

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

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

**Docket No. DE 16-241**

**REPLY BRIEF OF ENGIE GAS & LNG LLC**

This reply brief is submitted by ENGIE Gas & LNG LLC (“ENGIE”) to address issues arising from the April 28, 2016 initial briefs submitted by Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource Brief”), Algonquin Gas Transmission, LLC, (“Algonquin Brief”) and the Coalition to Lower Energy Costs (“CLEC Brief”).

The Eversource Brief asserts that: (i) the transaction it proposes in this docket<sup>1</sup> does not conflict with the restructuring principles of RSA 374-F, (ii) Eversource’s legal authority to enter the Access Northeast Contract is supported by the “potential applicability” of RSA 374-A, (iii) RSA 374:57 is authority for Eversource to contract for gas transmission capacity and authority for the Commission to allow recovery of the costs of the Access Northeast Contract, (iv) the transaction is consistent with Eversource’s statutory resource planning obligations, and (v) the transaction approvals sought from the Commission are not preempted by the jurisdiction given the FERC under the FPA. Similarly, the Algonquin Brief asserts the applicability of RSA 374:57, the transaction’s consistency with RSA 374-F, the lack of federal preemption, and the opportunity to recover the “prudent, used and useful” costs of the Access Northeast Contract under RSA 374:57 and general cost recovery statutes. The Algonquin Brief and the CLEC Brief

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<sup>1</sup> The transaction consists of the Access Northeast Contract, the ERSP, and the LGTSC Tariff. The definitions given those terms and the other defined terms in the April 28, 2016 ENGIE Gas & LNG LLC initial brief are used in this reply brief.

also assert an argument in support of Eversource authority to enter the Access Northeast Contract not made in the Eversource Brief. Algonquin argues that the PSNH (now Eversource) corporate charter and the State's business corporation law, RSA Chapter 293-A, allow Eversource to enter the Access Northeast Contract and no further specific statutory authority is needed. CLEC makes a similar argument based on RSA 295:6. CLEC also asserts that the Access Northeast Contract does not conflict with RSA Chapter 374-F, and general statutes, including RSA 374:7, can authorize the Eversource transaction.

Upon examination, each of these arguments fail to provide a legal basis for the Access Northeast Contract or for obligating Eversource's distribution services customers to the twenty-year financial consequences arising from that contract and from selling natural gas transportation and storage capacity to electric gas generators or the secondary non-generation market.

## **I. ARGUMENT**

### **A. The Eversource And Algonquin Briefs Ignore The Plain Text And Legislative History Context of RSA 374:57 And Hence Misapprehend That Law. It Does Not Provide Corporate Authority For Eversource To Enter The Access Northeast Contract Or Authority For The Commission To Approve That Contract Or The LGTSC Tariff As In The Public Interest.**

Eversource argues that the Access Northeast Contract is a contract for transmission capacity and falls within the term "transmission" in RSA 374:57 because, on its face, that statute does not restrict "transmission capacity" to electric transmission capacity. Eversource Brief at 16. In support of that construction of RSA 374:57 Eversource cites a number of New Hampshire statutes that use the term "transmission" but do not limit it to just electric transmission. *Id.* The argument that "transmission capacity" in RSA 374:57 should encompass both electrical and gas

transmission based on the use of the term “transmission” occurring in other statutes which do not distinguish between electrical and gas transmission fails for the following reasons.

First, the Eversource Brief overlooks RSA 362:2 in arguing that New Hampshire statutes use the term “transmission” to describe both electrical transmission and gas transmission. RSA 362:2 is the definition of “public utility” used throughout TITLE XXXIV on public utilities. This definition distinguishes electrical transmission from gas transportation. In relevant part, that definition states that a public utility includes any business owning or operating any: plant used in the “generation, transmission, or sale of electricity ultimately sold to the public”, or “pipeline, including pumping stations, storage depots and other facilities for the transportation, distribution or sale of gas” (emphasis supplied)<sup>2</sup>. Use of the defined term “public utility” in the statutes comprising TITLE XXXIV incorporates this distinction. *E.g.*, RSA 371:1 (eminent domain); RSA 374:1 (just and reasonable service); RSA 374:22, I (commencing business as a public utility); and RSA 374:30 (public utility transfers and leases). Thus the argument, that the “repeated use of the term “transmission” to refer to both electric and gas transmission” in other New Hampshire statutes, Eversource Brief at 17, means that “transmission” as used in RSA 374:57 encompasses both, fails. New Hampshire statutes do make a distinction between the transmission of electricity and the transportation of gas.

Second, the Eversource Brief focuses on the use of the term “transmission” in other statutes to construe it to mean both electrical and gas transmission, and in doing so, fails to consider the legislative history of the statute in question, which limits the term “transmission capacity” to electrical transmission capacity. In passing HB-1 FN, the legislature was addressing matters pertaining to the bankruptcy of the state’s largest electric utility. It did not address matters

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<sup>2</sup> The RSA 362:2 also describes gas in terms of “distribution”. See RSA 362:4-c (excluding from the definition of “public utility” a business that “distributes liquefied petroleum gas through underground distribution systems....”).

pertaining to natural gas. The Joint Committee Report on HB-1 FN described RSA 374:57 as addressing generation and transmission agreements and ensuring that those wholesale power supply decisions would be subject to Commission review. See ENGIE Gas & LNG LLC April 28, 2016 brief (“ENGIE Brief”) at 7-12.

Third, Eversource claims there is no “limiting or restricting language in RSA 374:57” to preclude construing “transmission capacity” as applicable to gas transmission capacity. Eversource Brief at 17. This assertion overlooks the plain text of RSA 374:57 which states that a copy of the agreement in question is to be provided to the Commission at the time it is filed with the “Federal Energy Commission pursuant to the Federal Power Act or, if no such filing is required , at the time such agreement is executed.” If the legislature had intended the term “transmission capacity” to also encompass gas transmission, it would have referred to the Natural Gas Act in addition to the Federal Power Act<sup>3</sup>.

