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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2017-007

Appeal of Algonquin Gas Transmission, LLC; Appeal of Public Service Company of New Hampshire d/b/a Eversource Energy

APPEAL PURSUANT TO RSA 541:6 and RSA 365:21
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

BRIEF OF NEXTERA ENERGY RESOURCES, LLC

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QUESTION PRESENTED

Did the New Hampshire Public Utilities Commission ("Commission" or "PUC") correctly conclude that the Public Service Company of New Hampshire d/d/a Eversource Energy ("Eversource" or "PSNH") proposal to enter into a 20-year contract with Algonquin Gas Transmission, LLC ("Algonquin") for interstate pipeline transportation and storage services to provide natural gas capacity to electric generation facilities (the "Capacity Contract") *and* recover the net costs of the Contract through a new electric retail distribution rate tariff is not legally permissible under New Hampshire law?

CONSTITUTIONAL PROVISIONS

Part II, Article 83 of the New Hampshire Constitution.[1]

STATUTES INVOLVED IN THE CASE

RSA 374-F:1 and RSA 374-F:3. Also addressed are RSA 293-A:3.02, RSA 362-C:6, RSA 374:1 and 2, RSA 374-A, RSA 374-A:2, RSA 378:37 and 38, RSA 374:57, and RSA 541:13.[2]

STATEMENT OF THE CASE

On February 18, 2016, Eversource filed a Petition with the Commission ("Petition") requesting approval of: (1) the Capacity Contract: a 20-year interstate pipeline transportation and storage contract to provide natural gas capacity for use by electric generation facilities in the Independent System Operator of New England ("ISO-NE") region; (2) an Electric Reliability Service Program to set parameters for the release of capacity and the sale of liquefied natural gas

[1] A verbatim copy of Part II, Article 83 of the New Hampshire Constitution is included in the Addendum ("Add.") at 33.

[2] Although there are several other statutes involved in the appeal, which are cited, the two primary ones, RSA 374-F:1 and RSA 374-F:3, are included verbatim in the Addendum. Add. at 34-38.

supply available by virtue of the Capacity Contract; and (3) a Long-Term Gas Transportation and Storage Contract retail distribution tariff, which provides for the recovery of the costs associated with the Capacity Contract.[3] On March 24, 2016, the Commission issued an Order of Notice which divided its review of the petition into two phases, with the first involving the Commission's review of briefs submitted by Eversource, Algonquin, Commission Staff and other parties regarding whether the Capacity Contract was allowed under New Hampshire law. In that Order of Notice, the Commission further indicated that if it were to rule against the legality of the Capacity Contract, it would dismiss the Petition. NextEra Energy Resources, LLC ("NEER"), along with a number of other parties, was granted leave to intervene in the proceeding.

Eversource, Algonquin and a number of other parties, including NEER, submitted briefs to the Commission. The Commission's analysis of the briefs, the Restructuring Statute and other New Hampshire regulatory statutes involved the application of the following cannons of statutory interpretation and construction: (i) the plain and ordinary meaning doctrine; (ii) the principle that statutes should be interpreted in the context of the overall statutory scheme and not in isolation; (iii) the principle that, where reasonable, two statutes should be interpreted in harmony; (iv) the principle of giving effect to all words in the statute and not presuming that the legislature enacted superfluous or redundant words; (v) the principle that when two statutes conflict, the specific controls over the general; and (vi) the principle that when two statutes conflict, the later enacted one controls over the earlier enacted one. *Appeal of Old Dutch Mustard Co.*, 166 N.H. 501, 506 (2014); *State v. Collyns*, 166 N.H. 514, 518 (2014); *Appeal of Pennichuck Water Works*, 160 N.H. 18, 34 (2010); *Appeal of Plantier*, 126 N.H. 500, 510 (1985); and *Board of Selectmen v. Planning Bd.* 118 N.H. 150, 152 (1978).

[3] Brief of Appellant Eversource at 6-7, footnote 4.

Specifically, the Commission found that: (1) the Capacity Contract was a component of generation services in that it would acquire natural gas capacity for use by natural gas-fired generators; and (2) the net costs associated with the Capacity Contract would be recovered from PSNH's distribution ratepayers. Commission Order No. 25,950 at 9 (October 6, 2016) ("Order No. 25,950"), Add. at 39. Based on these undisputed facts, the Commission found that the Petition and the Capacity Contract were "fundamentally inconsistent" with the separation and unbundling requirements set forth in RSA 374-F:1, I and RSA 374-F:3, III ("Separation and Unbundling Requirements") of the Electric Utility Restructuring statute, RSA Ch. 374-F (the "Restructuring Statute"). *Id.* at 34-38.

The Commission further analyzed whether any other New Hampshire law on a stand-alone basis would support the Eversource proposal, and, if so, how any such statute was affected by the subsequent enactment of the Restructuring Statute, or otherwise not applicable to or supportive of the Petition. Order No. 25,950 at 10-14, Add. at 48-52. Based on this additional statutory analysis, the Commission found that no other New Hampshire law authorized the approval of the Petition. Therefore, the Commission dismissed the Eversource Petition as impermissible under New Hampshire law.

In response to Motions to Reconsider filed by Eversource and Algonquin, the Commission affirmed Order No. 25,950, concluding that Eversource and Algonquin failed to present any grounds for it to reconsider its decision. Order No. 25,970 (December 7, 2016). The Appellants appealed to this Court and submitted their initial briefs on May 30, 2017.

STATEMENT OF THE FACTS

Over twenty years ago, the State of New Hampshire fundamentally restructured its electric utility industry. In 1996, the State enacted the Restructuring Statute to extract and unbundle the services and costs associated with the generation of electricity from the costs and services associated with transmission and distribution, and to subject the generation of electricity to the competitive market (*i.e.*, the Separation and Unbundling Requirements). Prior to the enactment of the Restructuring Statute, PSNH was a vertically integrated monopoly providing integrated services and rates for all the services associated with the generation of electricity at power plants to the delivery of that electricity over transmission and distribution wires to its customers.

The Restructuring Statute specifically focused on the extraction or separation of the services and rates associated with the generation of electricity from the vertically integrated electric model, and subjecting the generation of electricity to the competitive market. To effectuate this separation of generation from transmission and distribution, the Restructuring Statute required the unbundling of the cost components associated with the generation of electricity from the rates charged to customers for the transmission and distribution of electricity. Thus, the Restructuring Statute included the Separation and Unbundling Requirements of RSA 374-F:1, I and RSA 374-F:3, III to ensure that electric utilities, such as PSNH, could no longer require their transmission and distribution customers to pay for, and, thus, bear the risks associated with, the generation of electricity.[4] To this end, the Restructuring Statute also

[4] This followed the 1988 PSNH filing of a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code. This was done as a means of salvaging PSNH's investment in the Seabrook Station Nuclear Generating Plant. In 1989, the legislature enacted RSA 362-C which authorized the Commission to determine whether it would be consistent with the public good to implement a rate agreement entered into by the State of New Hampshire and Northeast Utilities to resolve the bankruptcy. Upon approval of the rate agreement by the Commission, PSNH customers experienced a seven year fixed rate period, from June 1, 1990 to May 31, 1997, which included rate increases during that period of 5.5 percent each year for PSNH customers.

implemented customer choice to empower distribution customers to select their own generation supplier, as an alternative to PSNH supplying them electricity. While RSA 374-F has been amended over the years, the amendments have not changed the fundamental purpose of the law.

STATEMENT OF INTEREST

NEER was an active party in the underlying Commission proceeding, including submitting legal briefs supportive of the Commission's ultimate decision. NEER's interest is substantial as any decision of the Court will impact NEER affiliate assets in New England.

NEER is a Delaware limited liability company, and is an indirect, wholly-owned subsidiary of NextEra Energy, Inc. It is a national renewable energy marketing and development company that owns and operates over 19,000 megawatts of electric generating capacity in 29 states and Canada. NEER's generation fleet includes wind, solar, natural gas, and nuclear energy generating assets. In New England, NEER generation assets include the Seabrook Nuclear Generating Station (owned by NEER affiliate NextEra Energy Seabrook, LLC, which has a controlling ownership interest in the plant), the gas or oil-fired combined cycle generating facility in Bellingham, Massachusetts (50% ownership interest), and the oil-fired Wyman generating facilities in Yarmouth and South Portland, Maine. NEER is also the owner of a number of utility scale solar facilities currently under development in Connecticut, Maine, New Hampshire, and Vermont. As a wholesale power marketer, NEER sells wholesale generating capacity and energy to utilities, retail electricity providers, power cooperatives, municipal electric providers, and large industrial companies in vertically integrated and restructured electric utility markets throughout the nation.

Given the breadth of NEER's generating assets in New Hampshire and New England, along with its experience in vertically integrated and restructured electric utility markets, NEER

provides insight and experience to the history and current status of electric utility restructuring in New Hampshire, and its interests will be directly affected by this decision.

SUMMARY OF THE ARGUMENT

In 1996, the State of New Hampshire enacted the Restructuring Statute to separate the generation of electricity from the transmission and distribution of electricity, and subject generation to the competitive market. In so doing, the legislature explicitly stated in RSA 374-F:1, II of the Restructuring Statute that subjecting generation to the competitive market advances the directives of Part II, Article 83 of the New Hampshire Constitution ("Free 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."). Thus, to advance this Constitutional provision and effectuate the separation of generation services and costs from distribution and transmission services and rates, the Restructuring Statute directed the Commission to implement the Separation and Unbundling Requirements in RSA 374-F:1, I and RSA 374-F:3, III. *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 673 (2001), quoting *In re N.H.P.U.C.*, 143 N.H. at 236 (1998) ("The restructuring statute directed the PUC to design a restructuring plan 'in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition.'" – citing to RSA 374-F:1, I).

Contrary to the express language in the New Hampshire Constitution and the Separation and Unbundling Requirements, Eversource's Petition sought Commission approval to re-integrate generation services with regulated distribution services, and to re-bundle the costs associated with a generation service with distribution rates. Indeed, there is no dispute that the Capacity Contract with Algonquin is for interstate pipeline transportation and storage services to

provide natural gas capacity to natural gas-fired electric generation facilities in the ISO-NE region. Appellants' Joint Appendix at 202. There is also no dispute that the Petition requests authority to pass on the net costs associated with PSNH's share of the Capacity Contract to its distribution customers. *Id.* at 202-203, 211.

Applying its expertise to these undisputed facts, the Commission concluded that the Capacity Contract was a component of generation services, and, therefore, the net costs of this service could not legally be bundled with distribution rates:

> . . . the Capacity Contract is a component of 'generation services' under RSA 374-F:3, III, which requires unbundled, clear price information for the cost components of generation, transmission, and distribution. The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies. Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal.

Order No. 25,950 at 9, Add. at 47.

The Commission's decision is deserving of deference. *Appeal of Bretton Woods Tel. Co.*, 164 N.H. 379, 386 (2012); *Appeal of Old Dutch*, 166 N.H. 501, 506 (2013); *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012). Given its experience and expertise in the regulation of PSNH and other utilities, including the reliability of its wires business, the Commission has been entrusted by the legislature to administer the Restructuring Statute and the interdependent policy principles set forth in RSA 374-F:3 to regulate the restructured electric utility industry. *See* RSA 374-F:1, III. Therefore, the Commission's conclusion that on its face the Capacity Contract was a component of generation service under RSA 374-F:3, III is a correct interpretation of the law based on a finding well within its expertise, and, thus, deserving of deference.

Similarly, the Commission ruling that Eversource's Petition requesting recovery of the net costs of a generation service – the Capacity Contract – in distribution rates is in conflict with

the Separation and Unbundling Requirements is deserving of deference. First of all, the Commission's decision is required by the Court's rulings in *Appeal of Campaign for Ratepayers Rights* and *In re N.H.P.U.C.* confirming that the Commission was directed by the legislature to extract and unbundle generation services and costs from distribution services and rates. Secondly, the Commission decision is squarely consistent with the express language of the Restructuring Statute and its discretionary authority set forth in the statute to implement the Separation and Unbundling Requirements.

