sup>11</sup> February 18 Petition at 2; Testimony of James G. Daly at 4, 6:17-19, 11:1-3, 60-63; *see also* Attachments K Petak at 23-24.

<sup>12</sup> February 18 Petition at 4.

<sup>13</sup> *Id.* at 5; *see also* Attachments K Petak at 23-24.

<sup>14</sup> Order of Notice at 2.

electric load share of Eversource within the load served by all investor-owned EDCs in New England. Eversource further asserts that this proposed acquisition of gas capacity on the Access Northeast Project was developed through a Request for Proposals (“RFP”) process that met all requirements of New Hampshire law. Eversource requests approval of the proposed contract and related mechanisms by October 1, 2016.

The Commission issued an Order of Notice on March 24, 2016, setting the briefing schedule pursuant to which this filing is made.

## **II. ARGUMENT**

The Commission should deny the February 18 Petition because the Petition requests approvals that are contrary to New Hampshire and federal law and regulation. First, approving any of the Petition’s requested relief would violate the Restructuring Principles of RSA Chapter 374-F. Second, Eversource lacks appropriate authority to enter into the Access Northeast Contract under applicable New Hampshire law. Third, the requested LGTSC would violate New Hampshire law. Fourth, the Petition violates applicable federal laws, including the Natural Gas Act and the regulations of the Federal Energy Regulatory Commission (“FERC”). In any event, even if the Commission determines that it has the legal authority to grant the Petition and that the Petition is consistent with all applicable laws, the Commission should still condition any approval it may decide to give on approval by FERC.

### **A. Eversource’s entry into the Access Northeast Contract, development of the Electric Reliability Service Plan and assessment of the Long-Term Transportation and Storage Contract tariff would violate the Restructuring Principles of RSA Chapter 374-F.**

The Commission should not grant the Petition because doing so would be contrary to New Hampshire electric restructuring principles. RSA Chapter 374-F:1 explains the first principles of electric utility restructuring in New Hampshire:

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.

II. A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: “Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it.” Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

RSA Chapter 374:F-3(III) provides in pertinent part:

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.<sup>15</sup>

RSA Chapter 374-F-3(IV) provides that “[n]on-discriminatory open access to the electric system for wholesale and retail transactions should be promoted.”

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<sup>15</sup> As the July 10, 2015 Staff Legal Memorandum released in Docket IR 15-124 correctly notes “[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.” *Available at* [https://www.puc.nh.gov/Electric/Investigation\\_into\\_Potential\\_Approaches\\_to\\_Mitigate\\_Wholesale\\_Electricity\\_Prices.html](https://www.puc.nh.gov/Electric/Investigation_into_Potential_Approaches_to_Mitigate_Wholesale_Electricity_Prices.html) (last visited Apr. 27, 2016).

Where, as here, the statutory language is clear, the meaning is not subject to modification.<sup>16</sup> The Court in *Old Dutch Mustard* explained:

We first look to the language of the statute or regulation itself, and, if possible, construe that language according to its plain and ordinary meaning. *Id.*; *Marino*, 155 N.H. at 713, 928 A.2d 818. **When the language of the statute or regulation is clear on its face, its meaning is not subject to modification.** *Marino*, 155 N.H. at 713, 928 A.2d 818. We will neither consider what the legislature or commissioner might have said nor add words that they did not see fit to include. *Id.* Furthermore, we interpret statutes and regulations in the context of the overall statutory and regulatory scheme and not in isolation. *Id.* Our goal is to apply statutes and regulations in light of the legislature’s or commissioner’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory and regulatory scheme. *Id.*

99 A.3d 290, 293-94 (N.H. 2014) (emphasis added).

The February 18 Petition is irreconcilable with the plain language of each of the aforementioned restructuring principles. Rather than relying on competitive markets to balance supply and demand, the February 18 Petition seeks to embark on a 20-year program to suppress wholesale natural gas and power prices at the expense of distribution ratepayers by providing a discriminatory preference to one type of generation connected to a single natural gas pipeline.<sup>17</sup> This effort cannot coexist with the principle that “[g]eneration 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.”<sup>18</sup> The express provisions of RSA Chapter 374-F(III) and the relief sought in the February 18 Petition directly conflict.