Eversource, in asserting the Access Northeast Contract is a “transmission capacity” contract, states the contract “is not for generating capacity”, but “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.” Eversource Brief at 16. This assertion cannot be sustained when one considers the Eversource testimony in this docket. The Access Northeast Contract is not a contract for the purchase and sale of natural gas; it is a contract for the sale of pipeline transportation capacity and LNG storage capacity<sup>4</sup>. Furthermore, the assertion that “energy agreement” as that phrase is used in RSA 374:57 includes an agreement for the sale of natural gas as a form of energy cannot

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<sup>3</sup> See Office of Consumer Advocate April 28, 2016 Brief at 11.

<sup>4</sup> Redacted Testimony of Eversource Corporation, James G. Daly, DE 16-241 (hereinafter “Eversource Testimony”), at 4 (Under the Access Northeast Contract Eversource will hold contractual entitlements for firm transportation and storage services and will release that capacity to the electric market under a tariff to be approved by FERC). See ENGIE Brief at 20 (footnote 4).

be sustained in light of the plain language of that statute requiring the agreement to be filed with the Commission at the time it is filed with the FERC under the FPA. Part II of the FPA applies to “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce....” 16 U.S.C. Section 824 (b) (1). The RSA 374:57 reference to the FPA and the FPA’s applicability to the sale of electric energy demonstrate that the legislature did not include agreements for the sale of fuel in the phrase “energy agreement”<sup>5</sup>. An “energy agreement” as used in RSA 374:57 is one for the sale of electrical energy.

Eversource also argues that RSA 374:57 provides the Commission authority to review and approve the Access Northeast Contract and its related cost recovery (*i.e.*, assessments under the LGTSC Tariff) in advance of the costs being incurred. Eversource Brief at 15-16. In support of this proposition, Eversource references Commission Order No. 25,305 (December 20, 2011) and the Commission’s approval of certain contracts in Docket DE 11-184. Order No. 25,305, however, does not support the use of RSA 374:57 for approval of the Access Northeast Contract or related cost recovery. The contracts which were approved by that order fall squarely within RSA 374:57 because they were contracts for the sale of unit contingent energy from certain electrical generators. Order No. 25,305 at 26. As discussed above and in the ENGIE Brief at 5-14 the Access Northeast Contract, as a gas transportation and LNG storage capacity contract, is not a contract within the scope of RSA 374:57, and hence, that statute does not provide for, and Order No. 25, 305 does not support approval of that contract or cost recovery approval under the LGTSC Tariff.

The Algonquin Brief states that RSA 374:57 specifically authorizes EDCs to acquire transmission capacity, notes that “transmission capacity” is not defined, and urges the

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<sup>5</sup> By the same reasoning, the FPA’s applicability to the transmission of electric energy and the reference to the FPA in RSA 374:57 demonstrates that “transmission capacity” agreement as used in the latter statute means electrical transmission capacity agreement.

Commission to interpret the term to include gas transmission capacity because the term is used in both the gas and electric industry. Algonquin Brief at 5-6. For the reasons set forth above and in the ENGIE Brief at 5-14, RSA 374:57 encompasses agreements only relating to electricity. The fact that the term “transmission capacity” may be used by both industries in other contexts does not change the meaning of that term as it is used in RSA 374:57.

**B. RSA 374-A Does Not Provide Broad Policy Direction For, Or Authorize, EDCs To Solve Electric Power Supply Issues. Furthermore, The Access Northeast Contract Does Not Constitute Participation In An Electric Power Facility.**

Eversource states that RSA Chapter 374-A “may not be directly applicable” to the Access Northeast Contract and so its brief addresses the “potential applicability” of that statute.

Eversource Brief at 12. Eversource does not argue that there is any direct applicability of the statute to the approval of the Access Northeast Contract or the assessment of costs under the LGTSC Tariff. Instead, Eversource states it supports “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.” *Id.* at 15. No such policy exists in, or should be inferred from, RSA Chapter 374-A.

First, the plain language and legislative history of RSA Chapter 374-A do not support reading that statute as a broad policy directive or authority to solve electric supply issues when applied to the Access Northeast Contract. To the extent not in conflict with RSA Chapter 374-F, the electric power supply opportunities available under RSA Chapter 374-A involve sharing or participating in electric power facilities, and the legislative history discusses that statute in terms of investment in, owning parts of, and buying shares of, large generation facilities. See ENGIE Brief at 17-18. The Access Northeast Contract is a sale of gas transportation capacity “that is

available generally to anyone” and “capacity that is not taken by the electrical generators [could]...be released to other market participants....” Eversource Brief at 14. As such, the Access Northeast Contract is not the type of power supply solution envisioned or addressed by RSA 374-A.

Second, reading a “policy of flexibility to solve electric supply issues” into RSA Chapter 374-A conflicts with RSA Chapter 374-F. The legislature, in enacting RSA Chapter 374-F, found that market forces can now play the principal role in organizing electric supply for all customers instead of monopoly regulation. Laws 1996, 129:1. Eversource’s assertion that RSA Chapter 374-A contains a policy that allows an EDC to solve electric power supply issues, particularly when applied to selling generation fuel transportation capacity to electrical generators and assessing the costs of the transaction to the EDC customers, ignores this legislative finding. According to the legislative finding “market forces”, not monopoly EDCs are to organize electric supply<sup>6</sup>.

