STATE OF NEW HAMPSHIRE

PUBLIC UTILTIES COMMISSION

IR 15-124

Investigation into Potential Approaches to Ameliorate Adverse Changes in the Wholesale Electricity Market

COMMENTS OF THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC. TO STAFF'S MEMO ON COMMISSION JURISDICTION FOR GAS CAPACITY ACQUISITIONS BY EDCs

I. Introduction

The New England Power Generators Association, Inc. (NEPGA) appreciates the opportunity to submit its analysis to the New Hampshire Public Utilities Commission (PUC or Commission) in response to the Memorandum issued by Staff on July 10, 2015 (Staff Memo) analyzing the Commission's authority to authorize electric distribution companies (EDCs) to enter into long-term contracts for natural gas. This analysis is intended to supplement NEPGA's responses to Staff's questions submitted on July 16, 2015.

NEPGA is the trade association representing competitive electric generating companies in New England. Our member companies represent approximately 25,000 megawatts (MW) of generating capacity throughout New England, including approximately 2,700 MW of generation in New Hampshire, or 66 percent of the electric generating capacity in the State. NEPGA's New Hampshire companies provide power to the State from a diverse portfolio of plants, which together pay over $46 million annually in state and local taxes. In addition, NEPGA's New Hampshire companies provide

nearly 800 well-paying and skilled jobs in the State. NEPGA's mission is to support competitive wholesale electricity markets in New England. We believe that open markets guided by stable public policies are the best means to provide reliable and competitively-priced electricity for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region.[1]

Staff's Memo analyzes the Commission authority to increase new natural gas delivery capacity to the New England market by permitting electric distribution companies (EDCs) to acquire capacity. Staff's position proposes that EDCs become suppliers of natural gas transportation capacity for wholesale generators making "capacity available for the use of merchant generators" which in turn would "enhance power system reliability." Staff Memo at 3.

While it seems clear that interstate pipeline companies are not willing to build new capacity without having long-term contracts in place, for the reasons discussed herein, neither New Hampshire's electric utility restructuring statute, RSA 374-F (the "Restructuring Act"), nor ancillary statutes cited in Staff's memo, allow the Commission to authorize the EDCs to engage in long-term contracting for pipeline expansion, nor provide a mechanism for the recovery of costs through rates. Among the many reasons include the following:

1. The concept violates the letter and spirit of the Restructuring Act;
2. The Commission is not authorized to provide for the recovery of costs and such a plan requires EDCs to discriminate among potential bidders in a manner prohibited by the Natural Gas Act as administered by the Federal Energy Regulatory Commission (FERC);

[1] These Comments represent the views of NEPGA, but not necessarily those of any particular member.

3. If the ultimate plan to implement this framework involves transactions between affiliates, it potentially runs contrary to the Commission's newly adopted rules on affiliate transactions; and

4. The concept is contrary to sound public policy relating to the competitive electricity markets.

NEPGA fundamentally opposes subsidies and out-of-market solutions that impact competitive wholesale electricity market outcomes. NEPGA therefore remains concerned with proposals to use electric distribution company (EDC) rates to subsidize the financing of new natural gas pipeline capacity into New England. For the most part, pipelines into New England have traditionally been contracted for through gas utility local distribution companies (LDCs). Such contracting is currently being used for the development of a substantial amount of new pipeline capacity. NEPGA believes relying on this traditional model is preferable to the proposed EDC pipeline funding mechanism. To the extent that there is a need demonstrated in a state (or states) to provide incremental natural gas supplies for electric generation reliability purposes, NEPGA does not oppose using LDCs as a counterparty to support prudent investment in interstate pipelines. Any LDC procurement along these lines, however, should focus on reliability needs and not be done to expressly suppress competitive electricity prices, as such actions interfere with the proper functioning of the wholesale electricity markets under FERC jurisdictional tariffs.

II. The Express Language of the Restructuring Act Prohibits EDCs from Entering into Contracts and Recovering Costs through Jurisdictional Tariffs for Ratepayer Financing of Pipeline Capacity and Resale to Generators

In adopting the Restructuring Act in 1996, the legislature stated that the "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." RSA 374-F:1, I. Moreover, the legislature expressly recognized that, in order to achieve the key elements of restructuring, i.e., increasing customer choice and developing the competitive markets for wholesale and retail electricity services, "...a restructured industry...will require...at least functional separation of centralized generation services from transmission and distribution services." Id. Staff's Memo correctly states the threshold question for the Commission's consideration: whether the Restructuring Act "categorically prohibits such activity." Staff Memo at 2.

