

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE PUBLIC UTILITIES COMMISSION

IN RE: REVIEW OF PRECEDENT AGREEMENT
WITH ALGONQUIN GAS TRANSMISSION LLC FOR
CAPACITY ON THE ACCESS NORTHEAST PROJECT
PURSUANT TO R.I.G.L §39-31 *et seq.*

DOCKET NO. 4627

THE DIVISION OF PUBLIC UTILITIES & CARRIERS
REPLY TO THE CONSERVATION LAW
FOUNDATION'S MOTION TO DIMISS

Now comes the State of Rhode Island Division of Public Utilities and Carriers (Division) and hereby submits its reply to the Conservation Law Foundation's Motion to Dismiss. The grounds for said reply are set-forth in the accompanying supporting memorandum.

Division of Public Utilities and
Carriers
By its attorney,

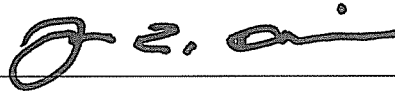


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Dated: September 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2016 that I transmitted an electronic copy of the within Reply to the attached service list and to Luly Massaro, Commission Clerk by electronic mail and one set hand delivered.



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**THE DIVISION OF PUBLIC UTILITIES & CARRIERS REPLY
TO THE CONSERVATION LAW
FOUNDATION'S MOTION TO DISMISS**

I. TRAVEL OF CASE

On June 30, 2016 the Narragansett Electric Company d/b/a National Grid filed with the State of Rhode Island Public Utilities Commission (Commission), a petition for review and approval (Petition) of a Precedent Agreement with Algonquin Gas, LLC (Agreement) for Capacity on the Access Northeast project (ANE) pursuant to R.I. Gen. Laws § 39-31-6 of the Act entitled Affordable Clean Energy Security Act (ACES).¹

On August 22, 2016, the Conservation Law Foundation (CLF) filed pursuant to Public Utilities Commission's Rules of Practice and Procedure (Rules) Rule 1.15 a Motion to Dismiss the instant Petition.

¹ R.I. Gen. Laws § 39-31-6 (a) (v) provides *inter alia* that (a) Pursuant to the procurement activities in § 39-31-5, the public utility company that provides electric distribution as defined in § 39-1-2(12), as well the public utilities that distribute natural gas as provided by § 39-1-2(20) are authorized to voluntarily file proposals with the public utilities commission for approval to implement these policies and achieve the purposes of this chapter. The company's proposals may include but are not limited to the following authorizations: (v) Subject to review and approval of the public utilities commission, to enter into long-term contracts for natural gas pipeline infrastructure and capacity that are commercially reasonable and advance the purposes of this chapter at levels beyond those commitments necessary to serve local gas distribution customers, and may do so either directly or in coordination with other New England states and instrumentalities; utilities; generators; or other appropriate contracting parties.

The linchpin of the CLF motion to dismiss here is that the Massachusetts Supreme Judicial Court in the matter of *ENGIE Gas & LNG, LLC v. Dept. of Pub. Utilities*,² 475 Mass. 191 (2016), (*Engie*) held that G. L. c. 164 § 94A did not grant enabling authority for the Massachusetts Department of Public Utilities (DPU) to approve a long term contract for gas capacity entered into by an electric distribution company. CLF posits that as a result of the Massachusetts Supreme Judicial Court's (SJC) holding in *Engie supra* that "[i]n effect, Massachusetts' non-participation cripples the project. Since the ANE project cannot proceed, the Petition must be dismissed".³ For the following reasons the Division asserts that CLF's Motion to Dismiss which is based primarily on the Massachusetts SJC's decision in *Engie*, is not controlling in the instant matter as the State of Rhode Island has enacted the Affordable Clean Energy Security Act found at R.I. Gen. Laws § 39-31-1 et seq. The ACES statute provides the enabling authority for the Commission to approve *inter alia* long term contracts for natural gas pipeline infrastructure and capacity entered into by the electric distribution company that are commercially reasonable. *See* R.I. Gen. Laws § 39-31-6 (a) (1) (v).

A. GENERAL POWERS OF THE PUBLIC UTILITIES COMMISSION

The Rhode Island Public Utilities Commission is a creature of statute, R. I. Gen. Laws § 39-1-1 which provides in pertinent part that:

(b) It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies,

² (and another case) Conservation Law Foundation vs. Department of Public Utilities.