This separation of functions into market forces and monopoly regulation is the foundation of the RSA Chapter 374-F separation of functions policy, which at a minimum calls for the functional separation of generation from transmission and distribution functions. RSA 374-F: 3, III. The separation of functions into market forces and monopoly regulation is also the foundation of the policy that calls for generation to be procured in a competitive market and distribution to remain a regulated market. *Id.* (distribution services should remain regulated for the foreseeable future). Inferring a policy into the earlier enacted RSA Chapter 374-A which allows an EDC to intervene in the generation market to provide gas transport capacity and assess

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<sup>6</sup> Part of organizing or providing electric supply from a natural gas-fueled electrical generator involves the acquisition of natural gas and the acquisition of capacity to transport that gas to the generator. See ENGIE Brief at 20, footnote 4. Also see Section F below regarding generation service energy rates as including fuel transportation contract costs.

the costs of that intervention to its distribution customers cannot be harmonized with the later enacted RSA Chapter 374-F. To do so, is to allow monopoly regulation to perform a role expected of, and given to, market forces by the legislature. Any such policy (to the extent it could be inferred in RSA Chapter 374-A) was repealed because EDC participation in generation conflicts with the restructuring of the electric industry undertaken by RSA Chapter 374-F.

Professional Firefighters of Wolfeboro, IAFF Local 3708, et al. v. Town of Wolfeboro, 164 N.H. 18, 22 (2012) (implied repeal proper when earlier enacted statute conflicts with later enacted statute).

The Algonquin Brief goes further than the Eversource Brief does in arguing the applicability of Chapter RSA 374-A to the Access Northeast Contract. Algonquin asserts that RSA 374-A: 2, II specifically authorizes Eversource “enter and perform contracts related to participation in electric power facilities” (internal quotes omitted). Algonquin Brief at 7. In making this argument, Algonquin “stresses that the Access Northeast Contract does not constitute any participation in electric generation” and the release of transportation capacity “is not direct participation.” *Id.* Algonquin characterizes the contract as “participation [which] would not constitute the performance of a generation function by Eversource, but merely the facilitation of access to adequate fuel for unaffiliated electric power generators.” *Id.* These arguments and assertions cannot be sustained in light of the plain language and legislative history of RSA Chapter 374-A.

As discussed above and in the ENGIE Brief at 17-18 the plain language of RSA 374-A: 2, I, and II and its legislative history requires the act of the utility to be participation in the electric power facility. Algonquin explicitly “stresses that the Access Northeast Contract does not constitute any participation in electric generation”. The Eversource Brief supports that

understanding when it states that “Eversource is not proposing that it...contract for pipeline or LNG capacity on behalf of one or more specific electric generators or generating facilities.” Eversource Brief at 14. By describing the action of Eversource under the Access Northeast Contract as “merely the facilitation of access to adequate fuel for unaffiliated electric power generators” Algonquin concedes that the contract is outside the scope of RSA Chapter 374-A and is more appropriately seen as a contract by a third party vendor selling fuel transportation and storage capacity services to a generator. See ENGIE Brief at 15-16.

Algonquin’s argument that RSA Chapter 374-A, as it applies to the Access Northeast Contract, was not repealed by implication with the later passage of RSA Chapter 374-F is moot given Algonquin’s statements that the contract does not constitute participation in an electric generation facility. Assuming for the sake of argument that the issue is not mooted by Algonquin’s statements, RSA Chapter 374-A was repealed by implication as it applies to the Access Northeast Contract by RSA Chapter 374-F for the reasons set forth above in this section refuting Eversource’s argument that Chapter RSA 374-A contains a policy allowing EDCs flexibility to seek energy supply solutions.

### **C. Eversource Is Not Authorized To Ensure Generator Reliability.**

The Eversource Brief claims that the Access Northeast Contract and its related transaction elements do not conflict with RSA Chapter 374-F because the contract “is in line with the very first restructuring policy principle in New Hampshire.” Eversource Brief at 10. The first policy in section 3 of RSA Chapter 374-F states that “reliable electricity service must be maintained....” RSA 374-F: 3, I. The statute’s restructuring policies also include the policy that “generation services should be subject to market competition...and at least functional separated from transmission and distribution services which should remain regulated for the foreseeable future.”

RSA 374-F: 3, III. To avoid its transaction being seen as violating the separation of functions policy in section 3 of the Act, the Eversource Brief asserts that the Access Northeast Contract is not a generation service; instead, it is proposed “in an effort to assure reliable and reasonably priced electric power to its customers”. Eversource Brief at 11-12. In making these assertions, Eversource misapprehends the plain language of the statute and the RSA Chapter 374-F statutory scheme as it pertains to the interplay between the reliability policy and the separation of functions policy. See Appeal of Old Dutch Mustard Co., 166 N.H. 501(2014) (statutes are to be interpreted in the context of the overall statutory scheme and not in isolation), Appeal of Northern New England Telephone Operations, LLC., 165 N.H. 267, 271 (2013) (construing statutory provisions harmoniously), and Formula Development Corp. v. Town of Chester, 156 N.H. 177, 178 (2007) (construing all parts of statute together to effectuate purpose).

The statute’s reliability policy speaks in terms of “system reliability” and “reliable electricity service”. RSA 374-F: 3, I. The policy requires that the reliability of the entire system be maintained and across all electricity services. Isolating the reliability policy from the other statutory policies, as Eversource does, allows one to assert that an EDC must act across all sectors of electric services to ensure reliable services for its customers. In essence this is Eversource’s argument; it is acting to “ensure long-term electric system reliability” and “it is proposing the ... [Access Northeast Contract] ...to assure reliable and reasonably priced electric power to its customers....” Eversource Brief at 11, and 12. The plain language and the statutory scheme of RSA Chapter 374-F; however, does not vest an EDC, acting in its distribution function, with the authority to take action to assure the reliability of electric power supply.

