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NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION
IR 15-124
Investigation into Potential Approaches to Ameliorate
Adverse Wholesale Electricity Market Conditions in New Hampshire

COMMENTS OF CONSERVATION LAW FOUNDATION IN RESPONSE TO STAFF MEMORANDUM REGARDING GAS CAPACITY ACQUISITIONS BY N.H. ELECTRIC DISTRIBUTION UTILITIES

Conservation Law Foundation ("CLF") appreciates the opportunity to comment on Staff's memorandum of July 10, 2015 relative to gas capacity acquisitions by New Hampshire Electric Distribution Utilities ("EDCs"). In light of the clear, overarching purpose of New Hampshire's Electric Utility Restructuring law, RSA Chapter 374-F, and applicable rules of statutory interpretation, it is CLF's assessment that New Hampshire statutes would prohibit the acquisition of gas capacity by an EDC in the event of a hypothetical EDC petition, as contemplated in Staff's memorandum. As set forth below, CLF's analysis addresses the three issues identified in Staff's memorandum, in the sequence discussed therein.

Issue 1: Does the Electric Utility Restructuring statute (RSA Chapter 374-F) prohibit EDCs from acquiring gas capacity?

New Hampshire's Electric Utility Restructuring law is driven by the clear, unambiguous purpose of establishing competitive markets, premised on the unbundling of electric generation from transmission and distribution services, to the benefit of all consumers of electricity. *See* RSA 374-F:1.[1] Indeed, in furtherance of this purpose, the General Court recently enacted SB 221, enabling Public Service Company of New Hampshire ("PSNH") – with the Public Utilities Commission's approval and oversight, and with multiple parties reaching a settlement now under review in DE 14-238 – to proceed toward divestiture of its generating assets and to thereby complete restructuring in New Hampshire. The

[1] For example, RSA 374-F:1,I states:

> 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. The overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services.

overarching purpose of RSA Chapter 374-F, as well ongoing actions to separate electric generation from transmission and distribution, are essential to answering the question at issue.

RSA 374-F:3 enumerates a series of restructuring policy principles. RSA 374-F:3,III, addressing the regulation and unbundling of services and rates, states in pertinent part: "Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future." Recognizing the importance of distributed generation, RSA 374-F:3,III then proceeds to describe an important exception regarding the separation of electric generation from transmission and distribution, stating that "distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs." RSA 374-F:3,III.

Staff's memorandum appropriately recognizes RSA 374-F:3,III as critical to determining whether New Hampshire EDCs can acquire gas capacity. Staff's Memorandum at 2. Importantly, regarding the above-stated exception to the separation of generation from transmission and distribution, Staff's memorandum states: "An acquisition of gas capacity, of the type referred to by certain stakeholders, most certainly does not qualify as a small-scale distributed generation resource." *Id.* CLF agrees. Staff's memorandum then proceeds to state that the restructuring principle set forth in RSA 374-F:3,III could be interpreted as prescriptive, and overriding other enumerated restructuring principles, and that the Commission "could reasonably conclude" that EDC acquisition of gas capacity for electricity generation "would violate the principle of separation of distribution and generation functions, and is therefore prohibited." Staff Memorandum at 2.

Based on the clear purpose of New Hampshire's restructuring law, *supra*, and the unambiguous and critically important restructuring principle of separating generation from transmission and distribution, analysis of this issue must go no further than RSA 374-F:3,III. To the extent Staff's memorandum suggests other restructuring principles in RSA 374-F:3 could potentially be invoked to allow an EDC to purchase gas capacity in contravention to the separation of generation from transmission and distribution, CLF disagrees. Rather, such a result would contravene the plain language and clear intent of the restructuring statute and, in light of the statutory expression of just one exception to the separation of electric generation from transmission and distribution as set forth in RSA 374-F:3,III, would violate the established rule of construction "expressio unis est exclusion alterius," meaning "the expression of one thing in a statute implies the exclusion of another." *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (*quoting St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12 (1996).

CLF also disagrees with the suggestion that RSA 374:1 – a statute enacted in 1951 establishing a general duty for public utilities – could be invoked to overcome the more recent, more specific principle of separating generation from transmission and distribution as adopted in New Hampshire's restructuring law in 1996. Rather, such a result would violate the well settled rules of statutory construction that, in the case of two conflicting

statutes, the more recently enacted statute, particularly when addressing more specific subject matter, supersedes the earlier one.[2]

Issue 2: Do New Hampshire EDCs have the corporate power under RSA Chapter 374-A, and allied statutes, to acquire gas capacity?[3]

For the reasons discussed above, New Hampshire's restructuring statute precludes the acquisition of gas by New Hampshire EDCs, thus precluding the need for analysis of Issue 2 identified in Staff's memorandum. However, to address the issues raised relative to Issue 2 in Staff's memorandum, CLF provides the following comments.

