BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

REPLY 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 reply brief in this matter.

Nothing in the briefs filed by Public Service Company of New Hampshire ("PSNH") d/b/a/ Eversource Energy ("Eversource"), Algonquin Gas Transmission, LLC ("Algonquin"), or the Coalition to Lower Energy Costs ("CLEC") demonstrates that the Eversource proposal is anything other than what it is: an effort to fund a generation-related investment that will not be used in Eversource's authorized transmission and distribution business in New Hampshire. The Legislature has not authorized an electric distribution company ("EDC") to step outside of the bounds established by the Electric Utility Restructuring Act ("Restructuring Act") as Eversource proposes to do, and the Commission cannot authorize an EDC to do so absent legislative action. Accordingly, NEER respectfully requests that the Commission find that the Eversource proposal is not authorized under New Hampshire law and that any order purporting to authorize it would be preempted by federal law.

DISCUSSION

I. The Eversource proposal is premised on suppressing wholesale electricity costs, not addressing a reliability need of a transmission and distribution company.

Eversource first argues that "[t]he structure described for the ANE Contract fits squarely within the general obligation of EDCs in New Hampshire to ensure that they are capable of providing safe and reliable service at just and reasonable rates." (Eversource Brief ("Eversource Br."), p.7.)[1] Given the proposal's inconsistency with the competitive supply market and separation of transmission and distribution from generation commanded by the Restructuring Act, it is not surprising that Eversource seeks to avoid the Act by recasting its proposal as one for reliability. Eversource misconstrues both the purpose for which the prior investigation was initiated, as well as the limitations of its business as a transmission and distribution utility in a restructured market.

The Eversource proposal emanated from the Commission's investigation into approaches to mitigate wholesale electricity prices. *Commission Staff Report on Investigation into Potential Approaches to Mitigate Wholesale Electricity Prices*, p.8 (noting that the proceeding was initiated to address "the winter price problem"). It was not initiated as a resource planning docket to address a perceived generation reliability need, because there is none, and certainly not a need germane to Eversource's business as a transmission and distribution entity. Commission Staff previously gave this argument the short shrift that it warrants:

> The sponsors of the Access Northeast project even assert that their solution is designed first and foremost to enhance electric grid reliability rather than mitigate high and volatile electricity prices; a statement Staff finds difficult to understand given that the region already has 6,000 MW of gas generation capacity with dual-fuel capability to protect against gas supply interruptions.[1] In addition, ISO-NE's Pay for Performance capacity market redesign, which is expected to become fully

[1] In support of its petition, Eversource argues on the one hand that "EDCs are required to plan for adequate resources to meet the expected demands of their customers," citing RSA 378:37 and :38, but then avers that "the ANE Contract is not governed by the resource planning statutes." (Eversource Br. p.8.)

> operational in June of 2018, will provide both financial incentives and penalties to existing generators to improve generator performance and to new gas generators to improve fuel assurance. For these reasons, Staff places less weight on reliability benefits and more weight on the benefits of price mitigation.
>
> [1]Or 1,000 MW more than the sponsors of ANE project contend is needed to supply load reliably.

(*Id.*, pp. 4-5) (Emphasis added).

Even if Eversource could demonstrate that its proposal is for the purpose of addressing a reliability need that is relevant to its authorized purposes as an EDC, rather than to affect wholesale electricity prices, that would not absolve Eversource from the obligation to comply with the Legislature's mandate that electricity supply in New Hampshire be separate from transmission and distribution and subject to competition. The principle that electric utilities must provide reliable service is a long-standing principle of the regulatory compact. *See, e.g.*, RSA 374:1; 378:37. The nature of an EDC's authorized business fundamentally changed with the passage of the Restructuring Act. The fact that the Legislature simply repeated in the Restructuring Act the concept that EDC's must provide reliable service does not mean that the competitive principles repeatedly and strenuously reiterated throughout the Act, or the separation of generation from transmission and distribution, which are the fundamental purposes of the Act itself, may be ignored. *See Public Service Company of New Hampshire*, Order No. 25,213 (April 18, 2011) (Commission must "consider the words and phrases used, not in isolation, but rather within the context of the statute as a whole.").