“Reliable electric service” cannot be read in isolation from the RSA Chapter 374-F separation of functions policy because that policy identifies the various areas constituting

“electric service”. The separation of functions policy delineates three areas of electricity service: “generation services”, which “should be subject to market competition...” and at least functionally separated from transmission and distribution services....” RSA 374-F: 3, III. Ensuring the reliability of “electricity service” requires action in each of these three electric service functions. For example, annual scheduled maintenance on a power plant’s boiler, turbine, and generator aids in ensuring the reliability of generation service. A gas transportation capacity contract may assure reliability of electric power, Eversource Brief at 12, by increasing available gas supply for generation, Eversource Testimony at Attachment EVER-JGD-5 at 2. Tree trimming programs aid in ensuring the reliability of distribution and transmission services.

To adhere to the statutory scheme and give meaning to both the separation of functions policy and the reliability policy, however, means that the particular reliability action undertaken must be one related to the electrical service function of the service provider. In other words, for example, the reliability action undertaken by an EDC must be one that aids in the reliability of distribution service as distribution. It would not include actions, such as the Access Northeast Contract, which is entered to assure reliable electric power supply for its customers. Eversource Brief at 12. Contrary to the Eversource statutory construction, this reading of the statute gives effect to both the reliability policy and the separation of functions policy and is consistent with the principles of statutory construction noted above in this Section.

Furthermore, the statutory scheme directs that electric supply is to be provided by the competitive market, and not by monopoly distribution utilities. RSA 374-F: 3, III and Laws 1996, 129:1. Consistent with the separation of functions policy this means that, as between EDCs and competitive generators, actions taken to promote the reliability of electric supply are the

domain of competitive generation services entities and not to be undertaken by monopoly distribution services entities.

To agree with the Eversource assertion that, in furtherance of its distribution utility functions, it can enter a contract to assure reliability of power supply is to exalt the reliability policy over the separation of functions policy. To reach such a conclusion, one must impermissibly ignore the text and statutory scheme of RSA Chapter 374-F, and principles of statutory construction.

**D. RSA 378:37 and RSA 378:38 Do Not Support The Eversource Transaction.**

Eversource maintains that EDCs are “required to plan for adequate resources to meet the expected demands of their customers” and cites to RSA 378:37 and RSA 378:38 pertaining to utility least cost planning in support of that claim. Eversource Brief at 7. Eversource also states “[i]f EDCs are to plan for, and ensure that [they have, adequate supply, and the generators will not make the necessary contractual commitments to maintain supply, EDCs have the obligation to seek alternative means of meeting the demands of their customers.” *Id.* at 8. Eversource recognizes that the Access Northeast Contract is not governed by RSA 378:37 and RSA 378: 38, but claims “it supports other goals contemplated” by those statutes, *Id.*, and that “the planning obligations embedded in state law support approval of the... [Access Northeast Contract]. *Id.* at 9. Nothing in these two statutes supports Eversource’s proposal to acquire and sell gas transportation capacity and storage capacity to generators and assess the twenty-year financial consequences of that transaction to distribution customers.

First, Eversource admits the statutes do not apply. Binding distribution customers to the twenty-year consequences of the Access Northeast Contract should not be sanctioned based on a policy argument crafted from admittedly non-applicable statutes.

Second, Eversource's argument moves from the statutory planning function, to a claim that it is to ensure its customers have an adequate supply of electricity, and finally to an assertion that Eversource has an obligation to find ways to meet its customers' need for electricity. RSA Chapter 374-F confutes this argument. The competitive market is to organize and provide for electric supply. Law 1996, 129:1, and RSA 374-F: 1, I. Other than the one exception explicitly stated in the statute, nothing in RSA Chapter 374-F vests the EDC with authority to enter the generation market. Nothing in RSA Chapter 374-F provides authority for an EDC to acquire and/or sell the generation-related service of fuel transportation capacity. ENGIE Brief at 22-24.

Third, the extent of Eversource's obligation to provide for an electrical power supply is explicitly set forth in State law. It is an obligation to provide default service to those customers opting for default service. At present Eversource provides default service using its generation fleet and supplemental power purchases as needed. RSA 369-B: 3, IV (b) (1) (A). If the Commission approves the divestiture of Eversource's generation fleet in Docket DE 14-238, then post-divestiture RSA 374-F: 3, V (c) provides that default service should be procured through the competitive market. Procurement of default energy supply through the competitive market is the power supply acquisition system used by other utilities in the State and approved by the Commission. E.g., Unitil Energy System, Inc., DE 16-250, Order 25,880 (April 8, 2016) (approving contracts for default service power supply from competitive suppliers for Unitil for the 6 month period commencing June 1, 2016)<sup>7</sup>. Nothing in State law or Commission approval of these default power supply solicitations holds that a utility is failing in its obligations to its

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<sup>7</sup> This competitive market procurement system utilizes contract terms to place the power supply obligation and the risks of fulfillment on the competitive supplier, not on the EDC or its customers. For example, the form of contract approved for use in the Unitil solicitation contains default and damage provisions for non-fulfillment of contract obligations and provisions on security for performance. Unitil Energy Systems, Inc., DE 16-250, Testimony of Lisa S. Glover, Schedule LSG-2 at 30-35, available at [http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-250/INITIAL%20FILING%20-%20PETITION/16-250\\_2016-04-01\\_UES\\_ATT\\_DTESTIMONY\\_L\\_GLOVER.PDF](http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-250/INITIAL%20FILING%20-%20PETITION/16-250_2016-04-01_UES_ATT_DTESTIMONY_L_GLOVER.PDF)

customers by procuring power in this manner or by not intruding into the electrical generation market as proposed by Eversource.

Finally, Eversource's claim that the planning obligations of these statutes support approval of the Access Northeast Contract is contradicted by Eversource's request for, and Commission approval of, waivers from those planning obligations in the preparation and approval of its least cost plan under RSA 378:38. The Commission, in response to the request of Eversource, limited the scope of Eversource's 2015 least cost plan to its transmission and distribution systems.