New Hampshire principles of statutory construction dictate that the Commission reach the conclusion that EDCs lack legal authority to enter into long-term contracts for gas capacity. In determining the meaning of any statute, the New Hampshire Supreme Court has indicated that it is the final arbiter of the legislature's intent "as expressed in the words of the statute considered as a whole." *Appeal of Old Dutch Mustard Co.*, 99 A.3d 290, 293 (2014). In determining the legislature's intent, the court looks first to the language of the statute itself and will interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Appeal of Town of Brookline*, 91 A.3d 627, 630 (2014). Importantly, the court will not consider what the legislature might have said, or add language that the legislature did not see fit to include. *In re City of Nashua*, 68 A.3d 288, 289 (2014). Nothing in RSA 374-F, the *electric* restructuring act, authorizes EDCs to engage in long-term contracting by EDCs for gas capacity. The Restructuring Policy Principles, where the legislature has given voice to the "policy" and "purpose sought" by the Act and which necessarily govern the Commission's implementation of the restructuring of the *electric* market, expressly provide that

"[g]eneration services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services..." RSA 374-F: 3,III. While the statute does provide for EDC ownership of small-scale distributed generation, it goes no further in providing for any other limited exceptions to the stated policies of competition and separation; thus contracting for natural gas capacity falls well outside the parameters of that limited permissible activity. Since it is clear that the legislature knew how to carve out exceptions for EDC activities that are not otherwise at odds with its stated goals in enacting electric restructuring, such as authorizing limited distributed generation investments, and it is equally clear that the legislature has opted not to include language permitting long-term gas capacity contracting or anything remotely similar, it is simply contrary to the express language of the statute to suggest that the statute authorizes such action. The plain language of the statute, especially when considered in conjunction with the legislature's critical policy objectives of separation of service functions, demonstrates that the EDCs lack legal authority for such activity.

Nor can the statutory provisions relating to reliability be used to bootstrap or augment EDC authority where the language of the statute itself clearly prohibits it. Maintaining system reliability, while certainly an important goal, can be achieved in a myriad of other ways that do not patently contradict the express language of the statute. ISO-NE has more recently implemented a number of programs specifically designed to increase reliability while attempting to minimize the impact on the market that are more effective than this heavy-handed out of market solution. Indeed, as the statute states:

"[a]s generation becomes deregulated, innovative market-driven approaches are preferred..." RSA 374-F:3, VIII.

The statute further directs the Commission to "assert maximum state authority over the entire ***electric industry*** restructuring process." RSA 374-F:3, XIII. Again, the statute addresses the electric industry and its markets, not the natural gas market. When the legislature wanted oversight of the restructuring of the gas industry, it enacted RSA 374:60.[2] The legislature clearly differentiated in statute, by its title, limitations when separately addressing electric and natural gas restructuring. In no instance did it conflate the two nor did it ever suggest or direct cross-subsidization between the two separate industries.

The New Hampshire Supreme Court has repeatedly held that where the language of a statute is clear on its face, its meaning is not subject to modification. *Old Dutch Mustard,* at 293-94; *Victor Virgin Construction Corp. v. N.H. Dep't of Transportation*, 75 A.3d 1136,1138 (2013). The Commission must not add words that the legislature did not see fit to include. *In re City of Nashua*, 68 A.3d 288, 289 (2014). Moreover, where, as here, the language of the statute is unambiguous on its face, the Commission must not look beyond the language of the statute to discern legislative intent.

III. The Restructuring Act Prohibits EDCs from Entering into Long-Term Contracts because to Do So Enables EDCs to Exercise Impermissible Vertical Market Power

The central purpose of the Restructuring Act was to transition New Hampshire to a competitive electricity market by deliberately separating the market functions of EDCs

[2] That statute was ultimately repealed.

and wholesale electric companies. Numerous provisions of the Restructuring Act and the Commission's regulatory orders that followed led to electric companies divesting their wholesale generation assets and exiting all aspects of the generation market.[3]

In passing the Restructuring Act, the Legislature expressly found that "[w]hen customer choice is introduced, services should be unbundled to provide customers clear price information on the cost components of generation, transmission and distribution and any other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services..." RSA 374-F:3, III. Although that transition was originally delayed by litigation, the New Hampshire electric utilities began to restructure in 1998. In return for divesting their generating assets, electric companies were allowed to recover and securitize their stranded costs. It would be antithetical to the Restructuring Act — and create an unfair windfall for the electric companies that accepted that stranded cost recovery — if the Commission now allowed the EDCs to reengage in the generation sector by purchasing and reselling pipeline capacity to wholesale generators.