Thus, whether Eversource's proposal is characterized as for the purpose of suppressing electricity prices, addressing an existing transmission and distribution reliability need, or some combination of both, the result is the same: the Eversource proposal must comply with the competitive and separation principles of the Restructuring Act. As set forth in the briefs from

multiple parties, it does not. *See* Principal Briefs of NEER, Office of Consumer Advocate, Conservation Law Foundation, ENGIE Gas and LNG, LLC, and Exelon Generation, LLC.

II. The Eversource proposal is an investment to facilitate development of a gas pipeline for the purpose of suppressing electricity prices from select electricity generators, in violation of the Restructuring Act.

Eversource next argues that, (1) because its investment to facilitate development of the Algonquin/Eversource pipeline project takes the form of firm gas capacity payments, it is not really an investment in generation resources in violation of the Restructuring Act (*see, e.g*, Eversource Br. at 10); but notwithstanding that stance, (2) its proposed investment is also authorized by RSA 374-A:2 as "other participation" in, or "support for," "electric power facilities." (Eversource Br. at 13-15.) Repeating their arguments together begs the question of how both contentions can be true.

The "electric power facilities" in which Eversource proposes to "participate" or "support" under RSA 374-A:2[2] are defined as "generating units greater than 25 megawatts." (Eversource Br. at 13, quoting RSA 374-A:1, III.) There is no head of the pin small enough to dance upon to maintain the separation of generation from transmission and distribution mandated by the

[2] The most relevant portions of RSA 374-A:2 are as follows:

> Notwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities or any limitation imposed by a corporate or municipal charter, but subject to the conditions set forth in this chapter, a domestic electric utility shall have the following additional powers:
>
> I. To jointly or separately plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within or without the state or the product or service therefrom or securities issued in connection with the financing of electric power facilities or portions thereof; and
>
> II. To enter into and perform contracts and agreements for such joint or separate planning, financing, construction, purchase, operation, maintenance, use, sharing costs of, ownership, mortgaging, leasing, sale, disposal of or other participation in electric power facilities, or portions thereof, or the product or service therefrom, or securities issued in connection with the financing of electric power facilities or portions thereof, including, without limitation, contracts and agreements for the payment of obligations imposed without regard to the operational status of a facility or facilities and contracts and agreements with domestic or foreign electric utilities for the sale or purchase of electricity from an electric power facility or facilities for long or short periods of time or for the life of a specific electric generating unit or units. Such contracts and agreements may contain provisions for arbitration, delegation, non-unanimous amendment and any other matters deemed necessary or desirable to carry out their purposes. . . .

Restructuring Act, while still holding that an EDC remains authorized to invest in generation resources in all of the ways contemplated by RSA 374-A, including "participating" in or "support[ing]" "electric power facilities" as Eversource argues here. (*See* NEER Principal Brief, Section I.D.)[3] While defeated when examined side-by-side, each of these arguments is also flawed when considered individually.

Eversource first suggests that its proposal to have EDC ratepayers fund the cost to facilitate development of the Algonquin/Eversource pipeline project is consistent with the Restructuring Act's requirement to separate generation from transmission and distribution:

> Through this contract, Eversource is not proposing to enter (or reenter) the electric generation business in New Hampshire. Instead, it is proposing the ANE Contract in an effort to assure reliable and reasonably priced electric power to its customers by making certain that the wholesale generators needing natural gas as a fuel will have a reliable and affordable supply.

(Eversource Br. at 12) (Emphasis added).

The Eversource proposal is not one in furtherance of its transmission and distribution functions. Eversource is an EDC that will not use the gas for the transmission or distribution of electricity. *See 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

[3] Algonquin similarly embraces, but then runs from, RSA 374-A:

> New Hampshire EDCs are specifically authorized by statute to "participate" in certain activities relative to electric power facilities. . . . Algonquin stresses that the Access Northeast Contract does not constitute any participation in electric generation and the release of such capacity through the ERSP is not direct participation.