Simply put, it is the generation of electricity, and not its transmission and distribution, that requires the purchase of fuel to generate electricity. In a restructured electric industry, as specified in the Restructuring Statute, an electric distribution company, like PSNH, has no need and no authority to acquire fuel necessary to provide electric generation. Although the Appellants contend that natural gas generation is needed to help the reliability of the electric transmission and distribution system, there is no express language in the Restructuring Statute that exempts the imposition of the Separation and Unbundling Requirements for a generation service proposed to assist system reliability.

In sum, the Commission's decision is well-reasoned and consistent with the express language of the Restructuring Statute, while Appellants offer an overly selective reading of the Restructuring Statute. The Appellants' arguments are unavailing and fail to satisfy their burden of proof that the Commission's decision is clearly unreasonable or unlawful. Accordingly, the Commission's decision to dismiss the Eversource Petition should be affirmed.

ARGUMENT

I. Standard of Review

The party seeking to set aside a Commission decision or order has the burden of demonstrating that the decision or order is clearly contrary to law or unreasonable or unlawful. RSA 541:13; *Appeal of Northern New England Tele. Operations, LLC*, 165 N.H. 267, 270 (2013); *Appeal of Bretton Woods Tel. Co.*, 164 N.H. at 386. The review of the Commission's findings of fact are presumed to be *prima facie* lawful and reasonable. *Id.* Further, judicial deference is afforded the Commission's ". . . discretionary choices of policy . . . [when] the legislature has entrusted such policy determination to the informed judgment of the PUC and not to the preference of the reviewing courts." *Appeal of Bretton Woods Tel. Co.*, 164 N.H. at 386. Similarly, it is well established that while the Court is the final arbiter of the intent of the legislature expressed in a statute, deference is afforded to the Commission's interpretation and construction of statutes it has been entrusted by the legislature to administer. *Appeal of Old Dutch*, 166 N.H. at 506, quoting *Appeal of Town of Seabrook*, 163 N.H. at 644 (". . . it is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference . . . .").

The Court's deference to the Commission, however, is not absolute. *Id.* The Commission is afforded deference when its interpretation is consistent with the express statutory language and the purpose the law is intended to serve. *Id.* Deference is not afforded, however, if the Commission's interpretation ". . . clearly conflicts with the express statutory language . . . or if it is plainly incorrect." *Appeal of Town of Seabrook*, 163 N.H. at 644.

II. The Appellants have failed to meet their burden

The Appellants have failed to show that the Commission's decision to dismiss the Eversource Petition is inconsistent with the express language of the Restructuring Statute or any other law, or that the decision is plainly incorrect. Instead, the Appellants offer a selective and alternative reading of the Restructuring Statute and certain other laws. For example, the Appellants ask the Court to read the Restructuring Statute as supportive of the Capacity Contract, because hypothetically certain isolated words and phrases of the Statute can be read as supportive of the Contract. Brief of Appellant Algonquin at 2-8; Brief of Appellant Eversource at 3-8, 12, 13. However, none of these words or phrases or citation of other laws authorizes PSNH to re-bundle and re-integrate generation services and their costs with distribution services and rates. Nor is there any law that provides for an exemption to the Separation and Unbundling Requirements because of a theoretical proposal to reduce electric distribution rates or assist system reliability. Tellingly, in order to bolster what amounts to a weak statutory interpretation argument the Appellants have resorted to citing factual information that is not in the record, and, therefore, irrelevant to the Court's determination in this case.[5]

In contrast, the Commission's administration of the Restructuring Statute is consistent with the Court's recognition that the Commission was directed by the legislature to impose the Separation and Unbundling Requirements of RSA 374-F:3, III and is consistent with the express

[5] Although the Appellants concede that the question before the Court is one of law (Brief of Appellant Algonquin at 13; Brief of Appellant Eversource at 19-20), they inappropriately included extra-record statements, documents from other Commission dockets, studies and news articles in their Briefs and Joint Appendix in contradiction to RSA 541:14, as the Appellants have not satisfied the threshold for consideration of this information. *See, e.g.*, Joint Appendix at 284, 508 and 510. While NEER will not specifically address these extra-record materials as they are inappropriately proffered, it wishes to point out to the Court that this information was not in the record of the underlying docket, and the information is not necessary or appropriate for the Court to consider in resolving the question of law at issue in this case. Therefore, consistent with RSA 541:14, the extra-record statements should be stricken and disregarded. Further, there are only two undisputed facts set forth in Eversource's Petition that are needed to decide this case: (1) that the Capacity Contract would provide natural gas capacity for use by electric natural-gas fired generation facilities in the ISO-NE region; and (2) that the net costs of the Contract would be recovered by electric distribution ratepayers.

language of the Statute. Accordingly, the Appellants' arguments fail to show that the Commission's administration of that Restructuring Statute is clearly unreasonable or unlawful.

III. The Commission correctly decided that the Eversource Petition was "fundamentally inconsistent" with the Restructuring Statute

In 1996, the State Legislature enacted the Restructuring Statute. Prior to the Restructuring Statute, PSNH was a vertically integrated electric utility providing all the generation, transmission, and distribution services to its customers in a bundled or packaged rate structure. *Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 673. As a result of the enactment of the Restructuring Statute, the Commission was directed to extract electric generation services and rates from the vertically integrated utility model, unbundle those services and rates, and subject the generation of electricity to the competitive market – *i.e.,* the Separation and Unbundling Requirements. *Id.*, quoting *In re N.H.P.U.C.*, 143 N.H. at 236 ("The restructuring statute directed the PUC to design a restructuring plan 'in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition.'"). Although the Court's recognition of the directive to impose the Separation and Unbundling Requirements was in the early stages of electric utility restructuring, this directive is applicable twenty years later because the Commission continues to be charged with the implementation of the Separation and Unbundling Requirements ". . . in regulating a restructured electric utility industry." RSA 374-F:1, III. Therefore, the Commission appropriately applied the Separation and Unbundling Requirements to Eversource's Petition.

In Order No. 25,950, the Commission's examination of the Restructuring Statute properly began with the express language of the first of three "purpose" provisions, RSA 374-F:1, I, which reads, in part:

> 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. (emphasis added).

The plain and ordinary meaning of this statute is clear, logical, and profound. The first three sentences of RSA 374-F:1, I set forth three premises for restructuring: (1) to reduce customer costs through competitive markets; (2) to achieve a more efficient industry structure and regulatory framework that reduces customer costs while maintaining reliable electric service and with minimum adverse environmental impact; and (3) to increase customer choice and the development of competitive markets as key elements. RSA 374-F:1, I is clear that achievement of these key elements "will require" the following action: the ". . . unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services."

RSA 374-F:3, III (entitled the "Regulation and Unbundling of Services and Rates,) is an extension of the separation and unbundling directive in RSA 374-F:1, I, with additional specificity on how to effectuate the directive:

> . . . services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, 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 which should remain regulated for the foreseeable future.

Together, RSA 374-F:1, I and RSA 374-F:3, III complement each other and comprise the mandated Separation and Unbundling Requirements. The interrelated relationship between RSA

374-F:1, I and RSA 374-F:3, III was recognized by the Court when it concluded that the Restructuring Statute only deregulated generation services and rates, and not distribution and transmission. *In re N.H.P.U.C.*, 143 N.H at 242.

Therefore, given the Court's recognition of the Separation and Unbundling Requirements as a directive to the Commission, the Commission correctly considered whether the Eversource Petition was legally permissible in light of these Requirements. In so doing, the Commission concluded that:

> . . . *RSA 374-F:3, III directs the restructuring of the industry*, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services. . . . the proposal brought forward by Eversource is fundamentally inconsistent with the purposes of restructuring. Specifically, *we conclude that the Capacity Contract is a component of 'generation services' under RSA 374-F:3, III, which requires unbundled, clear price information for the cost components of generation, transmission, and distribution.* The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies. Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and *conflict with the functional separation principal.* (emphasis added).

Order No. 25,950 at 9, Add. at 47.

The Commission's finding that the Petition was in conflict with the Separation and Unbundling Requirements follows the parallel construction between RSA 374-F:1, I and RSA 374-F:3, III and the Court's recognition of the directive nature of the Requirements; it is also well within the Commission's discretionary authority. The express language in RSA 374-F:1, III shows that the legislature entrusted the Commission with the administration of the interdependent policy principles set forth in RSA 374-F:3, including RSA 374-F:3, III, as guides for the Commission to regulate PSNH in the ". . . restructured electric utility industry." Within the context of its discretionary authority, the Commission used its informed judgment to determine that RSA 374-F:3, III was directly implicated by the Eversource Petition, while other

policy principles were not. *Appeal of Bretton Woods Tel. Co.,* 164 N.H. at 386 ("... judicial deference [carries] particular significance where ... discretionary choices of policy are at issue and the legislature has entrusted such policy determinations to the informed judgment of the PUC and not to the preference of the reviewing courts."). Accordingly, the Commission's decision to apply the Separation and Unbundling Requirements of RSA 374-F:3, III to dismiss the Eversource Petition was: (1) required by the Court's ruling in *In re N.H.P.U.C.* that the Requirements are a directive to the Commission on how to regulate PSNH; and (2) well within the Commission's discretionary authority to use its informed judgment to determine which of the interdependent policy principles of RSA 374-F:3 were implicated by the Petition.

Contrary to the Court's ruling in *In re N.H.P.U.C* and the Commission's discretionary authority in RSA 374-F:1, III, the Appellants maintain that the Commission erred in finding that RSA 374-F:3, III was a directive because the statute used the word "should" instead of "must" or "shall." Brief of Appellant Algonquin at 17, note 8; Brief of Appellant Eversource at 21-22. Eversource also maintains that RSA 374-F:1, I only applies to "centralized generation services" while RSA 374-F:3, III refers to "components of generation," and, therefore, even if RSA 374-F:1, I can be read as a separation directive, the Commission's reliance on RSA 374-F:3, III is misplaced. Brief of Appellant Eversource at 13. These positions highlight the Appellants' selective and isolated reading of certain words in an attempt to thwart the express language of the Restructuring Statute.

The Appellants' pointing to the use of "should" in RSA 374-F:3, III fails to recognize the parallel construction between that statute and RSA 374-F:1, I, and RSA 374-F:1, I's use of the phrase "will require." Such a selective reading is inconsistent with well-established cannons of statutory construction that instruct that the Restructuring Statute should be read as a whole and

not to nullify its purpose. *State Employees Assoc. of N.H. v. N.H. Div. of Personnel, 158 N.H. 338, 343, 345 (2009)*, quoting *Appeal of City of Portsmouth, 151 N.H. 170, 174 (2004)* and *Merrill v. Great Bay Disposal Serv.*, 125 N.H. 540, 543 (1984) ("'We interpret statutes not in isolation, but in the context of the overall statutory scheme'" . . . . "We also note the 'elementary principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words.'"); *Appeal of Ashland Electric Dept.*, 141 N.H. 336, 340 (1996), quoting *State v. Kay*, 115 N.H. 696, 698 (1975) ("[i]t is not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute."). In addition to running counter to these cannons, Appellants' position also ignores the common understanding of the word "should," which is ". . . to express duty, obligation, propriety, or expediency." *Webster's Third International Dictionary* at 2104 (2002). Consistent with the cannons of statutory construction and the common understanding of the word "should," the Commission construed the Restructuring Statute as a whole and consistent with its directive language in RSA 374-F:1, I and RSA 374-F:3, III, as recognized in *In re N.H.P.U.C.* Therefore, the Appellants' arguments attempting to discount the directive nature of RSA 374-F:3, III because of its use of the word "should" is unavailing.

Equally unpersuasive is Eversource's position that only RSA 374-F:1, I may be construed as a directive and not RSA 374-F:3, III, because the former uses the term "centralized generation services" and the latter uses the term "components of generation." Neither term is specifically defined in the Restructuring Statute, and, thus, there is no statutory definition that supports Eversource's argument. Further, Eversource's reading of these statutory terms violates a well-established cannon of statutory construction that disfavors an isolated reading over reading the

statute within the context of its purpose and as a whole. *Appeal of Ashland Electric Dept.*, 141 N.H. at 341 (1996) (quoting Judge Learned Hand, "'it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that the statutes always have some purpose or object to accomplish.'" The Court in *Appeal of Ashland Electric Dept.* further concluded that "'we must keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases . . . .'" *Id.*, quoting *N.H. Div. of Human Services v. Hahn*, 133 N.H. 776, 778 (1990)).

