STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 16-241

BRIEF OF ENGIE GAS & LNG LLC

The issues raised in this docket test New Hampshire's commitment to the establishment and promotion of a viable competitive electric market; a market that has been a work in progress at least since the 1996 passage of RSA Chapter 374-F set out policies and an implementation schedule for the restructuring of the electric industry. The RSA Chapter 374-F purpose statement identifies the development of competitive markets for wholesale and retail electricity services as a "key element in a restructured industry", RSA 374-F: 1, I, and recognizes that the establishment of a competitive electric services market will require "at least functional separation of centralized generation services from transmission and distribution services". Id. The commission is on the verge of completing the actual separation of generation services from transmission and distribution services as it considers the divestiture of Public Service Company of New Hampshire's ("PSNH") generation in Docket DE 14-238.

Achievement of the electric restructuring separation of functions policy has been placed at risk with the filing of the petition in this case. Approval of the petition's requests will allow an electric distribution company ("EDC"), in particular PSNH /d/b/a Eversource ("Eversource"), to obligate its distribution services customers to the twenty-year financial consequences arising from Eversource's provision of a generation-related service (natural gas supply transportation

and storage capacity) to electric gas generators with the goal of increasing their participation in the generation services market.

The relief requested in the February 18, 2016 Eversource petition cannot be granted because Eversource lacks the corporate authority under New Hampshire law to enter the transaction contract, the proposed transaction is not authorized by New Hampshire law and is in direct conflict with RSA Chapter 374-F policies, and the proposed assessment of charges to distribution customers is not permitted under New Hampshire law. Furthermore, state actions taken to approve the contract and to implement the assessment of charges arising from the Eversource proposal would be preempted by the Federal Power Act.

I. THE PETITION, LEGAL QUESTIONS, AND PROPOSED TRANSACTION

On February 18, 2016 Eversource filed a petition with this commission for approval of : (1) a twenty-year interstate pipeline transportation and storage contract providing natural gas pipeline and LNG storage deliverability capacity for use by natural gas electric generation facilities ("Access Northeast Contract"), (2) an electric reliability service program addressing the release of the gas and LNG capacity to electric generators ("ERSP"), and (3) a long term gas transportation and storage contract tariff ("LGTSC Tariff"), which will recover the costs of the Access Northeast Contract from all Eversource retail electric customers. On March 24, 2016, the commission issued an order of notice commencing this docket. The order divided the docket into two phases, with phase one addressing the issue of whether the Access Northeast Contract, LGTSC Tariff, and the ERSP can be lawfully entered into and approved under New Hampshire law.

The Eversource Petition asserts that: (1) RSA 374:57 authorizes the commission to act in the public interest with respect to the Access Northeast Contract approval and related aspects of

the proposed transaction, (2) RSA Chapter 374-A authorizes the execution of the Access Northeast Contract, (3) RSA Chapter 374-A and RSA 374:57 authorize the recovery of the Access Northeast Contract costs from all Eversource distribution customers as is contemplated by the proposed LGTSC Tariff, and (4) Eversource's participation in the Access Northeast Contract does not violate the electric industry restructuring policies of RSA Chapter 374-F. Petition at 14. The Order of Notice casts the questions regarding legal authority to be examined in phase one of the docket as whether: (1) Chapter RSA 374-A and RSA 374:57 constitute authority to enter the Access Northeast Contract, (2) the Access Northeast Contract, ERSP, and assessment of the LGTSC Tariff violate RSA Chapter 374-F, or any other law (including the Federal Power Act), and(3) the LGTSC Tariff assessment is permitted under RSA Chapter 374-A, RSA 374:57 and RSA Chapter 378. Order of Notice at 3-4.

In Docket IR 15-124 the Staff of the commission evaluated the generic questions of whether existing law allows EDC's to enter contractual arrangements to acquire natural gas pipeline capacity and whether the costs related thereto can be approved for recovery from EDC customers. The Staff July 10, 2015 memorandum (hereinafter "Staff Memorandum") reviewed the applicability of RSA Chapter 374-F, RSA Chapter 374-A, and RSA 374:57, to the authorization issue and RSA Chapter 378 to the issue of cost recovery. The Staff Memorandum states that staff is of the view that RSA Chapter 374-A is the most "foursquare statutory authorization for entering into gas capacity activities" and that "additional indirect statutory support may be found" in RSA 374:57. In Docket IR 15-124 Staff also issued a September 15, 2015 report addressing, among other issues, the legal authority questions (hereinafter "Staff Report"). The Staff Report clarified that staff was not proposing a solution to the legal authority issue in the Staff Memorandum, but was merely analyzing the legal issues of EDCs contracting

for gas pipeline capacity. The Staff Report affirmed the view that RSA Chapter 374-A and RSA Chapter 374-F could allow for such transactions, but recognized ambiguity in the use of RSA 374:57 for such transactions. Staff Report at 11.

Examination of the applicable text and legislative history of each of these statutes, however, demonstrates that none of the foregoing statutes constitute corporate authorization for Eversource to enter into the Access Northeast Contract. Absent authorization to enter such a contract no New Hampshire statute provides the commission with the authority to approve the Access Northeast Contract and no statute, including RSA Chapter 378, authorizes the assessment of the costs of the contract to electric customers through the LGTSC Tariff.

