BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Eversource Energy Petition for approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC	)	DE 16-241

PRINCIPAL BRIEF OF
NEXTERA ENERGY RESOURCES, LLC

Pursuant to New Hampshire Public Utilities Commission ("Commission") Code Admin. Puc Rule 203.32 and the March 24, 2016 Order of Notice, NextEra Energy Resources, LLC ("NEER") hereby submits its principal brief in this matter.

Twenty years ago the New Hampshire Legislature passed RSA 374-F (the "Act" or "Restructuring Act") for the purpose of fundamentally changing the New Hampshire electricity market from one predominated by vertical utilities to one requiring free competition for energy supply. Electric utilities would continue to have responsibility for the transmission and distribution function within their service territories, but their ratepayers would no longer bear the costs associated with the utilities' obligation to develop sufficient generation assets to meet long-term resource planning (and potential stranded costs associated with new generation assets). In February 2016, the Commission in Docket No. DE 14-238 heard several days of testimony in support of a settlement agreement for the divestiture of all of the generation assets of Public Service Company of New Hampshire ("PSNH") d/b/a Eversource Energy ("Eversource") and thus accomplishing the Legislature's 1996 directive, transitioning Eversource entirely to a transmission and distribution-only entity and finalizing the amount of stranded costs to be borne by its electric ratepayers.

Eversource now asks the Commission to un-do what was to be this complete transition to competition and allow Eversource to include in rates a portion of $3.2 billion in gas pipeline infrastructure that Algonquin Gas Transmission, LLC ("Algonquin") and its partners, including an Eversource affiliate, seek to develop, but which will not be used by Eversource to provide utility service and will be offered to a preferred class of sellers. If there is to be such a reversal in the structure of the energy supply market in New Hampshire, (one that will also adversely affect competitive price signals sent to electricity buyers and sellers), Eversource must ask the Legislature – not this Commission – to authorize that dramatic change.

The question in this proceeding is not whether investment in natural gas pipeline infrastructure is a good or bad idea. Indeed, energy companies invest in natural gas, nuclear, or renewable sourced electricity generation plants and infrastructure on a regular basis when they are sufficiently confident that supply and demand and the overall economics warrant the investment on behalf of their shareholders. That is the very nature of a competitive energy market structure. Here, to the contrary, the questions instead are: (1) whether Eversource – as a regulated electric distribution company ("EDC") in New Hampshire – can legally recover in rates a share of $3.2 billion in natural gas infrastructure that will be used not by the utility for transmission or distribution, but to benefit certain generators in what is supposed to be under the Restructuring Act a competitive (not vertically-integrated) electricity supply market; if so, (2) whether federal law would permit Eversource's intended affect on wholesale electricity prices; and if so, (3) whether Eversource should be permitted to do so given the intended and unintended consequences of reintegration.

NEER submits that the answer to each of these questions is the same: No.

The Restructuring Act plainly requires a competitive energy market for energy supply in New Hampshire. Eversource's proposal is contrary to that requirement, moving the utility back into areas that the Legislature determined should be left to the competitive market. In New Hampshire's restructured environment, there is no statutory authority for Eversource's proposal. In a prior proceeding before this Commission, Staff cited RSA 374-A as granting EDCs corporate power to invest in electric generating units of 25 megawatts or more. Eversource disagreed, suggesting the requisite authority may be found in RSA 374:57, a statute that requires Commission approval of agreements that an electric utility has entered into for the purchase of generating capacity, transmission capacity, or energy. Neither can be read to authorize an EDC to enter into a multi-billion dollar pipeline capacity contract in a restructured energy supply market.

Even if otherwise authorized, Eversource's investment in natural gas capacity is not permitted to be included in rates under state law because such investments are not used and useful in Eversource's permitted business as an EDC authorized to participate in electric transmission and distribution.

Second, in addition to violating New Hampshire law, Eversource's stated intention – to affect wholesale energy prices by developing this ratepayer-funded pipeline – is prohibited by federal law. The purpose of Eversource's proposal is to suppress wholesale rates by preferentially reselling discounted gas capacity to a restricted class of natural gas generators, which impermissibly intrudes on the Federal Energy Regulatory Commission's ("FERC") exclusive jurisdiction over wholesale rates. It thus infringes on the existing federal-state relationship under the Federal Power Act.

Third, energy companies like NEER invested in New Hampshire plants and infrastructure with the understanding that they would be operating in a competitive supply market that did not favor one fuel source (or supplier) over another. Subsidizing[1] development of natural gas infrastructure as Eversource proposes would create non-competitive supply prices among natural gas fueled plants, and would undermine the continued economic viability of plants sourced by other fuel types.

No New Hampshire statutory provision authorizes an EDC to invest in natural gas infrastructure that it cannot use in order to provide preferential releases of gas to certain generators. Given the unambiguous purposes of the Restructuring Act, if Eversource desires to reinvest in generation supply infrastructure, it must get authorization from the Legislature to do so, and even then the proposal would remain subject to a challenge that such actions are preempted by federal law. Under the current state of New Hampshire and federal law, the Eversource proposal is unlawful and should be rejected.

[1] In this context, NEER uses "subsidizing" to refer to the fact that Eversource is using ratepayer funds to invest in a gas capacity contract for the purpose of funding a pipeline that will benefit select, preferred generators and thereby undermine the competitive supply market mandated by New Hampshire's Restructuring Act.

BACKGROUND

I. The Restructuring Act is premised on competition, separating transmission and distribution from generation, and eliminating the risk of generation asset investments from EDC ratepayers.

When passing the Restructuring Act in 1996, the New Hampshire Legislature made clear that the purpose of the Act was to establish competitive energy supply markets both because the Legislature found that competitive markets are more efficient and because the New Hampshire Constitution demands it:

> I. The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. . . . Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services.
>
> II. A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

(RSA 374-F:1).

To drive home this emphasis, the words "competitive" or "competition" are repeated more than 50 times in the Restructuring Act.

The Legislature also made clear that the rules applicable in New Hampshire's restructured energy market must be applied evenly and without favor to any market participant. *See, e.g.*, RSA 374-F:3, VII ("Full and Fair Competition. Choice for retail customers cannot exist without a range of viable suppliers. <u>The rules that govern market activity should apply to all buyers and sellers in a fair and consistent manner in order to ensure a fully competitive</u>

market.") (Emphasis added); RSA 374-F:3, IV ("The commission should monitor companies providing transmission or distribution services and take necessary measures to ensure that no supplier has an unfair advantage in offering and pricing such services.") (Emphasis added); *cf.* RSA 378:10 ("No public utility shall make or give any undue or unreasonable preference or advantage to any person or corporation, or to any locality, or to any particular description of service in any respect whatever or subject any particular person or corporation or locality, or any particular description of service, to any undue or unreasonable prejudice or disadvantage in any respect whatever."). The Legislature also found that competitive markets should provide electricity buyers and sellers "appropriate price signals." RSA 374-F:1, II.

The purpose of restructuring to a competitive supply market was to separate energy supply from transmission and distribution; the former to operate in a competitive market, the latter to remain a regulated natural monopoly. *See, e.g.*, RSA 374-F:2, II (defining "Electricity suppliers" to facilitate separation) and RSA 374-F:3, III (requiring unbundling of rates for generation and transmission and distribution components); *see also* RSA 369-B:2, IV & XII ("'Electric utility' means a public utility . . . that provides retail electric service. . . . 'Retail electric service' means the delivery of electric power through the provision of transmission and/or distribution service by an electric utility to a retail customer . . . "). The Act provides a single and very limited exception to this required separation:

> When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future. However, distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs.

(RSA 374-F:3, III (emphasis added).) As Commission Staff noted in its July 10, 2015 memorandum, "[a] n acquisition of gas capacity, of the type referred to by certain stakeholders, most certainly does not qualify as a small-scale distributed generation resource." (July 10 Memo p.2.)[2] It is relevant, however, as a demonstration of the Legislature's conviction that electric distribution utilities – like Eversource – cannot fund or own generation assets following divestiture. *See* RSA 369-B:1, I & II ("The restructuring of electric utilities to allow retail electric competition and less costly regulation is in the public interest. . . . The divestiture of electric generation by New Hampshire electric utilities will facilitate the competitive market in generation service."); *see also Proceeding Regarding the Sale of Seabrook Station Interests*, Order 24,050 at 3 (September 12, 2002) ("Consistent with the Electric Utility Restructuring Act, RSA 374-F, and other applicable statutes, the Restructuring Agreement provided for the . . . transformation of PSNH from a traditional, vertically integrated electric utility into a company that would provide its retail customers solely with energy distribution services.").