Consistent with this cannon of statutory construction, a reading of the Restructuring Statute as a whole shows that the RSA 374-F:1, I reference to "centralized generation services" is used in the context of minimum level of separation: ". . . key elements in the restructured industry . . . will require . . . *at least* functional separation of centralized generation services from transmission and distribution." (emphasis added). Similarly, RSA 374-F:3, III includes a minimum level of separation: "Generation services should be . . . *at least* functionally separated from transmission and distribution services . . . ." (emphasis added). Thus, both statutory provisions are qualified by the phrase "at least," which eliminates any meaningful distinction, and, therefore, provides for an unambiguous reading of the two statutes as setting forth the same Separation and Unbundling Requirements consistent with carrying out the purpose of the Statute which is to extract generation services and subject them to the competitive market. Further, the use of "components of generation services" in RSA 374-F:3, III specifies how the costs of generation must be unbundled from the rates of transmission and distribution, thus effectuating the separation requirements of RSA 374-F:1 and RSA 374-F:3, III in rates. Consequently, a reading of these statutes as a whole and as paralleling and complementing each other is not

impacted by Eversource's pointing to the word "centralized" in RSA 374-F:1, I. Accordingly, Eversource's attempt to limit the directive nature of the cost component unbundling requirement specified in RSA 374-F:3, III or discredit the Commission's administration of the provision is unavailing.

Moreover, the propriety of the Commission's imposition of the Separation and Unbundling Requirements is confirmed by its reliance on the second purpose provision, RSA 374-F:1, II:

> A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: 'Free 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.' Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

Order No. 25,950 at 8, Add. at 46. The plain language of this provision explicitly ties the movement to competitive markets for the generation of electricity to the New Hampshire Constitution's directive to ensure the inherent right of the people to free and fair competition. In the context of this inherent right, the statutory provision also sets forth specific expectations for the competitive markets of suppliers of electricity, which includes "actual electricity generators." RSA 374-F:2, II.

The import of this Constitutional mandate on the regulation of entities, including PSNH, has been long-recognized by the Court. For example, the Court upheld the Commission's ruling that PSNH does not hold an exclusive electric utility franchise, in part, because the Commission's ruling was consistent with carrying out this Constitutional directive:

> Our cases interpreting the role of the PUC in conjunction with New Hampshire's constitutional directive favoring free enterprise also shed light on the legal status of electric utility monopolies. Part II, article 83 of the New Hampshire

> Constitution sets out the State's policy on free enterprise and provides in part: 'Free 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.'
>
> *   *   *
>
> Although not dealing directly with electric utilities, both *New England Household* and *Omni* stand for the proposition that legislative grants of authority to the PUC should be interpreted in a manner consistent with the State's constitutional directive favoring free enterprise. Limitations on the right of the people to 'free and fair competition,' N.H. CONST. pt. II, art. 83, must be construed narrowly, *with all doubt resolved against the establishment or perpetuation of monopolies.* (emphasis added).

Appeal of Public Serv. Co. of N.H, 141 N.H. 13, 18-19 (1996).

As with the ruling that PSNH does not hold an exclusive franchise, the Commission's decision that the Separation and Unbundling Requirements required dismissal of the Eversource Petition advances the Constitutional mandate of "free and fair competition" and ". . . with all doubt resolved against the establishment or perpetuation of monopolies." It is undisputed that the Capacity Contract was proposed to provide interstate pipeline transportation and storage services to provide natural gas capacity to natural gas-fired electric generation facilities in the ISO-NE region. Appellants' Joint Appendix at 202. It is also undisputed that the proposal included the recovery of the net costs of the Capacity Contract from electric distribution ratepayers. *Id.* at 202-203, 211. Therefore, the Capacity Contract is specifically limited to providing service to only one type of competitor in the wholesale generation market – natural gas-fired generators – through a pipeline owned in part by a PSNH affiliate, and it is to do so at the net expense of PSNH regulated distribution ratepayers. Simply put, PSNH proposes to use its monopoly status with distribution customers to fund the injection of natural gas fuel into the wholesale competitive generation market, and, therefore, the Commission properly rejected it:

> The proposal before us would have Eversource purchase long-term gas pipeline capacity to be used by gas-fired electric generators, and include the net costs of its purchases and sales in its electric distribution rates. That proposal, however, goes 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. *It would allow Eversource to reenter the generation market for an extended period, placing the risk of that decision on its customers.* We cannot approve such an arrangement under existing laws. (emphasis added).

Order No. 25,950 at 15, Add. at 53.

The Commission's ruling illuminates how the Eversource Petition is inconsistent with the mandate of free and fair competition in Part II, Article 83 of the New Hampshire Constitution in that PSNH would use its monopoly in the distribution wires business to have those ratepayers incur the risk and pay for its venture back into the generation market. The Petition's conflict with this Article of the New Hampshire Constitution is exacerbated by PSNH's favoring of one type of competitor – natural gas-fired generators – in the wholesale market. Consequently, the Petition's conflict with Part II, Article 83 of the New Hampshire Constitution and RSA 374-F:1, II confirms the reasonableness of the Commission's imposition of the Separation and Unbundling Requirements in RSA 374-F:1, I and RSA 374-F:3, III in dismissing the Eversource Petition.

In sum, in contrast to the Commission's reading of the Restructuring Statute as a whole and consistent with its express language, as recognized in *In re N.H.P.U.C*, the Appellants selective and alternative reading of the Statute fails to show that the Commission's decision to dismiss the Eversource Petition was unreasonable or unlawful.

A. The Commission properly considered the overriding purpose and the interdependent policy principles of the Restructuring Statute

The Appellants disagree with the Commission's conclusion that the overriding purpose of the Restructuring Statute is the introduction of competition into the generation of electricity. Instead, the Appellants contend the overriding purpose of the Restructuring Statute is the reduction of electric rates. The Appellants further argue that the Commission ignored fourteen of the fifteen interdependent policy principles set forth in RSA 374-F:3. Brief of Appellant Algonquin at 15-18; Brief of Appellant Eversource at 12, 14. In significant part, the Appellants' arguments are unavailing for the reason stated above: the legal propriety of the Commission's decision to dismiss the Eversource Petition is consistent with the Court's rulings on the directive nature of the Separation and Unbundling Requirements and the Commission's authority to administer the Restructuring Statute in accordance with its express language.

Accordingly, the following Commission conclusion on the overriding purpose of the Restructuring Statute was reasonable and lawful:

> . . . the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity. The competitive generation market is expected to produce a more efficient industry structure and regulatory framework, by shifting the risks of generation investments away from customers of regulated EDCs toward private investors in the competitive market. The long-term results should be lower prices and a more productive economy.
>
> *　　　　*　　　　*
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> . . . the overriding principle of restructuring . . . is to harness the power of competitive markets to reduce costs to consumers by separating unregulated generation from fully regulated distribution.

Order No. 25,950 at 8-9, 15, Add. at 46-47, 53. As noted above, the Restructuring Statute was enacted to transform the electric utility industry in New Hampshire from a vertically integrated electric industry (in which generation was regulated and bundled with transmission and

distribution) to an industry in which generation was separated and subject to market forces. *Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 673. Thus, the Commission's conclusion that introducing competition to the generation of electricity was the overriding purpose is well within the context of extracting generation from the vertically integrated electric model and subjecting it to the competitive market.

Nonetheless, against this clear mandate, the Appellants maintain that it is necessary to read the Statute as singularly focused on the reduction of electric rates. Although one of the goals of the Restructuring Statute is to produce lower electric rates, it is to do so through subjecting generation and its related services to the competitive market. *Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 673, quoting *In re N.H.P.U.C.*, 143 N.H. at 236 ("The restructuring statute directed [that] '. . . electric generation services and rates would be extracted from the traditional regulatory scheme . . . and subjected to market competition' . . . [and that] The goal of restructuring was to 'create competitive markets that [would] produce lower prices for all customers than would have been paid under the [then-] current regulatory system.'"). Put simply, there would have been no electric utility restructuring, pursuant to the Restructuring Statute, without the extraction of generation and subjecting it to the market. Hence, the restructuring of what had been a vertically integrated utility industry by subjecting generation to competition was the clearly articulated policy that RSA 374-F advanced. *See State Employees Assoc. of N.H. v. N.H. Div. of Personnel*, 158 N.H. 338, 343 (2009), quoting *Saragham v. Mt. Cranmore Ski Resort*, 152 N.H. 399, 401 (2005) ("'Our goal is to apply statutes . . . in light of the policy sought to be advanced by the entire statutory scheme.'"). Therefore, the Commission's decision to dismiss the Eversource Petition because it violated the Separation and

Unbundling Requirements is supported by the Commission's discernment that the overriding purpose of the Restructuring Statute was the introduction of generation to competition.

Similarly, the Commission's weighing of the interdependent policy principles and its decision to impose the Separation and Restructuring Requirements of RSA 374-F:3, III on the Eversource Petition (Order No. 25,950 at 8-9, Add. at 46-47) has already been shown to be consistent with: (1) the directive from the legislature to impose the Separation and Unbundling Requirements (*Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 673, quoting *In re N.H.P.U.C.*, 143 N.H. at 236); and (2) the express language in RSA 374-F:1, III providing the Commission with the discretion to use the interdependent policy principles as guides in regulating PSNH in a restructured electric industry.[6] On the latter point, there is no statutory language dictating that the Commission analyze each of the interdependent policy principles against the Eversource Petition; to the contrary, RSA 374-F:1, III expressly states that the principles are guides for the Commission, and, therefore, the Commission has the discretion to use the guides, as needed, to administer the Restructuring Statute. Further, as explained above, the Court's ruling in *Appeal of Bretton Woods Tel. Co.*, 164 N.H. at 386 supports that the Commission's weighing and administration of the policy principles, including the imposition of the Separation and Unbundling Requirements in RSA 374-F:3, III, is deserving of significant deference. Thus, the fact that the Commission used its informed judgment to focus on the one interdependent policy principle most directly implicated, and cross-referenced in many of the other principles, was reasonable and consistent with the express language of the Restructuring

[6] Further, even a cursory review of the interdependent policy principles shows that there is a focus on subjecting generation to the competitive market which can only be achieved by the separation of generation from distribution services and costs. For example, Principle I (System Reliability) – to ensure system reliability in a restructured industry; Principle II (Customer Choice) – "Allowing customers to choose among electric suppliers will help ensure fully competitive and innovative markets."; Principle III (Regulation and Unbundling of Service and Rates) – "Generation services should be subject to market competition . . . and at least functionally separate from transmission and distribution services . . . ." Many of the other policy principles contain similar references that highlight the primary importance of competition. Add. at 35-38.

Statute. Accordingly, Appellants again fail to meet their burden to show that the Commission's decision was clearly unreasonable or unlawful, because the decision is consistent with the express language of RSA 374-F:3, III and the Court's rulings.

B. The Commission correctly ruled that the Capacity Contract is a component of generation service

The Appellants maintain that even if the Commission correctly concluded that the Restructuring Statute's overriding purpose is the introduction of competition to the generation of electricity and requires the imposition of the Separation and Unbundling Requirements, the Commission erred in finding the Capacity Contract is a component of generation service. According to the Appellants, since the Capacity Contract is not a generation service, the Restructuring Statute does not implicate the Contract. Brief of Appellant Algonquin at 18-20; Brief of Appellant Eversource at 13, 18, 23-25. Notwithstanding this position, the Appellants concede ". . . that increasing the supply of natural gas capacity to generators was a purpose of the ANE Contract . . . ." (Brief of Appellant Eversource at 23) and that "[the Capacity Contract is] a mechanism by which firm natural gas transmission capacity would be made available to generators." Brief of Appellant Algonquin at 19. Further, the Eversource Petition is replete with statements on how the services provided by the Capacity Contract will be used by generators. *See, e.g.,* Appellants' Joint Appendix at 202 (". . . providing natural gas capacity for use by electric generation facilities . . . .") and at 203 ("The ANE project is designed to provide increased natural gas deliverability to the New England region to support electric generation, including most directly, the gas-fired electric generating plants . . . ."). Against these undisputed facts, Eversource nevertheless contends that: "The ANE Contract is not a 'component of

generation services' as it does not require or result in Eversource engaging in the production, manufacturing or generation of electricity." Brief of Appellant Eversource at 13.