According to the testimony filed in this docket by Eversource witnesses, the transaction contemplated by the Access Northeast Contract, the ERSP, and the LGTSC Tariff includes the following concepts. First, under the Access Northeast Contract Eversource will pay for and hold entitlements for firm gas pipeline transportation and storage capacity. Redacted Testimony of Eversource Corporation, James G. Daly, DE 16-241, at 4 (hereinafter "Eversource Testimony"). The ERSP is a program that will use a third party (the Capacity Manager) to administer the release of this gas capacity to the electric generation market. Eversource Testimony at 60. The revenues produced from the "margin" from the sale of this gas capacity to the electric generators would be credited to the EDC customers net of transportation charges, storage inventory costs, and administrative costs incurred for the transaction. Eversource Testimony at 63, 67-68. The net cost or credit associated with the sale will be recovered or credited through a uniform cents-per kWh rate on all Eversource customers under the LGTSC Tariff. Eversource Testimony at 66-67, and Redacted Joint Testimony Christopher J. Goulding and Lois B. Jones, DE 16-241 at 6 (hereinafter "Goulding"). The order of notice at 3 clarifies that "all Eversource customers" for

purposes of charges under the LGTSC Tariff means all Eversource electric distribution customers. Thus, the essence of the proposed transaction is that, for a twenty-year term, Eversource seeks to sell gas pipeline transportation and LNG storage capacity to certain electric generators and assess Eversource electric distribution customers the net cost or credit of having obtained and sold that capacity to electric generators in specified areas of New England.

II. ARGUMENT

A. RSA 374:57 Does Not Apply To Gas Pipeline Transportation Capacity Contracts Or Storage Contracts And Thus Does Not Constitute Corporate Authority For Eversource To Enter The Access Northeast Contract Or For The Commission To Approve That Contract Or The LGTSC Tariff As In The Public Interest.

RSA 374:57 at the time of its enactment and today states that "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...." (emphasis supplied). The statue authorizes the commission to "disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest."

The Staff Report's analysis of New Hampshire statutes authorizing EDCs to enter gas pipeline contracts, such as the Access Northeast Contract, recognizes the ambiguity inherent in attempting to find that RSA 374:57 authorizes such contracts given that the statute uses the undefined phrase "transmission capacity" and does not specify whether that phrase means gas capacity in addition to electric capacity. Staff Report at 11. The Staff Report states that "Staff views the applicability of RSA 374:57 to gas capacity acquisitions, in addition to electric capacity acquisitions, to be the key question for Commission resolution regarding the applicability of this statute to the activities being proposed by Eversource." Id. The fact that the

phrase "transmission capacity" is susceptible to more than one interpretation means it is ambiguous text. Union Leader Corporation v. New Hampshire Retirement System, 162 N.H. 673, 677 (2011). The same question exists for those activities under the Access Northeast Contract that constitute the provision of gas storage capacity.

When confronted with ambiguous statutory language, the New Hampshire Supreme Court stated it was "obligated to consult legislative history" to inform its analysis. Id., and Appeal of Gamas, 158 N.H. 646, 649 (2009). When construing an ambiguous statute, the Court looks to both the legislative intent and the overall objectives of the legislation. E.g., Appeal of Ashland Electric Company, 141 N.H. 336, 340 (1996), and Greenhagle v. Town of Dunbarton, 122 N.H. 1038 (1982) (legislative intent examined when Court found that the phrase "growing wood or timber" was not defined by the relevant statute and was not clear on its face).

The goal of statutory interpretation is to apply statutes in light of the legislature's intent in enacting the statute and in light of the policy sought to be advanced by the entire statutory scheme. Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501 (2014). Statutes are to be interpreted in the context of the overall statutory scheme and not in isolation. Id. Legislative intent can be gleaned from the statue's legislative history, the circumstances which led to the enactment of the statutory text in question, its purpose, and the problem or issue the statute is designed to remedy. Appeal of Coastal Materials Corporation, 130 N.H. 98 (1987). Application of these principles to RSA 374:57 resolves the ambiguity present in "transmission capacity".

1. The Legislative History Indicates That RSA 374:57 Was Enacted To Insure That Utility Wholesale Power Decisions, Including Transmission Decisions, Would be Subject to Commission Approval. As Used In That Context "Transmission Capacity" Only Refers To Electric Transmission Capacity.

On December 14, 1989 the New Hampshire General Court commenced a one day special legislative session to consider House Bill HB-1 FN. This bill sought to resolve the PSNH bankruptcy by authorizing the commission to determine if an agreement entered into between the State of New Hampshire and Northeast Utilities was in the public good. See generally 1990 Journal of the House Of Representatives of New Hampshire, pages 1-27, 1989 Special Session (hereinafter "N.H.H. Jour. (1990)") and 1990 Journal of the Senate of New Hampshire, pages 1-60, 1989 Special Session (hereinafter "N.H.S. Journ. (1990)"). The bill originated in the Joint Legislative Committee to Monitor the Public Service Company of New Hampshire Reorganization Proceedings (hereinafter "Joint Committee") and had been approved by the Joint Committee with an amendment prior to coming to the House in the Special Session. N.H.H. Jour. 8-9 (1990).

Representative Vartanian[1] spoke at length in the Special Session in support of HB-1 FN and, among other statements, noted that: "HB-1 is necessary to permit New Hampshire to realize the benefits of the Northeast Utilities plan and the rate agreement signed between the state and Northeast Utilities." N.H.H. Jour. 13 (1990). According to the Representative these benefits included "ensuring that PSNH will be subject to regulation by the New Hampshire PUC", and the state's energy requirements will be met with "predictable electricity rates that track expected inflation". N.H.H. Jour. 13 (1990). No mention of natural gas is made in the discussion of HB-1 reported in the House Journal for the Special Session.

[1] The HB-1 FN Joint Committee Report was authored by Representative Vartanian for the majority of that committee. Representative Vartanian also was the sponsor of HB-1 FN in the Joint Committee. N.H.H. Jour. 8, 12 (1990).

The Senate Journal for the Special Session reflects a debate focused on the resolution of the bankruptcy, the electric rate increases proposed under the rate agreement with Northeast Utilities and the effect of the bankruptcy and rate increases on the state's economy and citizens. E.g., N.H.S. Jour. 22-27 (1990) (remarks of Sen. President Bartlett). Access to electric supply and retention of the state's regulatory oversight of PSNH were also discussed. N.H.S. Jour. 45 (1990) (remarks of Sen. Bass), and N.H.S. Jour. 48 (1990) (remarks of Sen. Dupont). No mention of natural gas is made in the discussion of HB-1 reported in the Senate Journal for the Special Session.

