

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY

Docket No. DE 16-241

Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC

**INITIAL LEGAL MEMORANDUM OF PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE D/B/A EVERSOURCE ENERGY**

I. INTRODUCTION

On April 17, 2015, on its own motion the New Hampshire Public Utilities Commission issued an order of notice announcing an investigation, docketed as Docket No. IR 15-124, into potential approaches to address cost and price volatility issues affecting wholesale electricity markets involving New Hampshire's electric distribution utilities ("EDCs"). More specifically, the Commission required a "targeted Staff investigation to examine the gas-resource constraint problem that is affecting New Hampshire's EDCs and electricity consumers generally" and "potential means of addressing these market problems." April 17, 2015 Order of Notice in Docket No. IR 15-124 at 3. The Commission ordered the Commission Staff to prepare a report regarding the natural gas resource constraint issues facing the New England electricity market and New Hampshire customers, and potential solutions to those issues, by September 15, 2015.

As part of its investigation, on July 10, 2015, the Staff of the Commission issued a legal memorandum in Docket No. IR 15-124. In that memorandum, and while acknowledging that its analysis might adapt to a specific future proposal, the Staff concluded, in relevant part, that EDCs such as Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") are authorized under existing New Hampshire law to enter into contracts for

natural gas transmission capacity, and that the Commission is authorized to review and approve requests by EDCs for recovery of costs related to such contracts from electric customers.

Written comments on Staff's legal memorandum were submitted on August 10, 2015. In its comments, though Eversource's reasoning differed from that of Staff, Eversource agreed that EDCs are authorized under existing New Hampshire law to enter into natural gas capacity contracts and to recover the costs of such contracts from electric customers with Commission approval.

On September 15, 2015, the Staff issued its final report in Docket No. IR 15-124 wherein it noted, among other things, that there is a near universal opinion that "the root cause of the high and volatile winter period wholesale and/or retail electricity prices . . . can be attributed to a wholesale market imbalance of supply and demand for natural gas." September 15, 2015 Staff Report in Docket No. IR 15-124 at 14. The Staff Report also noted that various commenters identified the imbalance as attributable to limited natural gas pipeline infrastructure. *Id.* Importantly, the Staff's legal conclusions were also reaffirmed in its final report. *Id.* at 9-13. In sum, the Staff Report confirmed that natural gas pipeline constraints are the cause of high and volatile electric prices, that additional pipeline capacity would help address the problems resulting from constrained capacity, that New Hampshire's EDCs have the authority under New Hampshire law to enter into contracts for natural gas capacity, and that the Commission has the authority to authorize cost recovery from electric customers under those contracts.

Following its review of the Staff's report, and the additional material submitted by the numerous parties in the investigation, on January 19, 2016 the Commission issued Order No. 25,860 in Docket No. IR 15-124. That order accepted the Staff Report. Additionally, the order

set out the Commission's expectations for the submission and review of potential gas-capacity-contract-related filings by EDCs. Relevant to the instant matter, the order stated:

The Commission thus intends to rule on the question of whether a New Hampshire EDC has the legal authority to acquire natural gas capacity resources to positively impact electricity market conditions, only within the context of a full adjudicative proceeding conducted pursuant to the New Hampshire Administrative Procedure Act, RSA Chapter 541-A, and only in response to an actual (as opposed to hypothetical) petition. Such a proceeding would be opened if and when a New Hampshire EDC files a petition for a proposed capacity acquisition, and related cost recovery. The Commission would consider the petition in separate phases. In the first phase, the Commission would review briefs submitted by the petitioner EDC, Staff, and other parties regarding whether such capacity procurement is allowed under New Hampshire law. If the Commission were to rule against the legality of such acquisition, the petition would be dismissed. If the Commission were to rule in the affirmative regarding the question of legality, it would then open a second phase of the proceeding to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by the actual proposal. This second phase would involve the usual procedural features of discovery, testimony, rebuttal testimony, and cross-examination, provided in any adjudicative proceeding before the Commission.

Order No. 25,860 at 3.

On February 18, 2016, Eversource filed a petition and supporting testimony seeking approval of a proposed 20-year gas capacity contract (the "ANE Contract") between it and Algonquin Gas Transmission, LLC ("Algonquin") on the proposed Access Northeast pipeline (the "ANE Project").¹ That submission was docketed as Docket No. DE 16-241. On March 24, 2016, the Commission issued an order of notice in Docket No. DE 16-241 commencing the first phase of its review, as it had described in Order No. 25,860. The Commission's order of notice stated:

¹ Eversource acknowledges that its corporate affiliate is a participant in the ANE Project, along with National Grid and Spectra Energy, the corporate parent of Algonquin. See <http://accessnortheastenergy.com/Our-Solution/>. As Eversource noted in its petition, throughout the contract process Eversource has used a rigorous process to ensure that contract negotiations were conducted on a transparent, arms-length basis consistent with N.H. Code Admin. Rules Puc 2100. Regardless, for purposes of this submission Eversource does not further address such issues as they are not relevant to a discussion of the legal authority of Eversource, or any other EDC, to contract for natural gas capacity under New Hampshire law.