The Appellants' position, however, does not hold up to logic and a common understanding of the functional elements that are required to generate electricity as compared with delivering it to the customer. It is undisputed that natural gas-fired generators require natural gas fuel to generate electricity. Fuel and the generation of electricity are, therefore, inseparable, as separating one from the other results in an inability to generate electricity. It is further undisputed that the services under the Capacity Contract are not needed for the functional operation of transmission or distribution wire services that take the electricity from the generator and deliver it to the customer. Consistent with this common understanding, and its own expertise informed from regulating the cost components and services of PSNH, the Commission correctly concluded:

> . . . that the *Capacity Contract is a component of 'generation services'* under RSA 374-F:3, III, which requires unbundled, clear price information for the cost components of generation, transmission, and distribution. *The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies*. Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal. (emphasis added).

Order No. 25,950 at 9, Add. at 47. The Commission's ruling that the Capacity Contract is a component of generation services was based on undisputed facts presented in the Petition and its informed judgment of those facts as they apply to the Restructuring Statute; therefore, its decision on whether the Capacity Contract is a generation service is correct and deserving of deference. *Appeal of Bretton Woods Tel. Co.*, 164 N.H. at 386, 389 (affording substantial

deference to Commission's finding that a statute was not competitively neutral).[7] Accordingly, against the common understanding of how electricity is generated and the Commission's informed judgment on this subject, the Appellants' arguments are unavailing.

C. The legislative history confirms the Commission's decision

The Appellants proffer legislative history to claim that the legislative intent of the Restructuring Statute was primarily focused on reducing electric rates and encouraging "a viable range of suppliers." Brief of Appellant Algonquin at 19; Brief of Appellant Eversource at 19-21. At the same time, Appellants argue the statutes at issue are clear and should be interpreted consistent with the plain language doctrine. *Id.* at 13; *Id.* at 19-20. They cannot have it both ways. *See, e.g., Petition of Malisos*, 166 N.H. 726, 729 (2014); *Pennelli v. Town of Pelham*, 148 N.H. 365, 368 (2002); *State v. Whittey*, 149 N.H. 463, 467 (2003) (Legislative history is only consulted when the language of the statute is ambiguous.)

Yet, even if the statutes were unclear, a review of the legislative history of the Restructuring Statute confirms that House Bill 1392 (which became the Restructuring Statute) was focused on a fundamental structural change to the vertically integrated electric utility industry that existed in New Hampshire, a change that would subject the generation of electricity

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[7] The Commission's ruling is also supported by the Massachusetts Supreme Judicial Court's review of the Capacity Contract. Similar to the Commission, the Massachusetts Court concluded that

> . . . the department itself has recognized that fuel procurement and planning is an integral component of the generation business, as evidenced by its exemption of electric distribution companies from § 69I. Indeed, by some estimations, fuel-related costs constitute seventy-five per cent of a natural gas-fired plant's generation costs. 3 World Scientific Handbook of Energy 72 (G.M. Crawley ed., 2013) . . . . We agree with the plaintiffs that if the restructuring act does not allow electric distribution companies to finance investments in electric generation, it cannot be reasonably interpreted to permit those companies to invest in infrastructure unrelated to electric distribution service.

Engie Gas & LNG, LLC v. Department of Public Utilities, 475 Mass. 191, 209; 56 N.E.3d 740, 754-755 (2016). Although the Massachusetts Supreme Judicial Court decision is not dispositive of the issue in New Hampshire, the Massachusetts Supreme Judicial Court's ruling reinforces the reasonableness of the Commission conclusion that the Capacity Contract is a component of generation services under the Restructuring Statute.

to competition. Take, for example, the comments of Representative Clifton Below, one of the principal sponsors of House Bill 1392:[8]

> [HB 1392] is the bill to restructure the New Hampshire electric utility industry to *provide retail competition for electricity generation* and streamlined regulation for the remaining monopoly functions of distribution and transmission.... We are the first legislative body in the Unites States to vote on a comprehensive set of principles and policies to restructure the electric utility industry and implement full customer choice of electricity generation suppliers.
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> * * *
>
> It means you will see a lot more components on your electric bill and that the *transmission and distribution functions will be separated from generation* and they [transmission and distribution] will continue as natural monopolies for the foreseeable future.... (emphasis added).

The legislative call for subjecting generation to the competitive market was reiterated during the House and Senate consideration of the Bill.[9] Accordingly, contrary to Appellants' position, the legislative history confirms that the purpose of restructuring was the extraction of generation services and costs from transmission and distribution services and rates, and subjecting generation to the competitive market. Thus, the Commission appropriately applied the Separation and Unbundling Requirements to dismiss Eversource's Petition.

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[8] *State of New Hampshire Journal of the House of Representatives containing the Recall Session of November 1, 1995 and the 1996 Session January 3, 1996 through June 13, 1996*, Remarks of Representative Below at 351, 353 (February 1, 1996) (hereinafter "1996 House Journal"), Add. at 58, 60.

[9] *State of New Hampshire Senate Journal*, Remarks of Senator Keogh at 26, Add. at 64 (Jan. 11, 1996) (hereinafter "1996 Senate Journal") ("I agree with Senator Shaheen that there seems to be a fair amount of consensus, in fact, widespread consensus, that bringing about competition in the electric utility industry is something that we should all do."); *1996 Senate Journal*, Remarks of Senator Cohen at 29, Add. at 67 (Jan. 11, 1996) ("It is appropriate to authorize the PUC to take action to bring about competition."); *House Science, Technology & Energy Committee Public Hearing on HB 1392*, Remarks of Senator Barnes, Joint Appendix at 64 (Jan. 9, 1996) (hereinafter "Committee Hearing on HB 1392") ("[(HB 1392)] establishes the principles by which New Hampshire will move to a competitive electric market and requires all electric utilities to submit rate restructuring plans.... And when we achieve competition, we can begin to provide the consumers of our state the rate relief they are demanding and rightly deserve."); Committee Hearing on HB 1392, Remarks of Senator Cohen, Joint Appendix at 83 ("We need competition now.").

IV. The Commission correctly found that no other New Hampshire statute authorizes the approval of the Eversource Petition

The Commission's review of Eversource's Petition included ". . . whether any . . . statutes standing alone would support the Eversource proposal, and, if so, how those statutes are affected by the subsequent enactment of the Restructuring Statute." Order No. 25,950 at 10, Add. at 48. This review included a number of statutes enacted to regulate PSNH as a vertically integrated utility, which was prior to the Restructuring Statute's sweeping restructuring of the electric utility industry in New Hampshire. Based on this review, the Commission concluded that there was no New Hampshire statute that provided a legal basis for the approval of the Eversource Petition. *Id.*

The Appellants take issue with the Commission's analysis of these other statutes: (1) RSA 374:57 (enacted in 1989) authorizes Eversource to enter into the Capacity Contract; (2) RSA 374-A (enacted in 1975) continues to apply to electric distribution companies like PSNH; (3) RSA 378:37 and 38 (enacted in 1990) continue to require Eversource to plan for energy supply resources; (4) RSA 374-A:2 (enacted in 1975) authorizes Eversource to own or otherwise participate in electric power facilities; (5) RSA 374:1 and 2 mandate that public utilities provide reasonably safe and adequate service; and (6) RSA 293-A:3.02 (7) (enacted in 1992) generally authorizes a public utility to exercise authority as a business corporation in New Hampshire. (Collectively, these statutes are herein referred to as "Pre-Restructuring Laws"). Brief of Appellant Algonquin at 20-25; Brief of Appellant Eversource at 10-11, 15-17, 25-32. The Appellants' arguments that these statutes, which predate RSA 374-F, supersede or override the more specific and later-enacted Restructuring Statute are without merit.

First, there is no plain language reading of the Pre-Restructuring Laws that would authorize PSNH's re-entering the generation market through the Capacity Contract *and*

recovering of the net costs of the Contract from its distribution ratepayers. Second, the Pre-Restructuring Laws can be consistently construed with the Restructuring Statute. Third, even if the Pre-Restructuring Laws are read to be in conflict with the Restructuring Statute, that statute prevails as it is later in time and it addresses the subject matter with specificity. *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 282-283 (1988).

The Pre-Restructuring Laws are either general grants of authority, definitional provisions, or related to performing a regulatory task (*e.g.,* filing of a least cost integrated resource plan). None of the Pre-Restructuring Laws authorize the re-bundling of generation services with distribution services in a post restructuring regulatory regime, nor do they authorize PSNH to recover a component of generation services in distribution rates. Therefore, on their face, these Laws do not authorize Eversource to re-enter the generation market to contract for interstate pipeline transportation and storage services in order to provide natural gas capacity to natural gas-fired electric generation facilities *and* to recover the net costs of these services in its regulated distribution rates.

Furthermore, Pre-Restructuring Laws and the Restructuring Statute can be consistently construed. In *In re N.H.P.U.C.*, the Court held that RSA 362-C:6 (enacted in 1989), which pertained to the reorganization of PSNH after its bankruptcy, could be construed consistently with the Restructuring Statute, provided that the Commission only award PSNH stranded costs that comported with the standard set forth in the RSA 374-F:4, V and VI of the Restructuring Statute. Similarly, the Pre-Restructuring Laws can be read as consistent with the Restructuring Statute, provided that they are read to comport with the Separation and Unbundling Requirements of RSA 374-F:1, I and RSA 374-F:3, III. Hence, even if these statutes could be read as not prohibiting Eversource from entering into a generation service contract, such as the

Capacity Contract, the Restructuring Statute clearly prohibits PSNH from recovery of the net costs associated with the Contract in its distribution rates. Therefore, a reading of the Pre-Restructuring Laws in light of the Separation and Unbundling Requirements in the same manner that RSA 362-C:6 was read in conjunction with the Restructuring Statute in *In re N.H.P.U.C.*, shows that the Commission correctly found that none of the Laws provide legal authority for the approval of the Eversource Petition.

Finally, even assuming the Pre-Restructuring Laws and the Restructuring Statute are in conflict, the application of the cannons of statutory construction would require that the later in time and more specific Restructuring Statute control. *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 281-284 (The later in time prohibitions in the anti-CWIP statute controlled over the earlier in time general ratemaking statute).[10] Thus, applying the holding in *Petition of Public Service Co. of N.H.* requires that the later in time and more specific Restructuring Statute controls over the earlier in time Pre-Restructuring Laws. One, the Restructuring Statute, with particularity, regulates PSNH as a restructured electric utility, including the imposition of the Separation and Unbundling Requirements. Two, none of the earlier in time Laws even indirectly regulate the post-restructured PSNH with specificity on what services may and may not be unbundled or integrated. Instead, the earlier in time Pre-Restructuring Laws address either other matters altogether or the ability of PSNH to contract in a general manner. Accordingly, consistent with the holding in *Petition of Public Service Co. of N.H.*, the specific prohibitions in

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[10] Although the Appellants complain that the Commission's ruling involves the implicit repeal of the Pre-Construction Laws, for the reasons provided herein, the Court can find the Restructuring Statute controls without reaching the question of whether the Pre-Restructuring Laws were implicitly repealed. *Public Service Company of New Hampshire v. Lovejoy*, 114 N.H. 630, 633-634 (1974). In the event the Court finds it necessary to reach the issue of implicit repeal, the same reasoning that the Restructuring Statute controls applies and shows that implicit repeal of the Pre-Restructuring Laws to the extent they conflict with the Restructuring Statute is appropriate.

the Separation and Unbundling Requirements control over the Pre-Restructuring Laws, and require the dismissal of the Eversource Petition.

CONCLUSION

The Appellants failed to meet their burden of proof that the Commission's decision to dismiss the Eversource Petition was clearly unreasonable or unlawful. The Commission correctly read and interpreted the clear language and purpose of the restructuring law mandating the separation of generation from transmission and distribution services, and in so doing honored the New Hampshire Constitution and the intent of the New Hampshire Legislature. In rejecting Eversource and Algonquin's attempt to obtain approval of a generation services contract that was outside the bounds of a restructured electric distribution company's authority, the Commission exercised its long-standing expertise and appropriately interpreted a law it was charged to administer. Accordingly, the Court should accord deference to the Commission's interpretation and the Commission's decision to dismiss the Eversource Petition should be affirmed.