PSNH d/b/a Eversource, Docket DE 15-248, Order No. 25,828 (Oct. 19, 2015) at 1. In that order the Commission reaffirmed certain waivers requested by Eversource. These waivers include waiver of the: (i) assessment of supply side options, particularly in light of the on-going PSNH asset divestiture Docket DE 14-238, (ii) assessment of environmental laws because the continued ownership of generation by Eversource is under review in Docket DE 14-238, (iii) assessment of plan integration and consistency with the state energy strategy, and (iv) assessment of the environmental, economic and energy price and supply impact, given the potential generation divestiture<sup>8</sup>. Order at 6-9.

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<sup>8</sup> The Commission order did direct that the next Eversource plan address all issues; however, Eversource can request additional waivers and it remains to be seen whether those previously waived matters will be part of a plan if Eversource divests its generation as a result of Docket DE 14-238. The Commission has granted such waivers to Unitil for that utility's plan, given it does not own any generation. See Unitil Energy Systems, Inc., Docket DE13-195, Order No. 25,651 (April 17, 2014) (waiver of filing requirements except for plans related to transmission and distribution because Unitil does not own generation and is not party to long term power purchase contracts), and Unitil Energy Systems, Inc., DE 16-463 (plan as filed limited to transmission, distribution, distributed generation, smart grid technologies, demand side management and energy efficiency). The plan is available at [http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-463/INITIAL%20FILING%20-%20PETITION/16-463\\_2016-04-19\\_UES\\_2016\\_LEAST\\_COST\\_INTEGRATED\\_RESOURCE\\_PLAN.PDF](http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-463/INITIAL%20FILING%20-%20PETITION/16-463_2016-04-19_UES_2016_LEAST_COST_INTEGRATED_RESOURCE_PLAN.PDF) The recently filed least cost plan for Liberty Utilities does address energy supply, but in the context of procuring its energy supply in the wholesale electric market administered by ISO-NE. Liberty Utilities, Docket DE 16-097, Plan at 14, 20. The Commission ruled an earlier Liberty plan was adequate based, in part, on presenting an overview of its participation in the wholesale electric market as the required assessment of supply options. Liberty Utilities, Docket DE 12-347, Order No. 25,625 (January 27, 2014) at 6.

**E. RSA 293-A and RSA 295 Do Not Authorize The Access Northeast Contract.**

The Algonquin Brief and the CLEC Brief argue that New Hampshire's general business corporation statutes are adequate to authorize Eversource to enter the Access Northeast Contract. Algonquin states that RSA 293-A:3.02 when read in conjunction with Eversource's 1991 corporate charter authorizes entry into the Access Northeast Contract because that statute provides that, unless restricted by corporate charter, corporations can "do all things necessary or convenient to carry out its business and affairs, including...[entering into] contracts...." Algonquin Brief at 4. Algonquin finds no restriction in the Eversource charter because Eversource was established to "carry on the business of an electric utility...and to transact any and all lawful business...." *Id.* The CLEC Brief makes a similar argument based on RSA 295:6, which provides that corporations "may make contracts necessary and proper for the transaction of their authorized business, and no other." CLEC Brief at 6. RSA 293-A:3.02 does not resolve the question of Eversource corporate authority to enter the Access Northeast Contract or assess its customers under the LGTSC Tariff because it is limited to contracting to carry-out Eversource's "business and affairs", and hence requires a determination of what constitutes Eversource's lawful business. Similarly, RSA 295:6 is limited to authorizing contracts "necessary and proper" for Eversource's "authorized business", and hence requires a determination of what constitutes Eversource's authorized business.

Pursuant to RSA Chapter 374-F, Eversource's electricity services are functionally separated into: (i) generation service for its default energy service customers, which pending divestiture, is provided by Eversource's generation assets<sup>9</sup>, (ii) distribution services, and (iii) and transmission services. In the first instance, the issue arising from the RSA 239-A:3.02 and RSA 295:6 arguments of Algonquin and CLEC is whether the Access Northeast Contract is necessary

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<sup>9</sup> RSA 369-B: 3, IV (b) (1) (A).

or convenient to carrying-out one of these business functions, or necessary and proper for transacting an Eversource authorized business. Eversource does not need the gas transportation capacity or LNG storage capacity obtained from the Access Northeast Contract for its own generation business. Thus, the issue restates as whether the Access Northeast Contract is necessary or convenient to carrying-out Eversource's distribution and transmission business functions or necessary and proper for transacting Eversource's authorized distribution and transmission services business. It is not.

The Access Northeast Contract has nothing to do with provision of distribution service (or the similar electric service of transmission). The Eversource Brief is quite explicit in describing the contract's purpose. Eversource explains that the contract "is seeking to ensure long-term electric system reliability", and "it is proposing the ... [Access Northeast Contract] in an effort to assure reliable and reasonably priced electric power to its customers...." Eversource Brief at 11 and 12. Eversource also states that the Access Northeast Contract helps Eversource to "maintain a sufficient, reliable and reasonably priced electric supply." Eversource Brief at 8. As discussed in Section C. above, and contrary to the Algonquin blanket assertion that an EDC has a general duty to provide reliable electric service, Algonquin Brief at 5, an EDC's business does not include ensuring the reliability of generation services. Furthermore, an EDC's business does not include assuring the supply of generation service. In enacting RSA Chapter 374-F, the legislature determined that market forces and not monopoly distribution utilities are to organize the provision of electric supply. Laws 1996, 129:1. RSA Chapter 374-F is also quite explicit in that regard. It states that generation services should be subject to market competition, RSA 374-F: 3, III, and allowing customers to choose among suppliers of electricity generation services "will help ensure fully competitive and innovative markets." RSA 374-F: 2, II and F: 3, II.