(Algonquin Br. 5-6.) Like Eversource, Algonquin does not explain how providing the central component necessary for a gas-fired plant to operate – that is, gas – is participation in an electric power facility (*i.e.*, the gas-fired plant) for purposes of authorization under RSA 374-A, but at the same time, not participation in electric generation from that gas-fired plant, tacitly conceding that the latter is not authorized for an EDC under the Restructuring Act.

its retail customers solely with energy distribution services.") (Emphasis added). The gas is to be used for the generation of electricity by the subset of New England gas-fired plants connected to the Algonquin/Eversource pipeline outside of New Hampshire. Undoubtedly, gas-fired electric generators view natural gas as a key component in their process of generating electricity. It would be unreasonable to interpret the Eversource proposal as anything but an effort to move away from being a company that "provide[s] customers solely with energy distribution services" by having its ratepayers bear the cost of gas pipeline infrastructure that is not used by Eversource in providing energy distribution services.

The question then becomes whether Eversource's proposed financing (rather than direct purchase) of that component of the electricity generation process somehow removes it from the Restructuring Act's mandate of competitive supply. It does not. Financing in EDC rates the cost of a pipeline project to facilitate "affordable supply" to electricity generators is an investment in generation, distinct from an investment in transmission and distribution facilities. The fact that it will be done through a 20-year purchase of capacity the EDC will not use does not change that its purpose is to facilitate supply to a subset of electricity generators.

As NEER pointed out in its Principal Brief, accepting Eversource's interpretation would mean that Eversource could embed in EDC rates any generation-related cost, including the cost for one of its affiliates to re-purchase Eversource's divested generation assets at auction. Indeed, if such investment would in Eversource's view enhance reliability of supply, they would be free to argue that re-purchase of the assets it plans to divest is actually in furtherance of the Restructuring Act. (*See, e.g.*, Eversource Br. at 10.) Such a twisted interpretation of the Restructuring Act would not survive fair review. *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.").

Eversource's second point—that its proposal would constitute "other participation" in or "support for" "electric power facilities" and is therefore authorized under RSA 374-A—is unavailing because relying on this provision reveals that the Eversource proposal would impermissibly involve funding the cost of generation resources in EDC rates.

Eversource does not address the fact that the authority in RSA 374-A for a "domestic electric utility" to invest in "electric power facilities" is premised on a definition of "electric utility" that contemplates a vertically-integrated, not restructured, market. Inasmuch as the authority in RSA 374-A:2 is based on a structure that is no longer allowed under New Hampshire law, Eversource cannot rely on those provisions as authority for its proposal. As explained in NEER's Principal Brief and below, because RSA 374-A differs in this fundamental way from the Restructuring Act, New Hampshire law requires that the former give way to the later enactment. (*See* NEER Br., Section I(D)(1)).

III. RSA 374:57 does not authorize the Eversource proposal.

Eversource and Algonquin argue that RSA 374:57 authorizes the Eversource proposal. NEER relies upon and incorporates by reference the arguments in its Principal Brief on this point (pp. 29-31) as well as those by the Office of Consumer Advocate (pp. 10-11), Conservation Law Foundation (pp. 8-9), ENGIE (pp. 5-14), and Exelon (pp. 10-14). Even if RSA 374:57 could otherwise be read as authorizing the purchase of gas transportation capacity by an EDC (rather than electricity as is apparent from the context of this provision), the Restructuring Act would prevent that interpretation. (*See* NEER Principal Br. at Section I(D)(1).)

IV. To the extent they conflict with the Restructuring Act, RSA 374-A and 374:57 are repealed by implication.

NEER explained in its Principal Brief that the provisions relied upon by Eversource were premised on a vertically-integrated utility structure and were repealed by implication with the passage of the Restructuring Act. (NEER Br. Section I(D)(1).) To avoid repeal by implication, Eversource suggests that (1) the Restructuring Act is permissive, not mandatory, in its directive to separate generation from transmission and distribution and move to a competitive market for energy supply (*see* Eversource Br. at 14, n.11); and (2) the Commission should presume the inconsistent provisions remain operative because the Legislature did not expressly repeal them when enacting the Restructuring Act. (*Id*. at 14.) Neither argument is persuasive.