Moreover, in expressly providing that the Commission ensure that "generation services be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services," the legislature could not have been clearer. RSA 374-F:3, III. The Act further directed that the Commission "monitor companies providing transmission of distribution services and take necessary

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[3] Eversource has been authorized legislatively to continue to own generation units in New Hampshire. In DE 14-238, the Commission is in the process of considering whether Eversource's divestiture of its generation assets is in the public interest; if approved, after 20 years since initiating its first pilot program, New Hampshire would take the final step in restructuring the competitive electricity markets.

precautions to ensure that no supplier has an unfair advantage." RSA 374-F:3, V. Both of these measures are the legislature's clear directives to the Commission to be vigilant against the exercise of vertical market power and the reintroduction of the pre-restructuring utility structure. Although the details of the mechanics of the EDCs' participation in the wholesale purchase and resale of natural gas capacity from the proposed pipeline are unknown, it is, nonetheless, clear that the overall scheme implicates the Restructuring Act's prohibition on EDC accumulation of vertical market power by allowing EDCs to reassume functional control over a critical aspect of generation, i.e., fuel transportation to generation facilities.

However structured, such a proposal would effectively grant EDCs market influence over both gas capacity for generators and distribution of the resulting generation. This approach harkens back to the days of regulatory commission approval of cost-recovery and profits for vertically-integrated utilities, while at the same time harming companies that have invested — and continue to invest — in New Hampshire and the region without similar cost recovery guarantees. It would be patently unjust to undermine both the billions of dollars of new infrastructure proposed as well as the tens of billions of dollars in investments already made within the current competitive marketplace. That result is neither envisioned nor permitted by the Restructuring Act and would amount to a troubling regression toward the very vertically integrated electric market that the Restructuring Act was enacted to end. *See* RSA 374-F:3 Long-term capacity contracts by EDCs would not only unnecessarily and unduly disrupt the wholesale marketplace, but would also shift the risks associated with generation

development, including associated fuel supply and delivery infrastructure, from developers, who are best positioned to manage such risks, back to consumers.

IV. New Hampshire EDCs Lack Corporate Authority to Acquire Natural Gas Capacity

Staff's Memo also addresses whether EDCs have corporate authority under RSA 374-A to acquire gas capacity. RSA 374-A, defines a "domestic electric utility" as "an electric utility resident in, or organized under the laws of this state." RSA 374-A:1, II. Thus, all EDCs operating in New Hampshire would qualify as a domestic electricity utility. The statute, however, also defines "electric power facilities" as "generating units rated 25 megawatts or above and electric transmission facilities rated 69 kilovolts or above..." RSA 374-A:2 further states:

> Notwithstanding any other 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...shall have the following additional powers...
> I. To jointly or separately plan, finance, construct, operate maintain, use, share cost of, own, mortgage, lease, sell, dispose of or otherwise participate in ***electric*** *power facilities*, or portion 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 of services therefrom...
> RSA 374-A:2 (emphasis added).

From this statutory language, enacted more than 20 years prior to the Restructuring Act, Staff's Memo erroneously concludes that such corporate authority exists. That conclusion cannot be sustained.

At the time of adoption the statute encompassed electric power facilities that were still vertically integrated. While these statutory provisions could be read in isolation to

allow limited activities by EDCs, certainly they cannot now be read in a manner that would directly undermine the core goals and purposes of the Restructuring Act, once it was adopted in 1996. These statutory provisions cannot credibly be read in a manner that would permit the reintegration of the functions specifically separated by restructuring and the creation of a competitive market. Statutes should be read in harmony where possible, *Appeal of Northern New England Tele. Operations, LLC., 165 N.H 267, 271 (2012),* and it strains credulity to assert an interpretation that permits vertical reintegration of the very functions the legislature expressly separated in a comprehensive overhaul of the State's electric industry when it adopted RSA 374-F. To the extent that the two statutes cannot be interpreted harmoniously, the doctrine of implied repeal applies, and the later-enacted statute, the Restructuring Act, prevails. *See In re Regan*, 164 N.H. 1, 7 (2012) (implied repeal occurs when natural weight of all competent evidence demonstrates that purpose of new statute was to supersede former statute). The interpretation asserted in Staff's Memo is not only antagonistic to both the letter and the spirit of the Restructuring Act, but for the Commission to endorse such an interpretation would create a climate of uncertainty in the marketplace such that it would raise the question of what rational business would invest in New Hampshire.