As indicated by the Commission in Order No. 25,860, issued in Docket No. IR 15-124, the Commission will divide its review of this petition into two phases. In the first phase, the Commission will review briefs submitted by Eversource, Staff and other parties regarding whether the Access Northeast Contract, and affiliated program elements, is allowed under New Hampshire law. If the Commission were to rule against the legality of the Access Northeast Contract, this petition will be dismissed. If the Commission were to rule in the affirmative regarding the question of legality, it will then open a second phase of the proceeding to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by Eversource's proposal. This Order of Notice opens the first phase of this review proceeding.

March 24, 2016 Order of Notice in Docket No. DE 16-241 at 4. In response to the requirements set out in the order of notice, Eversource herein provides its analysis demonstrating that the ANE Contract is permitted under New Hampshire law.

In setting out its analysis, Eversource requests, pursuant to Puc 203.27(a)(2), that the Commission take administrative notice of the materials submitted in the investigation in Docket No. IR 15-124, and which formed the basis for the Staff's report in that docket, as well as the basis for Order No. 25,860. Many of the issues discussed in submissions in that docket are directly relevant and informative here and taking administrative notice would be administratively efficient and would avoid the need for the resubmission of voluminous material.

Finally, for purposes of these comments, Eversource will hew to a discussion of the legal authority, rather than engage in a detailed discussion of whether procurement of gas capacity by EDCs is the preferred policy of the state. At present, Eversource will point out that having EDCs procure gas capacity to ensure reliability of supply and to protect their customers from the continuing harm of high and volatile market prices driven by the scarcity of available pipeline capacity, and for which no other near term solution is adequate, it is fully consistent with and supportive of the state's policies, as noted by the Commission in opening Docket No. IR 15-124,

by the Staff in its report in that docket, and by Eversource (and others) in their submissions in that docket.

II. DESCRIPTION OF EVERSOURCE'S PROPOSAL

As described in Eversource's petition in Docket No. DE 16-241, Eversource is requesting the Commission's approval of: (1) the ANE Contract, a 20-year interstate pipeline transportation and storage contract providing natural gas capacity for use by electric generation facilities in the ISO-NE region; (2) an Electric Reliability Service Program ("ERSP") to set parameters for the release of capacity and the sale of liquefied natural gas ("LNG") supply available by virtue of the ANE Contract; and (3) a Long-Term Gas Transportation and Storage Contract ("LGTSC") tariff, which allows for recovery of costs associated with the ANE Contract. If approved by the Commission, Eversource would release the natural gas capacity for which it has contracted to the electric market in accordance with Algonquin's Electric Reliability Service ("ERS") tariff to carry out the terms of the state-approved ERSP. The Algonquin ERS tariff is subject to approval by the Federal Energy Regulatory Commission ("FERC"), and FERC regulates the capacity release market. The net revenues received by virtue of the sale of the released capacity under the Algonquin ERS would be credited back to Eversource customers and help offset the costs of the capacity purchased under the ANE Contract.

The ANE Project is designed to 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. The ANE Project is designed to provide: (1) 500,000 MMBtu/day of access to the gas supplies in the Marcellus Shale region in Northeastern Pennsylvania through Algonquin's existing direct connections to the Millennium Pipeline at Ramapo, NY, the interconnection with Tennessee Gas

Pipeline at Mahwah, N.J., and the interconnect with Iroquois in Brookfield, CT; and (2) 400,000 MMBtu/day of access to a proposed market-area domestic LNG storage facility. The new LNG storage facility will be built on land adjacent to an existing LNG facility in Acushnet, Massachusetts and will provide storage withdrawal capacity of 400,000 MMBtu/day, liquefaction capability up to 54,000 MMBtu/day, and 6,400,000 MMBtu of LNG storage capacity. In the aggregate, the ANE Project's transportation and storage facilities will provide a total of 900,000 MMBtu/day of firm, incremental, integrated transportation and LNG deliverability to multiple generators in New England, and thereby create net benefits to electric customers.

Relevant to the portion of the ANE Project covered by Eversource's proposed contract in New Hampshire, the ANE Contract provides a Maximum Daily Receipt Quantity of 37,000 MMBtu/day of capacity, and a Maximum Daily Withdrawal Quantity of 29,600 MMBtu/day from the LNG storage service, which provides an opportunity to deliver up to a maximum of 66,600 MMBtu/day of gas to New England generators. The contract quantities applicable to Eversource in New Hampshire under the ANE Contract were determined through a computation of New England load share and represent the load share served by Eversource within the load served by investor-owned EDCs in New England.

III. NEW HAMPSHIRE LAW

There is ample authority under existing New Hampshire state law for EDCs, such as Eversource, "to acquire natural gas capacity resources to positively impact electricity market conditions." Order No. 25,860 at 3. For the reasons set out below, the procurement of natural gas capacity by EDCs is permitted, if not encouraged, by state law and does not violate or harm the state's goals relating to the restructuring of the electric industry in New Hampshire.