STATEMENT CONCERNING ORAL ARGUMENT

NEER requests oral argument and requests that NEER be allowed to share oral argument with the other Appellees. Mr. Patch will argue for NEER.

Respectfully submitted,

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Date June 29, 2017

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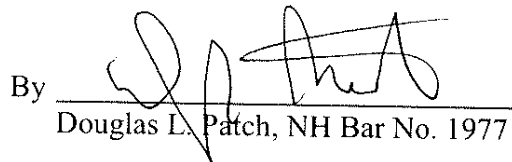
Certificate of Service

I hereby certify that 2 copies of the foregoing Brief have on this 29th day of June 2017 been sent by first class mail, postage prepaid, and electronic mail to all counsel of record.

By 
Douglas L. Patch, NH Bar No. 1977

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ADDENDUM TO BRIEF OF NEXTERA ENERGY RESOURCES, LLC

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State Constitution > **Encouragement of Literature, Trades, Etc.**

Established October 31, 1783 Effective June 2, 1784 As Subsequently Amended and in Force January 2007

[Art.] 83. [Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc.] Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. Free 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. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

June 2, 1784
Amended 1877 prohibiting tax money from being applied to schools of religious denominations.
Amended 1903 permitting the general court to regulate trusts and monopolies restraining free trade.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 374-F
ELECTRIC UTILITY RESTRUCTURING

Section 374-F:1

374-F:1 Purpose. –

I. 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.

II. A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: "Free 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." Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

III. The following interdependent policy principles are intended to guide the New Hampshire public utilities commission in implementing a statewide electric utility industry restructuring plan, in establishing interim stranded cost recovery charges, in approving each utility's compliance filing, in streamlining administrative processes to make regulation more efficient, and in regulating a restructured electric utility industry. In addition, these interdependent principles are intended to guide the New Hampshire general court and the department of environmental services and other state agencies in promoting and regulating a restructured electric utility industry.

Source. 1996, 129:2, eff. May 21, 1996.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 374-F
ELECTRIC UTILITY RESTRUCTURING

Section 374-F:3

374-F:3 Restructuring Policy Principles. –

I. System Reliability. Reliable electricity service must be maintained while ensuring public health, safety, and quality of life.

II. Customer Choice. Allowing customers to choose among electricity suppliers will help ensure fully competitive and innovative markets. Customers should be able to choose among options such as levels of service reliability, real time pricing, and generation sources, including interconnected self generation. Customers should expect to be responsible for the consequences of their choices. The commission should ensure that customer confusion will be minimized and customers will be well informed about changes resulting from restructuring and increased customer choice.

III. Regulation and Unbundling of Services and Rates. When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, 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 which should remain regulated for the foreseeable future. However, 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. Performance based or incentive regulation should be considered for transmission and distribution services. Upward revaluation of transmission and distribution assets is not a preferred mechanism as part of restructuring. Retail electricity suppliers who do not own transmission and distribution facilities, should, at a minimum, be registered with the commission.

IV. Open Access to Transmission and Distribution Facilities. Non-discriminatory open access to the electric system for wholesale and retail transactions should be promoted. Comparability should be assured for generators competing with affiliates of groups supplying transmission and distribution services. Companies providing transmission services should file at the FERC or with the commission, as appropriate, comparable service tariffs that provide open access for all competitors. The commission should monitor companies providing transmission or distribution services and take necessary measures to ensure that no supplier has an unfair advantage in offering and pricing such services.

V. Universal Service. (a) Electric service is essential and should be available to all customers. A utility providing distribution services must have an obligation to connect all customers in its service territory to the distribution system. A restructured electric utility industry should provide adequate safeguards to assure universal service. Minimum residential customer service safeguards and protections should be maintained. Programs and mechanisms that enable residential customers with low incomes to manage and afford essential electricity requirements should be included as a part of industry restructuring.

(b) As competitive markets emerge, customers should have the option of stable and predictable ceiling electricity prices through a reasonable transition period, consistent with the near term rate relief principle of RSA 374-F:3, XI. Upon the implementation of retail choice, transition service

should be available for at least one but not more than 5 years after competition has been certified to exist in at least 70 percent of the state pursuant to RSA 38:36, for customers who have not yet chosen a competitive electricity supplier. Transition service should be procured through competitive means and may be administered by independent third parties. The price of transition service should increase over time to encourage customers to choose a competitive electricity supplier during the transition period. Such transition service should be separate and distinct from default service.

(c) Default service should be designed to provide a safety net and to assure universal access and system integrity. Default service should be procured through the competitive market and may be administered by independent third parties. Any prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service or purchased power agreements shall be recovered through the default service charge. The allocation of the costs of administering default service should be borne by the customers of default service in a manner approved by the commission. If the commission determines it to be in the public interest, the commission may implement measures to discourage misuse, or long-term use, of default service. Revenues, if any, generated from such measures should be used to defray stranded costs.

(d) The commission should establish transition and default service appropriate to the particular circumstances of each jurisdictional utility.

(e) Notwithstanding any provision of subparagraphs (b) and (c), as competitive markets develop, the commission may approve alternative means of providing transition or default services which are designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, if the commission determines such means to be in the public interest.

(f)(1) For purposes of subparagraph (f), "renewable energy source" (RES) means a source of electricity, as defined in RSA 362-F:2, XV, that would qualify to receive renewable energy certificates under RSA 362-F, whether or not it has been designated as eligible under RSA 362-F:6, III.

(2) A utility shall provide to its customers one or more RES options, as approved by the commission, which may include RES default service provided by the utility or the provision of retail access to competitive sellers of RES attributes. Costs associated with selecting an RES option should be paid for by those customers choosing to take such option. A utility may recover all prudently incurred administrative costs of RES options from all customers, as approved by the commission.

(3) RES default service should have either all or a portion of its service attributable to a renewable energy source component procured by the utility, with any remainder filled by standard default service. The price of any RES default service shall be approved by the commission.

(4) Under any option offered, the customer shall be purchasing electricity generated by renewable energy sources or the attributes of such generation, either in connection with or separately from the electricity produced. The regional generation information system of energy certificates administered by the ISO-New England and the New England Power Pool (NEPOOL) should be considered at least one form of certification that is acceptable under this program.

(5) A utility that is required by statute to provide default service from its generation assets should use any of its owned generation assets that are powered by renewable energy for the provision of standard default service, rather than for the provision of a renewable energy source component.

(6) Utilities should include educational materials in their normal communications to their customers that explain the RES options being offered and the health and environmental benefits associated with them. Such educational materials should be compatible with any environmental disclosure requirements established by the commission.

(7) For purposes of consumer protection and the maintenance of program integrity, reasonable efforts should be made to assure that the renewable energy source component of an RES option is not separately advertised, claimed, or sold as part of any other electricity service or transaction, including

compliance with the renewable portfolio standards under RSA 362-F.

(8) If RES default service is not available for purchase at a reasonable cost on behalf of consumers choosing an RES default service option, a utility may, as approved by the commission, make payments to the renewable energy fund created pursuant to RSA 362-F:10 on behalf of customers to comply with subparagraph (f).

(9) The commission shall implement subparagraph (f) through utility-specific filings. Approved RES options shall be included in individual tariff filings by utilities.

(10) A utility, with commission approval, may require that a minimum number of customers, or a minimum amount of load, choose to participate in the program in order to offer an RES option.

VI. Benefits for All Consumers. Restructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another. Costs should not be shifted unfairly among customers. A nonbypassable and competitively neutral system benefits charge applied to the use of the distribution system may be used to fund public benefits related to the provision of electricity. Such benefits, as approved by regulators, may include, but not necessarily be limited to, programs for low-income customers, energy efficiency programs, funding for the electric utility industry's share of commission expenses pursuant to RSA 363-A, support for research and development, and investments in commercialization strategies for new and beneficial technologies.

VII. Full and Fair Competition. Choice for retail customers cannot exist without a range of viable suppliers. The rules that govern market activity should apply to all buyers and sellers in a fair and consistent manner in order to ensure a fully competitive market.

VIII. Environmental Improvement. Continued environmental protection and long term environmental sustainability should be encouraged. Increased competition in the electric industry should be implemented in a manner that supports and furthers the goals of environmental improvement. Over time, there should be more equitable treatment of old and new generation sources with regard to air pollution controls and costs. New Hampshire should encourage equitable and appropriate environmental regulation, based on comparable criteria, for all electricity generators, in and out of state, to reduce air pollution transported across state lines and to promote full, free, and fair competition. As generation becomes deregulated, innovative market-driven approaches are preferred to regulatory controls to reduce adverse environmental impacts. Such market approaches may include valuing the costs of pollution and using pollution offset credits.

IX. Renewable Energy Resources. Increased future commitments to renewable energy resources should be consistent with the New Hampshire energy policy as set forth in RSA 378:37 and should be balanced against the impact on generation prices. Over the long term, increased use of cost-effective renewable energy technologies can have significant environmental, economic, and security benefits. To encourage emerging technologies, restructuring should allow customers the possibility of choosing to pay a premium for electricity from renewable resources and reasonable opportunities to directly invest in and interconnect decentralized renewable electricity generating resources.

X. Energy Efficiency. Restructuring should be designed to reduce market barriers to investments in energy efficiency and provide incentives for appropriate demand-side management and not reduce cost-effective customer conservation. Utility sponsored energy efficiency programs should target cost-effective opportunities that may otherwise be lost due to market barriers.

XI. Near Term Rate Relief. The goal of restructuring is to create competitive markets that are expected to produce lower prices for all customers than would have been paid under the current regulatory system. Given New Hampshire's higher than average regional prices for electricity, utilities, in the near term, should work to reduce rates for all customers. To the greatest extent practicable, rates should approach competitive regional electric rates. The state should recognize when state policies impose costs that conflict with this principle and should take efforts to mitigate those costs. The unique New Hampshire issues contributing to the highest prices in New England

should be addressed during the transition, wherever possible.

XII. Recovery of Stranded Costs.

(a) It is the intent of the legislature to provide appropriate tools and reasonable guidance to the commission in order to assist it in addressing claims for stranded cost recovery and fulfilling its responsibility to determine rates which are equitable, appropriate, and balanced and in the public interest. In making its determinations, the commission shall balance the interests of ratepayers and utilities during and after the restructuring process. Nothing in this section is intended to provide any greater opportunity for stranded cost recovery than is available under applicable regulation or law on the effective date of this chapter.

(b) Utilities should be allowed to recover the net nonmitigatable stranded costs associated with required environmental mandates currently approved for cost recovery, and power acquisitions mandated by federal statutes or RSA 362-A.

(c) Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs. Mitigation measures may include, but shall not be limited to:

(1) Reduction of expenses.

(2) Renegotiation of existing contracts.

(3) Refinancing of existing debt.

(4) A reasonable amount of retirement, sale, or write-off of uneconomic or surplus assets, including regulatory assets not directly related to the provision of electricity service.

(d) Stranded costs should be determined on a net basis, should be verifiable, should not include transmission and distribution assets, and should be reconciled to actual electricity market conditions from time to time. Any recovery of stranded costs should be through a nonbypassable, nondiscriminatory, appropriately structured charge that is fair to all customer classes, lawful, constitutional, limited in duration, consistent with the promotion of fully competitive markets and consistent with these principles. Entry and exit fees are not preferred recovery mechanisms. Charges to recover stranded costs should only apply to customers within a utility's retail service territory, except for such costs that have resulted from the provision of wholesale power to another utility. The charges should not apply to wheeling-through transactions.

XIII. Regionalism. New England Power Pool (NEPOOL) should be reformed and efforts to enhance competition and to complement industry restructuring on a regional basis should be encouraged. New Hampshire should work with other New England and northeastern states to accomplish the goals of restructuring. Working with other regional states, New Hampshire should assert maximum state authority over the entire electric industry restructuring process. While it is desirable to design and implement a restructured industry in concert with the other New England and northeastern states, New Hampshire should not unnecessarily delay its timetable. Any pool structure adopted for the restructured industry should not preclude bilateral contracts with pool and non-pool services and should not preclude ancillary pool services from being obtained from non-pool sources.