³ *See* CLF's Memorandum in Support of its Motion to Dismiss Narragansett Electric Company d/b/a National Grid's Request for Approval of gas Capacity Contract and Cost recovery, p.6, August 22, 2016.

without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy.

(c) To this end, there is hereby vested in the public utilities commission and the division of public utilities and carriers the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce energy, communication, and transportation services and water supplies for the purpose of increasing and maintaining the efficiency of the companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair, and adequate administrative procedures and remedies, and by securing a judicial review to any party aggrieved by such an administrative proceeding or ruling.

R. I. Gen. Laws § 39-1-7 provides *inter alia* that:

The commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may make orders and render judgments and enforce the same by any suitable process issuable by the superior court.

The Public Utilities Commission (Commission) possesses broad powers and latitude in the conduct of its affairs including during the hearing process. R.I. Gen. Laws § 39-1-38 provides in pertinent part:

The provisions of this title shall be interpreted and construed liberally in aid of its declared purpose. The commission and the division shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power which may be proper or necessary to effectuate their purposes.⁴

⁴ See In Re: Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1244 (R.I. 2000), where the Rhode Island Supreme Court, reviewed and affirmed the authority of the Commission to grant intervention to the Town of New Shoreham and Interstate Navigation, a competitor of Island Hi-Speed Ferry, LLC's according to Rule 1.13 of the *Public Utilities Rules of Practice & Procedure*.⁴ The *Island Hi-Speed Ferry* Court harkened back to a prior decision which held "[t]his court is ill equipped to second-guess the multifarious nature of commission decisions."⁴ The Court further

**B. ENUMERATED POWERS OF THE PUBLIC UTILITIES COMMISSION
PURSUANT TO AFFORDABLE CLEAN ENERGY SECURITY ACT (ACES) R.I. GEN.
LAWS § 39-31-1 ET SEQ.**

The State of Rhode Island Public Utilities Commission is vested with specified powers to review among other things long term contracts for natural gas pipeline infrastructure and capacity that are commercially reasonable pursuant to R.I. Gen. Laws § 39-31-6 (a) (1) (v). The Rhode Island General Assembly (General Assembly) in 2014 enacted the Affordable Clean Energy Security Act (ACES) R.I. Gen. Laws § 39-31-1 et seq. recognizing the need for regional solutions to specific needs of Rhode Island's electricity consumers and those of the New England region.

The General Assembly made specific findings that formed the basis for the enactment of ACES stating as follows:

The general assembly finds and declares:

- (1) The state and New England face significant short and long-term energy system challenges that may undermine the reliable operation of the bulk electric system and spur unsustainable levels of price volatility, and that these challenges may have a substantial impact on energy affordability for ratepayers and undermine the economic competitiveness of our state by serving as a detriment to capital investment and job growth; and
- (2) Planned retirements of fossil-fuel, nuclear, and other electric generators, along with lack of new interstate natural gas pipeline infrastructure and capacity into the region, may exacerbate these conditions; and
- (3) Rhode Island benefits from a holistic energy strategy that pursues both local investment in clean energy resources such as energy efficiency and renewable distributed generation and regional investment in energy infrastructure projects that strengthen system

found that “[i]t is in light of this limitation to our power of review that we consider the Commission's grant of intervenor status to the Town and Interstate.”

reliability and diversify our supply portfolio, and the combination of these strategies advance our economic development interests and environmental quality; and

(4) Rhode Island is committed to the increased use of no and low carbon energy resources which diversify our energy supply portfolio, provide affordable energy to consumers, and strengthen our shared quality of life and environment, and that new energy infrastructure investments may help facilitate the development and interconnection of such resources; and

(5) Rhode Island is part of an integrated, regional energy system and addressing these challenges, while meeting state policy goals, requires a coordinated, multi-state approach built upon collaboration and utilizing appropriate expertise and stakeholder processes of regional entities including, but not limited to, the New England State's Committee on Electricity, ISO-NE and NEPOOL that takes into account affordability, energy security, reliability, fuel diversity, and environmental sustainability.⁵

The stated purpose of ACES is:

(1) Secure the future of the Rhode Island and New England economies, and their shared environment, by making coordinated, cost-effective, strategic investments in energy resources and infrastructure such that the New England states improve energy system reliability and security; enhance economic competitiveness by reducing energy costs to attract new investment and job growth opportunities; and protect the quality of life and environment for all residents and businesses;

(2) Utilize coordinated competitive processes, in collaboration with other New England states and their instrumentalities, to advance strategic investment in energy infrastructure and energy resources provided that the total energy security, reliability, environmental, and economic benefits to the state of Rhode Island and its ratepayers exceed the costs of such projects, and ensure that the benefits and costs of such energy infrastructure investments are shared appropriately among the New England States; and

(3) Encourage a multi-state or regional approach to energy policy that advances the objectives of achieving a reliable, clean energy future that is consistent with meeting regional greenhouse gas reduction goals at reasonable cost to ratepayers.⁶

⁵ See R.I. Gen. Laws § 39-31-1.