II. The 2015 Settlement Agreement in the Eversource divestiture docket is intended to implement the Restructuring Act, with Eversource "exit[ing] the generating business."

Over the course of the next two decades, the Legislature delayed ordering full divestiture pending a careful consideration of the consequences and timing for divestiture. In June 2015, a number of the parties in Docket No. 14-238 entered into a settlement agreement that proposed to (1) establish a process for an auction to divest the remaining Eversource generation assets; (2) establish a mechanism to determine the

[2] The exception is designed to allow a distribution utility to own strategically located distributed generation as an alternative to transmission or distribution system upgrades.

stranded costs that would be included in the rates paid by Eversource electricity ratepayers; and (3) "establish a competitive energy market" in compliance with the Restructuring Act. (*See* June 10, 2015 Settlement Agreement, Docket No. 14-238, p.16.) On January 26, 2016, the settling parties entered into a Partial Litigation Settlement, which among other things demonstrates their agreement that divesting all of Eversource's generation assets promptly is in the public interest, would enhance the New Hampshire economy, and remove from EDC ratepayers the risk of owning generating assets:

> Near-Term Divestiture of PSNH's Generation Assets Is in the Public Interest and Advances the Economy in PSNH's Service Territory as well as the Ability to Attract and Retain Employment Across Industries . . .
>
> The Settling Parties and Staff agree that the prompt divestiture of PSNH's generation assets will eliminate customer risks arising from potential future capital costs and future regulatory and environmental compliance costs, and will effectuate the Legislature's intent to "harness the power of competitive markets" set forth in the "Electric Utility Restructuring" enactment in 1996 at RSA 374-F:1, I.

(Partial Litigation Settlement, Docket No. 14-238, p. 1 & paragraph 12.)

During the hearing held by the Commission to consider the Settlement Agreement, Eversource itself argued that, with approval of the Settlement Agreement, Eversource would exit the generation business and free its ratepayers from further risk from funding generation resources, including potential future stranded costs:

> [COUNSEL FOR EVERSOURCE; OPENING REMARKS]: . . . Today's hearing marks the beginning of the end of a long journey, transforming the state's electric utilities from vertically integrated entities to adoption of a restructured model, one that relies upon the power of competitive markets to control the cost of electric generation.
>
> . . .
>
> [COUNSEL FOR EVERSOURCE; CLOSING REMARKS]: The Company believes that this settlement agreement meets all the relevant standards, and, if approved, PSNH would move as quickly as it's reasonably able to sell its generating assets. As parties have testified at length in this process, having PSNH exit the generating business, including through an appropriate disposition of its

> two existing PPAs and its status as a hybrid utility, and make more clear its status in the marketplace.
>
> . . .
>
> It will avoid having a shrinking pool of default service customers, predominantly residential customers, who continue to bear the cost of PSNH's generation assets. It removes from PSNH and its customers the risk of potential future liabilities relating to the facilities.

(Tr. Day 1 AM session, p.19; Day 3 PM session, pp. 58-59) (Emphasis added).

It is clear from the testimony that the parties to the divestiture proceeding relied upon these fundamental assertions about the transition to a competitive electricity market in New Hampshire and removing generating asset risk from electricity ratepayers:

> [STAFF:]
> Q. Do you think that, looking forward, this new competitive world where PSNH is fully divested will result in lower rates?
> A. [STAFF] Yes.
> . . .
> More importantly, I think it shifts the risk where we intended it in electric restructuring away from customers and prudence cases and to the wholesale market and to the generators and suppliers in that market.

(Day 2, PM session, p.73) (Emphasis added).

> [COUNSEL FOR CONSERVATION LAW FOUNDATION]: . . . We fully support completing this process of restructuring and moving New Hampshire's electric generating sector to a fully competitive market. It is our hope that this docket will result in a decision enabling PSNH to proceed to divestiture of its generating assets.

(Day 1 – AM session, pp. 23-24) (Emphasis added).

> [NEPGA:] Our testimony briefly summarized . . . NEPGA and RESA's strong support for divestiture to end the bifurcated market in rate-base generation, and . . . strong support for the Settlement focused on goals of shifting risks away from consumers and market participants, as well as providing further transparency and competition to serve default customers in a restructured market.

(Day 2 – AM session, pp.50-51) (Emphasis added).

> [SENATOR JEB BRADLEY:] [W]e move forward, get the divestiture behind us, the end of the half-in-one-world/half-in-another-world of deregulation partly. With this Settlement, we do that. We implement fully competition, and we

> allocate the stranded costs in a way that is fair to residential customers, because they're going to see lower rates as a result of this, but, in particular, protects the most vulnerable segment of our economy, those large businesses that have choice.

(Day 2 – AM session, p.73-74) (Emphasis added).

The Commission has not yet issued an order on the proposed settlement of the DE 14-238 docket and Eversource's promised "exit [from] the generating business."

III. The Commission's Order in the investigative docket.

In its *Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire*, Docket No. IR 15-124 (the "Investigation"), the Commission received preliminary views on the hypothetical question of whether an electric distribution company in a restructured environment could under New Hampshire law nonetheless enter into a long-term contract to support development of gas pipeline infrastructure and thereby place the cost and risk of those investments on the EDC's electricity ratepayers. In its January 19, 2016 *Order Accepting Staff Report and Stakeholder Comments, and Outlining Review Process for Any Petitions for Capacity Acquisitions and Associated Competitive Bidding* (Order No. 25,860), the Commission determined that the legal question should be analyzed and determined in the context of an actual petition following a competitive bid process and that the proceeding would be in two phases: the first to address the question of whether the proposed contract is lawful and, if so, a second phase would be opened "to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by the actual proposal." (Order No. 25,860 at 3; *see also* Order of Notice, Docket No. 16-241: "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.").

The Commission also articulated its expectations concerning the competitive bid process that should have preceded the filing of any petition for approval of a proposed gas pipeline infrastructure contract:

> Under the Commission's Affiliate Transactions Rules, N.H. Code Admin. Rules, Chapter Puc 2100, there exists a strong policy preference against self-dealing in relations between New Hampshire EDCs and their unregulated affiliates. . . .
>
> Also, there is a recognition in private industry and regulatory bodies throughout the United States that competitive bidding acquisition processes provide powerful benefits for ensuring prudency in utility expenditure and, by extension, cost savings for utility customers, through the introduction of cost discipline, open participation by competitors, and choices in product acquisition. Those benefits were identified in the Staff Report, which strongly advocated in favor of requiring that any gas capacity acquisition program by a New Hampshire EDC be predicated on competitive evaluation and selection processes undertaken by entities unaffiliated with the project sponsors. Staff Report at 11-12, and 46-47. We agree. The Commission expects that any acquisition of gas capacity by a New Hampshire EDC for the ultimate benefit of electric customers would be undertaken through an open, transparent, and competitive bidding/Request for Proposals (RFP)-type process, in which competitors of the New Hampshire EDC's corporate affiliates or business partners would also be able to participate.

(Order No. 25,860 at 4-5) (Emphasis added.)

IV. In its Petition, Eversource now seeks to reenter the generation business by having its EDC ratepayers fund infrastructure intended to serve a subset of generators selected by Eversource.

On February 18, 2016, Eversource filed a petition for approval of its proposed gas infrastructure contract with Algonquin for the $3.2 billion Access Northeast project that, together with the proposed rate structure, would obligate Eversource electricity ratepayers to fund the project costs for twenty years through the purchase of firm transportation capacity and liquefied natural gas ("LNG") storage (the "Petition" or "Eversource's Petition"). Eversource has a significant financial interest in the proposed development of the Access Northeast project. (Daly, p.41: "On September 16, 2014, Eversource announced a joint venture with Spectra

Energy to develop the Access Northeast project.")[3]. As the Commission is undoubtedly aware, the Algonquin pipeline does not serve New Hampshire.