A. The Restructuring Act restructured electric utilities to require competition for electricity supply.

Suggesting as Eversource has that competitive supply is merely a permissive component of the Act ignores (1) its purpose articulated in RSA 374-F:1, (2) the explicit incorporation in the Act of the "directives of part II, Article 83 of the New Hampshire constitution" mandating "free and fair competition," and (3) the 51 other references in the Act demonstrating that it is premised on restructuring to a competitive energy supply market. Indeed, if Eversource's argument prevailed, one would wonder what the Legislature actually restructured in the "Electric Utility Restructuring Act" because it certainly would not be "electric utilities."

Eversource's stark assertion that the Act is permissive also runs counter to the representations that Eversource made to the Commission when seeking approval of the Settlement Agreement in Docket DE 14-238 to divest its generation assets. (*See, e.g.*, Partial Litigation Settlement, DE 14-238, ¶12: "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.")

B. The Restructuring Act's fundamental premise is inconsistent with RSA 374-A or 374:57 and/or occupies the field as it relates to an electric utility's entanglement with generation resources, rendering the absence of an explicit repeal immaterial.

Eversource's second argument here is that because the Legislature did not expressly repeal RSA 374-A and/or 374:57 when it enacted the Restructuring Act, those statutes remain fully intact. Eversource is apparently arguing that there is no such thing as repeal by implication. Eversource is incorrect.

As NEER explained in its Principal Brief (*see* Section I(D)(1)(b)), prior statutory provisions are of no effect "(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) (citations omitted). The statutory provisions Eversource cites for authorization for its petition (RSA 374-A and 374:57) both contemplate unified ownership or operation of transmission, distribution, and generation. *See, e.g.*, RSA 374-A:1, IV. That structure fundamentally conflicts with the Restructuring Act's competitive supply premise. Even if the Commission were to find otherwise, the Restructuring Act occupies the field as it relates to permissible activities for a transmission and distribution utility.

Contrary to Eversource's argument, the provisions of RSA 374-A and RSA 375:57 it cites cannot be harmonized with the Restructuring Act. Under Eversource's interpretation of RSA 374-A, an EDC would be authorized to "own" "electric power facilities."[4] Eversource's attempt to parse RSA 374-A to claim that an EDC "otherwise participat[ing] in electric power

[4] *See* RSA 374-A:2(I).

facilities" continues to be authorized even after the Restructuring Act while apparently conceding in its divestiture proceeding that "own[ing]" electric power facilities is not authorized has no principled basis. Even if a principled basis could be found, this interpretation would run directly afoul of the Restructuring Act's command for a "fully competitive" supply market. For the same reasons, RSA 374:57 cannot be harmonized with the Restructuring Act, rendering the earlier enactment ineffective to authorize Eversource's proposal.

C. Eversource cannot invoke authorization under RSA 374-A, but escape its inherent conflict with the Restructuring Act by distinguishing its proposal from one covered by RSA 374-A.

Eversource next tries to split another non-existent hair by suggesting that the proposed investment is authorized as participating in generating facilities under RSA 374-A, but is not a "direct link" to "any particular electric power facility" (which they concede is prohibited) because generators are free, but not required, to purchase the capacity from Eversource. Accordingly, Eversource argues that its 20-year "participation in" or "support for" electric power facilities is not a prohibited entanglement with generation resources. (Eversource Br. at 14.) Eversource's argument does not survive principled analysis.

Prior to the Restructuring Act, RSA 374-A 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 . . . or service therefrom or securities issued in connection with the financing of electric power facilities or portions thereof" or enter into contracts for the same. RSA 374-A:2, I &II. If, as Eversource suggests, its proposal qualifies under these provisions, it constitutes an investment in generation resources (not transmission and distribution) and undermines competition, both in violation of the Restructuring Act.

Eversource ultimately comes clean in describing both its proposal and desire to avoid the Restructuring Act's required separation of transmission and distribution from generation and mandated competition:

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

(Eversource Br. at 15.) Because this "underlying logic" has been fundamentally altered by the Restructuring Act, Eversource must request a change by the Legislature before there can be a return to the vertically-integrated principles contemplated by RSA 374-A.