As presented in the Special Session, and ultimately passed[2], section 1 of HB-1 FN proposed to add a new chapter to state law; RSA Chapter 362-C. Section 1 of HB-1 FN included provisions to authorize the commission to determine if the proposed rate agreement between the state and Northeast Utilities was in the public interest. Section I also included proposed RSA 362-C: 10, which states, in relevant part, that nothing in the approval of the bankruptcy plan "shall restrict access to Public Service Company of New Hampshire's or its successors, power supply and transmission resources for...existing New Hampshire firm wholesale and transmission utility customers."

Section 2 of HB-1 FN, as presented in the Special Session and ultimately passed, added RSA 374:57 to existing RSA Chapter 374. The Joint Committee Report on HB-1 FN, in explaining the addition of RSA 374:57, stated "...the legislation requires PUC approval of all generation and transmission agreements with a term of more than one year. This ensures that utility wholesale power supply decisions will be reviewed by the PUC for reasonableness and prudence...." N.H.H. Jour. 9 (1990) (emphasis supplied). In explaining the Joint Committee

[2] HB-1 FN, as had been amended by the Joint Committee, was approved by both chambers of the General Court in the Special Session, N.H.S. Jour. 59 (1990), and on December 18, 1989 was signed into law by Governor Gregg.

amendment to HB-1 FN regarding RSA 374:57, Representative Vartanian stated that: "...any power purchase or energy agreement of longer than one year" requires public utilities commission approval. N.H.H. Jour. 14 (1990). The Representative further explained the significance of such approval authority, stating: "if the PUC feels that any of those rate charges are unjust or unreasonable they can throw out that portion of the agreement. So that is an important adjustment in terms of the PUC oversight." Id.

The HB-1 legislative history demonstrates that the bill and debate that produced RSA 374:57 had nothing to do with natural gas or the transmission or transportation of natural gas as a fuel for use in electric generating facilities. The New Hampshire General Court was called into Special Session to address issues involving the resolution of the bankruptcy of the largest electric utility in the state. The issues confronting the General Court in HB-1 FN concerned the proposed level of electric rate increases and the economic effects of those electric rate increases on citizens and business, the retention of regulation of PSNH and its rates by the state, and whether the commission should be authorized to determine if the implementation of the rate agreement negotiated with Northeast Utilities was in the public interest. Because the intent and policies that the legislature sought to advance with the passage of HB-1 FN concerned the resolution of the PSNH bankruptcy, any questions regarding the intent of any particular provision of HB -1 FN are to be read in that context. HB-1 FN's statutory provisions should not be expanded to imbue them with meaning and subject matter outside the subject matter of the resolution of the bankruptcy of the state's largest electric utility. See Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501 (2014) (statutes are to be interpreted in light of the intent and polices sought to be advanced by the legislature).

The commission's interpretation of RSA 374:57 should not ignore this legislative context. See Union Leader Corporation v. New Hampshire Retirement System, 162 N.H. 673, 678 (2011) (stating where legislative history plainly supports a particular construction of the statute, the court will adopt that construction). RSA 374:57 was not a separate stand-alone legislative enactment. It stands as part of the resolution of the bankruptcy of the state's largest electric utility and the legislative intent to retain state regulatory authority over power supply determinations. The Joint Committee Report makes this clear in stating that the intent in requiring commission approval of "all generation and transmission agreements with a term of more than one year" in RSA 374:57 was to ensure "that utility wholesale power supply decisions will be reviewed by the PUC for reasonableness and prudence". N.H.H. Jour. 9 (1990) (emphasis supplied). Thus, the General Court understood that the "transmission agreement" (i.e., the agreement for the purchase of transmission capacity) contemplated in RSA 347:57 involved the transmission of wholesale power, not the transmission (or transportation) of a fuel, such as natural gas, used to make power in an electrical generation facility. The General Court also understood that RSA 374:57 existed as part of the statutory scheme to strengthen commission oversight of such power supply transactions. N.H.H. Jour. 14 (1990).

The addition of RSA 362-C:10 by section 1 of HB-1 FN further supports limiting the RSA 374:57 phrase "transmission capacity" to electric transmission capacity. In enacting RSA 362-C: 10 as part of HB-1 FN the General Court intended to advance policies addressing access to electric transmission. The bill analysis accompanying HB -1 FN applicable to proposed RSA 362-C: 10 made clear that section 10 addressed the access of small electric utilities to power supply and transmission of that supply. The references in that section to "transmission resources" and "transmission utility customers" are in the specific context of electric transmission, as

evidenced by the bill analysis which refers to this transmission in the context of power supply and transmission access by the New Hampshire Electric Cooperative. See N.H.H. Jour. 9 (1990) (Joint Committee Report statement that "The legislation provides that other small electric utilities in New Hampshire will have access to power supply and transmission resources in the same manner as the New Hampshire Electric Cooperative."), and N.H.H. Jour. 13 (1990) (HB-1 FN bill analysis statement that nothing in the bankruptcy plan "shall restrict access to Public Service Company's or its successors power supply and transmission resources for...existing New Hampshire firm wholesale and transmission utility customers").

The upshot of reading RSA 374:57 in the context of its legislative history is that "transmission" is discussed in the context of wholesale power supply determinations. Nowhere does the legislative history refer to "transmission" as the transportation of a fuel by pipeline. To dissociate "transmission" from its legislative context and define it as an isolated word is impermissible statutory construction. City of Manchester School District v. City of Manchester, 150 N.H. 664, 669 (2004) (statutory provisions are to be construed in a manner that is consistent with the spirit and objectives of the legislation as a whole). When read in light of its statutory history, RSA 374:57 does not constitute authority for Eversource to enter the Access Northeast Contract or for the assessment of any of the gas transportation capacity related charges to electric customers for the costs of that contract through the LGTSC Tariff.

Furthermore, the plain text of RSA 374:57 demonstrates that it does not constitute authority for Eversource to enter, or for the commission to approve and charge customers through the LGSTC Tariff for the portion of the Access Northeast Contract that concerns gas storage capacity. See Appeal of Public Service Company, 141 N. H. 13 (1996) ("Courts can neither ignore the plain language of the legislation nor add words which lawmakers did not see

fit to include"). Nothing in RSA 374:57 addresses, or allows approval of, or addresses or allows the assessment of the charges related to, the acquisition or sale of gas storage capacity.