The express purpose of the Eversource proposal is to facilitate development of the Access Northeast gas pipeline project with the professed goal of providing lower cost gas to selected electricity generators in New England. *See, e.g.,* Eversource Petition, ¶7 ("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 M&NP systems.") In suggesting that an EDC would have authority to enter into such a contact, Staff determined its purpose was to invest in "electric power facilities," permissible under RSA 374-A:

> Under the plain language of RSA Chapter 374-A, it would appear that New Hampshire EDCs are granted the corporate power to share the costs of, or otherwise participate in, electric generating units rated 25 megawatts or above, or portions thereof, both inside and outside of New Hampshire. Arguably, the contracting for gas capacity from pipeline and/or LNG enterprises, on behalf of electric generators of at least 25 MW, would constitute permissible contracting under RSA 374-A:2, II for the sharing of costs of, and a form of other participation in, such electric power facilities. Furthermore, the actual transfer of such capacity rights, and the payment therefor, would arguably be allowable sharing in the costs of, or otherwise participating in, such electric power facilities under RSA 374-A:2, I.

(July 10 Memo, p.4 (emphasis added).)

Because it is a transmission and distribution utility with no need for natural gas, Eversource will engage a capacity manager that will resell that gas capacity preferentially to a restricted class of buyers: those electric generators who serve New England and who have physical access to the Algonquin pipeline in Massachusetts, Connecticut, and Rhode Island. To the extent such generators do not take this capacity, the capacity will be released on the open market. To the extent that no one acquires this large amount of capacity via capacity release, it

[3] Unstated in Eversource's filing is that Eversource's ownership in ANE is 40 percent. National Grid has a 20 percent interest in the pipeline project. *See* Eversource Energy Form 10-Q (for the quarterly period ended September 30, 2015), p.42.

will go unused or be sold by Algonquin as interruptible service. In order to accomplish suppressing wholesale prices by providing discounted gas capacity subsidized by ratepayers to preferred electricity generators contemplated by the Eversource Petition, Algonquin/Eversource requires approval from FERC of a waiver of FERC's rules, which require the purchase of capacity such as that proposed to be released by Eversource through a competitive bid process. This waiver is pending before FERC, is heavily contested, and was by order of FERC suspended for five months to allow further study.

Eversource argues that the economic principles of supply and demand clearly support development of the proposed pipeline infrastructure.[4] In its Petition, however, Eversource acknowledges that generators are unwilling to sign on to the types of contracts that Eversource proposes its ratepayers should fund because of "the uncertainty of cost recovery." (Direct Testimony of James G. Daly, "Daly Direct", p.10, ln.12.) That is, currently there is insufficient demand in the competitive marketplace for the expansion capacity that would be supported by the proposed capacity contracts. (Direct Testimony of James M. Stephens, "Stephens Direct", pp. 12-13.)

Eversource was in the process of negotiating the Access Northeast contracts with itself and Algonquin when in October of 2015 the Massachusetts Department of Public Utilities ("DPU") issued an order in Docket No. D.P.U. 15-37. That order, among other things, required the EDCs to "demonstrate that they have conducted a fair and reasonable procurement to identify

[4] To justify the proposed pipeline infrastructure development, Eversource relies on conditions during the 2013/14 winter when a polar vortex gripped the Northeast, demands were at their peak, and gas and electricity prices rose correspondingly. Natural gas prices are now at historically more reasonable levels: New England wholesale power prices at points in 2015 were the lowest since the ISO markets began in 2003. Importantly, these low prices occurred without the additional pipeline capacity that Eversource now suggests is necessary to stabilize prices.

In addition to relying on the earlier extreme weather to support its claims of significant benefits from its proposal, Eversource also assumes LNG and dual fuel availability at unrealistically low levels. The combination of these factors naturally paint an exaggerated picture of the benefits of (and corresponding need for) the Algonquin/Eversource pipeline project. NEER will address these flaws if the Commission determines the Eversource proposal is authorized under the law.

potential alternatives." (Order at 45.) Eversource and Algonquin had already "made progress on a number of key issues," but stopped short of reaching a final contract, perhaps recognizing that doing so would seem inconsistent with the "fair and reasonable procurement" process required by the DPU.

As reflected in the description of the request for proposals ("RFP") process, Eversource then undertook a rapid process to "confirm" that it should move forward with the Access Northeast contracts. (*See, e.g.*, Daly Direct pp. 43-44: "Based on the [DPU Order], the Eversource EDCs decided that an RFP process would be useful in confirming the range of alternatives meeting the criteria for relief of electric reliability and retail price volatility concerns.").

Eversource thereafter put its negotiations with Algonquin on hold – briefly – issuing an RFP on October 23, 2015 for gas infrastructure proposals, the responses to which were due three weeks later (on or before November 13, 2015) with the winning bid(s) to be submitted to the DPU for review. Following that brief respite, Eversource determined that the Algonquin/Eversource pipeline project should be selected, re-commenced the negotiations, and executed the contracts filed with the Petition.

Eversource disagreed with the guidance from Commission Staff about the procurement process, but nonetheless now suggests the truncated process it followed complied with the Commission's directives in Order No. 25,860 requiring a competitive bid process that included compliance with New Hampshire's affiliate transaction rules and independent assessment of the bids. *Compare* Comments of Eversource Re: Staff's September 15, 2015 Report (Docket No. IR 15-124) (October 15, 2015) at p.9 ("Eversource disagrees with the procurement process advocated by Staff.") *with* Daly, p.44 ("The process contemplated by both Massachusetts and

New Hampshire is, in all material respects the same process, and is therefore satisfied by the RFP process conducted by the Eversource EDCs and National Grid.").

During the prehearing conference on April 13, 2016, Staff suggested that Eversource did not meet the Order 25,860 requirements for a competitive bid process and that the bids should be re-examined by an independent expert.

V. Status of filings before FERC.

The project sponsors have not yet filed with FERC for a Certificate of Public Convenience and Necessity for the Algonquin/Eversource pipeline project. (Stephens Direct p. 62.) In its filing before FERC for approval of its tariff requesting a waiver of FERC's competitive bid process for the preferential capacity release it proposes, Algonquin argued that Eversource's willingness to subsidize the Algonquin/Eversource pipeline project development is a demonstration of appropriate price signals, notwithstanding that the competitive marketplace did not produce any such signal: "Algonquin states that, here, EDCs that have requested this proposed tariff amendment are providing the signal to Algonquin to expand its system through their market support for the Access Northeast Project." *Algonquin Gas Transmission, LLC*, *Order Accepting and Suspending Tariff Record and Establishing a Technical Conference*, 154 FERC ¶61,269 (March 31, 2016) at 14 ("FERC Suspension Order"). Eversource's proposal to have EDC ratepayers subsidize a preferred class of generators that have not indicated a need for the capacity is, however, hardly a demonstration of competitive market fundamentals at work.

FERC expressed skepticism about the developers' request to allow preferential capacity releases to specific generators, rather than complying with FERC's requirement for a transparent, competitive bid process:

> The Commission's current pipeline capacity release program is designed to permit expeditious and flexible releases, in a transparent and not unduly discriminatory manner, to the shipper placing the highest value on the capacity.
> . . .
> Based on a review of the filing, the Commission finds that Algonquin's proposed tariff record has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful.

(*Id*. at 3, 16.)

As a result of these findings, FERC did not approve Algonquin's request to approve its proposed tariff effective April 1, 2016 as filed. FERC also declined to grant Algonquin's request that FERC "specifically exclude from consideration the details of the state-regulated electric reliability programs and the pricing and other terms of such capacity releases." (*Id*. at 13.) Instead, FERC suspended Algonquin's proposal for five months and ordered a technical conference to "address the concerns raised in this proceeding, including those raised regarding the basis and need for the waiver." (*Id*. at 15.). The technical conference will be held on May 9, 2016. Eversource should be required to resubmit a new Petition if the FERC alters the capacity release program that is at the heart of Eversource's proposal.

DISCUSSION

I. The Restructuring Act plainly requires a competitive market for energy supply in New Hampshire. Nothing in the Act exempts from its provisions the large-scale natural gas pipeline infrastructure proposed by Eversource.

As set out above, prior to 1996, the electricity market in New Hampshire allowed vertical utilities in which generation and transmission and distribution were owned and managed through one regulated entity responsible to serve a defined service territory. The passage of the Restructuring Act fundamentally changed New Hampshire's energy market, requiring the separation of energy generation from its transmission and distribution, the former subject solely to competitive forces and the latter remaining regulated as a natural monopoly.[5] In addition to sending market-based pricing signals, the competitive energy supply market would remove from EDC ratepayers the risk of generation assets and their attendant stranded costs for those investments that do not work out economically as initially hoped.