XIV. Administrative Processes. The commission should adapt its administrative processes to make regulation more efficient and to enable competitors to adapt to changes in the market in a timely manner. The market framework for competitive electric service should, to the extent possible, reduce reliance on administrative process. New Hampshire should move deliberately to replace traditional planning mechanisms with market driven choice as the means of supplying resource needs.

XV. Timetable. The commission should seek to implement full customer choice among electricity suppliers in the most expeditious manner possible, but may delay such implementation in the service territory of any electric utility when implementation would be inconsistent with the goal of near-term rate relief, or would otherwise not be in the public interest.

Source. 1996, 129:2. 1998, 191:5. 2000, 249:3. 2001, 29:5, 6. 2002, 212:6; 268:4. 2006, 294:3. 2007, 26:4, eff. July 10, 2007. 2009, 236:1, eff. Nov. 13, 2009.

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

Order Dismissing Petition

ORDER NO. 25,950

October 6, 2016

In this Order, the Commission dismisses Eversource's petition requesting approval of a contract to purchase capacity on the proposed Access Northeast gas pipeline, and associated program details and distribution rate tariff. The Commission has determined that Eversource's proposed program is inconsistent with New Hampshire law. The legal authorities relied upon by Eversource and other supporters of the petition do not overcome the policies preventing such activity found within the Electric Utility Restructuring statute, RSA Chapter 374-F.

I. EVERSOURCE'S PROPOSAL

On February 18, 2016, Public Service Company of New Hampshire d/b/a Eversource (Eversource) filed a petition for approval of a proposed 20-year contract with Algonquin Gas Transmission, LLC (Algonquin), for natural gas capacity on Algonquin's Access Northeast Pipeline Project (Access Northeast pipeline), and for recovery of associated costs through a new distribution rate tariff, to be assessed on all of Eversource's customers. In its petition, Eversource sought approval of: (1) a 20-year interstate pipeline transportation and storage contract providing natural gas capacity for use by electric generation facilities in the New England region (the Capacity Contract); (2) an Electric Reliability Service Program to set

parameters for the release of capacity and the sale of LNG supply made available to electric generators through the Capacity Contract; and (3) a Long-Term Gas Transportation and Storage Contract tariff for Eversource's rates (Tariffed Rate) to be applied through a uniform cents-per-kWh rate element on all retail electric customers served by Eversource, to provide for recovery of costs associated with the Capacity Contract.

Eversource is a public utility headquartered in Manchester, operating under the laws of the State of New Hampshire as an electric distribution company (EDC). Algonquin is an owner-operator of an interstate gas pipeline located in New England. Algonquin is owned by a parent company, Spectra Energy Corp (Spectra), a publicly-traded corporation headquartered in Houston, Texas. Algonquin has partnered with Eversource's corporate parent, Eversource Energy, headquartered in Boston, Massachusetts, and Hartford, Connecticut, and with National Grid, the parent company of EDC subsidiaries in Rhode Island and Massachusetts, to develop the Access Northeast pipeline. In general terms, Eversource Energy's EDC subsidiaries in Connecticut, Massachusetts, and New Hampshire and National Grid's EDC subsidiaries in Rhode Island and Massachusetts, are each individually seeking regulatory approval of gas capacity on the Access Northeast pipeline.[1]

The Access Northeast pipeline is intended to provide 500,000 million British thermal units (MMBtu)/day of incremental gas transportation capacity and 400,000 MMBtu/day of incremental liquefied natural gas (LNG) storage deliverability. Under its petition, Eversource would hold contractual entitlements for firm gas transportation and storage deliverability up to a

[1] The Massachusetts Supreme Judicial Court issued an order prohibiting the Massachusetts Department of Public Utilities from approving the companion petition from the Massachusetts affiliates of Eversource Energy and National Grid. The Massachusetts Court concluded such a Capacity Contract would contradict the policy embodied in the Massachusetts restructuring act, which removed electric companies from the business of electric generation. 475 Mass. 191 (2016).

Maximum Daily Transportation Quantity of 66,000 MMBtu/day, which would represent 7.4 percent of the total capacity of the Access Northeast pipeline. Eversource asserts that energy cost savings resulting from the increased supply of gas capacity to New England electric generators would exceed contract-related costs by a 3:1 ratio, excluding any additional capacity-release revenues that would be credited to Eversource's customers, thereby offering Eversource's customers significant benefits and justifying the recovery of the contract costs through rates.

II. PROCEDURAL HISTORY

With its petition in February, Eversource filed supporting testimony and related exhibits along with a motion for confidential treatment of certain information. Algonquin filed a similar motion for confidential treatment on March 10, 2016. The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-241.html.

There was significant interest in this docket from its inception. On February 22, 2016, the Office of Consumer Advocate (OCA) filed notice of its participation on behalf of residential ratepayers pursuant to RSA 363:28. Numerous other entities and groups sought intervenor status. They included Algonquin, NextEra Energy Resources LLC (NextEra), Richard Husband, TransCanada Pipelines (TransCanada), Portland Natural Gas Transmission System (PNGTS), Exelon Generation Company, LLC (Exelon), Coalition to Lower Energy Costs (CLEC), Tennessee Gas Pipeline Company (Tennessee), the New Hampshire Municipal Pipeline Coalition (NHMPC), SunRun Inc., Pipe Line Awareness Network of the Northeast (PLAN), Repsol Energy North America Corporation (Repsol), the Office of Energy and Planning, the Conservation Law Foundation (CLF), and ENGIE Gas &LNG, LLC (ENGIE). On April 22,

2016, the Commission issued Order No. 25,886, addressing intervention requests and certain procedural issues.

In its March 24, 2016, Order of Notice, the Commission indicated that before assessing the merits of Eversource's proposal, it would determine as a threshold matter whether the proposed Capacity Contract and the associated request for rate recovery, are consistent with New Hampshire law. The Commission set deadlines for initial submissions and responses on the legal issues of April 28 and May 12, respectively.

On May 10, 2016, the OCA filed a motion pursuant to RSA 363:32, for designation as Staff Advocates, Electric Division Assistant Director, George McCluskey and Staff Attorney, Alexander Speidel. The OCA alleged that, due to past involvement in the IR 15-124 investigation regarding gas supply constraints into the New England region, past pleadings at FERC, involvement in regional wholesale market meetings regarding related topics, and alleged statements made by Staff at a technical session in the instant docket, Messrs. McCluskey and Speidel should be designated Staff Advocates. This motion received the concurrence of CLF, Richard Husband, NextEra, and NHMPC.

III. POSITIONS OF THE PARTIES

A. Supporters of the Capacity Contract

Eversource, Algonquin, and CLEC[2] (collectively the Supporters) argue generally that Eversource's plans are authorized by a number of statutes, either standing alone or in combination. The Supporters' basic argument is that RSA Chapter 374-F, the electric utility restructuring statute, was intended to lower energy prices and that an EDC's purchase of gas capacity to be used by generators could further that intent. The Supporters argue as well that

[2] Although CLEC supported the legality of an EDC entering into a long-term gas capacity contract, it objected to the lack of a competitive procurement process for the Capacity Contract entered into by Eversource. CLEC Brief at 26-29.

Eversource's proposal could be considered to be part of its obligation to provide reliable service at reasonable rates under RSA 374:1 and :2; or the type of "least cost" resource planning required by RSA 378:37 and :38. They also point to the specific language in RSA 374:57, which sets forth an EDC's obligations when it "enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy"; and to RSA Chapter 374-A, which discusses EDCs' participation in electric power facilities. The Supporters dispute the opposition arguments that Eversource's plan would violate the Federal Power Act and the Natural Gas Act. They maintain that the proposal is consistent with Federal law and thus not preempted.

B. Opponents of the Capacity Contract

ENGIE, NextEra, CLF, OCA, Exelon, NHMPC, and PLAN, (collectively the Opponents), all disagree. They argue that the most significant intention of the restructuring statute, RSA Ch. 374-F, was to do what its title promised and restructure the industry to get the EDCs out of the generation business completely. To the Opponents, lower rates were and continue to be expected as a result of that restructuring, as competition for generation services replaces the vertically integrated generation, transmission, and distribution structure that existed for decades before. The Opponents view competitive markets and retail choice for consumers as the key components of restructuring; rate effects are secondary to competition. They also claim that in the restructured market, the risks associated with investments in generation would be borne by the owners of that generation, not by the ratepayers of the regulated distribution utilities. As for the other statutes that are part of the Supporters' arguments, the Opponents' general position is that the restructuring statute controls. They argue that those other statutes do

not support Eversource's proposal, either because they never meant what the Supporters argue, or because they have been superseded by the more recent enactment of RSA Chapter 374-F.

The Opponents make two additional points to support their position. First, they argue that the notion of an EDC charging customers for the costs of a gas capacity contract is fundamentally inconsistent with the requirement that assets included in rate base must be "used and useful." They also assert that the proposed Capacity Contract and the release of gas capacity to wholesale power generators is pre-empted by the Federal Power Act and the Natural Gas Act.[3] They cite to decisions by the Federal Energy Regulatory Commission ("FERC"), and recent decisions by the United States Supreme Court to argue that state laws permitting proposals like Eversource's improperly interfere with FERC's regulation of both the wholesale natural gas market and the wholesale electric market.

IV. COMMISSION ANALYSIS

A. New Hampshire Electric Utility Restructuring Statute, RSA Chapter 374-F

The threshold question regarding any potential proposal for gas capacity acquisition by a New Hampshire EDC is whether the Electric Utility Restructuring Statute, RSA Ch. 374-F, (Restructuring Statute) prohibits such activity. All parties to this proceeding make arguments based on the Restructuring Statute passed in 1996 and implemented over the course of many years, including most recently through Order 25,920 (July 1, 2016) approving the divestiture of Eversource's remaining hydro and fossil electric generation facilities. We must determine: (1) whether the functional separation of transmission/distribution activities on the one hand, and generation activities on the other, called for by RSA 374-F:3, III, would be violated by the terms of Eversource's proposal, and (2) if yes, whether this directive of the Restructuring Statute

[3] *See* Natural Gas Act 15 U.S.C. § 717c(b) (prohibiting preferential pricing for natural gas capacity releases) and Federal Power Act 16 U.S.C.§824(b)(1)(giving FERC core responsibility for regulating electric transmission and wholesale pricing).

overrides, or supersedes, all other restructuring principles and therefore prohibits the Capacity Contract and associated Tariffed Rate contemplated by Eversource.

In examining these questions, we apply traditional New Hampshire principles of statutory interpretation. The New Hampshire Supreme Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. The Court interprets statutes in the context of the overall regulatory scheme and not in isolation. The goal is to determine the Legislature's intent. Further, the Court construes statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other. When interpreting a statute, the Court gives effect to all words in the statute and presumes that the legislature did not enact superfluous or redundant words. *See Appeal of Old Dutch Mustard Co., Inc.,* 166 N.H. 501 (2014); *State v. Collyns*, 166 N.H. 514 (2014). When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with the 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); *see also Appeal of Pennichuck Water Works,* 160 N.H. 18, 34 (2010) (quoting *Appeal of Plantier*, 126 N.H. 500 (1985)).

Because the Restructuring Statute contains numerous policy directives, we begin our analysis of the statute with reference to its stated purposes.

> I. 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.

> II. A transition to competitive markets for electricity is consistent with the directives of Part II, article 83 of the New Hampshire constitution which reads in part: "Free 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." Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

RSA 374-F:1, I and II.

In addition to the overall statutory purposes, RSA 374-F:3 outlines the restructuring policy principles that must govern the Commission's approach to restructuring the New Hampshire electric market. RSA 374-F:3, III states, in part:

> When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, 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 which should remain regulated for the foreseeable future. However, 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.

The disagreement in this matter is based on the multiple objectives in the sections quoted above. Supporters point to the purpose of reducing costs to customers, and argue that having EDCs purchase gas capacity for use by electric generators will further that goal. Opponents argue that competition, furthered by restructuring and unbundling, is the ultimate purpose of the statutory scheme.