A. EDC Resource Supply Planning

The structure described for the ANE Contract fits squarely within the general obligation of EDCs in New Hampshire to ensure that they are capable of providing safe and reliable service at just and reasonable rates. *See* RSA 374:1, :2. More particularly, in meeting this general obligation, EDCs are required to plan for adequate resources to meet the expected demands of their customers. *See, e.g.*, RSA 378:37, :38. As has been noted repeatedly, there has been a sharp and substantial rise in the use of natural gas as a fuel for electric generation in the region over the past few years, and that trend is expected to continue for years to come.² At the same time, there has been only minimal expansion of the natural gas delivery capacity in the region. These misaligned trends, when coupled with anticipated retirements of non-gas fired generation, puts at risk the reliable and affordable supply of electricity in the region, and in New Hampshire for Eversource's customers. Also, gas-fired generators have no cause to contract for capacity to assist in the development of incremental gas capacity in the region because they have no ready means under existing market rules of recovering their costs for such capacity, nor any incentive to increase the supply of inexpensive natural gas that may reduce their profit margins.³ Since power generators earn most of their revenues from the sale of energy, high energy prices enhance their revenues, particularly if it is fired by fuels other than natural gas. And, indeed, generators have not contracted for long term gas capacity. For example, in open seasons conducted by Algonquin Gas Transmission on its Algonquin Incremental Market ("AIM") and Access Northeast projects, no power generators contracted for capacity. Similarly, in the Tennessee Gas

² *See, e.g.*, Attachments 3, 8, 9, 11, 14, and 15 to June 2, 2015 Comments of Eversource in Docket No. IR 15-124.

³ In fact, the New England Power Generators Association ("NEPGA"), which represents the majority of natural-gas fired generators in New England, states at page 3 of its August 10, 2015 comments in Docket No. IR 15-124, that even if there is a verified and demonstrated need for incremental gas supplies for electric generation reliability purposes, such needed supply should only be procured by natural gas distribution companies ("LDCs"). LDCs, however, have no reason to support electric generation. Thus, it appears that gas-fired generators would not be willing to support contracts for incremental pipeline capacity even when such capacity has been shown to be necessary to maintain electric system reliability.

Pipeline Company open season conducted for the Northeast Energy Direct (“NED”)⁴ project all of the contracting entities were gas LDCs, and there were no long term contracts from power generators. In other words, there is no existing market mechanism that would cause the entities that actually require the gas, the gas-fired generators, to make any commitment to ensure that adequate supplies of natural gas needed for electric generation will be available.

In light of the region’s dependence upon the natural gas supply for electric generation, and the fact that gas-fired generating entities do not make commitments to support the construction of the gas capacity infrastructure they require, there is substantial cause to question whether there will be adequate electric supply to meet demand on days where the existing natural gas capacity is fully subscribed. If EDCs are to plan for, and ensure that they have, adequate supply, and the generators will not make the necessary contractual commitments to maintain that supply, EDCs have the obligation to seek alternative means of meeting the demands of their customers. A proposal such as the one brought by Eversource will help ensure that there is adequate supply to meet customer needs by ensuring that the electric generators will have an ample and reliable source of fuel. The ANE Contract helps Eversource do what it is expected and required to do under New Hampshire law – maintain a sufficient, reliable, and reasonably priced electric supply.

Further, though the ANE Contract is not governed by the resource planning statutes, it supports other goals contemplated there. For example, the ANE Contract demonstrates that Eversource has engaged in a meaningful assessment of the energy supply options for the region as contemplated in RSA 378:38, III, and has found that there is a need to protect and enhance the supply. Moreover, it demonstrates that Eversource has accounted for the long- and short-term

⁴ On April 20, 2016 Kinder Morgan, the corporate parent of Tennessee Gas Pipeline Company, announced that it was suspending the NED project due to insufficient customer contracts. *See* http://www.kindermorgan.com/content/docs/NED_Project_Statement-April_20_2016.pdf.

environmental, economic, and energy price and supply impact on the state as expected under RSA 378:38, VI. Lastly, given the regional nature of the proposed solution of the ANE Project, Eversource is demonstrating integration and consistency with the State Energy Strategy in line with RSA 378:38, VII.⁵

In Eversource's assessment, having EDCs participate in gas capacity contracts such as the ANE Contract would provide a means for EDCs to demonstrate that they will be able to meet their obligations to safeguard a continued and sufficient electrical supply by ensuring that there is adequate natural gas capacity to serve the electrical generation needs in the region. Given the substantial and continuing rise in the use of natural gas as fuel for electric generation in the region, this link is not speculative, but is clear and proven. Moreover, the ANE Contract would provide a means for the State to reap the benefits of expanded natural gas supply through a regional effort, which would dovetail appropriately with the State Energy Strategy. Therefore, it is Eversource's position that the planning obligations embedded in state law support approval of the ANE Contract.

B. RSA chapter 374-F

RSA chapter 374-F, New Hampshire's restructuring statute, set the state policy, guidelines, and directives for restructuring of the electric industry in New Hampshire. Most relevant to the instant analysis, it was the law through which electric generation was to be

⁵ With respect to the State Energy Strategy, produced by the New Hampshire Office of Energy and Planning, the most recent version of that document, available at: <http://www.nh.gov/oep/energy/programs/documents/energy-strategy.pdf>, states that while New Hampshire has limited influence over natural gas transmission and pipeline expansion, the State was and should remain engaged in regional efforts to explore ways to encourage additional pipeline capacity in the region. *See* New Hampshire 10-Year State Energy Strategy, New Hampshire Office of Energy and Planning, September 2014, at 46. The strategy encouraged the State to continue those coordination efforts, so as to ensure that New Hampshire's interests were represented in larger decision-making forums, while exploring other opportunities such as reducing usage through efficiency and conservation.

separated from transmission and distribution.⁶ The proposal from Eversource does not upset, undermine, or conflict with the restructuring principles in RSA chapter 374-F, but is consistent with them.