2. Application Of The Associated Word Doctrine Also Construes The RSA 374:57 "Transmission Capacity" Phrase to Mean Electrical Transmission Capacity.

Additional support for understanding the phrase "transmission capacity" in RSA 374:57 to mean only electric transmission capacity arises from application of the *noscitur a sociis* rule of statutory construction. This rule, sometimes referred to as the associated word doctrine, states that words grouped together in a statutory list should be given related meaning. Yates v. United States, 574 U.S. ___, (2015), 135 S. Ct. 1074 (2015) (construing the phrase "tangible object" to refer not to any tangible object, but specifically to tangible objects used to record or preserve information, given the statutory list of "any record, document, or tangible object), and Jarecki v. G. D.Searle & Co., 367 U.S. 303, 305-307 (1961) (construing "discovery" to mean only discovery of mineral resources and not scientific discoveries, given the statutory phrase "resulting from exploration, discovery, or prospecting"). See generally 2A Sutherland, Statutory Construction (7th ed. 2007), section 47:16. In construing statutes, the United States Supreme Court relies on the statutory construction principle of *noscitur a sociis* (a word is known by the company it keeps) to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress". Yates v. United States, 574 U.S. ___, (2015), 135 S. Ct. 1074, 1085 (2015) (internal citations omitted). Additionally, in construing statutes the New Hampshire Supreme Court recognizes that words used in a technical capacity are to be given their technical meaning. Appeal of Public Service Company, 125 N.H. 46 (1984) (technical meanings applied in addressing cost recovery issues for the abandoned Pilgrim 2 nuclear generating plant), and State v. Berry, 121 N.H. 324, 327 (1981).

RSA 374:57 lists three types of agreements: a generating capacity agreement, a transmission capacity agreement, and an energy agreement. In the electric utility industry, energy is a well-known technical term referring to power produced in the form of electricity and is measured in KWhs or MWhs. Capacity is also a well-known technical term and generally means the rated load-carrying ability of generation, transmission, or other electrical equipment expressed in MWs or megavolt- amperes. See Appeal of Granite State Electric Company, 121 N.H.787, 789-90 (1981) (explaining the meaning of energy and capacity as applied to generation). The New Hampshire legislature has used the technical meaning of the terms energy and capacity in a number of enactments to describe the electrical load-carrying ability of a generating unit or the amount of its electrical output. See RSA 162-H: 2, (b) (defining electric generating station in terms of capacity); RSA 374-A:2, II, (b) and (c) (enacted in 1975 and referencing sales of energy, and sales of capacity and related energy from a generating unit); RSA 374-D: 1, IV (defining small scale power facility as producing energy with a capacity no greater than 80 MWs), and RSA 362-A: 8 (first enacted in 1988 and referring to the purchase of energy, or energy and capacity from certain generation facilities). Understanding generation capacity and energy as terms having a technical definition and applying them in the context of RSA 374:57 means an energy agreement is one an electric utility would enter to procure electric power supply in the form of MWhs and the generating capacity agreement is one an electric utility would enter to procure electric power supply in the form of MWs.

Because two of the agreements in the RSA 374:57 list of three refer to agreements pertaining to electricity, application of the associated word doctrine means that the third agreement, the transmission capacity agreement, should be read to pertain only to transmission of electricity and not to the transportation of natural gas by a pipeline. To do otherwise is to

ascribe the phrase "transmission capacity" with a meaning so broad that it is inconsistent with its accompanying phrases, thus giving unintended breadth to the statute passed by the General Court. See Yates v. United States, 574 U.S. ___, (2015), 135 S. Ct. 1074, 1085 (2015).

Having determined that the Access Northeast Contract proposed for approval is not a "transmission capacity" contract as that term is used in RSA 374:57 also means that RSA 374:57 is not a source of authority for commission consideration and approval of the Access Northeast Contract or the LGTSC Tariff seeking to charge electric customers for the costs associated with the Access Northeast Contract as in the public interest or for cost recovery. This is so because the approval authority in RSA 374:57 is only applicable to "any such agreement", meaning only an electric generation capacity agreement, electric transmission capacity agreement, or an electric energy agreement.

B. RSA 374-A Pertains To Investment In Bulk Power Generation Facilities. It Does Not Authorize Eversource to Enter Fuel Transportation Or Storage Capacity Contracts as a Vendor To Such Facilities or Authorize Assessments To Its Distribution Customers Associated With Such Contracts. Therefore, The Access Northeast Contract Cannot Be Entered Under, And The LGTSC Tariff Assessments Cannot Be Authorized Or Approved Under, This Statute.

The Eversource Petition asserts that RSA Chapter 374-A authorizes the execution of the Access Northeast Contract and the assessment of the contract costs to its distribution customers through the proposed LGTSC Tariff, Petition at 14, even though it earlier took the position on the related generic question in Docket IR 15-124 that RSA Chapter 374-A "is not directly applicable". Staff Report at 11. The Staff Memorandum also asserts the applicability of RSA Chapter 374-A to the generic proposed transaction. The Staff Memorandum at 4 states that authority for such a transaction may be found in RSA 374-A: 2, I, which states, in relevant part, that domestic electric utilities have power:

> 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 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.... (emphasis supplied).

Similar language appears in RSA 374-A: 2, II which states that a domestic utility "may enter into and perform contracts for such joint or separate... sharing costs of, ownership, mortgaging, leasing, sale, disposal of or other participation in electric power facilities, or portions thereof...." (emphasis supplied). The Staff Memorandum holds the view that an EDC contract for gas pipeline transportation capacity entered into for the use of electric generators of the size defined in the statute can constitute "the sharing of costs of, and a form of other participation in, such electric power facilities." Staff Memorandum at 4.

