

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 16-241

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

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

RESPONSE OF
THE COALITION TO LOWER ENERGY COSTS
TO ALGONQUIN AND EVERSOURCE
MOTIONS FOR RECONSIDERATION

The Coalition to Lower Energy Costs (“CLEC”) files this Response to the Motion for Rehearing and/or Reconsideration of Algonquin Gas Transmission, LLC (“AGT”) and the Motion for Reconsideration of Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”), each filed on November 7, 2016. This response is filed pursuant to Rule PUC 203.07(f). Both AGT and Eversource argue that Order No. 25,950 (the “Order”) improperly interprets the Restructuring Statute, RSA Chapter 374-F, as restricting the ability of New Hampshire’s electric distribution companies to enter into contracts that reserve long term capacity on interstate natural gas pipelines and to recover the cost of such contracts from their customers. CLEC agrees with the arguments presented by AGT and Eversource, and offers the following arguments in support of the motions.

I. The Eversource Proposal Does Not Violate the Restructuring Act.

In the Order, the Commission denied the Eversource proposal to enter a long term commitment for interstate gas pipeline capacity because doing would go “against the overriding principle of restructuring, which is to harness the power of competitive markets to reduce costs

to consumers by separating unregulated generation from fully regulated distribution” and that “it would allow Eversource to reenter the generation market for an extended period, placing the risk of that decision on its customers.” These conclusions are flawed, and are not based on facts such as would be adduced in hearings as to why such pipeline investment is necessary and how its absence actually impairs competitive generation markets.

CLEC agrees that the Restructuring Act emphasizes the application of *competitive* markets to achieve lower costs for customers. RSA 374-F:1(I). However, the situation that New Hampshire faces is one in which the markets on which it relies are not competitive and, in fact, are in a state of market failure. The solution presented by Eversource in its proposal would return the market to the competitive state that the New Hampshire General Court intended and assumed would be available to New Hampshire’s citizens.

The Commission is well aware the electric generation industry is not one that operates naturally as a competitive market, unlike many other commodity markets. Without extensive government intervention, a competitive market for electric generation service cannot even exist at either the wholesale or retail level. The creation of ISO New England and other regional transmission organizations required Congressional action and years of development and continuing federal regulatory oversight. Indeed, the market rules of ISO New England are constantly being reviewed and revised subject to FERC approval to ensure and preserve the market’s open and competitive nature. It is critical to keep in mind that *government created* this market. It would be incorrect and naive to assume that it operates perfectly without any need for monitoring and, when necessary, intervention to correct its deficiencies.

Further, markets are not ends in themselves. Rather, as the Restructuring Act itself recognizes, they are a means to an end – lower costs for consumers. RSA 374-F:3(XI) (“[t]he

goal of restructuring is to create competitive markets that are expected to produce lower prices for all customers.”) When market failure occurs, reliance on markets can, and this case does, lead to higher prices for consumers. This is directly contrary to the intent of the Restructuring Act.

Market failure exists because the current wholesale market structure provides no mechanism to provide for recovery of the cost of infrastructure necessary to ensure the availability of fuel supply to the generators producing most of the electric energy consumed in New England. This has created substantial price volatility and has cost New Hampshire energy consumers hundreds of millions of dollars over the past four years alone. In addition, it has threatened the reliability of the electric grid and increased New Hampshire’s reliance on heavily polluting oil and coal fired generation, both also in contravention of the explicit intent of the Restructuring Act. RSA 374-F:3(I) and (VIII).

The Eversource proposal does not put Eversource in the generation business. Eversource would not own any generating units and would not contract for the purchase or sale of their output. Eversource would not benefit in any manner from changes in wholesale electric prices. Eversource would act solely as a financing conduit for its customers, flowing through all of the costs and benefits of its contractual commitment. Further, doing so would not increase the risk faced by customers; it would reduce risk. In fact, as testimony by Competitive Energy Services in Docket IR 15-124,¹ the proceeding that led to this proceeding, irrefutably showed, increased gas pipeline capacity would take away the existing risk to New Hampshire electricity consumers that they will suffer a repeat of the more than \$200 million in higher electricity costs suffered in

¹ *Re Electric Distribution Utilities, Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire*, Docket IR 15-124, Direct Testimony and Exhibits of Richard Silkman and Mark Isaacson (June 2, 2015).