The 2015 Settlement Agreement in Docket No. DE 14-238 is to be the last step in fully implementing the Restructuring Act, resulting in the divestiture of Eversource's generation assets, determination of stranded costs from Eversource's generation assets, and eliminating from Eversource's ratepayers further risk from generation assets outside of those stranded costs.

Turning back the clock to the pre-restructuring days, Eversource now asks that the Commission approve new investment in gas pipeline infrastructure facilitated by contracts with Algonquin and an Eversource affiliate that once again requires ratepayers to fund generation resources (which is contrary to Eversource's own statements in support of the divestiture Settlement Agreement) and create pricing distortion in what is supposed to be a competitive

[5] Wires-based service providers, such as electric transmission and distribution companies, are a natural monopoly. The regulatory compact between the utility and the state government allows the EDC to have a monopoly within its service territory, but the EDC must submit to state regulation of its rates and quality of service provided to the public. The generation function, however, is no longer a natural monopoly. Like many regions within the United States, New England has developed an integrated transmission system that allows consumers to be served with generation resources that are located beyond their EDC's service territory.

market for energy supply. The reasons the Commission should reject this proposal are multiple and set forth below.

A. The Eversource proposal is affirmatively designed to be anticompetitive.

Today, in the competitive New England gas and electricity supply markets, merchant energy companies determine how best to use their capital, their shareholders take on the risk of the investments they make, and they compete with every other generation entity based on prices that emanate from competitive forces, without EDC ratepayer subsidization of certain types of generation. The Eversource proposal shares none of these fundamental characteristics.

There is no question that the Eversource Petition is anticompetitive; it is designed to be so. The purpose of the Eversource Petition is to facilitate development of pipeline infrastructure, despite the lack of market demand. The intended result, although whether Eversource's proposal would work as intended is highly questionable, is that natural gas-fired plants eligible for preferential capacity releases under Eversource's proposal, all of which are located outside New Hampshire, would gain a significant advantage over all other competitors in the generation marketplace. Eversource has not explained – because it cannot – how this proposal complies with the requirements of a "fully competitive market" where rules are applied "in a fair and consistent manner" to all buyers and sellers in the market, or how subsidizing this pipeline provides no unfair advantage to the selected natural gas-sourced energy suppliers. *See* RSA 374-F:3, VII ("Full and Fair Competition. . . . The rules that govern market activity should apply to all buyers and sellers in a fair and consistent manner in order to ensure a fully competitive market."); RSA 374-F:3, IV (Commission must "ensure that no supplier has an unfair advantage in offering and pricing such services."). Eversource's proposal is to use ratepayer funds to invest in a pipeline project that is not supported by market demand and then to provide preferential releases of capacity to certain generators for the purpose of providing a competitive advantage in

the New England energy supply market, in the hope that such a preference will somehow benefit ratepayers in New Hampshire. This is convoluted reasoning at best, but patently anticompetitive at its foundation.

The question then becomes how to analyze Eversource's anticompetitive proposal under New Hampshire law.

B. Given the free and fair competition requirement of New Hampshire's Constitution –embodied in the Restructuring Act – the question is whether the Restructuring Act specifically authorizes Eversource's anticompetitive proposal.

On July 10, 2015, Commission Staff issued a memorandum preliminarily addressing questions concerning the legality – solely from a state law perspective – of EDC ratepayers funding natural gas pipeline infrastructure. When performing its analysis, Staff articulated the question posed as follows: "Does the Electric Utility Restructuring statute (RSA Chapter 374-F) prohibit EDCs from acquiring gas capacity?" (July 10 Memo at 2.)

Analyzing the Restructuring Act to determine whether it prohibits an EDC from entering into a contract for gas pipeline infrastructure (that is, the question answered by Staff) misses the mark. As explained below, evaluating whether an anticompetitive proposal is prohibited by the Act, rather than whether it is specifically authorized by it, places one's analytical thumb on the wrong side of the scale.

The New Hampshire Supreme Court addressed the history of the free and fair competition requirement of the New Hampshire Constitution and the strict limitations on anticompetitive behavior in *Appeal of Omni Communications, Inc.*, 451 A.2d 1289, 122 N.H. 860 (N.H. 1982):

> Therefore, after considerable discussion regarding the evils of monopoly, the convention delegates voted overwhelmingly, 313 to 2, to recommend adoption of a constitutional amendment which would prohibit the growth and expansion of monopolies in this State. "This principle should be asserted in a concrete form so

> that the legislature of this state, and the legislature of every other state, will understand that it is a principle upon which New Hampshire insists." [Citation omitted.] The amendment read in part as follows: "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." This amendment is now included in the New Hampshire Constitution in part II, article 83 and thus declares our fundamental preference for free enterprise.
>
> The unique nature of gas, railroads, electricity and telephone service, however, as a practical matter, requires the existence of certain monopolies. . . . Thus, the legislature, acting in an era of extensive anti-monopolistic fervor, had no choice but to create a commission which would oversee and regulate those sanctioned monopolies.
>
> The role and duty of such a commission is to oversee and regulate those few necessary monopolies so that the constitutional right of free trade and private enterprise are disrupted as little as possible.

Id. at 862-63 (Emphasis added).

It is noteworthy that *Omni* was decided in 1982, fourteen years before the Legislature passed the Restructuring Act, as it voices both New Hampshire's strong policy in favor of competitive markets and the corollary principle that exceptions to competition should be as limited as possible and only as authorized specifically by the Legislature. The Court in 1996 made this very clear:

> In *Appeal of Omni Communications, Inc.*, 122 N.H. 860, 451 A.2d 1289 (1982), we held that the PUC lacked the authority to regulate the use of radio pagers. After reviewing the history of the 1902 Constitutional Convention, which produced the amendment favoring free enterprise found in part II, article 83 of the State Constitution, we concluded that the fundamental preference of this State is for free enterprise. *Id.* at 862, 451 A.2d at 1290. Against this constitutional backdrop, "[t]he role and duty of [the PUC] is to oversee and regulate those few necessary monopolies so that the constitutional rights of free trade and private enterprise are disrupted as little as possible." *Id*. at 862-63, 451 A.2d at 1291.
>
> Although not dealing directly with electric utilities, both *New England Household* and *Omni* stand for the proposition that legislative grants of authority to the PUC should be interpreted in a manner consistent with the State's constitutional directive favoring free enterprise. Limitations on the right of the people to "[f]ree

> and fair competition," N.H. CONST. pt. II, art. 83, must be construed narrowly, with all doubt resolved against the establishment or perpetuation of monopolies.

Appeal of Public Service Company of New Hampshire, 676 A.2d 101, 141 N.H. 13, 19 (N.H. 1996) (Emphasis added).

The point here is not so much that Staff's July 2015 analysis is wrong, but is instead that Staff answered the wrong question. Rather than asking whether a return to generation asset funding by EDC ratepayers is specifically prohibited under New Hampshire law, Staff should have asked whether the Legislature expressly authorized this deviation from the "free and fair competition" principle that is so fundamental to New Hampshire that it is embodied in the State's Constitution. That is the essence of construing the law "so that the constitutional right of free trade and private enterprise are disrupted as little as possible." *Omni*, 122 N.H. at 863; *see also Appeal of PSNH,* 141 N.H. at 19 (exceptions to competition "must be construed narrowly, with all doubt resolved against the establishment or perpetuation of monopolies.").[6]

When analyzed appropriately – with the burden on the party proposing the anticompetitive structure and with the necessary disfavor to any proposal that is inconsistent with New Hampshire's fundamental policy of free and fair competition – it is clear that Eversource has not met its burden to establish that its proposal to use EDC ratepayer funds to invest in natural gas pipeline infrastructure is affirmatively authorized by the Restructuring Act. *See Omni*, 122 N.H. at 863 ("In the instant case, the PUC, by attempting to regulate radio pagers, is demonstrating the very behavior it was established to prevent: interference and disruption of free market private enterprise.")

[6] Given the form of the question, it is not surprising that Staff concluded that EDC ratepayer subsidization of gas pipeline infrastructure may not be prohibited. If asked whether an interpretation is prohibited, good and capable lawyers will craft an argument, which explains why Staff would conclude only that "the Commission could conceivably hold that RSA 374-F allows such activity by EDCs." (September 15, 2015 Staff Report, p.10) (Emphasis in original). As set out above, however, New Hampshire law directs a very different evaluative process when anticompetitive behavior is proposed.