As an initial matter, the first of the restructuring policy principles in RSA 374-F:3 is that under a restructured system “Reliable electricity service must be maintained while ensuring public health, safety, and quality of life.” RSA 374-F:3, I. In light of the issues described above relative to the rising use of natural gas as a fuel for electric generation at a time when the ability to deliver that fuel has not increased, the lack of an adequate and reliable natural gas supply imperils the State’s ability to provide reliable electricity service and ensure public health, safety, and quality of life. The ANE Contract, therefore, is in line with the very first restructuring policy principle in New Hampshire.

In Docket No. IR 15-124, a few stakeholders posited that permitting EDCs to acquire natural gas capacity might violate the restructuring policy principle of separation of the distribution and generation functions as contemplated in RSA 374-F:3, III. That provision provides, in relevant part, 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, III. A natural gas capacity contract, such as the ANE Contract, would not allow an EDC to reengage in the generation business.

The ANE Contract does not require or result in Eversource engaging in the production, manufacture, or generation of electricity for sale at wholesale or retail. Instead, in this case Eversource is proposing to contract for long-term gas capacity using its creditworthiness and

⁶ Eversource is in the process of divesting itself of its generating assets and a settlement agreement relating to such divestiture is presently under review by the Commission in Docket No. DE 14-238.

balance sheet, and in so doing, to support the construction of additional pipeline capacity. In the absence of such capacity being purchased by the companies owning gas-fired generation, entities like Eversource are the only entities with the financial strength and vested interest in pursuing such long-term contracts. The additional pipeline capacity procured through such contracts will add new fuel resources to the market, and the introduction of that capacity will provide long-term reliability benefits and cost savings to Eversource electric customers. However, the generators are not required to purchase that capacity,⁷ and there is no intervention or participation in the wholesale market, and electric generation will remain subject to market competition.

Furthermore, Eversource is not proposing to combine any generation and distribution functions and it is also not proposing the ANE Contract as a means to engage in “generation services” as described in RSA 374-F:3, III. Rather, and consistent with RSA 374-F:3, I, as noted, Eversource is seeking to ensure long-term electric system reliability by supporting the delivery of adequate natural gas supplies to the region.

Also, and as noted by Staff in its September 15, 2015 report in Docket No. IR 15-124,⁸ making arrangements to bring additional gas resources to the region is consistent with other restructuring principles. In particular, assuring an adequate supply of natural gas would help ensure: the availability of universal electric service as supported RSA 374-F:3, V; that New

⁷ See, e.g., Prefiled Testimony of James G. Daly in Docket No. DE 16-241 at 66 (noting that if FERC does not approve the request for priority releases of capacity to generators, the ANE Project would release capacity consistent with current market rules, where it could be purchased by any entity in the market for capacity).

⁸ Specifically, the Staff stated:

Staff considers these other Restructuring Policy Principles to be of similar importance to the functional separation principle, and therefore, Staff believes that the Commission could rule, in response to a proposal being made by a New Hampshire EDC, that the potential benefits of a gas-capacity acquisition project would foster the overall goals of the Restructuring Policy Principles of RSA 374-F. These goals include, but are not limited to: cost savings for distribution customers of EDCs; enhanced reliability for New England’s increasingly gas-dependent electric generation fleet and electric transmission system; and environmental benefits from the displacement of inefficient coal and oil generation units by highly efficient gas generation units.

September 15, 2015 Staff Report in Docket No. IR 15-124 at 10.

Hampshire's electric rates will remain competitive with other regional rates, as provided in RSA 374-F:3, XI; and that New Hampshire is a meaningful participant in regional solutions to regional issues, as contemplated in RSA 374-F:3, XIII. Moreover, having an adequate supply of natural gas for electric generation will help assure that there is reliable electric power as older, less efficient generating facilities retire, and will thus assist in encouraging environmental improvement consistent with RSA 374-F:3, VIII. The ANE Contract would not contravene RSA chapter 374-F or its principles. Through this contract, Eversource is not proposing to enter (or reenter) the electric generation business in New Hampshire. Instead, it is proposing the ANE Contract in an effort to assure reliable and reasonably priced electric power to its customers by making certain that the wholesale generators needing natural gas as a fuel will have a reliable and affordable supply.

C. RSA chapter 374-A

While Eversource has previously stated its conclusion that the tenets of RSA chapter 374-A may not be directly applicable to the instant contract,⁹ other parties, including Staff,¹⁰ support the conclusion RSA chapter 374-A does provide additional support for the legal authority of an EDC to purchase natural gas capacity to aid electrical generation in the region. Accordingly, Eversource will address potential applicability of RSA chapter 374-A.

Eversource qualifies as a "domestic electric utility" as defined in RSA 374-A:1, II, and, as such, pursuant to RSA 374-A:2:

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:

⁹ See August 10, 2015 Comments of Eversource in Docket No. IR 15-124 at 9-11.