2013-14 because of inadequate pipeline capacity. Today customers continue to face wild volatility in prices because of the market failure. The Eversource proposal would help resolve that failure. This and related evidence should have been taken in this proceeding to give real life to the legal issues the Commission is asked to consider.

II. The Restructuring Act Must be Read in a Manner Consistent with Other Provisions of Law.

The Commission itself specifically recognized in the Order, “the Court construes statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other.”² The New Hampshire Supreme Court has specifically held that

[I]mplied repeal of former statutes is a disfavored doctrine in this State. The party arguing a repeal by implication must demonstrate it by evidence of convincing force. If any reasonable construction of the two statutes taken together can be found, this court will not find that there has been an implied repeal.³

Similarly, the Supreme Court of the United States has held that “[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”⁴ Therefore, under the well-established principles of “implied repeal,” it would be improper to find that the Restructuring Act implicitly prohibits such a transaction if it is permitted by other provisions of law. The very opposite of irreconcilability is demonstrated by New Hampshire law.

Eversource is a corporation founded under the general corporation statutes of New Hampshire. The powers of corporations under New Hampshire law are laid out in exceedingly broad terms in RSA Chapter 295. Section 295:2 states:

The rights, powers and duties set forth in this chapter are incident to all corporations legally constituted not excepted in RSA 295:1, subject to any limitations or restrictions

² Order at 7.

³ *Board of Selectmen v. Planning Board*, 118 N.H. 150, 152-53 (1978).

⁴ *Morton v. Mancari*, 417 U.S. 535, 550 (1974)

imposed by their charters or articles of association or the laws under which they were organized.

Section 295:6 provides that corporations:

may make contracts necessary and proper for the transaction of their authorized business, and no other. They shall be capable of binding themselves as sureties or guarantors for others, to the extent that such suretyship or guarantee may be necessary and proper for the transaction of their authorized business or serves to further their corporate purposes.

These broad statutory provisions authorize Eversource to engage in any lawful activity absent a specific legal limitation or restriction. Broad authority is not an accidental feature of the statutory scheme or a symptom of legislative inattention; it is the basic underpinning of the free enterprise guaranteed by the New Hampshire Constitution. In the case of corporations affected with the public interest, like Eversource, there are specific statutory restrictions (e.g., pre-approval requirements) placed on certain corporate actions, but these are explicit exceptions to the otherwise plenary discretion to take any lawful action the corporation deems “necessary and proper.”

Nothing in Eversource’s history, corporate documentation, or the laws under which it was organized imposes any limitation or restriction on Eversource’s “necessary and proper” authority to enter into contracts for pipeline capacity. Public Service Company of New Hampshire (“PSNH”), d/b/a Eversource, was originally incorporated on August 16, 1926 “under the provisions of Chapter 225 of the Public Laws of the State of New Hampshire known as the Business Corporation Law.⁵ At that time, the “objects” of the corporation included:

“To acquire by construction, purchase or otherwise, and to maintain and operate any plant or property for the production, sale and distribution of electrical energy, gas, ice, water, heat or light, and to acquire by construction, purchase or otherwise, and/or to maintain and operate any other property or business, and specifically, but without limiting the generality of the foregoing, to acquire, use and enjoy the properties, rights

⁵ State of New Hampshire, Record of Organization of Public Service Company of New Hampshire, *Articles of Agreement of Public Service Company of New Hampshire* (1926).

and franchises of existing public utilities, and to carry on the business purpose of a public utility in the State of New Hampshire and/or elsewhere[;]”⁶