V. The preferential capacity releases to a subset of electricity generators with access to the Algonquin/Eversource pipeline do not further the Restructuring Act's mandate of a competitive energy supply market.

Algonquin takes the surprising position that the preferential capacity releases to certain generators that are critical to the Eversource proposal actually <u>further</u> the competitive principles mandated by the Restructuring Act:

> [S]uch preferential release would work with the ERSP that will encourage competition among generators, consistent with the Restructuring Principles of open access to transportation and distribution facilities and full and fair competition. . . . For both long and short-term releases, capacity will be released to the generator bidding the highest price in a competitive process. The ERSP will therefore encourage competition among generators, consistent with the Restructuring Principles.

(Algonquin Br. at 12.) This remarkable assertion ignores that the "competition" that Algonquin suggests is promoted will be engaged in by a selected subset of generators that are connected to its pipeline to the exclusion of all other generators in the market.

While it may be true that some generators will compete for the released capacity, the Eversource proposal will be purposefully limited to natural gas-fired generators and, even as among them, only those that are connected to the Algonquin pipeline. Competition may exist

within the subset of preferred generators, but the other "non-preferred" gas generators and generators using any other fuel source will be left out of this EDC-funded preferential arrangement, contrary to the fundamental principles of New Hampshire's restructured electricity market. *See, e.g.*, 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.")

Algonquin must be suggesting that the fair competition commanded by the Restructuring Act would be satisfied as long as someone in the marketplace is competing with someone else. Under this interpretation, Eversource could, for example, offer the released capacity to two generators to the exclusion of all other generators in the electricity supply market and deem that in furtherance of the competitive mandate in the Restructuring Act. The interpretative principles of New Hampshire law would not allow that result.

The Act instead means what it says: the law must be applied "to ensure a fully competitive market." Suggesting that preferential capacity releases to a subset of natural gas generators furthers that mandate is unsupportable.

VI. Any state ruling authorizing the Eversource proposal would be preempted by federal law.

Eversource's proposal is preempted by federal law because the proposal would directly affect, and is intended to directly affect, prices for release of interstate pipeline capacity and wholesale sale of electricity. Under the Natural Gas Act ("NGA"), the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the "transportation of natural gas in interstate commerce" as well as the "sale in interstate commerce of natural gas for resale for ultimate public consumption." (15 U.S.C. § 717(b).) FERC's jurisdiction also extends to the

interstate pipeline capacity release market. Eversource and Algonquin argue that approval of the ANE Contract is plainly within the Commission's jurisdiction (*see* Eversource Br. at 21; Algonquin Br. at 16), but these arguments ignore the underlying purpose for construction of the Algonquin/Eversource pipeline.

"Whether the [NGA or Federal Power Act ("FPA")] preempts a particular state law turns on 'the *target* at which the state law *aims*."[5] The plain intent of the coordinated petitions before this Commission and in other states is to reduce prices for retail electricity by *first* reducing prices for: interstate pipeline transportation, wholesale natural gas, and wholesale electricity. A state is not permitted to "disregard interstate wholesale rates FERC has deemed just and reasonable, even when states exercise their traditional authority over retail rates." *Hughes*, slip op. at 14. Rather, the "fact that [the state commission] is setting retail rates does not give it license to ignore the limitations that FERC has placed."[6]

The EDC contracts here are virtually indistinguishable from the state program rejected in *Hughes*. They merely substitute one type of subsidized infrastructure construction for another. State authorization of the sale of interstate pipeline capacity contemplated in the capacity release program proposed here—the rates for which are subject to FERC jurisdiction—is preempted for the same reasons the state approval of sale of electric capacity was preempted in *Hughes.* The Maryland program was preempted because using a contract to provide the generator with a rate for electric capacity sold to PJM Interconnection ("PJM") that was different from the PJM

[5] *Hughes v. Talen*, No. 14-614 slip op. at 13 (US Apr. 19, 2016) (quoting *Oneok, Inc. v. Learjet, Inc.*, No. 13-27, slip op. at p. 11 (US April 21, 2015) (emphasis in the original)).