¹⁰ See July 10, 2015 Staff Legal Memorandum in Docket No. IR 15-124 at 3-5, and September 15, 2015 Staff Report in Docket No. IR 15-124 at 11.

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

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.

“Electric power facilities,” as defined, means generating units greater than 25 megawatts, or transmission facilities of 69 kilovolts or larger, and placed in service after June 24, 1975. RSA 374-A:1, III.

Eversource agrees that should pipeline capacity or LNG be procured on behalf of an electric generator or a specified generating facility, such capacity procurement could qualify as a form of contract for “other participation” in an electric power facility. Should that be the case,

RSA chapter 374-A would directly and specifically authorize Eversource's participation in such a contract, notwithstanding any other law. The fact that the authority granted in RSA chapter 374-A, which predates restructuring, remains following the passage of RSA chapter 374-F in New Hampshire provides evidence that the Legislature intended EDCs to have such contracting authority, notwithstanding restructuring. *See, e.g., Appeal of Public Service Company of New Hampshire*, 141 N.H. 13, 25-26 (1996) (Legislature presumed to be aware of earlier enactments when passing later statutes), and *Barksdale v. Town of Epsom*, 136 N.H. 511, 516 (1992) (same).¹¹

In this case, however, Eversource is not proposing that it, or any other EDC, contract for pipeline or LNG capacity on behalf of one or more specific electric generators or generating facilities. Instead, the ANE Contract is for capacity that is available generally to anyone, but with a preference for electric generators, yet no generator would be compelled to take or use it. It could be, for example, that any available pipeline or LNG capacity that is not taken by the electric generators will be released to other market participants during low demand periods. Generators are free to purchase the capacity, but there is no obligation for them to do so, and there is no direct link between the capacity on the ANE Project and any particular electric power facility.

¹¹ In its August 10, 2015 comments in Docket No. IR 15-124, NEPGA argued, at page 10, that the relevant portions of RSA chapter 374-A and RSA chapter 374-F cannot be read in harmony and that because they cannot, RSA 374-A has been impliedly repealed. In New Hampshire:

Repeal by implication occurs when the natural weight of all competent evidence demonstrates that the purpose of a new statute was to supersede a former statute, but the legislature nonetheless failed to expressly repeal the former statute. Because repeal by implication is disfavored, if any reasonable construction of the two statutes taken together can be found, we will not hold that the former statute has been impliedly repealed.

In the Matter of Regan & Regan, 164 N.H. 1, 7 (2012) (internal brackets, quotations and citations omitted). The permissive language of RSA 374-F stating that generation and distribution services "should" be separated and that distribution services "should" remain regulated falls short of demonstrating that the laws cannot be read in harmony or the weight of all evidence shows that RSA chapter 374-A has been repealed by implication.

As such, Eversource continues to support the underlying logic and policy of RSA chapter 374-A, that is, to provide flexibility to EDCs to seek solutions to electric supply issues by giving them relatively broad authority to pursue support for electric power facilities and ensure a stable, adequate, and reliable supply of electric power at a reasonable cost.

D. RSA 374:57

Further statutory support for the legal authority of Eversource to enter into the ANE Contract may be found in RSA 374:57. RSA 374:57 reads, in its entirety:

374:57 Purchase of Capacity. – Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the commission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility’s decision to enter into the transaction was unreasonable and not in the public interest.

Eversource is an “electric utility” as the term is used in the statute and any potential agreement for natural gas capacity would be a long-term contract of greater than one year. Accordingly, the remaining question is whether the ANE Contract is a contract for “generating capacity, transmission capacity or energy” that must be submitted to the Commission at the time of its execution. For the reasons stated below, in Eversource’s assessment the ANE Contract is one that falls within the purview of RSA 374:57.

Prior to addressing the applicability of RSA 374:57, Eversource notes that there is no requirement in the law that an EDC seek preapproval to enter into a contract covered by this provision, only that the Commission would have the authority to review it when it is filed, and to disallow costs if the contract is determined to be unreasonable or not in the public interest. The implication of this language is that if the costs are not disallowed, the EDC is permitted to

recover them. In fact, the Commission has previously analyzed and applied RSA 374:57 as a means of determining, in advance, whether certain contracting activities were reasonable and in the public interest for purposes of cost recovery.¹² Accordingly, in Eversource's assessment the ANE Contract is covered by the statute, and the Commission has the authority to approve the contract itself, as well as the related cost recovery.

By its terms, RSA 374:57 refers to contracts for the purchase of "generating capacity, transmission capacity or energy." The ANE Contract is a contract for transmission capacity. It is not for generating capacity, and arguably could be considered a contract for the reliable purchase of energy since gas transmission is the transportation of energy in the form of natural gas and the sale of LNG is the sale of energy in the form of liquefied natural gas. For purposes of this analysis, and for the reasons discussed below, Eversource treats the ANE Contract as a contract for transmission capacity as contemplated in the law.

On its face, the term "transmission capacity" is not restricted to electric transmission capacity. As concerns utility services, there are few uses of the term "transmission" in New Hampshire statutes; however, what references there are also do not limit the term to electric transmission. For example, RSA 378:38, regarding the content of a utility's least cost integrated resource plan, requires every "electric and natural gas utility" to include "an assessment of distribution and transmission requirements" in its plan. RSA 378:38, IV. The statute's language indicates that the "transmission" analysis applies to both natural gas and electric "transmission" and supports the conclusion that the Legislature views the term as applicable to both.