Moreover, separate and apart from any statutory provisions prohibiting EDCs from entering into long-term gas capacity contracts, such activity is also contrary to the constitutional provision favoring free and fair competition. *See N.H. Const. Part II, art. 83.* In dismantling the monopolistic stronghold that investor-owned utilities enjoyed for decades in the state, the legislature also recognized that the transition to a competitive electricity market was consistent with Part II, art. 83 of the New Hampshire Constitution,

which provides in pertinent part that "[F]ree and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." N.H. Const. Part II, art. 83; RSA 374-F:1, II. Consistent with the constitutional mandate, the statute's intended purpose was to create and protect the competitive electricity markets in New Hampshire; it was not then, and cannot now be interpreted to extend to the development of natural gas infrastructure at odds with both statutory and constitutional requirements for open competition.

V. Authorizing EDCs to Enter into Long-Term Contracts for Gas Capacity Raises Serious Affiliate Transaction Concerns

Even assuming for the sake of argument that the Commission were to authorize EDC contracts for gas pipeline capacity, fundamental conflicts of interest potentially exist between EDCs and their affiliates that should be a cause of great concern for ratepayers and regulators. There is insufficient information regarding the specific structure of any interstate pipeline project, making it difficult for NEPGA to fully assess the issues that could be raised by affiliate participation. However, given that the Commission has, as recently as July 28, 2015, enacted stricter regulations on affiliate transactions in N.H. Admin. Rule Chapter 1200, it is clear that the Commission takes seriously its role of monitoring affiliate transactions in order to protect New Hampshire ratepayers. Although the details of any particular plan have not yet been laid out, careful consideration should also be given here, since the potential for affiliate relationships to exert control to steer certain projects towards completion, all to the potential risk and disadvantage of New Hampshire ratepayers certainly exists.

VI. New Hampshire Law does not Authorize EDCs to Recover the Costs Associated with Gas Capacity Contracts from Ratepayers

While New Hampshire statutes confer broad discretion to the Commission relative to the fixing of rates, contrary to the position asserted by Staff, the Commission lacks authority to approve such recovery through jurisdictional rates and tariffs. As the New Hampshire Supreme Court has stated, "[p]roperty not devoted to the delivery of energy to the consumer is not includable in rate base." *Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332, 354 (1979). Analysis under any of the statutes Staff suggests as possible paths for the authorization for rate recovery yields the same result: the connection between gas-capacity related costs is unrelated to the delivery of electricity, thus precluding any basis for recovery. Regardless of any impact such contracts may or may not have on wholesale electricity prices, such charges are unrelated to the provision of electric distribution services. Absent that connection, there can be no recovery.

Moreover, although not addressed in Staff's Memo, the federal Natural Gas Act and FERC regulations prohibit the apportionment of pipeline capacity on an "unduly discriminatory" basis. The pipeline must "allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of release."[4]

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[4] While not addressed in these comments, if approved by the Commission, the scheme to allow EDCs to enter into long-term contracts for gas capacity may raise serious issues of preemption under the Federal Power Act. While Staff's memo acknowledges this potentiality, it does not address it in any detail. *See* Staff Memo at 2. NEPGA asserts that the preemption issue is one that the Commission cannot simply consider for another day; it is an issue that must be given serious consideration in as part of any discussion on the authority to permit EDCs to contract of natural gas capacity. *See, e.g., PPL EnergyPlus,*

18 C.F.R. § 284.8(e). *See* 15 U.S.C. § 717(d); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1148-57 (D.C. Cir. 1996). Federal law prohibits the EDCs and interstate pipeline company from reserving capacity in the pipeline for the exclusive benefit of the EDCs' ratepayers. Any prospective purchaser can bid for the gas capacity, regardless of the fact that the EDCs' New Hampshire ratepayers will have funded the pipeline's construction or that the Commission may consider those ratepayers to be the intended beneficiaries.

The implications of this arrangement are troubling. EDC ratepayers, or some subset thereof, would be compelled to fund an expansion of fuel delivery capacity that is intended to benefit all ratepayers through lower electricity prices, but that additional capacity could be purchased by any other non-generator, including an LDC or a non-New Hampshire user, because the Commission does not have the legal authority to require generators to purchase capacity from the ratepayer-funded pipeline.