C. The Restructuring Act does not affirmatively authorize an EDC to place the risk of developing natural gas pipeline infrastructure on its electricity ratepayers.

Given the purpose of the Restructuring Act – establishing free competition in the energy supply markets, separation of generation from transmission and distribution functions and corresponding elimination of generation resource risk from electricity ratepayers – it seems self-evident that nothing in the Act affirmatively authorizes Eversource to ask ratepayers to bear the cost of infrastructure associated with generation resources. The analogy of attempting to jam a square peg into a round hole could not be more apt than Eversource's proposal in the context of what is supposed to be a restructured, competitive energy supply market.

The plain language of the single exception for EDC-owned generation in the restructured energy market authorized by the Act likewise demonstrates that Eversource's proposed investment is not authorized by the Act. *See* RSA 374-F:3, III (exception to separation of transmission and distribution from generation for "small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs.").

In light of the overall purpose of the Restructuring Act and the very limited exception noted above, construing the Act to authorize a multi-billion dollar pipeline investment would be absurd. *See, e.g., State Employees' Ass'n of New Hampshire v. State*, 20 A.3d 961, 161 N.H. 730, 738 (N.H. 2011) ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.").

Although unnecessary in light of this plain language, it is noteworthy that Eversource and the settling parties in the divestiture docket purported to share the view that the Restructuring Act means what it says. That is, the testimony and arguments from the parties in support of the Settlement Agreement was that the complete divestiture of all of Eversource's generating assets and the company's "exit [from] the generating business" was necessary in order to comply with

the Legislature's directives in the Restructuring Act, including resulting in electricity ratepayers no longer having any risk for generation resource investment. (Tr. Day 2, PM at 73 (Staff): "More importantly, I think it shifts the risk where we intended it in electric restructuring away from customers and prudence cases and to the wholesale market and to the generators and suppliers in that market."). Not having yet even received an order in the divestiture case, Eversource now proposes that the Commission rule that the existing law allows it to use ratepayer funds to invest in a multi-billion dollar natural gas pipeline project to facilitate releases of discounted gas capacity to certain generators in the hopes that the resulting wholesale price suppression will be greater than the costs to ratepayers of the investment in a pipeline that the EDC cannot use in its transmission and distribution functions. This intended result is directly at odds with, and certainly not authorized by, the Restructuring Act.

The Legislature repeated the mandate that the New Hampshire electricity supply market must be competitive 52 times in the Act. No one but the Legislature is authorized to make exceptions not provided in the Act itself. *State Employees' Ass'n of New Hampshire,* 161 N.H. at 739 (Court is not permitted "to carve out exceptions to the [] statute not specifically provided for by the legislature."), *citing Fowler v. Fowler*, 116 N.H. 446, 362 A.2d 204 (1976); *see also Great Traditions Home Builders, Inc. v. O'Connor*, 949 A.2d 724, 157 N.H. 387, 389 (N.H. 2008) ("We will not interpret the statute to create such an exception where the legislature has not seen fit to do so."), *citing Nenni v. Comm'r, N.H. Ins. Dep't*, 156 N.H. 578, 581, 938 A.2d 116 (2007).

Other generators in this market have invested literally hundreds of millions of dollars on New Hampshire's bedrock principle of free and fair competition. If there is to be a reversal of the competitive marketplace mandated by the Restructuring Act, it is for the Legislature – not

this Commission – to do so. *See, e.g.*, *Public Service Company of New Hampshire*, Order No. 24,695 ("the construction or acquisition of new generation capacity by PSNH appears to require prior legislative authorization . . . to the extent that PSNH suggests or advocates a change in the law that would allow it to build or acquire new generation, PSNH must demonstrate that the resources that it plans to add to its portfolio will satisfy customers' energy service needs at the lowest overall cost.").

D. Neither RSA 374-A nor 374:57 overcomes the Restructuring Act's command that the energy supply market must be the product of free competition, not ratepayer subsidization of certain generators.

In its July 10, 2015 legal memorandum and follow-up report, Staff determined that RSA 374-A or the Restructuring Act itself could be read to authorize an EDC to fund gas pipeline infrastructure. Again, for the reasons articulated above, Staff's starting point for its analysis (that is, whether the Restructuring Act "categorically prohibits" such investment, (July 10 Memo, p.2)) improperly shifted the burden of the analysis, which should instead have focused on whether the Restructuring Act affirmatively authorized what can only be described as a significant exception to a restructured energy market that is supposed to be based on competitive energy supply. With that said, the statutory provisions referenced by Staff as potentially affording the authorization that Eversource seeks – RSA 374-A and RSA 374:57 – are unavailing for multiple reasons.

For its part, Eversource concedes that RSA 374-A "is not directly applicable to the potential solution described by Eversource," arguing instead that RSA 374:57 authorizes the proposed gas infrastructure contracts. For similar reasons, however, RSA 374:57 does not provide the authorization Eversource seeks. Each is discussed in turn.

1. RSA 374-A does not authorize an EDC to fund gas pipeline infrastructure.

a. The definition of "electric utility" in RSA 374-A is inapplicable to the Eversource Petition.

RSA 374-A:2, I & II authorized an "Electric Utility" to "plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell dispose of or otherwise participate in electric power facilities." RSA 374-A:1, III defines "electric power facilities" to mean, *inter alia*, "generating units rated 25 megawatts or above." Staff took this to mean that "[u]nder the plain language of RSA Chapter 374-A, it would appear that New Hampshire EDCs are granted the corporate power to share the costs of, or otherwise participate in, electric generating units rated 25 megawatts or above, or portions thereof, both inside and outside of New Hampshire." (July 10 Memo, p.4.)

Though well beyond a fair reading, prior to the effective date of the Restructuring Act, these provisions could conceivably be read as authorizing the Eversource proposal (but not its cost recovery) under state law; indeed, they could also be read to authorize Eversource to develop, purchase, or operate a nuclear power plant or any other generating asset, so long as the asset was rated at 25 megawatts or above. This makes sense in the context of a vertically integrated utility structure in which generation, transmission, and distribution are all under the same regulated roof. These provisions, however, do not authorize the Commission to approve the Eversource proposal in a market restructured pursuant to the Act.

When interpreting statutory provisions, the Commission must "consider the words and phrases used, not in isolation, but rather within the context of the statute as a whole." *Public Service Company of New Hampshire*, Order No. 25,213 (April 18, 2011), citing *State v. Seymour*, No. 2009-678, 2011 WL 76770 at page 2 (N.H. March 1, 2011); *Petition of George*, 160 N.H. 699, 702 (2010); *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010). "We

endeavor to give effect to the provisions of all parts of the statute, *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009), and we construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd, illogical or unjust result or a result that would nullify to an appreciable extent the purpose of the statute." PSNH Order No. 25,213, *citing In re Alex C*, 13 A.3d 347, 350 (N.H. 2010); *Appeal of Johnson*, 13 A.3d 315, 318 (N.H. 2011); *Nashua School Dist. v. State*, 140 N.H. 457, 458 (1995). The Commission must also "construe the various statutory provisions harmoniously." *Nashua School Dist. v. State, supra* at 459.

Applying these principles of statutory construction reveals the flaw in any argument that RSA 374-A authorizes the proposed pipeline infrastructure investment.

The definition of "Electric utility" in RSA 374-A:1, IV was enacted in 1975 and included an entity "primarily engaged in the generation and sale or the purchase and sale of electricity or the transmission thereof, for ultimate consumption by the public." That is, an electric utility was defined consistent with its functions as a vertically integrated utility as New Hampshire law allowed at that time.

With the separation of transmission and distribution from generation required by the Restructuring Act, what it means to be an electric utility in New Hampshire necessarily changed to reflect that separation. For example, in RSA 369-B:2, IV & XII enacted after the Restructuring Act was passed, "'Electric utility' means a public utility . . . that provides retail electric service. . . . 'Retail electric service' means the delivery of electric power through the provision of transmission and/or distribution service by an electric utility to a retail customer . . . ." This is also consistent with the separate definition of "electricity suppliers" in the Restructuring Act itself. *See* RSA 374-F:2, II. In the New Hampshire electricity market of today, Eversource simply cannot be an entity that is engaged – to any degree not authorized by

the Restructuring Act – in generation related activities, as contemplated by the pre-Restructuring Act definition of "electric utility" in RSA 374-A:1, IV.