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<sup>16</sup> *Appeal of Old Dutch Mustard*, 99 A.3d 290, 293-94 (N.H. 2014).

<sup>17</sup> Testimony of James G. Daly at 11:1-3.

<sup>18</sup> RSA Chapter 374:F-3(III).

The Staff Report suggests that the direct conflict between RSA Chapter 374-F(III) and the February 18 Petition might be overlooked in light of other Restructuring Principles.<sup>19</sup> ExGen respectfully submits that this is incorrect.

Discarding the principles of RSA chapter 374-F(III) cannot be justified on reliability grounds. As noted above, the Staff Report itself questioned whether a filing like the February 18 Petition was actually grounded on concerns related to reliability.<sup>20</sup> The February 18 Petition seeks to justify the 20-year ratepayer-funded market intervention it seeks on the grounds that the investment will suppress competitive market prices, rather than enhance reliability.<sup>21</sup> Further, as the Staff Report found, other ISO-NE initiatives are expected to address reliability concerns directly, without causing the disruptive and discriminatory effects that would result if the February 18 Petition were approved.

Nor can the February 18 Petition be approved, as the Staff suggests, as:

‘[a] non-bypassable and competitively neutral system benefits charge applied to the use of the distribution system . . . 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 investments in commercialization strategies for new and beneficial technologies.’<sup>22</sup>

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<sup>19</sup> Staff Report at 10-11.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> See February 18 Petition at 3-5 (seeking “recovery of costs associated with the ANE Contract” and anticipating “price relief” will result from approval of the Petition).

<sup>22</sup> Staff Report at 10 (quoting RSA 374-F: 3, VI).

Nothing in the statutory text supports the conclusion that adopting a structure directly incompatible with RSA Chapter 374-F(III) could be justified as a “public benefit” attainable through a non-bypassable system benefits charge.<sup>23</sup>

**B. Eversource does not have the authority to enter into the Access Northeast Contract Under RSA Chapter 374-A or 374:57.**

Eversource argues that its authority to enter into ratepayer-subsidized contracts for long-term natural gas pipeline capacity, which it cannot use, for the purpose of offering that capacity to gas-fired generation that is interconnected with the Algonquin system flows from two statutes, each of which pre-dates the electric utility restructuring mandated by RSA Chapter 374-F.<sup>24</sup> These statutes are RSA Chapter 374-A and 374:57.

RSA 374-A was enacted in 1975, decades prior to the restructuring of the New Hampshire electric energy market. The authority granted in RSA Chapter 374-A:2 focuses solely on “electric power facilities.” Nothing in RSA Chapter 374-A:2 expressly relates to natural gas transportation services.

RSA Chapter 374-A:2 provides:

Notwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities or any limitation imposed by a corporate or municipal charter, but subject to the conditions set forth in this chapter, a domestic electric utility shall have the following additional powers:

I. To jointly or separately plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of or otherwise participate in **electric power facilities** or portions thereof within or without the state or the product or service therefrom or securities issued in connection with the financing of **electric power facilities** or portions thereof; and

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<sup>23</sup> The same defect exists in arguments that principles of regionalism (RSA Chapter 374-F(XII)) or environmental considerations (RSA Chapter 374-F(VIII)) could support a result in direct conflict with the plain meaning of the statute.

<sup>24</sup> February 18 Petition at 14.

II. To enter into and perform contracts and agreements for such joint or separate planning, financing, construction, purchase, operation, maintenance, use, sharing costs of, ownership, mortgaging, leasing, sale, disposal of or other participation in **electric power facilities**, or portions thereof, or the product or service therefrom, or securities issued in connection with the financing of **electric power facilities** or portions thereof, including, without limitation, contracts and agreements for the payment of obligations imposed without regard to the operational status of a facility or facilities and contracts and agreements with domestic or foreign electric utilities for the sale or purchase of electricity from an electric power facility or facilities for long or short periods of time or for the life of a specific electric generating unit or units. Such contracts and agreements may contain provisions for arbitration, delegation, non-unanimous amendment and any other matters deemed necessary or desirable to carry out their purposes.