The plain text of RSA 374-A: 2, I, II quoted above does not authorize an EDC to enter a contract for gas transportation or storage capacity to be sold to an electric generation facility. This is so because the cost sharing or participation must be in the electric power facility. Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501 (2014) (plain and ordinary meaning of statutory text applied where text is clear on its face.) The acquisition of pipeline capacity and storage capacity and the subsequent sale of such capacity to another entity (the electric generation company) is not cost sharing or participation in the generating facility. "Participation" is defined in its ordinary usage to mean to share or take part in something, and "participate" means to "share or be involved in something". American Heritage Dictionary of the English Language, 5th Ed. 2015. "Sharing" means "to accord a share in (something) to another or others, to divide and parcel out in shares; apportion; or to participate in". Id. Here, there is no sharing in the cost of, or participation by Eversource in the actual generation facility, as is required in the plain text

quoted above. Instead, under the proposed Eversource transaction, the electric generation company pays for gas transport capacity and gas storage capacity releases and the net cost or credit associated with that sale will be recovered or credited through a uniform cents-per kWh rate on all Eversource customers. See Goulding at 3. This transaction is more appropriately seen as a third party vendor selling fuel transportation and storage capacity services to a generating facility.

Any argument that the word "participate" and the phrase "share the cost of" as applied to the electric generation facility are broad enough to encompass acts such as the sale of gas transportation and gas storage capacity is dispelled by examining the legislative history, and the circumstances which led to the enactment, of RSA 374:57. Appeal of Coastal Materials Corporation, 130 N.H. 98 (1987). This legislative history supports the plain reading of the statute; sharing and participation mean sharing in or participating in the actual generation facility. The terms do not include third party sales of fuel or fuel transportation or storage capacity to the facility, as is proposed in the Eversource transaction. See Union Leader Corporation v. New Hampshire Retirement System, 162 N.H. 673, 678 (2011) (stating where legislative history plainly supports a particular construction of the statute, the court will adopt that construction).

RSA Chapter 374-A was enacted in the 1975 legislative session. At least three bills in that session sought to address the subject matter that ultimately became RSA Chapter 374-A. They are: HB 527, SB 86, and HB 996. HB 996 addressed participation in regional bulk power facilities. It was sent to "interim study" by the House due to its complexity and the expectation the House would be receiving SB 86. N.H.H. Jour. 678 (1975).

SB 86 proposed to add two new chapters to state law: RSA Chapter 374-A and RSA Chapter 374-B. N.H.S. Jour. 346-356 (1975). Senator Smith described SB 86 as allowing PSNH and municipal utilities "to invest in the construction of the larger energy producing plants". N.H.S. Jour. 346 (1975) (emphasis supplied). As proposed in SB 86 RSA Chapter 374-A found it to be in the public interest for electric utilities to "participate together in a power pool which will permit enlarged development of a reliable regional bulk power supply in New England" and authorized participation in such a pool. . Id. at 347. The bill also authorized utilities to "jointly or separately plan, finance, construct, purchase, operate, maintain, use, share costs of ...or otherwise participate in electric power facilities or portions thereof...." Id. at 348. As proposed in SB 86, RSA Chapter 374-B addressed municipal electric revenue bond issuance and participation in New England Power Pool (hereinafter "NEPOOL") facilities. SB 86 was "killed" by the House. N.H. S. Jour. 1009 (1975).

HB 527 as originally passed by the House had nothing to do with the subject matter of bulk power facilities. The House bill was amended in its entirety by the Senate because the House had killed SB 86. In offering the Senate amendment, Senator Smith stated: the amendment "incorporates some of SB 86 which was the bill we had relative to the New England Electric Power Pool." N.H.S. Jour. 971 (1975). The Senator noted that the bill "would allow utilities to buy shares in the producing facilities like these large atomic plants." Id. (emphasis supplied). It did not contain any version of SB 86's proposed RSA Chapter 374-B. Id. The House non-concurred on HB 527 as amended and asked for, and the Senate acceded to, a committee of conference. N.H. H. Jour. 988, 993 (1975), and N.H.S. Jour. 1027-1028 (1975).

A June 4, 1975 letter from Governor Meldrim Thomson, Jr. to the General Court just prior to the committee of conference explains the importance of and the reason for HB 527 as

amended by the senate. The letter states that HB 527: "allows out-of-state utilities with at least one New Hampshire utility to own parts of power plants within the State of New Hampshire". N.H.S. Jour. 1046 (1975) (emphasis supplied). The letter also states: "this legislation is needed if we are to go forward with the vital Seabrook Nuclear facility", and "if you kill this amended version, you could be jeopardizing the funding for the Seabrook facility." N.H.S. Jour. 1046-1047 (1975).

The bill was amended in its entirety in the committee of conference. The amendment inserted essentially what had been proposed RSA Chapter 374-A and Chapter 374-B as presented in SB 86, but without any references to NEPOOL. N.H.S. Jour. 1082-1091 (1975). Senator Smith explained the removal of all reference to NEPOOL as broadening "the participation which companies and municipalities...may experience. Instead of just having to invest in the New England States, they could go to New York or other areas to invest and participate in the construction of an atomic power plant." Id. at 1091. The HB 527 committee of conference bill was adopted by both chambers of the General Court, and was enacted as Laws 1975, 501:1, 2.

This legislative history is replete with references to the policy the General Court actually sought to advance in RSA Chapter 374-A, which is authorizing investment and financing for the purpose of acquiring an ownership or entitlement interest in an actual electric generation facility. Hence, Senator Smith spoke of investing in power plants and participating in power plants to develop reliable bulk power supply in discussing SB 86, or how the Senate amendment to HB 527 "would allow utilities to buy shares in the producing facilities like these large atomic plants", or how the committee of conference bill allows investment and participation in the construction of atomic power plants beyond just New England. Governor Thompson is clear in

his support for HB 527 because it allows utilities to own parts of power plants and is needed for the financing of Seabrook Station. These legislative expressions of intent, objective and the circumstances surrounding the enactment of RSA Chapter 374-A mean that the construction of the phrases "share the cost of" and "otherwise participate in" are to be read in the context of making the investment and financing determinations that produce the ownership interest in the electric generating facility and cannot be dissociated from that intent. City of Manchester School District v. City of Manchester, 150 N.H. 664, 669 (2004) (statutory provisions are to be construed in a manner that is consistent with the spirit and objectives of the legislation as a whole).