For these reasons, the provisions of RSA 374-A:2, I & II authorizing electric utilities to "plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell dispose of or otherwise participate in electric power facilities" are inapplicable in New Hampshire's restructured market. Holding otherwise would mean EDCs in New Hampshire remain authorized to invest in (*i.e.* share in the costs of) generating assets of any kind going forward, effectively nullifying the Restructuring Act. The law does not allow that tortured interpretation. *See, e.g.*, PSNH, Order No. 25,213; *see also Public Service Company of New Hampshire*, Order No. 24,695 ("the construction or acquisition of new generation capacity by PSNH appears to require prior legislative authorization").

Indeed, if Staff's interpretation of RSA 374-A were correct, nothing would prevent Eversource from financing through EDC electricity rates its affiliate's re-purchase of the very generation assets that Eversource proposes to divest if the 2015 Settlement Agreement is approved. Because the existing law would not allow that absurd result, the same principles prevent the conclusion that Eversource may fund through EDC rates the Algonquin/Eversource project.

Independent of this basis, as explained in the next section, RSA 374-A is also unavailing as a means to authorize the Eversource proposal because it conflicts with the Restructuring Act and/or has been overtaken by a legislative action that is intended to occupy the field of EDC regulation as it relates to entanglement with generation.

b. The provisions of RSA 374-A authorizing an electric utility to invest in generation assets were repealed by implication with the passage of the Restructuring Act.

"[A]lthough construction of a later statute as impliedly repealing an earlier one is disfavored, *Board of Selectmen*, 118 N.H. at 152, 383 A.2d 1122, this general principle is subject to two well-recognized exceptions: (1) when it is clear that the later act conflicts with the earlier act; or (2) when the later act clearly is intended to occupy the entire field covered by the prior enactment." *Professional Firefighters of Wolfeboro, IAFF Local 3708 v. Town of Wolfeboro*, 48 A.3d 900, 164 N.H. 18, 22 (N.H. 2012), citing 1A Singer, Statutes and Statutory Construction § 23.9, at 453-54 (2009); *see Professional Engineers in California Government v. Kempton*, 40 Cal.4th 1016, 56 Cal.Rptr.3d 814, 155 P.3d 226, 240 (2007); *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347, 351 (2002).

Under either prong of this test, RSA 374-A:2 is of no effect in this proceeding.

The 1996 Restructuring Act plainly mandates that energy generation must be competitive and separated from the transmission and distribution functions, which are to remain regulated. *See* RSA 374-F:3, III. By contrast, the provisions of RSA 374-A contemplate unified ownership and operation of generation, transmission, and distribution. *See* RSA 374-A:1, IV (providing the vertical utility definition of "electric utility" upon which the authorizations in RSA 374-A:2 are based). Because the Restructuring Act conflicts with RSA 374-A:2 in this fundamental way, the earlier enactment (RSA 374-A) must give way to the later enactment (the Restructuring Act).

Even if the Commission were to determine that the Restructuring Act does not conflict with RSA 374-A:2, the Restructuring Act is intended to occupy the field of EDC authority concerning its entanglement with generation resources. Specifically here, the Act directs that electric utilities are confined to transmission and distribution activities, with the sole exception of "small scale distributed generation resources as part of a strategy for minimizing transmission

and distribution costs." (RSA 374-F:3, III.) Because the Act fully proscribes the lawful generation-related activities of an electric utility, prior statutory provisions that contemplate a single entity providing generation, transmission, and distribution are at this point ineffective. *See Prof. Firefighters of Wolfeboro*, 164 N.H. at 24 (portions of statute that conflicted with new statute were "superseded by the enactment of [the new statutory provisions]").

If there is to be a change authorizing an electric utility to undo the separation required by the Act and authorizing the utility to participate in and have ratepayers fund not small, but massive scale investments in generation assets such as that proposed by Eversource, the change must be made by the Legislature, not by this Commission.[7]

2. RSA 374:57 does not authorize Eversource's proposed pipeline infrastructure investment.

As noted above, Eversource disagrees with Staff's analysis and concedes that RSA 374-A:2 does not authorize its proposed investment. Eversource relies instead upon another provision within the General Regulations, RSA 374:57, as authorizing the proposed gas infrastructure contracts. For similar reasons, however, RSA 374:57 is as equally unavailing as RSA 374-A.

RSA 374:57 provides as follows:

> **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.

[7] Staff reads importance into the fact that RSA 374-A:2 was not repealed expressly when the Restructuring Act was passed. (*See* July 10. 2015 Memo p.4.) The fact that the Legislature does not expressly repeal inconsistent provisions is the very premise for the well-recognized principle of repeal by implication when the later statute conflicts with the earlier statute or occupies the field.

Staff did not go so far as Eversource in claiming that RSA 374:57 authorizes the proposed gas infrastructure contracts, but opined only that the Commission "could" rule that this provision allows an electric distribution utility to purchase gas capacity. For the reasons below, RSA 374.57 does not authorize Eversource's proposed contract.

First, the plain language of the statute cannot be read to authorize a utility to enter into agreements that are contrary to the Restructuring Act. The statute simply requires filing and Commission review of the agreements referenced in the statute, and is irrelevant to the question of whether certain types of contracts are authorized or not under the Restructuring Act.

Second, RSA 374:57 was enacted in 1989 in connection with the bankruptcy and reorganization of PSNH. Its purpose was to tighten controls around PSNH's decision-making in the context of PSNH having previously made decisions that resulted in the bankruptcy of the state's largest utility and requiring reorganization. (*See* House Journal December 14, 1989, p.9; *id*. p. 14: "Again this was an effort to strengthen legislation . . . . It says that the PUC will have review of energy agreements that take place with longer than one year's duration. Under that process 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.")

Suggesting that RSA 374:57 – which was inserted into the General Regulations as part of the larger agreement to end the PSNH bankruptcy through a reorganization agreement intended to establish tight controls on Eversource – should be read as somehow expanding Eversource's contracting ability to the point that it authorizes Eversource to circumvent the Restructuring Act and allows the twenty-year, multi-billion dollar investment in natural gas pipeline capacity that it

cannot use suggested by Eversource is simply unsupportable. The statute's purpose was to constrain, not expand, Eversource's contracting authority.

Third, the 1989 act at most indicated that prior to the Restructuring Act, an electric utility was authorized to enter into contracts for "generating" or "transmission" capacity or "energy." This meant, prior to the Restructuring Act, a vertically-integrated utility could enter into a contract with an electricity generator for capacity from the generator's electricity generation resource, for transmission of electricity, or for the electricity. By contrast, a natural gas pipeline does not have the capability of generating any power, nor does it have the capacity to transmit electricity. Particularly in light of the Legislature's purpose (*i.e.*, to constrain PSNH's contracting authority), a fair reading of RSA 374:57 would not expand its meaning to include the purchase of firm gas transmission capacity to support development of a multi-billion dollar pipeline used by a certain class of generators.

Finally, even if Eversource's implausible reading would otherwise prevail, however, RSA 374:57 was enacted seven years prior to the Restructuring Act. For the reasons set forth in the preceding section, to the extent RSA 374:57 could be read as authorizing Eversource to force its ratepayers to fund gas pipeline infrastructure, it would be inconsistent with the later-enacted Restructuring Act and/or involves an activity the field of which is regulated by the Restructuring Act. Accordingly, RSA 374:57 has no effect on the question presented by Eversource in this proceeding.

3. The Restructuring Act itself does not authorize approval of the Eversource Petition.

In another attempt to suggest a "conceivabl[e]" (Staff Report at 10) interpretation that would authorize an EDC to fund pipeline infrastructure, Staff suggested that:

> the Commission could determine that the Restructuring Policy Principle delineated in RSA 374-F:3, III, regarding the functional separation of generation

> services from transmission and distribution services, could be complied with by an EDC acquiring gas capacity on behalf of merchant generators, insofar as separate ownership of the actual generation plants will remain in the hands of merchant generation companies, rather than the EDCs.

(September 15, 2015 Staff Report, p.10.)