Nothing in this section shall be construed to authorize a domestic electric utility to sell electricity at wholesale or retail within or without this state except:

(a) As otherwise authorized by or under its charter or the general or special laws of this state other than by this chapter;

(b) In connection with sales of economy, backup and other energy; and

(c) For any sale or sales of capacity and related energy from a specifically identified generating unit which is an electric power facility.

RSA Chapter 374-A:1:III defines “electric power facilities” as “generating units rated 25 megawatts or above and transmission facilities rated 69 kilovolts or above planned to be placed in service in New England after June 24, 1975.”

Under New Hampshire law, “[i]t is axiomatic that ‘all statutes upon the same subject-matter are to be considered in interpreting any one of them.’”<sup>25</sup> Applying this rule of statutory harmony, the New Hampshire Supreme Court in *Polizzo* interpreted the language of an older statute so that it was construed consistently with another, newer statute pertaining to the same

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<sup>25</sup> *Polizzo v. Town of Hampton*, 494 A.2d 254, 257 (N.H. 1985).

subject matter.<sup>26</sup> The rule as it applies here requires that RSA 374-A be read in harmony with later-adopted RSA 374-F:3, which, among other things, mandates that “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.” RSA 374-F:3 precludes Eversource from participating in electric generation, with a limited exception for small scale distributed generation resources.<sup>27</sup> If the restructuring principles of RSA 374-F:3 are to be given effect, the Petition should be rejected. Moreover, as Eversource itself has admitted, RSA 374-A is on its face inapplicable to an acquisition of natural gas transportation capacity that is not tied to any specific electric power facility or facilities (even if Eversource were permitted to engage in any such conduct in light of the restructuring principles).<sup>28</sup>

To the extent that the Commission cannot read the statutes harmoniously, RSA 374-F, “the later statute[,] will control” and will operate to repeal by implication the earlier statute where, as here, the later statute is intended to “occupy the entire field covered by the prior enactment.”<sup>29</sup> RSA 374-F functions broadly to “restructure the New Hampshire electric utility

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<sup>26</sup> *Id.*

<sup>27</sup> Response of New England Power Generators Association (“NEPGA”), Docket No. IR 15-241, at 10 (Aug. 10, 2015) (citing *Appeal of Northern New England Tele. Operations, LLC*, 75 A.3d 1102, 1107 (N.H. 2015); see *Polizzo*, 494 A.2d at 257-58 (construing earlier statute in manner wholly consistent with later-adopted statute). As NEPGA has argued, to the extent the statutes cannot be read in harmony, the doctrine of implied repeal should be applicable and the later enacted statute should control. NEPGA Response at 10; see *Prof'l Fire Fighters of Wolfeboro, IAFF Local 3708 v. Town of Wolfeboro* (hereinafter “*Firefighters*”), 48 A.3d 900, 905 (N.H. 2012) (comparing two statutes and deeming the earlier statute repealed by implication by a later-adopted statute).

<sup>28</sup> See Comments of Public Service Company of New Hampshire D/B/A Eversource Energy Re: Staff’s July 10, 2015 Memorandum at 11 (Aug. 10, 2015) (admitting “RSA chapter 374-A is not directly applicable to the potential solution described by Eversource” and Eversource is not proposing a solution fitting the descriptions in RSA chapter 374-A.”) available at [https://www.puc.nh.gov/Electric/Investigation\\_into\\_Potential\\_Approaches\\_to\\_Mitigate\\_Wholesale\\_Electricity\\_Prices.html](https://www.puc.nh.gov/Electric/Investigation_into_Potential_Approaches_to_Mitigate_Wholesale_Electricity_Prices.html) (last visited Apr. 27, 2016).

<sup>29</sup> *Firefighters*, 48 A.3d at 905.

industry” by “harnessing the power of competitive markets” in order to “develop a more efficient industry structure and regulatory framework.”<sup>30</sup> The New Hampshire legislature clearly intended for RSA 374-F to “occupy the entire field” of the electric industry, including that which is covered by 374-A, the participation of electric utilities in electric power facilities.<sup>31</sup> Given the New Hampshire Supreme Court’s rules of construction and RSA 374-F’s sweeping breadth to restructure the electric industry in order to “harness the power of competitive markets,” Eversource cannot lawfully locate in 374-A the source for its purported authority to enter a contract that undermines competitive market forces.