[6] *Nantahala Power and Light Co. v. Thornburg*, 106 S. Ct. 2349, at 2358 (1986) ("*Nantahala*"); *see also Miss. Power & Light Co. v. Miss. Ex rel. Moore*, 108 S. Ct. 2428, at 2440 (1998) ("Once FERC set such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A state must give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that States do no interfere with this authority." (quoting *Nantahala*, 106 S. Ct. at 2356-37)).

market rate for electric capacity "disregards an interstate wholesale rate required by FERC." (*Hughes*, slip op. at p. 15.)

Here, Eversource seeks the same thing, but in the pipeline capacity release market rather than the electric capacity market. It wants the Commission to cause retail ratepayers to pay a fixed rate, for twenty years, for pipeline capacity. Because the EDCs have no use for that pipeline capacity, a Capacity Manager will release it into the secondary capacity release market. That market is a market for interstate natural gas transportation subject to FERC's exclusive jurisdiction, and FERC has determined that capacity release rates should be determined by the market, through negotiation. Implicit in that policy is the assumption that the releasing shipper will seek to maximize proceeds from the capacity release. Although the releasing shipper may not fully recover its costs, the shipper is not indifferent to the price for capacity release and will seek to maximize its recovery. In contrast, because (i) the purpose of the Eversource proposal would be to make capacity available to generators to lower wholesale power prices, (ii) Eversource represents that EDCs may under-recover capacity costs, and (iii) Eversource proposes that those under-recoveries be borne by retail customers, Eversource would be indifferent to the price they receive for capacity releases. Just as with the Maryland contract for differences made the generator indifferent to the actual market price for electric capacity, here the EDC will credit back amounts received in the secondary market to ratepayers so that the end result for the EDC is that it will be receiving the amount due to ANE, no more and no less. This Commission cannot authorize this plan because it cannot "disregard[] an interstate wholesale rate required by FERC" under the NGA – the market-determined price for release of interstate pipeline capacity.

The ANE Contract will also cause (and is intended to cause) price suppression in wholesale energy markets subject to FERC's exclusive jurisdiction.[7] Congress and FERC both intended that wholesale markets be opened to competition so that competition, rather than regulatory determination of rates, could ensure that rates are just and reasonable.[8] Although both Eversource and Algonquin argue that their contract does not have a "direct effect" on wholesale energy prices, and thus the FPA does not preempt state action,[9] these arguments are not credible. Eversource submitted voluminous testimony to the Commission and studies to attempt to prove that the ANE Contract would lower wholesale prices.[10] The proposal here is preempted because it will undermine the competitive function of FERC's markets, as it "has the potential to seriously distort" ISO New England markets.[11] A state cannot "second-guess the reasonableness of interstate wholesale rates." (*Hughes*, slip op. at p. 14.)

---

[7] *See FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, at 780 (2016) ("The FPA 'leaves no room either for direct state regulation of the prices of interstate wholesale' or for regulation that 'would indirectly achieve the same result'" (quoting *Northern Natural Gas. Co. v. State Corporation Comm'n of Kan.*, 372 U.S. 84, 91 (1963)) ("*EPSA*").

[8] The Federal Power Act does not permit concurrent jurisdiction over wholesale rates and practices affecting such wholesale rates subject to FERC's jurisdiction. *See EPSA*, 136 S. Ct. at 767 (2016) ("The Commission instead undertakes to ensure 'just and reasonable' wholesale rates by enhancing competition—attempting, as we recently explained, 'to break down regulatory and economic barriers that hinder a free market in wholesale electricity.' *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 536 (2008)").

[9] *See* Eversource Initial Brief at 25 ("any impact that the ANE Contract may have on any wholesale energy market would be only indirect and a legally permissible means of effectuating a state policy to ensure the availability of a natural gas supply for electric generation purposes without setting the wholesale price"); Algonquin comments at 14 (arguing that the ANE Contract "does not directly interfere with FERC-regulated markets, as the Maryland order did in [*Hughes*]").