Simply put, EDCs are not “Electricity Suppliers” as that term is defined in RSA 374-F: 2, II, and the Access Northeast Contract is not one that is necessary or proper for Eversource’s lawful authorized EDC business<sup>10</sup>.

**F. The Access Northeast Contract Conflicts with RSA Chapter 374-F.**

Having argued that RSA 295:6 is broad authority allowing Eversource to enter the Access Northeast Contract, the CLEC Brief then asserts that RSA Chapter 374-F is not a limitation on that authority. It does so by claiming that the contract does not conflict with any restructuring principles and will foster achievement of the overall goal of RSA Chapter 374-F, which it identifies as “reducing costs for all consumers of electricity.” CLEC Brief at 10. The CLEC Brief then asserts that this goal of cost reduction is the lens for interpreting the statute and all the RSA 374-F policy principles “must be considered together, harmoniously with the ultimate goal of restructuring in mind: reducing electric costs.” CLEC Brief at 11 and 12. CLEC’s argument; however, dissociates the legislative pronouncement on cost reduction from the legislative pronouncements on how cost reduction is to be achieved in the restructured electric services industry. In doing so, CLEC fails to read the entire statute harmoniously and effectuate the legislative purpose in the manner chosen by the legislature.

The legislature did not just articulate a cost reduction goal; it also declared the manner by which the goal is to be achieved. RSA 374-F:1, I states: “[t]he 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” (emphasis supplied). Restructuring and competitive markets are critical components of the legislative scheme. The legislative purpose in RSA 374-F:1, I also declared that “[t]he overall public policy goal of restructuring is

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<sup>10</sup> RSA 374-F: 2, II defines “Electricity Suppliers” to mean “suppliers of electricity generation services and includes actual electricity generators and brokers, aggregators, and pools that arrange for the supply of electricity generation....”

to develop a more efficient industry structure...that results in a more productive economy by reducing costs to consumers....” *Id.* The legislature has determined that restructuring to allow competition is in the public interest. RSA 369-B: 1, II (“The restructuring of electric utilities to allow retail electric competition and less costly regulation is in the public interest.”). The “development of competitive markets... [is one of the] key elements in a restructured industry that will require... at least functional separation of centralized generation services from transmission and distribution services<sup>11</sup>.” *Id.* (emphasis supplied). In enacting RSA Chapter 374-F, the legislature determined that the provision of electric supply in the competitive market was to be organized by market forces and not monopoly distribution utilities. Laws 1996, 129:1. The upshot of these many legislative pronouncements is that electric cost reduction is to come about through the development of a restructured industry, an industry in which distribution monopolies are responsible for distribution functions and the competitive market (not monopoly distribution companies) is responsible to organize electric power supply. The Access Northeast Contract conflicts with these legislative pronouncements, Eversource Brief at 8 (the Access Northeast Contract helps Eversource to maintain electric supply), and conflicts with the role assigned to distribution utilities in the restructured electric industry.

CLEC’s argument does not consider how the Access Northeast Contract and LGTSC Tariff assessment comport with Eversource’s function of providing distribution service in a restructured electric industry or how a distribution utility providing generation fuel transportation and storage capacity is not the impermissible act of a monopoly distribution company acting to organize a vital component of generation power supply service. CLEC, instead, focuses on the

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<sup>11</sup> The legislature has moved beyond calling for functional separation of electric services. RSA 369-B: 1, II states “[t]he divestiture of electric generation by New Hampshire electric utilities will facilitate the competitive market in generation service.” As it pertains specifically to Eversource, the legislature stated it found “that divestiture of PSNH’s generation plants...is in the public interest....” RSA 369-B: 3-a, I.

policy statement that generation services should be subject to market competition and concludes there is no direct conflict between that policy and the Access Northeast Contract. CLEC Brief at 14. The CLEC Brief reaches this conclusion by observing the term “generation services” is not defined in RSA Chapter 374-F, “but common usage of that phrase would not include gas pipeline capacity,” and the provision of that capacity to gas generators is not a generation service. Id. This conclusion, that fuel transportation capacity is not a component of generation services, is refuted by the Commission’s treatment of coal transportation costs associated with generation usage. These costs are part of the energy rate; they are not part of the distribution rate. See Order of Notice, DE 07-096 (May 16, 2008) (PSNH request for increase in energy service rate due, in part, to coal transportation costs)<sup>12</sup> and Public Service Company of New Hampshire, DE 07-057 and DE 06-097, Order No. 24,805 (December 7, 2007) (coal transportation costs in energy service rate) PSNH Technical Statement of Richard C. Labrecque and Robert A. Bauman<sup>13</sup>. See also Legislative Utility Consumers’ Council v. Public Utilities Commission, 118 N.H. 93, 96 (1978) (claim that fuel adjustment clause should be reduced by the transportation cost associated with BTU-deficient coal used at PSNH generation).

The outcome of the foregoing analysis is that Access Northeast Contract conflicts with Chapter RSA 374-F’s, is not one related to Eversource’s distribution utility functions, and is the type of contract whose costs Eversource and the Commission treat as generation costs in the energy service rate. As such, the contract is an impermissible one for a distribution utility under RSA 374-F. It crosses the line into generation service.