In the alternative, Eversource has in the past contended that its entry into the Access Northeast contracts is permitted by RSA 374:57, which provides:

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 in part, any amounts paid by the 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.

RSA 374:57 is on its face inapplicable to the purchase of natural gas transportation capacity. Nothing in the plain language of the statute supports the contention that the reference to “transmission capacity” can possibly encompass natural gas transportation, as opposed to electric transmission. The plain language of the statute refers only to electric generating capacity and transmission capacity. Consistent with its exclusive focus on electric energy, the statute refers to filing obligations under the Federal Power Act, to the extent applicable, not the Natural Gas Act.

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<sup>30</sup> RSA 374-F:1(I).

<sup>31</sup> RSA 374-A, *et seq.*

Moreover, nothing in the text of the statute suggests that RSA 374:57 authorizes the purchase of natural gas transportation capacity by an EDC **that the EDC cannot use.**

**C. Eversource's Assessment of the LGTSC would not be permitted under RSA Chapter 374-A, RSA 374:57 or Commission precedential standards for ratemaking.**

As noted above, cost recovery for the Access Northeast contracts should be denied pursuant to RSA Chapter 374-A and RSA 374:56. In addition, cost recovery should be denied because the costs Eversource proposes to incur pursuant to the February 18 Petition are not related to its distribution services. The benefits Eversource claims over the 20-year term of its proposed wholesale market intervention stem solely from its projection of the wholesale gas and power market price suppression that it anticipates. The capacity Eversource proposes to acquire cannot be used by Eversource; instead, it will be released by an asset manager selected by Eversource under terms and conditions that restrict the access (during many periods of time) only to gas-fired generation interconnected with Algonquin.

**D. FERC approval should be a condition precedent to any Commission approval of the February 18 Petition because Eversource's entry into the Access Northeast Contract and development of the ESRP would violate existing FERC regulations adopted pursuant to FERC's exclusive jurisdiction under the Natural Gas Act.**

The Commission should condition its approval on FERC approval because failing to do so risks wasted time and resources and exposes the Commission to legal challenges, particularly where, as here, there is significant doubt about the Petition's consistency with federal law.

Current FERC regulations mandate:

The pipeline must allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of the release. If more than one person offers the highest rate and meets the terms and conditions of the release, the

released capacity may be allocated on a basis provided in the pipeline's tariff . . . .<sup>32</sup>

The current exceptions to this general principle of capacity allocation were adopted only after generic rulemaking proceedings and are inapplicable to the facts of this case.

Section 4(b) of the Natural Gas Act makes it unlawful for any natural gas company subject to the jurisdiction of the Commission to “(1) make or grant any undue preference or advantage to any person or subject any person to any undue preference or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.”<sup>33</sup>

The February 18 Petition and the companion tariff filing submitted to FERC by Algonquin are inconsistent with current FERC regulations and cannot be reconciled with the ban on undue preference and undue discrimination in Section 4 of the Natural Gas Act. The FERC's bedrock policy with respect to capacity release was designed to facilitate a more efficient use of capacity while preventing undue discrimination and preference through open and transparent competitive bidding.<sup>34</sup> The proposed exemption from competitive bidding sought by Eversource and Algonquin would result in inefficient use of capacity and denial of access to capacity to market participants who are not electric generators interconnected with Algonquin.

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<sup>32</sup> 18 C.F.R. § 284.8(e) (2015).

<sup>33</sup> 15 U.S.C. § 717c(b) (2011).