⁶ See R.I. Gen. Laws § 39-31-2.

It is against this legislative back drop that the instant petition has been filed specifically pursuant to R.I. Gen. Laws § 39-31-6 (a) (1)(v) which provides in pertinent part:

(a) Pursuant to the procurement activities in § 39-31-5, the public utility company that provides electric distribution as defined in § 39-1-2(12), as well the public utilities that distribute natural gas as provided by § 39-1-2(20) are authorized to voluntarily file proposals with the public utilities commission for approval to implement these policies and achieve the purposes of this chapter. The company's proposals may include but are not limited to the following authorizations:

(1).....

(v) Subject to review and approval of the public utilities commission, to enter into long-term contracts for natural gas pipeline infrastructure and capacity that are commercially reasonable and advance the purposes of this chapter at levels beyond those commitments necessary to serve local gas distribution customers, and may do so either directly or in coordination with other New England states and instrumentalities; utilities; generators; or other appropriate contracting parties.

Turning now to the CLF Motion to Dismiss the instant petition. CLF asserts here that the SJC's decision in *Engie* affirms as a matter of law that electricity ratepayer-backed natural gas capacity contracts are antithetical to the principles of electricity restructuring.⁷ The Division here will not second guess the Massachusetts SJC's reasoning for its ruling that ratepayer-backed long term contracts for firm natural gas capacity is contrary to the general laws of the Commonwealth of Massachusetts, nor does it have to and neither does the Commission in the instant case. The Division asserts however that the SJC made its determination in *Engie* based upon the Massachusetts legislature's intent for its enacting restructuring laws and exemptions thereto.

⁷ See CLF's Memorandum in Support of its Motion to Dismiss Narragansett Electric Company d/b/a National Grid's Request for Approval of gas Capacity Contract and Cost recovery, p.4, August 22, 2016.

The General Assembly in Rhode Island has however spoken and it clearly differs with opinion of SJC in Massachusetts, as Rhode Island passed the ACES statute, knowing that it had one of the first restructuring acts enacted in the country.⁸ Notably, the Rhode Island General Assembly in a 2006 amendment to R. I. Gen. Laws § 39-1-1 made a pivotal finding with respect to restructuring as follows:

The legislature further finds and declares as of 2006:

- (1) **That prices of energy, including especially fossil-fuels and electricity, are rising faster than the cost of living and are subject to sharp fluctuations,** which conditions create hardships for many households, institutions, organizations, and businesses in the state;
- (2) That while **utility restructuring has** brought some benefits, notably in transmission and distribution costs and more efficient use of generating capacities, **it has not resulted in competitive markets for residential and small commercial industrial customers, lower overall prices, or greater diversification of energy resources used for electrical generation;**
- (3) That the state's economy and the health and general welfare of the people of Rhode Island benefit when energy supplies are reliable and least-cost; and
- (4) **That it is a necessary move beyond basic utility restructuring in order to secure for Rhode Island, to the maximum extent reasonably feasible, the benefits of reasonable and stable rates,** least-cost procurement, and system reliability that includes energy resource diversification, distributed generation, and load management.⁹

A review of R. I. Gen. Laws § 39-1-1 (d) 7 clearly demonstrates that the Rhode Island's General Assembly considered the effects of utility restructuring on Rhode Island and its electricity consumers and it concluded that the restructuring act here should be malleable in nature, in order to maintain the ability to respond to the state's energy issues. The enactment of the ACES statute

⁸ See R.I. Gen. Laws § 39-1-1 (d); *see also* P.L. 1996, ch. 316, § 1, entitled An Act Relating to the Utility Restructuring Act of 1996.