The legislative history evidences no intent to advance a policy that "share in" or "otherwise participate in" an electric generation facility can take place in the absence of some form of ownership or right in or to the actual generating facility. The act of a third party, with no such ownership or right in or to the generating facility, selling fuel or fuel transportation and storage capacity (as is proposed under the Access Northeast Contract) to the electrical generation facility is beyond the scope of authorizations granted by RSA 374-A. Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501, 506 (2014). Thus, contrary to the assertion in the Eversource Petition, RSA Chapter 374-A does not authorize Eversource to enter the Access Northeast Contract or authorize the assessment of charges under the LGTSC Tariff.

C. The Access Northeast Contract, The ERSP, And Assessment Of The LGTSC Tariff Conflict With, Violate, And Are Precluded By The Electric Restructuring Policies Of RSA Chapter 374-F.

The General Court enacted RSA 374-F, the Electric Restructuring Act (hereinafter "Act"), as public Law 1996, 129:2. Section 1 of that public law contains RSA 374-F legislative findings, including the finding that:

> Monopoly utility regulation has historically substituted as a proxy for competition in the supply of electricity but recent changes in economic, market and technological forces and national energy policy have increased competition in the electric generation industry and with the introduction of retail customer choice of electricity suppliers as provided by this chapter, market forces can now play the principal role in organizing electric supply for all customers instead of monopoly regulation[3] (emphasis supplied).

The core of the proposed Eversource transaction, i.e., the purchase of gas transportation and storage capacity under the Access Northeast Contract, the subsequent sale and release of gas transportation and storage capacity to electric generation facilities under the ERSP and the assessment of those twenty-year contract and ERSP administrative costs to its distribution customers under the LGTSC Tariff, are actions proposed to be taken by Eversource in the exercise of its monopoly distribution function. Taken as a whole, these actions seek to organize parts of electric generation fuel infrastructure needed to provide for electric supply from gas-fueled electric generation facilities. As such, these actions constitute the provision of a generation-related service to gas-fired electrical generation facilities.[4] For example, the Eversource Testimony notes that gas-fired generators' day-ahead market commitments are often reduced due to an inability to acquire natural gas. Eversource Testimony at 29. The Eversource transaction proposed in this docket is designed to remedy that situation and thereby increase gas-fueled electric generation supply. See Eversource Testimony at Attachment EVER-JGD-5 at 2 (The ERSP has the objective of increasing available gas supply for generation). This generation

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[3] Laws 1996, 129:1, 2 is available at http://www.gencourt.state.nh.us/legislation/1996/HB1392.htm See In re New Hampshire Public Utilities Commission Statewide Electric Utility Restructuring Plan, 143 N.H. 233, 241 (1998) (in construing RSA 374-F the Court evaluated legislative findings in Laws 1996, 129:I).

[4] The acquisition and provision of this transportation and storage capacity constitutes a principal or major organizing of the gas-fueled electric generation supply market and is a generation-related service because "the generation portfolio in New England relies substantially on natural gas for electric generation, which is a fuel resource that requires pipeline capacity for delivery", Eversource Testimony at 27, about 50% of New England's power comes from gas-fired generation, Id. at 37,"gas-fired generators are unwilling to contract for pipeline capacity due to the uncertainty of cost recovery", Id. at 10, and gas generators do not hold firm pipeline capacity contracts, therefore they are dependent on the availability of capacity released by firm capacity holders. Id. at 13-14.

related service is not a function that Eversource, in the performance of its distribution function, can undertake and charge to its distribution customers given the plain text of RSA Chapter 374-F discussed below.

RSA Chapter 374-F is very clear in the significance it accords to the line between generation services and transmission and distribution services. The Act states that 'the most compelling reason" to restructure the electric industry is to reduce customer costs "of electricity by harnessing the power of the competitive markets." RSA 374-F: 1, I. The development of that competitive market is called a "key element" 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." Id. These same policies exist in section 3 of the Act, which states: (i) services and rates should be unbundled into generation, transmission, and distribution, (ii) generation services should be subject to market competition and minimal economic regulation, and (iii) generation services should at least be functionally separated from transmission and distribution services. RSA 374-F: 3, III. The Act also requires that customers have access to default service electricity supply, which "should be procured through the competitive market." Id. at V, (c).

The Access Northeast Contract and the ERSP, in intending to increase the amount of gas-fired generation in the market at any given time, conflict with, and impermissibly entangle, the functional separation policies of the Act because the contract only exists to provide a generation-related service through the ERSP, See note 4 supra., the financial consequences of which are proposed to be assed to distribution customers. The ERSP violates the functional separation requirement because, as discussed above, that program provides a gas generation-related service procured under the Access Northeast Contract, and the ERSP is ultimately overseen and

managed by the participating EDCs. See Eversource Testimony at Attachment EVER-JGD-5.[5] Nothing in the Act authorizes an EDC to take actions to influence the amount of gas-fired generation capacity or its availability. Those are functions left for the competitive generation market to address. The LGTSC Tariff assessment violates the Act's separation of functions requirement because its assessments will financially obligate distribution customers to be responsible for the cost consequences of the provision of generation-related services to gas electrical generators arising from the Access Northeast Contract. See Eversource Testimony at 14 (EDCs have the financial capability to support pipeline contracts as long as they can recover associated costs from retail electric customers).

The Eversource Petition and the testimony provided by Eversource in support of the Petition contain numerous characterizations of the proposed transaction as promoting "reliability"; however, this characterization does not change the fact that the transaction constitutes the provision of generation-related services by a company under its electric distribution function in violation of the RSA Chapter 374-F functional separation of services policy and the related policy requiring the unbundling of prices and services into distribution, transmission, and generation. RSA 374-F: 3, III, and F: 4, I. Assessment of generation-related costs under the LGTSC Tariff to distribution customers is the functional equivalent of bundling distribution costs and those generation costs.