<sup>34</sup> See generally *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13,267 (Apr. 16, 1992), FERC Stats. and Regs., Regulations Preambles January 1991 - June 1996 ¶ 30,939 (Apr. 8, 1992), *order on reh'g*, Order No. 636-A., 57 Fed. Reg. 36,128 (Aug. 12, 1992), FERC Stats. and Regs., Regulations Preambles January 1991 - June 1996 ¶ 30,950 (Aug. 3, 1992), *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992), *notice of denial of reh'g*, 62 FERC ¶ 61,007 (1993); *aff'd in part, vacated and remanded in part*, *United Dist. Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

The February 18 Petition and the associated Algonquin tariff filing at FERC result in undue discrimination between gas-fired generators on Algonquin who are given the benefit of non-biddable subsidized capacity and gas-fired generators who are connected to other pipelines and therefore are ineligible for the ratepayer-subsidized preference. Given that these same generators compete in the New England market, this preference will reverberate throughout the ISO-New England market. The February 18 Petition further results in undue discrimination between gas-fired generators on Algonquin and other generators who have made firm fuel arrangements without subsidies, whether it be natural gas or other fuels. There is even an undue preference on the Algonquin system with respect to pipeline capacity given that there are generators that already have firm pipeline capacity on Algonquin.<sup>35</sup> Algonquin’s proposed tariff language further places restrictions on the ability of a generator that obtains releases of capacity from an EDC to serve the wholesale electric market outside of the EDC.<sup>36</sup> The capacity release restriction is rather vague, as it could be perceived to limit a generator that acquires preferential capacity to only selling in the New England market or perhaps it is even more limited to “the market serving the electric distribution company”—*i.e.*, a sub-market within ISO-New England, such as the service territory of the releasing EDC. This restriction could balkanize wholesale sales by generators who receive subsidized preferential releases.

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<sup>35</sup> See Algonquin Index of Shippers, *available at* <http://infopost.spectraenergy.com> (last accessed Apr. 26, 2016).

<sup>36</sup> Proposed Section 14.16(b) of the Algonquin Tariff covers “[a] release by an electric distribution company, or an agent or asset manager for that electric distribution company, **when the replacement shipper is required by the release to provide electricity to the market serving the electric distribution company.**” Algonquin Gas Transmission, LLC February 19, 2016 Tariff Filing (FERC Gas Tariff, Sixth Revised Volume No. 1), FERC Docket No. RP16-618 (emphasis added). See Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC, Attachments J Daly, ATTACHMENT EVER-JGD-5, Proposed Electric Reliability Service Program at § II(4) (Feb. 18, 2016).

As noted above, FERC has suspended the effectiveness of Algonquin’s tariff filing subject to the outcome of technical conference procedures to address the full range of objections raised by ExGen and the many other parties protesting Algonquin’s filing to implement the February 18 Petition. The technical conference is scheduled for May 9, 2016.

FERC has exclusive jurisdiction over the interstate transportation of natural gas<sup>37</sup> and exclusive jurisdiction over interstate wholesale sales of electric energy.<sup>38</sup> The February 18 Petition threatens to conflict with that exclusive jurisdiction by upending the competitive market structures put into place by FERC—principles that are consistent with New Hampshire’s electric utility restructuring.

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<sup>37</sup> 15 U.S.C. § 717d(b); see *Schneidewind et al. v. ANR Pipeline et al.*, 485 U.S. 293, 301 (1988) (“The [Natural Gas Act] confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.”); *Northern Nat. Gas Co. v. State Corp. Comm’n of Kansas*, 372 U.S. 84, 89 (1963) (holding “that the State Commission’s orders did invade the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale.”).

<sup>38</sup> 16 U. S. C. § 824(b)(1); see *Hughes v. Talen Energy Marketing, LLC*, Nos. 14-614, 14-623, slip op. at 2 (S. Ct. Apr. 19, 2016) (stating that “The Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U.S.C. § 791a *et seq.*, vests in the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale sales of electricity in the interstate market.”).

### III. CONCLUSION

ExGen respectfully requests, for all the reasons set forth herein, that the Commission reject the February 18 Petition as unlawful.

Respectfully submitted,

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By its attorneys,

/s/ Mark R. Haskell

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## **CERTIFICATE OF SERVICE**

I certify that on April 27, 2016, pursuant to N.H. CODE ADMIN. R. Puc 203.02 and 203.11, I served an electronic copy of this Brief on each person identified on the Commission's service list in this docket and with the Office of Consumer Advocate, by delivering it to the email address specified on the Commission's service list for the docket.

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