⁹ See R. I. Gen. Laws § 39-1-1 (d) 7; enacted P.L. 2006, Ch. 236, § 5.

was clearly enacted as a response and a means to a solution to the energy issues recognized in the 2006 findings of the General Assembly codified in R. I. Gen. Laws § 39-1-1 (d) 7. Finally, there can be no doubt that that the ACES statute provides the Commission with the legal authority to carry out the review of the instant petition of National Grid.

The next important issue for consideration is whether the continued review of National Grid's Petition here remains practical at this point in time, in light of recent in the developments in Massachusetts and at the Federal Energy Regulatory Commission (FERC). It is clear that new legislation will be required in Massachusetts before a project such as ANE can go forward. There is great uncertainty whether such legislation could or would be passed in Massachusetts in the near future. Even if such legislation is passed in a timely manner, there is no guarantee that the exact same ANE project would emerge. A new RFP could be required and new projects could be bid, including a revised project to replace ANE. There is simply no assurance or even likely outcome that the current contract pending before this Commission will remain as is. If this docket were to continue, it is possible, perhaps even very likely, that a different contract will emerge in other states. There is little point in continuing to evaluate a project that will likely be reconfigured, and then have a new project also evaluated.

On August 31, 2016, FERC issued a ruling in docket RP16-618¹⁰. In this docket, Algonquin sought a waiver from FERC's gas pipeline capacity release rules. Algonquin requested authority to direct the ANE pipeline capacity solely to electric generators. FERC denied the requested broad waiver to allow the direction of ANE capacity to electric generators. FERC did state that EDCs could release ANE capacity to an asset manager, so long

¹⁰ *Algonquin Gas Transmission, LLC*, 156 FERC 61,151 (2016).

as that asset manager complied with existing capacity release rules. Page 18 of the FERC order states as follows: “However, as discussed above, we have rejected Algonquin’s proposed blanket exemption from bidding for capacity releases by EDCs and asset managers to natural gas-fired generators. Therefore, any asset manager to whom an EDC releases its capacity must comply with all applicable capacity release bidding requirements.” FERC did allow Algonquin to propose a different plan. On page 11, the order states that “The determination here is without prejudice to Algonquin developing other more targeted, justified proposals for consideration by the Commission.” Thus it is virtually certain that the proposed plan to have the ANE capacity used by electric generators, which is an integral part of the ANE project, will change from the current plan before this Commission.

FERC issued another order on August 31, 2016 that is relevant to this proceeding. In docket EL16-93¹¹, a complaint was filed with FERC asserting that having EDCs pay for gas pipeline capacity dedicated for use by electric generators constituted a manipulation of wholesale electric markets. The Complaint sought changes in the ISO-NE tariff that would mitigate the effect of the ANE project to lower wholesale electric prices. FERC declined to decide this complaint, but rather dismissed the complaint as not being ripe for decision. On page 10, FERC stated that “Accordingly, we find that the Complaint is not ripe, and we therefore dismiss it without prejudice.”¹² It is unclear when such an issue would be ripe for a decision. The worst possible outcome for Rhode Island would be to have the ANE project built, have Rhode Islanders be required to pay their share of the project’s costs, and then have ISO-NE tariff provisions negate the benefits. The issue of whether the ANE contract constitutes market

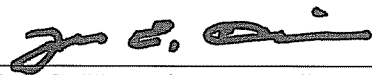
¹¹ *NextEra Energy Resources, LLC and PSEG Companies v. ISO-New England*, 156 FERC 61,150 (2016).

¹² *Id.*

manipulation or whether it is a valid exercise of states' rights needs to be determined before the project is approved and construction begins, unless a conditional order were to be entered by the Rhode Island PUC with respect to this issue. This uncertainty with respect to the ISO- New England tariff is compounded by the Massachusetts SJC's decision and the FERC ruling regarding the capacity release rules waiver in 156 FERC 61,151.

For the foregoing reasons, given the uncertainty surrounding the ANE project, it is highly likely that the ANE project and its associated contract will be changed. It does not make sense to proceed with an evaluation of and decision on the current contract before this Commission. Therefore, even though the Commission might be legally authorized to review and decide on this contract, the Division supports the CLF motion provided however, such dismissal should be without prejudice.

Division of Public Utilities and
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By its attorney,



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Dated: September 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2016 that I transmitted an electronic copy of the within Reply to the attached service list and to Luly Massaro, Commission Clerk by electronic mail and one set hand delivered.



Docket No. 4627 – National Grid - Gas Capacity Contract and Cost Recovery Service
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