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<sup>12</sup> The order of notice is available at: [https://www.puc.nh.gov/dtsearch/makeframe.asp?request=de+07-057&submit=Go&index=%2FNHPUC+Search+Index&SearchForm=%2FdtSearch%2FdtSearch\\_form.html&cmd=search&autoStopLimit=5000&stemming=Yes&maxFiles=10&stemming=yes](https://www.puc.nh.gov/dtsearch/makeframe.asp?request=de+07-057&submit=Go&index=%2FNHPUC+Search+Index&SearchForm=%2FdtSearch%2FdtSearch_form.html&cmd=search&autoStopLimit=5000&stemming=Yes&maxFiles=10&stemming=yes)

<sup>13</sup> Available at: [http://www.puc.nh.gov/dtsearch/makeframe.asp?request=de+07+-057&submit=Go&index=%2FNHPUC+Search+Index&SearchForm=%2FdtSearch%2FdtSearch\\_form.html&cmd=search&autoStopLimit=5000&stemming=Yes&maxFiles=10&stemming=yes](http://www.puc.nh.gov/dtsearch/makeframe.asp?request=de+07+-057&submit=Go&index=%2FNHPUC+Search+Index&SearchForm=%2FdtSearch%2FdtSearch_form.html&cmd=search&autoStopLimit=5000&stemming=Yes&maxFiles=10&stemming=yes)

**G. RSA 374:7 And Related General Laws Do Not Authorize The Transaction.**

The CLEC Brief also maintains that EDCs are obligated to rectify those problems investigated in Docket IR-15-124 and which, subsequently, have been determined by the Commission to exist. CLEC also states that the Commission has broad authority under provisions of RSA Chapter 374 to provide assurance that these EDC obligations are met. CLEC Brief at 19. CLEC refers to the general supervisory powers of the Commission in RSA Chapter 374 and investigatory powers of the Commission in RSA 365:5 and RSA 374:7. CLEC notes that under RSA 374:7, the Commission has the power to investigate “the quality of gas supplied by public utilities and the methods employed by public utilities in...supplying gas.... and order all reasonable and just improvements and extensions in service and methods.” CLEC also argues that the Commission has plenary authority to issue orders affecting service and rates. CLEC Brief at 22. These statutes, and in particular RSA 374:7, provide no authority for entry into or approval of the Access Northeast Contract.

In the case of conflicts, statutory construction principles state that statutes addressing matters specifically are to control over general statutes, Appeal of Pennichuck Water Works, 160 N.H. 18, 34 (2010) and later enacted statutes prevail over earlier enacted statutes. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 283 (1988). As discussed above in Section F, the Access Northeast Contract is a generation services-related contract and as such it conflicts with RSA Chapter 374-F’s policy on the separation of distribution services from generation services. Application of the noted statutory construction principles also means that the construction of the earlier enacted general statutes as cited by CLEC, inclusive of RSA 374:7, are in conflict with RSA Chapter 374-F’s separation of functions policy. The Commission’s authority under these statutes cannot extend to authorizing, approving, or ordering an EDC to

engage in generating service functions contrary to RSA Chapter 374-F. To the extent these general statutes could be read in the first instance to allow the Commission to order the entry into or approval of the Access Northeast Contract; they were repealed by RSA Chapter 374.

Professional Firefighters of Wolfeboro, IAFF Local 3708, et al. v. Town of Wolfeboro, 164 N.H. 18, 22 (2012).

#### **H. The Transaction Is Preempted By The Federal Power Act.**

The recently decided case of Hughes, Chairman, Maryland Public Service Commission, et al. v. Talen Energy Marketing, LLC, FKA PPL EnergyPlus, LLC, Et Al., 578 U.S. \_\_\_ (2016) (hereinafter cited as “Talen Energy”), in holding that a state program which sought to encourage the development of new in-state generation through a state-approved “contact for differences” impermissibly intruded into the wholesale power market, a domain reserved under the FPA exclusively to FERC, stated that “[t]he FPA leaves no room for either direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.” Slip Op. at 1 (internal citations and quotes omitted). The Eversource Brief and the Algonquin Brief dispute that state action producing an indirect effect on wholesale rates is a basis for preemption. Eversource Brief at 23-24 and Algonquin Brief at 13. Eversource asserts that “any impact that the [Access Northeast Contract]...might have on any wholesale energy market would be only indirect and a legally permissible means of effectuating state policy....” Eversource Brief at 24.

In support of its contention that indirect state action affecting the wholesale electric market is permissible and not preempted by the FPA, Eversource cites to Federal Energy Regulatory Commission v. Electric Power Supply Association et al., 577 U.S. \_\_\_ (2015) (hereinafter cited as “EPSA”), Slip Op. at 15 as establishing “a common- sense construction of

the FPA's language, limiting FERC's 'affecting' jurisdiction to rules or practices that 'directly affect the [wholesale] rate.'" (emphasis and brackets in original). Eversource Brief at 23.

Eversource misapplies this EPSA text to conclude that indirect state action affecting the wholesale electric market, such as approval of the Access Northeast Contract (or LGTSC Tariff assessment), is permissible and not preempted<sup>14</sup>.

EPSA addressed whether a rule promulgated by the FERC was within the jurisdiction granted to FERC under the FPA, or whether the FERC rule in question impinged upon the state's regulatory domain. Slip Op. at 2. The EPSA Court, in explaining the FERC's FPA jurisdiction, stated "...the FPA obligates FERC to oversee all prices for...interstate transactions and all rules and practices affecting such prices." Slip Op. at 3. The Court also noted that FERC's jurisdiction extended to all rules and regulations affecting all rates within FERC's jurisdiction. Slip Op. at 15. The specific jurisdictional issue in EPSA was whether the FERC rule under review exceeded the scope or limits of the FERC's "affecting wholesale rates" jurisdiction under FPA section 824 (d)(a). It is in this context that the EPSA Court adopted the "common-sense construction of the FPA's language" and limited FERC's "affecting wholesale rate" jurisdictional reach to those matters that directly affect wholesale rates. Slip Op. at 23. The Court held that the FERC rule at issue was a proper exercise of FERC's "affecting wholesale rate" jurisdiction. Slip Op. at 33-34 ("FERC's statutory authority extends to the Rule at issue here addressing wholesale demand response. The Rule governs a practice directly affecting wholesale electricity rates."). Thus, EPSA is a limit on the jurisdictional reach of the FERC. EPSA does not address the issue of