[10] *See, e.g.*, Eversource Petition at 9 ("The overriding objective of the resource procurement is to enter into contracts that will lead to the development of gas transportation and/or storage capacity that will have the ***greatest potential to improve reliability and reduce prices in the wholesale electric market***.").

[11] *See PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467, at 478 (4th Cir. 2004) (finding that the impact of the Maryland scheme was "'so extensive and disruptive of" the PJM markets that preemption [was] appropriate") ("*Nazarian*"), *aff'd on other grounds*, *Hughes*. In *Hughes*, the Supreme Court acknowledged, but did not address the Fourth Circuit's holding in *Nazarian*. *See Hughes* at pp. 11, 15. Accordingly, the Fourth Circuit's holding in *Nazarian* stands.

VII. Eversource's rights under general corporate law do not trump the Restructuring Act.

Algonquin and CLEC argue that Eversource has the "general corporate authority" to enter into the contracts attached to its petition: "[T]o the extent the contract before the Commission is necessary and/or convenient for Eversource to carry out its affairs, the [New Hampshire Business Corporations Act] authorizes such contract." (*See* Algonquin Br. at 4-5; *see also* CLEC Br. pp. 6-10.) New Hampshire's general corporate law does not obviate Eversource's burden to show that its anticompetitive proposal is nonetheless authorized by the Restructuring Act, particularly because Eversource proposes that the costs of the 20-year contracts will be paid by EDC ratepayers.

First, as Algonquin seems to acknowledge, Eversource's corporate authority is limited to that which is necessary or convenient to "carry out its affairs." The scope of Eversource's authorized "affairs" are now limited to transmission and distribution functions and no more. *See Proceeding Regarding the Sale of Seabrook Station Interests*, Order 24,050 at 3. Eversource in the divestiture docket, DE 14-238, acknowledged this limitation on its authority as a New Hampshire EDC. *See, e.g.*, Transcript of Hearings, Day 3 PM session, pp. 58 ("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.") (Emphasis added).[12]

Second, the general corporate authorizations in the Business Corporation Act ("BCA") do not trump other statutory limitations on the Eversource's power. *See, e.g.*, RSA 293-A:3.01(b)

[12] CLEC suggests that the Commission hold that, because Eversource deems the project necessary, the Commission is powerless to do anything but approve the proposal. (*See* CLEC Br. at 9: "Eversource's filing of a proposal in this docket is irrefutable evidence that it does in fact deem the ANE Contract necessary and proper for its transaction of authorized business. Thus, Eversource has corporate authority to contract for pipeline capacity. . . . Eversource has the same 'necessary and proper' authority to enter contracts today that Concord Electric Company did when it was incorporated in 1901.") Similar to arguments that Eversource and Algonquin have raised, if adopted, CLEC's argument would beg the question what the Legislature restructured in RSA 374-F.

("A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this chapter only if permitted by, and subject to all limitations of, the other statute."); RSA 293-A:3.02 (corporation may "make and amend bylaws, not inconsistent. . . . with the laws of this state" or "transact any lawful business that will aid governmental policy"); *see also* CLEC Br. at 7, quoting RSA 295:6 (corporations "may make contracts necessary and proper for the transaction of their authorized business . . . .") (Emphasis added). Certainly the BCA cannot be read as authorizing Eversource to convert (apparently immediately after the Commission rules in the divestiture docket) to a vertically-integrated utility with the power to subsidize gas-fired electricity supply through EDC rates. *Cf*. RSA 293-A:9.01 ("This chapter may not be used to effect a transaction in which the conversion from one entity to another type of entity is governed by other statutes of this state with specific provisions that address how that conversion is to be accomplished.").