In weighing the restructuring policy principles of RSA 374-F, we agree with the Opponents and find that the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity. The competitive generation market is expected to produce a more efficient industry structure and regulatory framework, by shifting the risks of

generation investments away from customers of regulated EDCs toward private investors in the competitive market. The long-term results should be lower prices and a more productive economy. To achieve that purpose, RSA 374-F:3, III directs the restructuring of the industry, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services. A more efficient structure involves placing investment risk on merchant generators who can manage that risk, and allowing customers to choose suppliers, thus enabling customers to pay market prices and avoid long-term over market costs. This purpose is underscored by the Legislature's recent strong encouragement, through the passage of HB 1602 and SB 221, to approve the 2015 Settlement Agreement that will accomplish the functional separation of Eversource's generation activities from its distribution activities. *See* 2014 N.H. Laws Ch. 310 (H.B. 1602); 2015 N.H. Laws Ch. 221 (S.B. 221); and Order No. 25,920 (July 1, 2016).

Based on that finding, we conclude that the proposal brought forward by Eversource is fundamentally inconsistent with the purposes of restructuring. Specifically, we conclude that the Capacity Contract is a component of "generation services" under RSA 374-F:3, III, which requires unbundled, clear price information for the cost components of generation, transmission, and distribution. The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies. Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal.

Having concluded that the basic premise of Eversource's proposal – having an EDC purchase long-term gas capacity to be used by electric generators – runs afoul of the Restructuring Statute's functional separation requirement, we turn to the question of whether any

of the other purported justifications would allow us to go forward in this proceeding to consider the merits of the proposal. To analyze the effect of other statutes applicable to EDCs on the Restructuring Statute, we must consider two issues. First, we must identify whether any of those statutes standing alone would support the Eversource proposal, and, if so, how those statutes are affected by the subsequent enactment of the Restructuring Statute.

B. Commission's General Oversight and Other Utility Statutes

Supporters note that RSA 374:1 and RSA 374:2 require that EDCs provide safe and reliable service at just and reasonable rates. They claim that by entering into the Capacity Contract and then selling capacity to gas-fired electric generators, Eversource would both increase reliability of electric supply and mitigate price spikes in the wholesale and retail markets in New England. That would, in turn, help Eversource meet its obligations under RSA 374:1 (safe and reliable service) and RSA 374:2 (just and reasonable rates). While we agree that those two sections of our supervisory statutes govern our regulation of Eversource's provision of distribution services, we do not agree that an EDC is responsible for either the reliability of the generation supply, or the price of such supply. That function has been shifted to the competitive marketplace for retail electric generation service in New Hampshire. For regional wholesale electric markets, the responsibility for regulating reliability and pricing remains with ISO-NE and FERC. *See* Federal Power Act, 16 U.S.C. § 824 (federal jurisdiction over electric transmission and wholesale electric sales).

Supporters also claim that the least cost planning statutes, RSA 378:37 and 378:38, create an affirmative obligation for Eversource to plan for adequate energy supply resources. The Legislature has set the goals for planning as follows:

> The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

RSA 378:37. In fulfilling its planning obligations a regulated utility is required to do a number of assessments, including:

> III. An assessment of supply options including owned capacity, market procurements, renewable energy, and distributed energy resources....
>
> VI. An assessment of the plan's long- and short-term environmental, economic, and energy price and supply impact on the state.
>
> VII. An assessment of plan integration and consistency with the state energy strategy under RSA 4-E:1.

RSA 378:38, III-VII. The Supporters reason that if the required assessments of generating capacity, price, and supply show that more gas is needed, and if the gas-fired generators are unwilling to purchase the necessary capacity, then it is the responsibility of the EDCs to do what has to be done and commit to those purchases.

Reading the planning statutes together with RSA Ch. 374-F, however, we do not find that the statutes permit the re-joining of distribution and generation functions in the manner provided by the Capacity Contract. The planning statutes must be read in concert with RSA Ch. 374-F and in light of the industries to which they apply. RSA 378:38 applies to both electric and natural gas utilities, and those industries now differ in a fundamental way. While natural gas utilities continue to arrange natural gas supplies for their residential and small commercial customers, following electric restructuring, electric utilities do not arrange electric supply for their customers. Instead, pursuant to RSA 374-F:3, V(c), electric utilities provide electric supply through default service, which is offered only to those customers who have not opted to purchase

their electricity from a competitive supplier. Default service is designed to be a safety net for customers who do not choose an independent competitive supplier. Further, default service must be competitively procured. *Id.* As a result of the Restructuring Statute, electric distribution utilities are no longer required to conduct long-term planning for electric supply. Accordingly, we find that in a restructured electric industry, the planning requirements for an EDC are limited to procurements of electric supply for the EDC's default service customers. That obligation is not broad enough to justify approval of a proposal like Eversource's.

Supporters also point out that the 10-Year New Hampshire State Energy Strategy, referenced in RSA 378:38, VII, encourages exploration of ways to increase gas pipeline capacity in New England. They claim that the Strategy thus requires EDCs to explore ways to increase gas pipeline capacity. We disagree. As discussed above, RSA 378:38 applies to both electric and gas utilities. Both are required to plan to have an adequate supply to meet their customers' demand. In our view, gas supply under the State Energy Strategy is the responsibility of the gas utilities. While Eversource, an EDC, cannot enter into the Capacity Contract and have it paid for through its distribution rates, natural gas utilities might be appropriate proponents of increased gas pipeline supply under RSA 378:38, VII. *See Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 25,822 (October 2, 2015) (approving firm transportation agreement for natural gas supply).

Supporters cite RSA 374:57, "Purchase of Capacity," as support for Eversource's proposal.

> Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the [C]ommission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The [C]ommission may disallow, in whole or part, any

> amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest.

RSA 374:57. The Opponents, however, maintain that the statute does not mean what the Supporters think it means. The Opponents argue that RSA 374:57 was enacted following PSNH's bankruptcy to tighten the commission's authority over contracting decisions for electric supply; a service EDCs no longer provide. According to the Opponents, a statute intended to give the commission authority to disallow unreasonable provisions in contracts with terms longer than one year cannot mean an electric utility can enter into a long-term contract for gas transmission.

While the Supporters' reading of the statute is plausible, we believe the Opponents have the better argument. The meaning of "capacity" in that legislation is limited to electric generating capacity and electric transmission capacity. First, the types of agreements listed are commonly associated with electric supply. Second, if gas capacity was to be included, the statute would have included references to the Natural Gas Act in addition to the Federal Power Act. Thus we find that RSA 374:57 concerns long-term contracts for electric supply and does not authorize EDCs to purchase gas capacity under long-term contracts.

Supporters claim that RSA Chapter 374-A's provisions granting EDCs authority to "enter into and perform contracts" related to "participation in electric power facilities" provide support for Eversource's petition. Supporters observe that those provisions were not repealed by subsequent enactments such as RSA 374-F. NextEra argues RSA 374-A applied to vertically integrated "electric utilities" as defined in 1975 by 374-A:1, IV and therefore that the provisions in RSA 374-A:2, I and II are inapplicable in a restructured market where electric utility has been redefined. RSA 374-A:1, IV defines electric utilities as "primarily engaged in the generation and

sale or the purchase and sale of electricity or the transmission thereof." We believe NextEra is correct and that RSA 374-A no longer applies to an EDC like Eversource.

The change in the industry through the Restructuring Statute, first passed in 1996, effectively ended a restructured EDC's ability to participate in the generation side of the electric industry. Given the centrality of the separation of functions between distribution and generation in the Restructuring Statute, allowing an EDC to "participate in electric power facilities" under RSA 374-A in the manner proposed by Eversource would make little sense in light of RSA 374-F.

Opponents also argue, based upon RSA 378:28, that the Capacity Contract violates the used and useful requirement which is a basic component of utility ratemaking under New Hampshire law. Supporters counter that RSA 378:28 applies to rate base and because the Capacity Contract does not add to Eversource's rate base, and is instead an ongoing expense, the used and useful standard does not apply. The requirement that utility rate base be used and useful for a utility to include a return on that rate base in rates has a corollary principle governing expenses. That is, expenses must be prudent and necessary for providing the service offered by the utility. In this case, we have found that after enactment of the Restructuring Statute, EDCs should unbundle rates for distribution from rates for energy supply. Capacity Contract expenses are not needed to supply distribution services to Eversource distribution customers. The Capacity Contract is designed to support electric generation supply, and therefore expenses related to generation supply would be disallowed in distribution rates.

C. Federal law

As noted above, the Opponents also argued that the Capacity Contract would violate a number of federal laws, including the Natural Gas Act, the Federal Power Act, and the terms of

FERC procedures and precedent. Having determined that we cannot approve the Capacity Contract and related capacity releases under New Hampshire law, we need not reach a decision concerning federal pre-emption.

V. CONCLUSION

The proposal before us would have Eversource purchase long-term gas pipeline capacity to be used by gas-fired electric generators, and include the net costs of its purchases and sales in its electric distribution rates. That proposal, however, goes 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. It would allow Eversource to reenter the generation market for an extended period, placing the risk of that decision on its customers. We cannot approve such an arrangement under existing laws. Accordingly, we dismiss Eversource's petition.

We acknowledge that the increased dependence on natural gas-fueled generation plants within the region and the constraints on gas capacity during peak periods of demand have resulted in electric price volatility. Eversource's proposal is an interesting one, with the potential to reduce that volatility; but it is an approach that, in practice, would violate New Hampshire law following the restructuring of the electric industry. If the General Court believes EDCs should be allowed to make long-term commitments to purchase gas capacity and include the costs in distribution rates, the statutes can be amended to permit such activities.

Because that concludes this proceeding, we deny the motion to designate Staff Advocates as moot. We will address the joint motion for confidential treatment in a separate order.

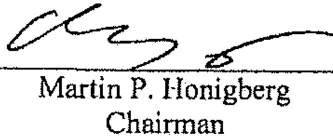
Based upon the foregoing, it is hereby

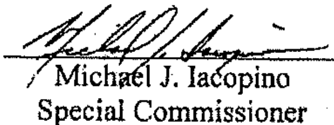
ORDERED, that Eversource's instant petition is hereby DISMISSED; and it is

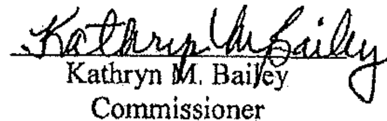
FURTHER ORDERED, that the information subject to Eversource's joint motion for confidential treatment should be kept confidentially, pending an order by the Commission regarding the disposition of same under RSA Chapter 91-A; and it is

FURTHER ORDERED, that the motions to designate Staff Advocates are hereby DISMISSED, having been rendered moot by the decision delineated in this Order.

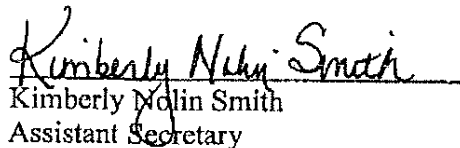
By order of the Public Utilities Commission of New Hampshire this sixth day of October, 2016.


Martin P. Honigberg
Chairman

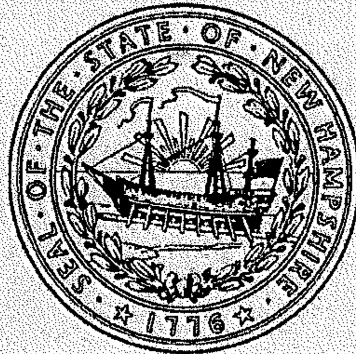

Michael J. Iacopino
Special Commissioner


Kathryn M. Bailey
Commissioner

Attested by:


Kimberly Nolin Smith
Assistant Secretary

NEW HAMPSHIRE GENERAL COURT



JOURNAL
of the
HOUSE OF REPRESENTATIVES

containing the
Recall Session of
November 1, 1995
and the
1996 Session
January 3, 1996
through
June 13, 1996

HAROLD W. BURNS
SPEAKER

ROBERT A. JOHNSON, II
SERGEANT-AT-ARMS

KAREN O. WADSWORTH
CLERK

LEO J. CALLAHAN
ASSISTANT CLERK

2 Membership. The committee shall consist of 3 members of the house, appointed by the speaker of the house and 3 members of the senate, appointed by the senate president.

3 Compensation. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

4 Report. The committee shall submit a report of its findings, including any recommendations for legislation to the speaker of the house, president of the senate, house clerk, senate clerk, the state library, and to the governor on or before November 1, 1996.

5 Effective Date. This act shall take effect 30 days after its passage.

AMENDED ANALYSIS

This bill establishes a committee to study issues relative to groups and salary ranges which reflect the responsibilities of unclassified employees, excepting the constitutional officers.