¹²See *Public Service Company of New Hampshire, et al.*, Order No. 25,305 (December 20, 2011) at 28-29 "RSA 374:57 contemplates the possibility of the Commission's disallowance of costs. We will treat the petition as a request, made in advance of costs being incurred under the PPAs, that the Commission not disallow the costs and instead find that PSNH's entry into the PPAs is reasonable and in the public interest. Because a decision on whether PSNH's entry into the PPAs is reasonable and in the public interest does not depend on future events or information only available in the future, we conclude that it may properly be made now based on the record before us, consistent with RSA 374:57." See also *EnergyNorth Natural Gas, Inc.*, Order No. 24,825 (February 29, 2008).

Other New Hampshire statutes support this same conclusion. RSA chapter 162-H, which governs the Site Evaluation Committee (“SEC”), provides that the SEC has jurisdiction over proposed “energy facilities.” RSA 162-H:2, VII. Among the “energy facilities” are “energy transmission pipelines that are not considered part of a local distribution network.” RSA 162-H:2, VII(a). The text of the definition for the term “energy transmission pipelines” refers to transmission lines for natural gas or oil or related products, rather than electricity. Also subsumed within the definition of “energy facility” are “electric transmission lines” of varying types and sizes. *See* RSA 162-H:2, VII(c), (d) and (e). Thus, the term “transmission” as used in that statute includes both electric and gas transmission. Similar usage is found in the statutes relating to the taxation of utility property where the term “utility,” is defined, in part, as a company “engaged in the generation, production, supply, distribution, transmission, or transportation of electric power or natural gas,” and “utility property” is defined as property “employed in the generation, production, supply, distribution, transmission, or transportation of electric power or natural gas.” RSA 83-F:1, IV, V. Here, both “transmission” and “transportation” are used to refer to both electricity and natural gas.¹³

In light of the Legislature’s, and the Commission’s, repeated use of the term “transmission” to refer to both electric and gas transmission, and the lack of any limiting or restricting language in RSA 374:57, the term “transmission capacity” in RSA 374:57 encompasses natural gas transmission capacity. In that RSA 374:57 is concerned with contracts by electric utilities, the statute covers natural gas transmission capacity procured by EDCs, and it covers the ANE Contract. Such a conclusion is reasonable because it ensures that the

¹³ The Commission’s rules likewise use “transmission” in referring to both electric and natural gas facilities. The Commission’s rules relating to electric service (PART Puc 300) and those relating to natural gas service (PART Puc 500) each use the term “transmission” throughout and, in fact, the rules on gas service define the term “utility” as applying to entities “engaged in the manufacture, distribution, sale, *transmission* or transportation *of gas* in the state.” Puc 502.25 (emphasis added).

Commission's oversight over such issues as long-term resource contracting, and the resulting rate impacts to customers, are preserved.¹⁴ Read in that reasonable manner, the statute provides that an EDC has the authority to enter a contract for natural gas transmission capacity, and that the Commission has the authority to approve, in advance, whether the costs of that contract would be allowed, if the decision to enter the contract can be shown to be reasonable and in the public interest. The ANE Contract is consistent with New Hampshire law.

IV. FEDERAL LAW

Initially, Eversource recognizes that Order No. 25,860, and the Commission's order of notice in this docket, both specifically limit the scope of the Commission's review of legal authority to matters falling under state law. For the above reasons, it is clear that Eversource has authority under state law to enter into the ANE Contract and the Commission has authority to approve the recovery of the costs of the contract. In the interest of completeness, and because some participants in Docket No. IR 15-124 have contended that federal law might limit state authority, Eversource also briefly addresses why the approvals it seeks from the Commission are not barred by federal law. As discussed below, there is no conflict between this Commission's authority to grant the approvals sought in Eversource's petition and the jurisdiction granted to the FERC under the Natural Gas Act ("NGA") and the Federal Power Act ("FPA"). Instead, the transactions contemplated under Eversource's proposal operate distinctly and without conflict within dual state and federal jurisdictional authority established by these statutes. In addition, Eversource points out that many of the below issues have been discussed and decided in the

¹⁴ In reviewing the factors relevant in determining whether and how the costs of a Power Purchase Agreement would be recovered pursuant to RSA 374:57, the Commission has concluded "The legislative scheme developed over time as evidenced throughout RSA Title XXXIV sets forth a variety of purposes and factors, which expresses recurring themes favoring fuel diversity and renewables, economic development, environmental and health impacts, and energy security, and which grants substantial discretion to the Commission relative to rate setting." *Public Service Company of New Hampshire, et al.*, Order No. 25,305 (December 20, 2011) at 32-33.

near-identical investigation in Massachusetts, D.P.U. 15-37.¹⁵ Eversource requests that the Commission take administrative notice of the conclusions of the MDPU in its October 2, 2015 Order in that docket. In Eversource's assessment, the analysis in that order relative to the matters of federal law is equally applicable in this case.