The transaction taken as a whole also conflicts with the RSA Chapter 374-F purpose statement regarding the development of competitive markets and the policies that generation services should be subject to market competition, RSA 374-F: 1, I, and F: 3, III. This conflict

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[5] The ERSP also violates the Act because nothing in the Act allows electric distribution companies to provide gas transportation and storage services to the secondary gas market and charge electric distribution customers for those costs. Yet, the capacity manager is granted this authority under the proposed ERSP. Eversource Testimony at 61, and Attachment EVER-JGD-5 at II (1) a, i (gas release to the general market if not acquired by generators).

arises from the fact that the Access Northeast Contract and the ERSP propose to affect what generation may be in the market at any time with the result that certain generation will be given a competitive edge due to the gas transportation and storage capacity made available to it under the ERSP. The intent is to produce an increase in the availability of gas-fired generation, see Eversource Testimony at Attachment EVER-JGD-5 at 2. This is not an inconsequential generation market action given the dominance of gas generation in New England and the twenty-year term of the commitment.

Furthermore, no express provision in the Act allows Eversource to enter the Access Northeast Contract, develop or implement the ERSP, or levy the assessments under the LGTSC Tariff. No provision of the Act authorizes the commission to approve any of the foregoing. The lack of such express authority is significant because, given the functional separation policy in RSA 374-F:3, III, the General Court was quite careful and explicit when it sought to authorize distribution companies to charge generation-related costs to distribution customers or engage in a generation function under the Act.

Regarding explicit reference to generation, Section F: 3, V (c) of the Act provides that costs from compliance with the RSA Chapter 362-F renewable portfolio law for default service or purchased power contracts are to be recovered through the default service charge, i.e., only those EDC customers buying electricity supply from the EDC will be responsible for these generation charges. Customers connected to the EDC distribution system and purchasing electricity supply from a non-EDC supplier are not assessed such charges. This distinction comports with the functional separation policy in the Act. In a later enacted statute the General Court made an explicit exception to this requirement and policy. Public Law 2015, 221:14 states:

> Notwithstanding RSA 374-F:3, V (c), the commission may approve recovery of net over-market costs of purchased power agreements entered into pursuant to

RSA 362-F:9 through a stranded cost charge as part of a comprehensive restructuring of PSNH's ownership of generation assets.[6]

The change in recovery of such costs from a default service charge to a stranded cost charge means that the cost will be recovered from all distribution customers in a non-bypassable charge, regardless of the customer's source of electricity supply. RSA 374-F: 3, XII (d). Similarly, when the General Court sought to identify permissible generation-related actives by an EDC, it did so explicitly and narrowly. See RSA 374-F: 3, III (notwithstanding functional separation of services, distribution companies could own small scale distributed generation resources to minimize distribution costs).

The Act identifies no other generation functions that can be undertaken by an EDC and charged to EDC customers. The structure of the Act and its plain text preclude finding that other generation functions and generation-related charges, such as the Access Northeast Contract, the ERSP, and the proposed assessments under the LGTSC Tariff, undertaken in the context of the distribution function are within the scope of the Act. Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501, 506 (2014) (statutes are to be applied in light of the policy advanced by the entire statutory scheme); and Appeal of Public Service Company, 141 N. H. 13 (1996) ("Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include").

D. State Law Does Not Provide For LGTSC Tariff Assessment.

Cost assessment under the LGTSC Tariff is not available under state law because Eversource lacks corporate authority to enter the transaction and its component agreements. As discussed above the Access Northeast Contract is not one that can be entered under RSA 374:57

[6] Laws 2015, 221:14 is available at http://www.gencourt.state.nh.us/legislation/2015/SB0221.pdf

or RSA Chapter 374-A, and it and the LGTSC Tariff assessment of costs to distribution customers conflict with and are precluded by RSA Chapter 374-F.

LGTSC Tariff approval and cost assessment is not available under RSA Chapter 374-A because, as discussed in Part B above, the transaction falls outside the scope of that statute. Furthermore, if the statute were applicable, RSA 374-A: 6, III only provides for rate base treatment of costs. The LGTSC Tariff is not a rate base proposal. See Eversource Testimony at 66-67 (the LGTSC Tariff is similar to cost recovery mechanisms used for renewable generation contracts and will charge customers a net cost on a uniform per KWh rate).

LGTSC Tariff approval and cost assessment is not available under RSA 374:2 because that section prohibits charges that are in excess of those allowed by law. No provision of law allows the costs incurred under the Access Northeast Contract or the charges under the LGTSC Tariff, and hence none of its charges are allowed by law. Furthermore, these costs and proposed charges are for a generation-related function precluded to an EDC under RSA Chapter 374-F. As discussed in Part C, Eversource in furtherance of its distribution function is precluded from charging distribution customers for generation-related costs not authorized under RSA Chapter 374-F. As the later enacted statute, RSA Chapter 374-F prevails over the earlier RSA 374:2 general cost charge provision in the event of any conflict between the two. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 283 (1988) (general ratemaking authority under RSA 378:9 overridden by later enactment of RSA 378:30-a restricting commission ratemaking discretion). A conflict exits between RSA Chapter 374-F and RSA 374:2 (putting aside for the present argument the fact RSA 374:2 as noted is inapplicable) because, as discussed in Part C above, RSA 374-F precludes the proposed Eversource actions giving rise to the cost

impliedly proposed to be assessed under RSA 374:2. As the later enacted statute, RSA 374-F controls this outcome and precludes the proposed assessment.