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<sup>14</sup> The Eversource Brief at page 19 states that many of the Federal law issues discussed in the Eversource Brief have been decided by the Massachusetts Department of Public Utilities ("MDPU"). Footnote 15 on page 19 states that the MDPU issued an order concluding that Massachusetts EDCs have the requisite authority to enter into gas capacity contracts. The Commission should be aware that the MDPU order was appealed to the Massachusetts Supreme Judicial Court by CLF and ENGIE. The Court heard oral argument in the case on May 5, 2016. The Attorney General of the Commonwealth filed a brief as *amicus curiae* contesting the MDPU order, and the Office of the Attorney General participated in the oral argument with CLF and ENGIE.

whether a State rule or program impermissibly intrudes into FERC's wholesale power market jurisdiction and whether such an intrusion must be a direct one to constitute an impermissible intrusion. That issue, *i.e.*, the limitation on State action (as opposed to FERC action), was addressed in Talen Energy, which held that “[t]he FPA leaves no room for either direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.” Slip Op. at 1 (internal citations and quotes omitted).

Algonquin's brief relies on New England Power Co. v. New Hampshire, 455 U.S. 331, 339-40 (1982) (hereinafter cited as “NEPCO”) to assert that state intrusion into FERC wholesale electric markets must have a direct effect to be preempted. Algonquin Brief at 13. NEPCO is an inapposite case. The issue in NEPCO was whether a state law banning the export of power from in-state hydroelectric facilities and requiring the owner of those hydroelectric facilities to sell the output of those facilities only within the state violated the Commerce Clause of the U. S. Constitution, Art. I, § 8, cl. 3. The opinion's “direct and substantial burden” language was used in reference to Commerce Clause jurisprudence. NEPCO at 339 (“Moreover, it cannot be disputed that the Commission's “exportation ban” places direct and substantial burdens on transactions in interstate commerce.”). The NEPCO Court determined the state law violated the Commerce Clause, stating: “[w]e conclude, therefore, that New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce in a manner inconsistent with the Commerce Clause”, and the FPA did “not provide an affirmative grant of authority for the State to do so.” NEPCO at 344. Thus, NEPCO is a commerce clause case and does not address issues of state programs intruding into FERC's FPA jurisdiction.

The Algonquin Brief argues that the Eversource transaction is permissible under Talen Energy. The argument does not withstand scrutiny. First, Algonquin states that the transaction

approvals do not directly interfere with FERC regulated markets. Algonquin Brief at 14. As discussed above, the applicable standard for determining the existence of an impermissible state intrusion into FERC's domain includes examination of direct and indirect state regulation in the wholesale electric market. As demonstrated in the ENGIE Brief at 27-29 the action requested of the State will have a critical effect on the New England wholesale market.

Second, Algonquin states that Talen Energy deems permissible certain types of state programs, in particular those programs that encourage "production of new or clean generation through measures 'untethered to a generator's wholesale market participation'". Algonquin Brief at 14-15 (quoting in part, Talen Energy, Slip Op. at 15). The Talen Energy Court did not elaborate on its use of the phrase "untethered to a generator's wholesale market participation"; however, it is difficult to conclude that the Access Northeast Contract, the ERSP, the LGTSC Tariff, and the requested State action are anything but measures tethered to generator wholesale market participation. E.g., Eversource Testimony at Attachment EVER-JGD-5 at 2 (the ERSP has the objective of increasing available gas supply for generation); Eversource Testimony at 27 (New England "relies substantially on natural gas for electric generation, which is a fuel resource that requires pipeline capacity for delivery"); Id. at 29 (gas-fired generator's day-ahead market commitments are often reduced due to an inability to acquire fuel); Id. at 10 (gas-fired generators are unwilling to contract for pipeline capacity due to uncertainty of cost recovery); Id. at 4 (under the Access Northeast Contract Eversource will hold contractual entitlements in firm transportation and storage services and release that capacity to the electric market), and Id. at 14 (EDCs have the financial capability to support pipeline contracts as long as they can recover associated costs from retail electric customers).

Thus, the overarching purpose of the Eversource transaction is to affect the wholesale electric market participation of gas-fired electric generators and to do so with the approvals it seeks from the State. Contrary to Algonquin's assertions, the State action would be preempted under Talen Energy.

## II. CONCLUSION

For the reasons set forth above, and in the April 28, 2016 Brief of ENGIE Gas & LNG LLC, the Commission should dismiss the Eversource Petition because the Access Northeast Contract, the ERSP, and the LGTSC Tariff are not authorized under New Hampshire law, violate RSA 374-F, the Commission lacks statutory authority to approve charging distribution customers for the provision of gas transportation and storage services to electric generators under the proposed LGTSC Tariff, and assessment of the LGTSC Tariff conflicts with the FPA and would be preempted.

Respectfully submitted,

**ENGIE GAS & LNG LLC**

By its Attorney,

R. OLSON LAW OFFICE, PLLC

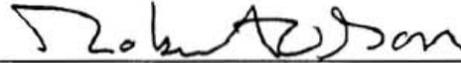
By: Robert Olson

Robert A. Olson, Esq.  
770 Broad Cove Road  
Hopkinton, NH 03229  
(603) 496-2998  
[roanolson@gmail.com](mailto:roanolson@gmail.com)

Dated: May 12, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2016, I caused a copy of the foregoing Reply Brief to be filed in hand and electronically with the Commission and electronically, or by U.S. Mail, first class to the Service List in DE 16-241.

A handwritten signature in black ink, appearing to read "Robert A. Olson", written over a horizontal line.

Robert A. Olson, Esq.