“To acquire in any lawful manner, to own and/or hold ... property both real and personal, of any kind[;]”⁷ and

“To enter into, make, perform and carry out contracts of any kind for any lawful purpose without limit as to amount, with any person, firm, association, corporation, municipality, county, state, territory or government...[.]”⁸

The most recently recorded Amended Articles of Incorporation of PSNH set forth

“Corporate Powers” as follows:

The objects for which this corporation is established are to carry on the business of any electric utility within the state of New Hampshire or elsewhere, and to transact any and all lawful business for which corporations may be incorporated under New Hampshire revised Statutes Annotated Chapter 293-A.⁹

In sum, the Legislature has provided that Eversource has broad corporate authority to enter into contracts for pipeline capacity as necessary and proper to the conduct of its authorized business. Under the general principles of “implied repeal,” this general authority may only be overridden by a specific legal limitation or restriction. The Restructuring Act includes no such explicit restriction. The Legislature obviously was aware of the corporate powers it had previously created and could have explicitly overridden those powers if it so desired.

This conclusion is bolstered by a decision of the New Hampshire Supreme Court regarding a challenge to the Concord Electric Company’s (now Unitil) grant of a mortgage. In *American Loan Trust Co. v. General Electric Co.*, the challengers alleged that the mortgage was void “for want of authority on the part of the Concord Electric Company as a corporation to make it, the legislature never having given it express permission to mortgage any of its property,

⁶ *Id.* at Art. II(1) (1926).

⁷ *Id.* at Art. II(2).

⁸ *Id.* at Art. II(4).

⁹ State of New Hampshire, Record of Organization of Public Service Company of New Hampshire, *Amended Articles of Agreement of Public Service Company of New Hampshire*, at Art. II (1991).

rights, or franchises, and the corporation itself being of such a public character that due performance of its obligations to the public” was “inconsistent with a voluntary disposition of its property... .”¹⁰ The Court disagreed, stating:

The Concord Electric Company was formed under the general law of the state. This provides that any five or more persons of lawful age may associate together by articles of agreement to form a corporation for certain specified purposes, and for "the carrying on of any lawful business except banking, life insurance, the making of contracts for the payment of money at a fixed date or upon the happening of some contingency, and the construction and maintenance of railroads." P. S., c. 147, s. 1. When the articles are recorded as required, and the charter fee, if any, is paid, the signers become a corporation, "and such corporation, its officers and stockholders, shall have all the rights and powers and be subject to all the duties and liabilities of other similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter." *Ib.*, s. 4. *Among the powers expressly granted to such corporations is the power to make "contracts necessary and proper for the transaction of their authorized business,"* and to "purchase, hold, and convey real and personal estate necessary and proper" for such purpose, not exceeding the amount authorized by their charter or by statute. P. S., c. 148, ss. 7, 8.¹¹

Eversource has the same “necessary and proper” authority to enter contracts today that the Concord Electric Company did when it was incorporated in 1901.

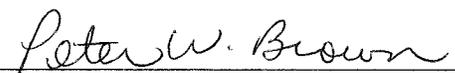
Since “[t]he most compelling reason to restructure the New Hampshire utility industry is to reduce costs for all consumers,”¹² it was unreasonable for the Commission to interpret the Restructuring Act as implicitly precluding Eversource’s proposal, especially given the Commission’s recognition of the cost and price volatility issues currently affecting wholesale electricity markets in New Hampshire and universally attributed to gas pipeline constraints.

¹⁰ *American Loan Trust Co. v. General Electric Co.*, 71 N.H. 192, 195 (1901).

¹¹ *Id.* at 199-200 (emphasis supplied).

¹² RSA 374-F:1.

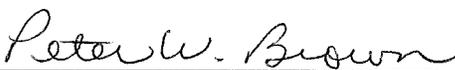
Respectfully submitted this 14th day of November, 2016.


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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule PUC 203.11.

Date: November 14, 2016


Peter W. Brown, Esq.