If the Commission were to so hold, EDCs in New Hampshire would be free to require ratepayers to bear the cost of investments in generation-related resources of any kind, even those (as here) that will be owned by the EDC's affiliate; that is, the antithesis of the competitive energy supply market envisioned by the Legislature. Reading the Restructuring Act in that manner would make the promised transition to competition a farce, effectively nullify the Restructuring Act and ignoring the settled law requiring the Commission to construe any limitation on free and fair competition "narrowly, with all doubt resolved against the establishment or perpetuation of monopolies." *Appeal of Public Service Company of New Hampshire*, 141 N.H. 13 at 19.

Reading the Restructuring Act in its proper context – *i.e*., as an act that was enacted to create a competitive energy supply market – but at the same time interpreting the law as allowing a restructured EDC to invest in pipeline infrastructure, would require the insertion of text into the Restructuring Act to this effect: "Nothing in the Restructuring Act shall prohibit an electric utility from funding generation infrastructure and including such investment in EDC ratepayer rates, which conduct is fully authorized despite any provision of this Act to the contrary."

No canon of statutory construction would permit the Commission to add words to a statute, and certainly not words that are entirely at odds with an act that regulates the activities of an EDC in a restructured environment in which generation supply activities are separated from transmission and distribution, and the former are supposed to be "fully competitive." *Contra*, *Formula Dev. Corp. v. Town of Chester*, 934 A.2d 504, 157 N.H. 177, 181 (N.H. 2007) ("To

hold otherwise would add words to the statute which the legislature did not see fit to include."), *citing Pennelli v. Town of Pelham*, 148 N.H. 365, 366, 807 A.2d 1256 (2002); *see also In re Regan*, 48 F.3d 920, 164 N.H. 1, 4 (N.H. 2012) ("We interpret legislative intent from the statute as written, and, therefore, we will not consider what the legislature might have said or add words that the legislature did not include."); *In re Jesse*, 722 A.2d 457, 143 N.H. 192, 195 (N.H. 1998) ("It is a well-established principle of statutory construction that we will not add words to a statute, and thus bestow rights, that the legislature did not see fit to include.").

For the reasons set forth above, Eversource is not authorized to enter into the proposed contract under New Hampshire state law.

II. Recovery of the pipeline infrastructure costs in electricity rates as Eversource proposes is unlawful.

Eversource has through the Long-term Gas Transportation and Storage Contract suggested that its electricity ratepayers pay for the proposed pipeline infrastructure in their rates. This is both unlawful and at odds with Eversource's promise that it is "exit[ing] the generating business."

Utilities can include in rates only investments that are used and useful to the utility. RSA 378:28 ("The commission shall not include in permanent rates any return on any plant, equipment, or capital improvement which has not first been found by the commission to be prudent, used, and useful."); RSA 378:27 (allowing temporary rates including reasonable return on property of the utility that is "used and useful in the public service"). It is difficult to conceive how a natural gas pipeline providing natural gas to independent gas-fired electricity plants, gas marketers, and for use as heat would be deemed to be "used and useful" to New Hampshire EDC customers within the context of RSA 378:28. An EDC uses wires to distribute electricity to its customers. An EDC does not use natural gas as any part of its distribution or

transmission functions. *See, e.g.*, RSA 374-F:3, III. Here, the connection to Eversource's EDC ratepayers is even more attenuated because the proposed pipeline will not deliver its fuel to New Hampshire electricity generators. In essence, Eversource concedes that this investment is not "used and useful"; instead they argue that there may be an indirect benefit from disposition of discounted gas capacity to generators that will be greater than the cost to ratepayers of the investment that cannot be used by the EDC. Any such benefit is speculative, but even if there were a benefit, that by itself does not transform this investment into something "used and useful" to an EDC.

Moreover, RSA 378 prohibits utilities from including in rates charges emanating from activities that are in violation of the law:

> Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law . . . the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. . . .

(RSA 378:7) (Emphasis added.) For the reasons set forth in the preceding sections, the Eversource proposal is in violation of the Restructuring Act and, accordingly, the costs of the Algonquin/Eversource pipeline project are not recoverable in EDC ratepayer rates.

In addition to the prohibition on including in rates costs that flow from unlawful activities, utilities cannot charge electricity ratepayers for the costs to construct a project that is not yet built:

> Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited

> to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

(RSA 378:30-a) (Emphasis added).

These provisions would preclude Eversource from including in EDC rates the cost of developing the pipeline until it has been completed. Although the extent of the construction for each phase has been redacted, we do know that Algonquin intends to construct the pipeline in four phases, the last of which will not even begin until mid-2021, even if the project stays on schedule. (Daly Direct p.18, lns. 6-11.) Despite this long, multi-phased schedule, Eversource consultant ICF has attributed the full estimated effect of the pipeline several years before the final phase even commences: "While our modeling has assumed that the full capacity is available in November 2018, it is likely that the proposed project will enter into the market between 2018 and 2021." (EVER-KRP-2 at 13.) Eversource has also made clear that EDC ratepayers would begin funding the pipeline "beginning on the in-service date of the first of four planned phases." (Day Direct p.18, lns. 6-7 (emphasis added). Because Eversource has agreed to a levelized cost for the 20-year duration of the contract, EDC ratepayers would be paying for costs prior to completion and construction of most of the phases of the project, in violation of RSA 378:30-a. Thus, to the extent any such payments are approved, those payments must be solely for the facilities in service and not for future facilities not even built.

III. Eversource's proposal to affect the wholesale electricity market is preempted by the Federal Power Act.

Commission intervention in the wholesale electricity market of the nature and extent proposed by Eversource is preempted by the Federal Power Act ("FPA"). The principles of federal preemption operate to invalidate any state action that intrudes in either a field of regulation where Congress intended the federal government "to occupy exclusively," *English v.*

General Elec. Co., 496 U.S. 72, 79 (1990), or where the state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal government." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

Under the FPA, FERC has exclusive delegated authority over "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(J). The FPA defines "sale of electric energy at wholesale" as the "sale of electric energy to any person for resale." 16 U.S.C. § 824(d). Any state actions with a direct effect on wholesale energy prices are preempted by the FPA. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982).

The scope of federal preemption is not limited only to direct effects. The FPA also preempts "state regulations which would indirectly achieve the same result." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963). "[E]ven where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority." *Public Utils. Comm'n v. FERC*, 900 F.2d 269, 274 n.2 (D.C. Cir. 1990) (internal quotation marks omitted).[8]

Most recently, the U.S. Supreme Court in *Hughes v. Talen Energy Marketing, LLC*, No. 14-614 (U.S. Apr. 19, 2016) found that a state program that guaranteed a rate different than the rate set by a FERC-administered wholesale market, in that case the PJM capacity rate, contravenes the FPA's division of authority between state and federal regulators. As already noted, the FPA allocates to FERC exclusive jurisdiction over "rates and charges . . . received . . . for or in connection with" interstate wholesale sales. 16 U.S.C. §824d(a). Under this authority,

[8] "Rather than ensuring the reasonableness of individual interstate transactions by directly setting [wholesale] electric rates, FERC has chosen instead to achieve its regulatory aims indirectly by protecting the integrity of the interstate energy markets." *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014) (internal citation omitted).

FERC has approved the market rules in ISO-NE including the "sole ratesetting mechanism for sales of" energy and capacity to ISO-NE, and "deemed the clearing price *per se* just and reasonable." (slip op. at 1)

In effect, Eversource here is requesting the Commission to substitute its judgment on wholesale rates for FERC's, just as the state of Maryland did in *Hughes*. By subsidizing natural gas through preferential capacity releases for the express purpose of suppressing wholesale electric prices, New Hampshire and this Commission will "invade[] FERC's regulatory turf." *Id.* at 7 (citing *EPSA*, 577 U. S., at ___ (slip op., at 26) ("The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result." (internal quotation marks omitted)). The proposal is doubly flawed in this instance, because here, while the impact is intended to be felt most in wholesale electric markets, the guaranteed recovery substituted for a market price is for interstate pipeline capacity release – also a rate subject to FERC's exclusive jurisdiction. And the *intent* to suppress wholesale market prices through preferential release of interstate pipeline capacity renders the scheme even more indefensible. *See Oneok, Inc.* v. *Learjet, Inc.*, 575 U. S. ___, ___ (2015) (slip op., at 11) (whether the Natural Gas Act (NGA) preempts a particular state law turns on "the *target* at which the state law *aims*"). As the Supreme Court concluded in *Hughes*, "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." (slip op. at 7).

