

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

Docket No. DE 16-241

Public Service Company of New Hampshire d/b/a Eversource Energy  
Petition for Approval of a Gas Capacity Contract with Algonquin Gas Transmission, LLC,  
Gas Capacity Program Details, and Distribution Rate Tariff for Cost Recovery

**JOINT SUPPLEMENTAL BRIEFING OF CONSERVATION LAW FOUNDATION,  
NEXTERA ENERGY RESOURCES, LLC, AND OFFICE OF THE CONSUMER  
ADVOCATE REGARDING LEGALITY OF PETITIONER'S PROPOSAL**

By Order of Notice dated March 24, 2016, the Public Utilities Commission (“PUC”) bifurcated this docket into two distinct phases, the first of which addresses the question whether, as a matter of law, Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”), as an electric distribution company (“EDC”), may acquire natural gas pipeline capacity funded by EDC ratepayers. During the first phase of this docket, Conservation Law Foundation (“CLF”), NextEra Energy Resources, LLC (“NEER”), the Office of the Consumer Advocate (“OCA”), and others filed briefing explaining why PSNH cannot lawfully be authorized to acquire natural gas pipeline capacity, including with respect to Algonquin Gas Transmission LLC’s (“Algonquin”) Access Northeast project.

CLF, OCA, and NEER wish to alert the PUC to the recent decision of the Massachusetts Supreme Judicial Court (“SJC”) in *ENGIE Gas & LNG LLC v. Department of Public Utilities* and *Conservation Law Foundation v. Department of Public Utilities*, slip op. SJC-12051, SJC-12052 (Aug. 17, 2016), invalidating an order of the Massachusetts Department of Public Utilities that authorized the acquisition of natural gas capacity by electric distribution companies. The SJC decision is significant to this docket for two important reasons.

First, as in this docket, the SJC considered the legal question whether electric distribution companies in a restructured electricity market can lawfully acquire natural gas capacity funded by EDC ratepayers. It concluded unequivocally that they cannot under Massachusetts law. Importantly, the SJC reached this conclusion in large part based on the restructuring of the Massachusetts electric market, analyzing the intent of the restructuring law to separate electric generation from electric distribution, establish a fully competitive generation market premised on customer choice, and protect ratepayers from bearing financial risks associated with generation. *See ENGIE Gas & LNG LLC et al. v. Dept. of Pub. Util.*, slip op. at 26 - 37. In doing so, the SJC held:

[W]e determine that the [Department of Public Utilities'] approval of ratepayer-backed, long-term contracts by electric distribution companies for gas capacity contradicts the fundamental policy embodied by the restructuring act, namely the Legislature's decision to remove electric distribution companies from the business of electric generation.

*Id.* at 27. *See also id.* at 3 (holding that acquisition of natural gas capacity by electric distribution companies "would undermine the main objectives of the [restructuring] act and reexpose ratepayers to the types of financial risks from which the Legislature sought to protect them."), 31 ("We agree with the plaintiffs that such activity would undermine the main object to be accomplished by the restructuring act, i.e., to move from a regulated electricity supply market to an open and competitive market for power."), 33 ("We agree with the plaintiffs that if the restructuring act does not allow electric distribution companies to finance investments in electric generation, it cannot reasonably be interpreted to permit those companies to invest in infrastructure unrelated to electric distribution service."), 34 ("The department's interpretation of the statute as permitting electric distribution companies to shift the entire risk of the investment to the ratepayers is unreasonable, as it is precisely this type of shift that the Legislature sought to preclude through the restructuring act."). Given the similarities between the restructuring acts in

Massachusetts and New Hampshire, the SJC's decision strongly bolsters the legal analyses provided in this case demonstrating that PSNH's proposal is contrary to New Hampshire law.<sup>1</sup>

In addition to the foregoing, the SJC's decision is highly relevant to this docket because PSNH's and Algonquin's proposal is part of a larger, regional scheme that was intended to include electric distribution companies in Massachusetts. As noted in PSNH's Petition, in December 2015 Eversource Energy's operating affiliates in Massachusetts submitted to the Massachusetts Department of Public Utilities a petition similar to the one at issue in this docket; in January 2016, National Grid, on behalf of its Massachusetts-based operating companies, did the same. Petition at 4, n.2. Importantly, PSNH makes clear in its Petition that the Access Northeast project is regionally scaled and "will require other New England states to take responsibility for a proportional share of the costs of the project," and that even if the PUC were to approve the contract, "Access Northeast will require sufficient subscription (i.e., a total of 900,000 MMBtu/day), *evidenced through the execution of long-term contracts by EDCs operating throughout New England.*" Petition at 13 (emphasis added). The SJC decision, by precluding such contracts with electric distribution companies in Massachusetts, severely undermines the proposal at issue in this docket.

While the decision of the Massachusetts Supreme Judicial Court is not binding on the PUC, the undersigned respectfully suggest it is persuasive authority from the highest court in a jurisdiction that restructured its electricity markets in essentially the same manner as did the New Hampshire Legislature. After consideration of the same issue presently pending before the PUC, the SJC determined that allowing EDC gas capacity acquisition would undermine the main objectives of the restructuring act and that doing so can only be authorized by the Legislature.

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<sup>1</sup> In its Petition seeking to open this docket, PSNH itself acknowledged the substantially similar nature of the proceeding in Massachusetts. See PSNH's Petition at 3, n.1.

See slip op. at 37, citing *Wakefield Teacher's Ass'n v. School Comm. of Wakefield*, 431 Mass. 792, 802 (2000) (fundamental policy decisions are province of Legislature, not coordinate branches of government).

For the foregoing reasons, as well as those set forth in the undersigned's briefing in this docket, the undersigned respectfully request that the PUC reach the same conclusion as the SJC in *ENGIE* and determine that PSNH's Petition is not authorized under New Hampshire law and should be dismissed.

Respectfully submitted,

CONSERVATION LAW FOUNDATION



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Dated: August 22, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading has been sent by email to the service list in  
Docket No. DE 16-241 on this 22nd day of August, 2016.



Thomas F. Irwin, Esq.