Similarly, LGTSC Tariff approval and cost assessment thereunder is not available under RSA 378:8, which is a general statement about burden of proof in seeking a rate increase. Any effort to infer that RSA 378:8 is authority to approve a rate increase upon meeting the burden of proof in the context of the LGTSC Tariff fails when evaluated in light of RSA Chapter 374-F. RSA 378:8 was enacted prior to RSA Chapter 374-F and prior to functional separation of generation from distribution and the unbundling of rates into their respective functional sectors. It cannot authorize recovery of costs which, as discussed in Part C above, are not authorized to be incurred in the first instance, and are in conflict with RSA Chapter 374-F's policy that, unless plainly stated to the contrary in that Act, generation-related costs cannot be charged to distribution customers. The later enactment of RSA Chapter 374-F's polices on functional separation also negates the use of any other general statutory provisions in RSA 378 or under RSA 374:3-a as a basis for LGTSC Tariff assessments. These general statements on ratemaking conflict with RSA Chapter 374-F's separation of functions policy and cannot provide authority for cost assessment for generation-related costs incurred for actions precluded to utilities in the performance of the distribution function by RSA 374-F. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 283 (1988).

E. The Transaction Is Preempted By The Federal Power Act.

On April 19, 2016 the United States Supreme Court decided the case of Hughes, Chairman, Maryland Public Service Commission, Et Al. v. Talen Energy Marketing, LLC, FKA PPL EnergyPlus, LLC, Et Al., 578 U.S. ___ (2016) (hereinafter cited as "Talen Energy"). Talen

Energy affirmed a ruling by the Fourth Circuit[7] that a State of Maryland program which sought to encourage the development of new in-state generation through a state-approved "contact for differences", the effect of which was to pay the generator in a manner that disregarded the interstate wholesale rate set by the Federal Energy Regulatory Commission ("FERC"), impermissibly intruded into the wholesale power market, a domain reserved under the Federal Power Act, 16 U.S.C. Section 791a et seq. ("FPA"), exclusively to FERC. Talen Energy, Slip Op. at 2, 11-12 ("Maryland's program invades FERC's regulatory turf...[t]he FPA leaves no room for either direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.") (internal citations and quotes omitted). Maryland had enacted this program because the State held the view that FERC's market mechanism "provided insufficient incentive" for the development of new generation. Slip Op. at 1.

In an effort to remedy wholesale electric market structural issues affecting gas-fired generation the Eversource transaction proposes a level of indirect, but critical, State involvement in determining what type and amount of electric generation will sell power in that interstate wholesale market. In light of Talen Energy, the proposed State actions to approve the Access Northeast Contract, and assessments under the LGTSC Tariff to recover costs incurred under the ERSP are an impermissible intrusion into FERC's exclusive domain and are preempted by the FPA because, taken in their entirety, these actions seek to affect the cost and supply of wholesale power by determining which gas-fired generation facilities will operate at any time in the New England wholesale power supply market.

As discussed in Part C above, the proposed Eversource transaction is designed to provide gas pipeline transportation capacity and gas storage capacity for one overarching purpose: to increase the availability of natural gas to gas-fueled electric generators in New England and

[7] PPL EnergyPlus, LLC v. Nazarian, 753 F. 3d 467 (4th Cir. 2014).

thereby increase the availability of that generation in the interstate wholesale electric market. See Eversource Testimony at 29 (gas-fired generators' day-ahead market commitments are often reduced due to an inability to acquire fuel); Eversource Testimony Attachment EVER-JGD-5 at 2 (The ERSP has the objective of increasing available gas supply for generation), and note 4 supra. Eversource views the necessity of the transaction as based in the fact that the wholesale power market mechanism leaves gas-fired generators unwilling to contract for pipeline capacity due to the uncertainty of cost recovery in the wholesale market. See Eversource Testimony at 10. The proposed transaction requires State actions, without which the transaction will fail in its goal to affect which generators operate at any given time in the wholesale market. The actions are: determining that the Access Northeast Contract can and should be entered into under state law, and finding that the LGTSC Tariff is permitted by state law and implementing that tariff to allow the net financial consequences to the Access Northeast Contract and the ERSP to be borne by the distribution customers. Without the Access Northeast Contract approval, there will be no gas released under the ERSP to influence wholesale market generation participation, and without customer financial responsibility, there will be no Access Northeast Contract to provide the gas to be released under the ERSP to influence wholesale market generation participation. See Eversource Testimony at 14 (EDCs have the financial capability to support pipeline contracts as long as they can recover associated costs from retail electric customers).

By engaging in these actions, the State will be taking steps to address the structural and pricing mechanisms in the interstate wholesale power market that result in the volatility of gas generation availability and the resulting volatility in the prices for wholesale electricity. Its actions in support of the transaction will be actions which: (i) significantly affect the price of power in the interstate wholesale power market, (ii) indirectly determine which generators

operate at any given time, (iii) cause non-gas generators to compete in the wholesale market against gas generation whose risk of covering their operational costs in the day-ahead market have been reduced by customers assumption of financial responsibility for the increase in pipeline capacity availability in the first instance, and (iv) increase the ability of the gas-fired generation which obtains transport and storage capacity under the ERSP to cover costs and operate more often in the day-ahead market. These actions invade FERC's exclusive authority to regulate the wholesale interstate power market pursuant to the FPA and hence any order of the commission approving the Access Northeast Contract or the LGTSC Tariff or its implementation are preempted by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, which makes the laws of the United States the supreme law of the land. See Talen Energy, Slip Op. at 13 ("[S]tates may not seek to achieve ends, however legitimate, through means that intrude on FERC's authority over interstate wholesale rates....").

III. CONCLUSION

The order of notice in this docket, as it pertains to phase one, states on page 4: "[i]f the commission were to rule against the legality of the Access Northeast Contract, this petition will be dismissed". For the reasons set forth above, the commission should dismiss the Eversource Petition because the Access Northeast Contract, the ESRP, and the LGTSC Tariff are not authorized under New Hampshire law, violate RSA 374-F, the commission lacks statutory authority to approve charging distribution customers for the provision of gas transportation and storage services to electric generators under the proposed LGTSC Tariff, and assessment of the LGTSC Tariff conflicts with the FPA and would be preempted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 28, 2016, I caused a copy of the foregoing Brief to be filed in hand and electronically with the Commission and electronically, or by U.S. Mail, first class to the Service List in DE 16-241.

Robert A Olson

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