Staff's memorandum suggests that RSA 374-A:2, enacted in 1975, may provide corporate powers on the part of New Hampshire EDCs to acquire natural gas capacity. CLF disagrees.

First and foremost, such a result would violate the well-established rules of statutory construction discussed *supra.* *See* note 2. Alternatively, even if RSA 374-A:2 could be interpreted as still providing New Hampshire EDCs certain corporate powers relative to generation assets, it does not provide corporate powers relative to the purchase of natural gas for electric generation. According to RSA 374-A:1, "'Electric power facilities' means generating units rated 25 megawatts or above and transmission facilities rated 69 kilovolts or above planned to be placed in service in New England after June 24, 1975." Natural gas acquired as fuel for electric generation does not constitute an electric power facility within the meaning of RSA Chapter 374-A. Nor do natural gas pipeline facilities themselves constitute "electric power facilities" within the meaning of this Chapter.

For the above reasons, RSA Chapter 374-A does not establish corporate powers on the part of New Hampshire EDCs to acquire natural gas for generation purposes. Nor does RSA 374:57, enacted in 1989, provide a basis for such corporate powers. *See* note 2, *supra.*

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[2] As the New Hampshire Supreme Court has stated: "When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152 (1978) (*citing* C.D. Sands, Sutherland Statutes and Statutory Construction sec. 51.05 (4th ed. 1973). *See also In re N.H. Public Utilities Comm'n Statewide Elect. Utility Restructuring Plan*, 143 N.H. 233, 240-241 (1998) (citing the principles, in interpreting RSA 374-F and RSA 362-C:6, that "when conflict exists between two statutes, [the] later statute prevails" and that "when [the] natural weight of competent evidence shows that latter statute's purpose was to supersede former, [the] latter controls even absent explicit repealing language.") (citations omitted); *Appeal of Pennichuck Water* Works, 160 N.H. 18, 34 (2010) ("The Utilities' argument is also contrary to our well settled rule of statutory construction 'that in the case of conflicting statutory provisions, the specific statute controls over the general statute.'") (*quoting Appeal of Plantier*, 126 N.H. 500 (1985)).

[3] In these comments, CLF has adopted the language used in Staff's memorandum for purposes of framing the three issues under consideration. Accordingly, the term "allied statutes" is not CLF's. Nor does CLF agree that the various statutes discussed in Staff's memorandum are necessarily "allied" statutes.

Issue 3: Could New Hampshire EDCs recover the costs associated with gas capacity acquisition in rates under RSA Chapter 378 and allied statutes?[4]

As discussed above, New Hampshire restructuring law precludes New Hampshire EDCs from acquiring gas capacity. *See* discussions of Issues 1 and 2, *supra*. To address matters raised under Issue 3 of Staff's memorandum, CLF provides the following comments.

Staff's memorandum discusses various statutes as potentially providing New Hampshire EDCs the ability to recover costs associated with gas capacity acquisition from ratepayers. Staff's memorandum first identifies provisions within RSA Chapter 374-A as a potential basis for recovering costs through rates. *See* Staff Memorandum at 6. For the reasons discussed under Issue 2, *supra*, RSA Chapter 374-A is inapplicable and cannot be invoked as a basis for recovering gas acquisition costs through rates. The memorandum then discusses RSA 374:2 (a generic provision related to charges, enacted in 1951), RSA Chapter 378 (generally applicable to rates and charges), and RSA 374:3-a (a generic provision related to alternative forms of regulation, adopted in 1994), as providing potential grounds for New Hampshire EDCs to recover gas acquisition costs from ratepayers. *Id.* At 6-7. In light of well settled rules of statutory construction, these provisions do not, in the face of more recent and more substantively specific legislation (i.e., New Hampshire's restructuring law and the associated separation of generation from transmission and distribution services), authorize New Hampshire EDCs to recover costs related to generation (e.g., gas acquisitions) from ratepayers. *See* note 2, *supra.*

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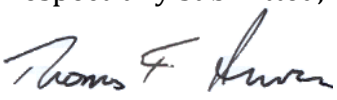
CLF reiterates its prior comments on the matter of federal preemption and urges Staff to specifically address that matter as well as part of its threshold legal analysis.

Again, CLF appreciates the opportunity to review Staff's July 10, 2015 memorandum and to provide these comments.

Respectfully submitted,



Tom Irwin
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Dated: August 10, 2015

[4] *See* note 3, *supra*.