

STATE OF NEW HAMPSHIRE

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June 12, 2018

Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. DE 16-241
Public Service Company of New Hampshire
Petition for Approval of Gas Infrastructure Contract with Algonquin Gas
Transmission LLC

Docket No. DE 16-693
Public Service Company of New Hampshire
Petition for Approval of Power Purchase Agreement with Hydro Renewable
Energy, Inc.

Dear Ms. Howland:

Please treat this letter as the response of the Office of the Consumer Advocate (OCA) to the filings made yesterday by Public Service Company of New Hampshire (PSNH) d/b/a Eversource Energy in the above-referenced proceedings. In each instance, PSNH has asked the Commission to take certain steps in light of the May 22, 2018 decision of the New Hampshire Supreme Court, *Appeal of Algonquin Gas Transmission, LLC*.¹

As you know, in its *Algonquin* decision the Court concluded that the Commission erred in Docket No. DE 16-241 when the Commission ruled that the Electric Industry Restructuring Act, RSA 374-F, did not allow PSNH to make a major investment in the so-called Access Northeast natural gas pipeline project and include the costs in nonbypassable electric distribution rates. As you also know, and as PSNH pointed out in its DE 16-693 filing, the Commission relied on its now-vacated decision in Docket DE 16-241 to conclude that PSNH could not enter into a power purchase agreement with Hydro Quebec that would likewise be included in nonbypassable distribution rates.

¹ The majority opinion and accompanying dissent are available at <https://www.courts.state.nh.us/supreme/opinions/2018/2018023algonquin.pdf>.

Accordingly, PSNH now asks the Commission (1) to keep Docket No. DE 16-241 open pending the filing of an “updated” proposal for the purchase of natural gas pipeline capacity, and (2) to vacate the Commission’s decision dismissing the DE 16-693 petition. The latter filing is silent as to what, if any, further proceedings PSNH contemplates with respect to wholesale purchases from Hydro Quebec.

In reality, the petition in each docket is now moot and the Commission should therefore close both proceedings. “The doctrine of mootness is designed to avoid deciding issues that have become academic or dead.” *Batchelder v. Town of Plymouth Zoning Board of Adjustment*, 160 N.H. 253, 255 (2010) (citation omitted). “Academic or dead” is an accurate summary of the current state of both proceedings.

Almost a year ago, PSNH parent company Eversource jointly announced with its development partners (fellow electric distribution utility National Grid and the Texas-based pipeline company Enbridge, Inc.) that they were shelving the Access Northeast project in light of the decision of the Supreme Judicial Court of Massachusetts that Access Northeast could not be included in that state’s nonbypassable electric rates. The co-developers withdrew their request for approval of the project by the Federal Energy Regulatory Commission and the *Boston Globe* quoted a spokesperson for Enbridge to the effect that the project could not go forward absent legislation in Massachusetts. See “Lacking financing, utilities put \$3 billion natural gas pipeline on hold,” *Boston Globe*, June 29, 2017.²

In these circumstances, it is obvious that the petition filed in Docket No. DE 16-241 is moot as academic, dead, or both. PSNH acknowledges in its June 11 filing that “[c]ircumstances underlying the modeling, assumptions, cost estimates, and other conditions relating to the Petition have changed” and, therefore, that “there is a need for updates and modifications to that proposal.” This is an understatement.

While a decision in an otherwise moot case “may be justified where there is a pressing public interest involved, or future litigation may be avoided,” *Batchelder*, 160 N.H. at 256 (citation omitted), that is not the situation here. To a significant extent, events have passed DE 16-241 by; the regional grid operator is now proceeding on the assumption that initiatives other than new interstate natural gas pipeline capacity can and will address issues of reliability, resource adequacy and fuel security. See, e.g., ISO New England, Operational Fuel Security Analysis (Jan. 17, 2018) at 4 (“The study assumed that no additional natural gas pipeline capacity to serve generators would be added within the timeframe of this study,” 2024-2025)³; Petition of ISO New England Inc. for Waiver of Tariff Provisions in FERC Docket No. ER18-1509 (May 2, 2018) (seeking waiver of various ISO New England Tariffs to provide cost-of-service treatment for two units at Mystic Station in Massachusetts on fuel security grounds). In these

² The referenced newspaper article is available at <https://www.bostonglobe.com/business/2017/06/29/utilities-withdraw-plan-for-billion-natural-gas-pipeline-expansion/o07zbTYmUIMWVmpjNItQ3H/story.html>.

³ Available at https://www.iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf.

circumstances, the Commission should close Docket DE 16-241 and make clear to PSNH that any subsequent proposal to force electric customers to pay for natural gas pipeline capacity must be made via a new petition with the requisite supporting testimony and exhibits. Any other course of action would be manifestly unfair and would raise serious issues of due process.

Likewise, the Hydro Quebec power purchase agreement at issue in Docket No. DE 16-693 was intimately related to the Northern Pass transmission project that has been rejected by the Site Evaluation Committee (SEC). Although Eversource has made clear its intention to seek New Hampshire Supreme Court reversal of the SEC determination, Northern Pass must itself go back to the drawing board because the SEC determination prompted decisionmakers in Massachusetts to pass over Northern Pass in favor of a similar Maine project for purposes of that state's mandatory renewable energy procurement program. With the fundamentals of Northern Pass in limbo, notably missing from the PSNH filing in DE 16-693 is any indication that the Company continues to pursue approval of the petition it filed in that docket.

Again, in the interests of fundamental fairness and due process, the Commission should now close Docket No. DE 16-693 and make clear that any similar power purchase agreements that might arise out of some future version of Northern Pass would require an entirely new filing. The Commission should not issue the requested order vacating the Commission's previous determination; at best, this would be an empty gesture and at worst it would effectively amount to a declaratory order on a hypothetical scenario in violation of N.H. Code Admin. Rules Puc 207.01(c) and the relevant case law supporting the rule. Moreover, because the Commission's order in DE 16-693 was a correct application of RSA 374-F on the day it was decided, vacating what has long since become a final and unappealable order, based on a subsequent appellate decision in an unrelated case, would be inequitable. *See Comcast Phone of New Hampshire LLC, Order No. 25,571 (Sept. 13, 2013) in Docket No. DT 12-308 at 10 (noting that vacatur is "an equitable remedy designed to prevent unfairness to the losing party, which would otherwise have to continue complying with an adverse judgment notwithstanding a subsequent event rendering the judgment moot and unreviewable") (citing Diffenderfer v. Gomez-Colon, 587 F.3d 445, 451 (CA1 2009)).*

Alternatively, if the Commission determines to keep either or both dockets open and finds it necessary to conduct additional proceedings of any sort in either proceeding, the Commission should take note that in each docket there are pending motions for confidential treatment to which the OCA has objected. The OCA respectfully requests that to the extent either docket remains 'live,' the Commission resolve the pending disputes over confidentiality. Both dockets raised controversial issues of public importance and, therefore, the public's interest in disclosure of the allegedly confidential information is high for purposes of the balancing test that applies under RSA 91-A.

The OCA does not object to explicit determinations that closure of these dockets is without prejudice to future requests for similar approvals. However, we strongly believe it would be unfair, unreasonable, and likely unconstitutional, for the Commission to keep these dockets alive in the circumstances. At the very least, the Commission should require PSNH to explain why either of these proceedings remains a live case or controversy that justifies anything other than closure.

Please feel free to contact me if there are any questions or concerns about the foregoing.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Maurice Kreis". The signature is fluid and cursive, with a long horizontal stroke at the end.

D. Maurice Kreis
Consumer Advocate

cc: Service Lists in DE 16-241 and DE 16-693