A. Natural Gas Act

The comments of some parties in Docket No. IR 15-124 showed concern that the ANE Contract, or a similar proposal, might be preempted by FERC's authority under the NGA, 15 U.S.C. § 717, *et seq.* The NGA was enacted to protect consumers from exploitation at the hands of natural gas companies through a comprehensive regulatory scheme of dual federal and state authority. *See Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972). Federal jurisdiction is not exclusive, but rather is intended to be complimentary to that reserved to the states. This dual jurisdictional scheme is spelled out in Section 717(b) of the NGA:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, **but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.**

15 U.S.C. §717(b) (emphasis added).

¹⁵ As it has noted in its petition in Docket No. DE 16-241, a review substantially similar to that in Docket No. IR 15-124 was undertaken in Massachusetts coincident with the review in New Hampshire and was docketed by the Massachusetts Department of Public Utilities ("MDPU") as D.P.U. 15-37. On October 2, 2015, the MDPU issued an order similar to that by the Commission in Docket No. IR 15-124, concluding in relevant part that EDCs in Massachusetts have the requisite authority to enter into gas capacity contracts and the ability to recover the costs of such contracts from electric customers, subject to meeting various filing requirements as well as MDPU review and approval. Investigation by the Department of Public Utilities on its own Motion into the means by which new natural gas delivery capacity may be added to the New England Market, including actions to be taken by the electric distribution companies, D.P.U. 15-37, at 26-29, 44-47 (2015).

Federal law preempts state law when Congress has legislated comprehensively to occupy an entire field of regulation, or where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). The Commission’s approval of Eversource’s petition would not invoke either basis for preemption because such action would fall squarely within the sphere of lawful state action conferred under the NGA – regulation of retail rates and reliability of retail service. Eversource’s petition seeks the Commission’s approval for the recovery of the costs of the ANE Contract from retail customers, and, to the extent necessary, the approval of the reasonableness of the contract for purposes of authorizing such cost recovery.¹⁶ Eversource is not proposing or requesting permission to purchase or sell the natural gas commodity for resale in wholesale markets, nor to engage in interstate transportation of natural gas - activities that are reserved to FERC under the NGA. Jurisdiction over the purchase and sale of natural gas and the release of natural gas capacity from the ANE Project belongs, and would remain, with FERC.

Furthermore, as recognized by the MPDU Order referenced above, having state law authority to review and approve the reasonableness of long-term contracts for natural gas capacity from an EDC does not result in the regulation of any of the matters covered by the NGA.¹⁷ Ultimately, the ANE Contract is a precedent agreement that will be replaced by a service agreement under a FERC jurisdictional tariff. Pursuant to that tariff, individual shippers

¹⁶ The approval sought here is similar to that sought by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities in Docket No. DG 14-380 relating to a precedent agreement between Liberty Utilities and Tennessee Gas Pipeline on the NED Project. In that case, the Commission noted that its “statutory review of the Precedent Agreement is limited to consideration of EnergyNorth’s prudence in entering into the Precedent Agreement, and the reasonableness of the terms of the agreement.” *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 25,822 (October 2, 2015) at 24. The Commission also clarified what matters were beyond its review and subject to the jurisdiction of FERC or the SEC. *Id.* Those same parameters apply here, and the Commission may look at matters relating to the prudence of the contract and the reasonableness of its terms without intruding upon the jurisdiction of FERC.

¹⁷ *See* October 2, 2015 Order of the MDPU in D.P.U. 15-37 at 31-32.

would use the ANE Contract capacity made available through the Capacity Manager to actually transport, purchase, and sell natural gas. That tariff, if approved by FERC, would allow the ANE Project to offer services to the shippers. Eversource would be responsible for the cost of the pipeline capacity to the extent that the Commission authorizes Eversource to recover those costs. Accordingly, under Eversource's proposal FERC's authority under the NGA would be preserved with respect to the interstate transportation and wholesale sales of natural gas, and that authority does not preempt this Commission's authority to review and approve the ANE Contract under state law for purposes of authorizing cost recovery from retail electric customers.

B. Federal Power Act

Some comments in Docket No. IR 15-124¹⁸ had suggested that permitting EDCs to enter into contracts such as the ANE Contract would risk intruding upon FERC's exclusive jurisdiction over wholesale electric markets under the FPA, 16 U.S.C. § 824, *et seq.* In particular, arguments have been raised about the applicability of recent court decisions in particular under *PPL Energyplus, LLC v. Nazarian*, 753 F. 3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Marketing LLC et al.*, 578 U.S. ____ (2016) ("*Hughes*"), which found that FERC's exclusive jurisdiction under the FPA preempted a program in Maryland intended to subsidize the participation of electric generators in wholesale energy markets.¹⁹ These decisions are inapposite.

¹⁸ See, e.g., October 15, 2015 Comments of CLF in Docket No. IR 15-124 at 8, and August 10, 2015 Comments of NEPGA in Docket No. IR 15-124 at 12-13, footnote 4.