First, the Eversource proposal is premised on its belief that wholesale electricity clearing prices will be lowered below those prices that would exist if the wholesale market were permitted to operate without state intervention (*i.e.*, in the absence of the Commission authorizing Eversource to recover the cost of the new gas capacity from its electricity

ratepayers). (*See, e.g.*, EVER-KRP-2 at 14: "ICF estimates Access Northeast's impacts on New England's electric market by assessing the reduction of wholesale electricity costs – measured as the wholesale energy price multiplied by total energy load in New England.")

Second, by authorizing such state intervention, the Commission will both eliminate the market incentives for gas-fired generators to pursue market-based fuel supply solutions, and discriminate against both gas generators who cannot access this new gas capacity and non-gas-fired generators who will be forced to compete with ratepayer-subsidized gas-fired generators—assuming that such gas generators take this capacity at all.

Third, Eversource has made clear that its motive is to correct a perceived failure of market-based incentives to encourage wholesale generators to contract for adequate pipeline capacity. Of course, Eversource's proposal does not mandate that the wholesale generators take such capacity, rather it simply hopes that by its ratepayers subsidizing such capacity, that these preferred generators will acquire capacity at a discount and the lower costs will flow through the wholesale prices in the market.

In each of these instances, state intervention is preempted as an impermissible intrusion in the exclusively federal domain of protecting the competitive wholesale market. If adopted by the Commission, the Eversource proposal would impermissibly establish a "preferred incentive structure" that preferences gas over other generation fuels; an action that would be preempted and of no effect. *Cf. Nazarian*, 753 F.3d at 478.

IV. Even if the Commission could determine that the Eversource proposal is otherwise authorized, the intended and unintended consequences of that decision militate in favor of rejecting the Eversource petition.

A. Approval will result in supply price distortion.

Eversource's analysis in support of its proposal suggests that the prices from the 2013/14 winter and low LNG and dual fuel resource availability will continue over the long term. They

also assume that 100% of the over-estimated cost savings will flow through in its entirety to EDC ratepayers, and beginning in 2018 notwithstanding that Phase IV of the pipeline will not even start until mid-2021. (*See, e.g.*, EVER-KRP-2 at 15: "For the purpose of this analysis, ICF further assumes that reductions or increases in wholesale electric costs would ultimately flow through to all New England electric consumers."). Based on these bloated assumptions, Eversource suggests that the Commission should authorize this two decades long deal because it is the only way to stabilize electricity rates over the long term.

It is noteworthy that California was convinced of the same when responding to the run-up in electricity prices in the winter of 2000 and into the summer of 2001. The problem and promised (versus actual) results in California should give the Commission considerable pause about locking New Hampshire electricity ratepayers into an unprecedented, long-term, and multi-billion dollar contract to fund the Algonquin/Eversource pipeline project, the purpose of which is to disrupt the competitive generation market.

In 2000, faced with high spot market prices and short supply and assuming those conditions would persist over the long-term if no action were taken, California authorized emergency measures to allow the California Department of Water Resources ("CDWR") to enter into long-term power purchase agreements, with the goal of shoring up supply and stabilizing energy prices. Starting in January, 2001, CDWR signed 58 long-term contracts obligating Californians to pay a total of $42 billion.

While originally touted as saving the struggling California energy markets, almost immediately after entering into these power purchase agreements, CDWR (and various other California state agencies, including the Attorney General) discovered that the contracts were based on supply curves embedded with short (not long)-term artifacts that resulted in artificially

high assumed prices, which in turn led to artificially high long-term contract prices. The result: CDWR, the California Attorney General, Public Utilities Commission and others spent the better part of the next 15 years litigating the $42 billion in contracts before FERC and the courts. The result for California ratepayers is that, rather than the promised savings and stabilization of the energy market, ratepayers funded millions in legal and expert fees and billions in over-priced energy.

While no set of circumstances is identical, the lessons of California's catastrophic handling of the 2000 energy crisis are that (1) fast action, including entering into long-term contracts that are purportedly designed to stabilize pricing and save ratepayer funds, can have the opposite effect; and (2) there is significant danger in assuming that short-term problems will persist and should be addressed with long-term ratepayer obligations.

Putting this to the side, and assuming for the sake of argument that Eversource's cost/benefit analysis is reasonable and the Eversource/Algonquin scheme works precisely as they suggest, the result would be wholesale natural gas prices that are distorted by the EDC ratepayer subsidies, discriminatory release of Eversource's capacity to select gas generators, that would (it is hoped) lead to lower wholesale electricity prices, which (it is hoped) would lead to lower retail electricity rates. In addition to unrealistic assumptions regarding future natural gas prices, Eversource ignores the consequences of what would happen to the New England electricity supply market if its proposal works as they predict.

B. The anticompetitive price suppression inherent in Eversource's proposal would disadvantage certain generators in the market.

Where one fuel source is favored through ratepayer subsidies, as would be the case under Eversource's proposal, it means all others are disadvantaged relative to the existing competitive

market. In addition to being facially anticompetitive, the economics upon which investments in plants fueled by other sources were and are made would be distorted.

By way of example, a NEER affiliate purchased its majority interest in the Seabrook Nuclear Power Station in 2002 for approximately $800 million. As all nuclear plants do, maintaining and updating Seabrook Station to ensure its continued operation through the anticipated license extension date (March, 2050) and potentially beyond requires significant additional, annual investments by NEER and the other joint owners of the plant. NEER made its initial investment in Seabrook Station based on the fact that New Hampshire had enacted the Restructuring Act and the energy supply market, accordingly, would be subject to competitive market forces. Although operationally excellent, changing the playing field to one not derived from competition, but instead tilted in favor of subsidized natural gas, would fundamentally alter the economics upon which the Seabrook Station investments were made. Subsidizing natural gas pipeline development in the manner suggested by Eversource materially increases NEER's affiliate's risk on the investments it has made, and will continue to make, in Seabrook Station. Given that Seabrook Station produces 1,247 MW on a nearly continuous basis with zero CO_2 emissions, this increase in risk is contrary to the low-emissions principles of RSA 362-F:1.

For the same reasons, the consequence of approving the Eversource petition is that developers of plants fueled by sources other than natural gas will be dis-incentivized to make those investments. This will mean plants fueled by sources other than gas may retire for economic reasons and others that might otherwise have come online in a competitive supply market are resistant to do so when "competing" with subsidized natural gas-fired plants.

FERC has previously warned of the consequences of strategies that are based on short-term price suppression, rather than focusing on long-term fundamentals. *See, e.g.*, *Cal. Indep.*

Sys. Operator Corp., 142 FERC ¶ 61,191, at P 28 (2013) (explaining that "the use of zero price bids could have the unintended effect of depressing the market clearing prices in the [] markets, thus adversely affecting other market participants"); *ISO New England Inc.*, 135 FERC ¶ 61,029, at P 14 (2011) (finding that subsidized new entry "creates a significant design issue for the [forward capacity market]; all other things being equal, it suppresses the clearing price below competitive levels"), *on reh'g*, 138 FERC ¶ 61,027 (2012); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 103 (2008) ("While a strategy of investing in uneconomic entry and offering it into the capacity market at a low or zero price may seem to be good for customers in the short-run, it can inhibit new entry, and thereby raise price and harm reliability, in the long-run."), *on reh'g*, 124 FERC ¶ 61,301 (2008), *on reh'g*, 131 FERC ¶ 61,170 (2010)).

CONCLUSION

The Eversource proposal violates the very fundamentals upon which a competitive energy supply market is based: electricity ratepayer subsidized (not competitive market) funding of a multi-billion dollar pipeline that is not used for transmission or distribution of energy, but rather for its supply and by companies other than the EDC. Coming as it does on the heels of Eversource having requested authorization to divest all of its generation assets and "exit the generating business," the Eversource proposal's incompatibility with the Restructuring Act is all the more highlighted. The Legislature set the competitive course for the New Hampshire energy supply market; it must be left to that same body to determine whether to reverse course and allow Eversource to re-invest in generation resources funded by its electricity ratepayers. It would be wholly inappropriate for the Commission to do so. Because neither state nor federal law authorizes a return to a vertical utility regime and the deviation from competitive principles proposed by Eversource, its Petition should be dismissed.

Respectfully Submitted,

NEXTERA ENERGY RESOURCES, LLC,

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on the date of this filing, I have served the foregoing document on all persons listed in the Commission's service list in this docket via electronic mail.

Christopher T. Roach