Third, CLEC argues that the Commission should be free to hold that the Legislature did not really mean to establish a competitive generation supply market when restructuring electric utilities in New Hampshire:

> The Restructuring Act must be interpreted and implemented through the lens of its ultimate aim: to reduce electric costs. A "competitive market" is merely the means to achieve lower electricity costs, and the means cannot jeopardize reliability or cause unnecessary environmental impacts. The "market" is failing on all accounts and must be harnessed to lower electric rates to just and reasonable levels. . . . Given the ongoing market failure, which impedes the Restructuring Act's purpose of lowering electricity costs, CLEC urges the Commission to interpret its broad regulatory authority to find that Eversource not only should, but must, acquire pipeline capacity in these specific circumstances.

(CLEC Br. at 5.) The Legislature, however, has made the policy decisions that generation must be separated from transmission and distribution, and the electricity supply market in New Hampshire is to be competitive. Only the Legislature has the power to change that and unless and until it does so, Eversource's authorized business is limited to that of a transmission and

distribution utility. Funding natural gas pipeline infrastructure to support electricity generation is not part of the authorized business of a transmission and distribution utility.

Fourth, Algonquin and CLEC would have the Commission start with the proposition that any contract that Eversource enters into—even one that is designed to disrupt the competitive supply market mandated by the Restructuring Act—is authorized unless specifically prohibited. As explained in NEER's Principal Brief, however, New Hampshire law requires the opposite evaluative process when reviewing an anticompetitive proposal. *Appeal of Omni Communications, Inc.*, 451 A.2d 1289, 122 N.H. 860 (N.H. 1982) ("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."); *Appeal of Public Service Company of New Hampshire*, 676 A.2d 101, 141 N.H. 13, 19 (N.H. 1996) ("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."). Analyzed properly, the Eversource proposal is not authorized under RSA 374-A, RSA 374:57 or the Restructuring Act.

CLEC, Eversource and Algonquin's arguments also seem to suggest the Commission has the authority to approve any action by Eversource, so long as it is not specifically and explicitly prohibited by the Legislature. That premise ignores that the Commission's "authority is limited by the express provisions of the public utility law and those that may be fairly implied therefrom." *Blair v. Manchester Water Works*, 175 A.2d 525, 103 N.H. 505, 506 (N.H. 1996), *citing Petition of Boston & Maine Railroad*, 82 N.H. 116, 129 A. 880; *State v. New Hampshire Gas & Electric Co*., 86 N.H. 16, 28, 163 A. 724; *State v. New Eng. Tel. & Tel. Co*., 103 N.H. 394. The Court's holding in *Blair* is instructive:

> It may be that the public interest would best be served if the Public Utilities Commission had full control of a municipal utility any time it extended its service outside its corporate limits. *City of Richmond v. Public Service Commission*, (Ky.) 294 S.W.2d 513. But there is no clear legislative mandate to that effect expressed in the statutes. Merely because a municipal utility extends its service to a small area in an adjoining town, the present statutes do not give the Public Utilities Commission authority over the utility to compel it to extend its service over the entire area of the adjoining town.

Id. at 507-08.

Thus, as set out in NEER's principal brief, the question is whether the Legislature has given the Commission the clear authority to approve an EDC investing in natural gas pipeline capacity with the costs to be borne by its ratepayers. The Restructuring Act removes any doubt: the Eversource proposal is not authorized under New Hampshire law.

CONCLUSION

Eversource and Algonquin's arguments in attempting to find statutory authority for the Petition are nothing short of textual gymnastics: the proposed natural gas capacity contracts constitute both participation in, but not participation in, electric power facilities; the Electric Utility Restructuring Act neither restructured electric utilities nor requires competition; and the preferential capacity release program providing releases to a limited number of gas-fired plants advances the "fully competitive" supply market required by the Restructuring Act. NEER respectfully suggests that these tortured interpretations are not the basis upon which the Commission could authorize imposition of twenty years of the costs associated with a natural gas pipeline on transmission and distribution ratepayers.

Respectfully Submitted,

NEXTERA ENERGY RESOURCES, LLC,

By its attorneys,

_____

Christopher T. Roach
William D. Hewitt
Roach Hewitt Ruprecht Sanchez & Bischoff, LLP
66 Pearl Street, Suite 200
Portland, Maine 04101
207-747-4870
croach@roachhewitt.com
whewitt@roachhewitt.com

Dated: May 12, 2016

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