¹⁹ A substantially similar issue was raised and decided relative to a program implemented in the State of New Jersey, *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) ("*Solomon*"), though that case was not included among those on which the Supreme Court granted certiorari when deciding *Hughes*. In *Solomon*, the state attempted to incent the construction of new generating facilities by creating a program where new generators would sell their capacity into the wholesale capacity market, but the state's EDCs would be required to obtain "Standard Offer Capacity Agreements" with the generators that would guarantee them a fixed price for their cleared capacity and act as a contract-for-differences between the price of capacity received by a generator from the capacity auction and a price fixed by the capacity agreements themselves. *Solomon*, 766 F. 3d at 252. As with *Hughes*, the result of this

The program in Maryland was found by the United States Supreme Court to be preempted by the FPA on the basis it substituted a state contract price for the wholesale price for electric energy or electric capacity, items falling within FERC's exclusive jurisdiction. *Hughes, slip op.* at 15. The Maryland program sought to incentivize the construction of new generation facilities in the state by offering a fixed, 20-year revenue stream secured by a contract for differences which would require a generating facility to sell its energy and capacity into the federal interstate wholesale market and receive a payment equal to the difference between the guaranteed revenue stream and whatever it received from its actual sales into the wholesale market. *Nazarian, 753 F.3d* at 473-74. The Supreme Court found that the Maryland program set "an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Hughes, slip op.* at 12. Because the state was effectively setting the price for interstate sales, the Maryland program was preempted by the FPA. *Id.* In its holding, however, the Supreme Court made explicit that the Maryland program was rejected "only because it disregards an interstate wholesale rate required by FERC" and specifically stated that without running afoul of the FPA, Maryland, and other states, could permissibly encourage "production of new or clean generation through measures untethered to a generator's wholesale market participation." *Id.* at 15 (internal quotation omitted).

Unlike the Maryland program, which set or guaranteed a price or level of compensation for a generator's participation in the wholesale energy market, the ANE Contract does not attempt to set the rates or the level of compensation any generator would receive for its sale of energy and/or capacity at wholesale, and does not require participation by any generator in any wholesale energy market. Rather, the ANE Contract increases the available supply of pipeline

design was a program that essentially set the price for wholesale electric capacity and the price for wholesale energy and, was, for that reason, found to be preempted by the FPA. *Id.* at 253.

capacity and generators, or others, may use the available capacity on their own initiative and for their own purposes.

The fact that making incremental pipeline capacity *could* have an indirect effect on wholesale rates by increasing the ability of natural gas-fired generators to participate in wholesale energy markets cost-effectively does not set any price for electric capacity or otherwise intrude upon FERC’s jurisdiction under the FPA. As another recent decision of the Supreme Court makes clear:

The FPA delegates responsibility to FERC to regulate the interstate wholesale market for electricity—both wholesale rates and the panoply of rules and practices affecting them. . . . That means FERC has the authority—and, indeed, the duty—to ensure that rules or practices “affecting” wholesale rates are just and reasonable.

Taken for all it is worth, that statutory grant could extend FERC’s power to some surprising places. As the court below noted, markets in all electricity’s inputs—steel, fuel, and labor most prominent among them—might affect generators’ supply of power. See 753 F. 3d, at 221; *id.*, at 235 (Edwards, J., dissenting). And for that matter, markets in just about everything—the whole economy, as it were—might influence LSEs’ demand. So if indirect or tangential impacts on wholesale electricity rates sufficed, FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice. We cannot imagine that was what Congress had in mind.

For that reason, an earlier D. C. Circuit decision adopted, and **we now approve, a common-sense construction of the FPA’s language, limiting FERC’s “affecting” jurisdiction to rules or practices that “directly affect the [wholesale] rate.”** *California Independent System Operator Corp. v. FERC*, 372 F. 3d 395, 403 (2004) (emphasis added); see 753 F. 3d, at 235 (Edwards, J., dissenting). As we have explained in addressing similar terms like “relating to” or “in connection with,” a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth.

Federal Energy Regulatory Commission v. Electric Power Supply Association et al., 577 U.S.

___ (2015), slip op. at 14-15 (italics and brackets in original; bold type added). Put another way,

“FERC’s authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates.” *Solomon*, 766 F. 3d at 255.

The ANE Contract does not set the price at which the generators acquiring pipeline capacity made available through the EDCs must sell their output, or otherwise set the compensation that those generators would receive, and it does not require that generators participate in a wholesale energy market. Thus, state approval of the ANE Contract for the purpose of allowing Eversource to recover the costs of participating in a project that would assist in adding incremental capacity to the market would not run counter to, or interfere with, FERC's jurisdiction over matters "affecting" wholesale rates. Rather, any impact that the ANE Contract might have on any wholesale energy market would be only indirect and a legally permissible means of effectuating a state policy to ensure the availability of a natural gas supply for electric generation purposes without setting the wholesale price or participation criteria for such generation.

V. CONCLUSION

As discussed above, there is ample authority under existing New Hampshire state law for EDCs to acquire natural gas capacity resources to positively impact electricity market conditions, including those relating to both price and reliability. The procurement of natural gas capacity by EDCs is permitted by state law, enhances, rather than undermines, the state's goals in restructuring the electric industry in New Hampshire, and does not improperly intrude upon the authority of FERC. Accordingly, the Commission should conclude that the ANE Contract is legal under state law, and should move forward in its review of the merits of the ANE Contract so that New Hampshire customers may receive the benefits that would accrue from the construction of the ANE Project.

Respectfully submitted this 28th day of April, 2016.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

April 28, 2016
Date


Matthew J. Fossum