Equally if not more troubling, however, is that using ratepayers to fund the pipeline will, in effect, turn the ratepayer into a speculative investor, as if the project were a real estate venture or a security interest. Investment in a pipeline is far different from ratepayer-funded reconciliation, such as recoupment of the cost for upgrading transmission lines or other EDC-owned infrastructure. With this venture, the ratepayers would be forced to bear significant downside investment risk. While ratepayers will be called on to fund the pipeline, those ratepayers may not actually see any direct benefit. This is not only because the generators who supply their electricity may not choose to, or

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LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014); PPL EnergyPlus, LLC v. Solomon, 378 F.3d 303 (3rd Cir. 2014).

be able to, purchase or otherwise benefit from any incremental gas transportation created. It is also because as there is an inherently uneven market interference at play. Certain natural gas hubs will benefit from the proposed EDC-funded pipeline construction projects, but overall access to gas will not be evenly distributed throughout the State or the ISO region. In essence, while the Commission's objective is to benefit New Hampshire ratepayers, it is more likely to benefit the ratepayers of the other New England states who will enjoy the benefits of additional natural gas capacity without having to shoulder the costs. Even worse, New Hampshire ratepayers would be exposed to downside investment risk in the event pipeline gas becomes uneconomic in future.

VII. Wholesale Electricity and Natural Gas Prices Continue to be Competitive

NEPGA's initial comments in this dockets recounted the resiliency of the market in withstanding enormously challenging operating environments and driving competitive pricing. Natural gas supply expansion in the form of new pipeline capacity continues to be proposed and developed while increased shipments of liquefied natural gas (LNG) also continue to enter the markets. What has been most remarkable in 2015 is that the region has experienced three of the four lowest average price months for wholesale electricity since the ISO markets began in 2003. According to the ISO, "June's average real-time electric energy price of $19.61/MWh was nearly half the June 2014 average price of $37.92/MWh and nearly 23% lower than the previous record-low average monthly price of $25.39/MWh, recorded during March 2012." Particularly notable for this

docket, June 2015 also saw the lowest price for natural gas in ISO market history coming in at $1.63/MMBtu. [5]

There is no question that New England's energy markets are in a time of transition and yet for even in this period of flux to see the pricing experienced in 2015 is nothing short of remarkable. It is also in this environment that ISO-NE is seeing a record turnout of interest for new generation to participate in the upcoming forward capacity auction (FCA 10). New plant investments are being announced almost on a weekly basis.[6] Importantly, the 1,800 MW of plants that have been selected in recent capacity auctions as well as the ones attempting to bid into FCA 10 are doing so without subsidized long-term contracts. The market is working.

IX. Conclusion

NEPGA fundamentally disagrees with any conclusion that suggests that in order to mitigate wholesale and retail price volatility, EDCs should enter into long-term pipeline capacity contracts. NEPGA continues to believe that system reliability can and will be maintained through the competitive markets. Power generators will ultimately choose the most economic means to meet their performance obligations to the ISO and will make the appropriate fuel supply arrangements necessary to do so. Merchant generation across New England is growing and investing in a variety of ways to meet stringent new

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[5] http://isonewswire.com/updates/2015/7/15/wholesale-electricity-prices-and-demand-in-new-england.html

[6] See, e.g., recent announcements for generation facilities planned in New England: http://www.capecodtimes.com/article/20150716/NEWS/150719565; http://www.businesswire.com/news/home/20150715005919/en/GE-Signs-80M-Agreement-Emera-Energy-Pact#.VcC8vYsbCDU; http://www.providencejournal.com/article/20150731/NEWS/150739880;

performance obligations under changes to the wholesale capacity market rules that have recently been approved by FERC.

The Commission should not entertain any plan to allow EDCs to contract for natural gas capacity because: (i) it contravenes RSA 374-F regarding the authority of EDCs to participate in the generation business; (ii) it contravenes the limitations on the Commission's authority under RSA 374-F to allow the reintegration of generation and transmission and distribution functions; (iii) the myriad potential conflicts involving affiliate relationships and transactions; and (iv) it conflicts with sound public policy underlying the competitive electricity markets.

NEPGA looks forward to continuing to work closely with the Commission to ensure adherence to the principles endorsed by the Legislature in the Restructuring Act for the benefit of all New Hampshire ratepayers.

Respectfully submitted,

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