Adopted.

Report adopted and ordered to third reading.

Rep. Howard Williams declared a conflict of interest and did not participate.

HB 1365, relative to unclassified employees. INEXPEDIENT TO LEGISLATE

Rep. Myron S. Steere, III for Executive Departments and Administration: This bill would change the method of handling unclassified employee salary. Changes of salary level for unclassified employees within letter group is now the responsibility of the governor. Changes in letter group for unclassified jobs is now the responsibility of the legislature and it should remain so. Vote 13-2.

Adopted.

HB 1560-FN, requiring persons who receive unemployment and public assistance and do not possess a high school diploma or general equivalency diploma to study for a general equivalency diploma or attend high school or a trade school. INEXPEDIENT TO LEGISLATE

Rep. Joseph P. Manning for Health, Human Services and Elderly Affairs: As written, this bill would cut off assistance to those who, because of their home situations or mental or physical capacities are incapable of additional education or training. It would also preempt the programs now addressing the education and training of the unemployed. Vote 14-0.

Adopted.

HB 1392, establishing a legislative oversight committee on electric utility restructuring, requiring all electric utilities to submit rate restructuring plans, and establishing restructuring principles to be used by the public utilities commission in assessing and approving utility restructuring plans. OUGHT TO PASS WITH AMENDMENT

Reps. Clifton C. Below, Jeb E. Bradley and Jeffrey C. MacGillivray for Science, Technology & Energy: This important legislation to restructure the New Hampshire electric utility industry will allow all customers to choose their supplier of electricity generation. This bill establishes the legislative framework for a process that should move N.H. to retail customer choice and near term rate relief as quickly as is reasonably possible. It is the work product of a year-long effort that started with a PUC initiated roundtable last January. Last June, SB 168 created a legislative study committee and authorized a pilot program for customer choice. The study committee and its four subcommittees met numerous times from July through December and unanimously approved the restructuring principles that are contained in section 374-F:3 of the amendment. The Science, Technology and Energy Committee held three full committee work sessions and further refined the principles and their implementation. This bill calls for electric utilities to submit restructuring plans to the PUC by June 30, 1996. Utilities will then have one year in which to negotiate a restructuring plan acceptable to the PUC and substantially consistent with the principles. If a utility fails to do so by July 1, 1997, then the PUC is to impose a plan for customer choice and limit stranded cost recovery as the PUC determines. Utilities will be able to recover costs that were mandated by state or federal law, such as pollution controls and required purchases from independent power producers. Negotiated restructuring plans must include near term rate relief approaching competitive regional rates to the greatest extent possible, and will allow only a reasonable opportunity for utilities to recover other net stranded costs that can't be mitigated, and only to a balanced and appropriate extent as determined by the PUC. This bill does not in any way guarantee or provide for full recovery of all stranded or uneconomic costs to any

utility. The interests of ratepayers and utilities in this matter must be equitably balanced and the committee added language in the amendment to make this intent clear. Other restructuring principles direct the PUC to ensure that: reliable and safe electricity services be maintained, residential customers have the same opportunities to benefit as large customers, competition be open and fair, environmental protections be continued, and safeguards for low income residential customers be provided. The bill also sets up a legislative oversight committee. The committee believes that this bill as amended creates the best possible opportunity for all parties to avoid expensive and protracted litigation, to achieve rate relief and customer choice in the most expeditious manner possible, and to proceed with restructuring and minimize delay in spite of possible litigation because this legislation is reasonable and legally defensible. Vote 21-0.

Amendment (4539L)

Amend the bill by replacing all after the enacting clause with the following:

1 Findings. The general court finds that:

I. New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high. The general court also finds that electric rates for most citizens may further increase during the remaining years of the Public Service Company of New Hampshire rate agreement. The general court finds that this combination of facts has a particularly adverse impact on New Hampshire citizens.

II. New Hampshire's extraordinarily high electric rates disadvantage all classes of customers; industries, small businesses, and captive residential and institutional ratepayers and do not reflect an efficient industry structure. The general court further finds that these high rates are causing businesses to consider relocating or expanding out of state and are a significant impediment to economic growth and new job creation in this state.

III. Restructuring of electric utilities to provide greater competition and more efficient regulation is a nationwide phenomenon and New Hampshire must aggressively pursue restructuring and increased customer choice in order to provide electric service at lower and more competitive rates.

IV. Monopoly utility regulation has historically substituted as a proxy for competition in the supply of electricity but recent changes in economic, market and technological forces and national energy policy have increased competition in the electric generation industry and with the introduction of retail customer choice of electricity suppliers as provided by this chapter, market forces can now play the principal role in organizing electricity supply for all customers instead of monopoly regulation.

V. It is in the best interests of all the citizens of New Hampshire for the general court, the executive branch, and the public utilities commission to work together to provide legislative and regulatory initiatives to create a more competitive and efficient restructured electric utility industry in New Hampshire.

2 New Chapter; Restructuring of the New Hampshire Electric Utility Industry. Amend RSA by inserting after chapter 374-E the following new chapter:

CHAPTER 374-F
ELECTRIC UTILITY RESTRUCTURING

374-F:1 Purpose.

I. 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.

II. A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: "Free 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." Competitive

II.(a) Committee members shall be appointed to an initial term expiring on December 4, 1996. Subsequent terms shall be for up to 2 years expiring on the first Wednesday of even numbered years. Members may succeed themselves.

(b) A chairperson shall be selected by a majority of the committee members.

III. The committee shall provide an annual report on or before November 1 to the governor, the speaker of the house, the senate president, the state library, and the public utilities commission on the status of electric utility restructuring.

IV. The committee shall meet quarterly or as often as is necessary to conduct its business.

V. Members shall receive mileage when attending to the duties of the committee.

374-F:7 Duties. The committee shall be responsible for the following:

I. Following up the work of the retail wheeling and restructuring study committee established in 1995, 272.

II. Working with the commission to assess the results of the pilot program allowing for the competitive retail purchase of electricity established in 1995, 272.

III. Working with the commission to develop any new legislation necessary to promote electric utility restructuring and retail choice of electricity suppliers and to propose changes to or recodification of existing statutes to be more consistent with the restructuring principles established in this chapter.

IV. Working with the commission and other agencies, where necessary, to implement this chapter and its restructuring principles.

3 Adjudication. If any party challenges any provision of RSA 374-F as inserted by section 2 of this act or any application thereof in court, then the general court urges the court of jurisdiction to give priority to and expeditiously adjudicate any such challenge.

4 Severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications, and to this end the provisions of this act are severable.

5 Effective Date. This act shall take effect upon its passage.

(Speaker Burns in the Chair)

Reps. Below and Jeb Bradley spoke in favor and yielded to questions.

Adopted.

Report adopted and ordered to third reading.

Reps. Coes and Sabella declared conflicts of interest and did not participate.

REMARKS

Rep. Ann Torr moved that the remarks of Reps. Below and Jeb Bradley be printed in the Journal.

Adopted.

Rep. Below: Thank you Mr. Speaker. Colleagues, I am very pleased to present to you today, the Science, Technology and Energy Committee's unanimous vote of 21-0 to report House Bill 1392, Ought to Pass with Amendment, as found on page 517 of today's Calendar. This is the bill to restructure the New Hampshire electric utility industry to provide retail competition for electricity generation and streamlined regulation of the remaining monopoly functions of distribution and transmission. This is something of a momentous occasion. We are the first legislative body in the United States to vote on a comprehensive set of principles and policies to restructure the electric utility industry and implement full customer choice of electricity generation suppliers. This industry is the last major remaining highly-regulated monopoly industry in the nation to undergo a transition to a more competitive market-based structure. While we are pioneering state legislation on this issue, we are not, I emphasize not, going where no man or woman has gone before. This process of restructuring the electric utility industry has become a national and worldwide phenomenon. At the Federal level there has been legislative impetus, particularly the Energy Policy Act of 1992, to create effective wholesale markets for electricity generation. The Federal Energy Regulatory Commission is in the process of adopting rules to open access nationally to the transmission grid and promote competition. This is a foundation for effective retail competition that is well on its way to being built. The New England Power Pool (NEPOOL) that coordinates the New England transmission grid and generation system an-

nounced last month its plan, NEPOOL PLUS, to restructure and evolve in a manner that promotes competition and economic efficiency while assuring continued high standards of reliability and responsibility. While geared primarily to wholesale competition, NEPOOL PLUS places New England in the vanguard for an evolving marketplace for electricity generation, another building block for retail customer choice here in New Hampshire. The utility commissions of Vermont, Massachusetts and Rhode Island, among other states, have begun the process of moving to retail choice by ordering utilities to submit restructuring plans in the first half of this year. Numerous other state legislatures are also working on this issue.

Perhaps even more significant is the experience of other nations that have moved to retail competition in recent years. Great Britain privatized its central government system and introduced limited retail competition but with rather mixed results to date. We have incorporated policies in our principles for restructuring that will avoid Great Britain's mistakes. A better model for us is the Scandinavian nations of Finland, Sweden and Norway that have a similar industry structure to ours and are now implementing retail customer choice in a manner similar to what we are proposing. In Norway, with a mixture of private and publicly-owned utilities, all customer classes have benefited from retail competition with a 20 percent decrease in residential prices over the past two years and a healthy utility industry. Finland voted just a year ago to open its electricity markets to retail customers starting last November with free markets open to all customers by next January 1. Sweden has moved even faster, piggy-backing on the Norwegian model and power exchange, voting just this past October to open their markets this past January 1. So my point is that our year of study and work on this issue has been a deliberate and carefully considered process with reams and reams of reading material and hours and hours of discussion involving stakeholders from all perspectives; more work than I care to think about. The policy principles in this bill have been through more than ten public drafts, including more refined amendments to this bill. I am sure you are all eager to get to lunch and end early today, but because this is such an important issue to the state, please bear with me as I walk you through key points in this bill so that you may be as fully informed as possible when constituents have questions, as I am sure they will.

The amendment, which is a complete substitution, so it is the whole bill, starts on page 517 of today's Calendar. There should also be an outline summary of the bill in your seatpockets. Rep. Jeb Bradley, who so ably serves as the Chair of Science, Technology and Energy and as Vice Chair of the Study Committee that worked on this issue over the past six months, and has played a key role in building the consensus on this bill, will address the issue of stranded costs after I am done, so I am going to skip that part for now. Starting on page 517, the findings are pretty self-explanatory. The fifth finding is important - which is that it is in the best interests of all branches of government to work together to achieve a more competitive and efficient restructured electric utility industry. On page 518, the Purpose, again it is pretty self-explanatory, there is just one sentence I'll point out, the second sentence of number I: "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." Right there it sounds like we want everything and that is kind of true. We want to build on what is now a good system and make it a better system, more efficient and productive. Then there is a set of definitions. You might want to look at the "Electricity suppliers" definition in particular. We don't use the term "retail wheeling" in this bill because it is something of a misnomer. You can't really direct the flow of alternating current from one generator to one customer. But, what you can do is you can match the electricity generation against your demand and consumption. You can have a choice of who provides that generation service for you.

Then the bill flows into the Restructuring Policy Principles. I should point out that these are a set of principles not everyone agrees with every word in these and I'm sure you won't either. They are a set of interdependent principles that have been developed by a collaborative consensus building process that balances a variety of interests and concerns. They are also intended to guide not only the PUC but other state agencies as well as this body in implementing this ambitious process. I will just highlight a few of the key principles. First and foremost, System Reliability: that must be maintained and public health and safety ensured. The second point is customer choice: that all customers must be able to participate in their choice of suppliers. The

third point is Unbundling of Services and Rates. It means you will see a lot more components on your electric bill and that the transmission and distribution functions will be separated from generation and they will continue as natural monopolies for the foreseeable future, regulated, although we are looking at more efficient ways of doing that. I'll skip the fourth point, it's sort of a minor one. The fifth is Universal Service: that electric service is essential to today's way of living, that there is an obligation for the distribution companies to connect, and that existing customer service safeguards must be maintained, and mechanisims that enable low-income customers to afford their essential requirements should also be part of restructuring. The sixth point is Benefits for All Customers: we make a point here that there is a possibility of nonbypassable systems benefit charge to fund public benefits related to the provision of electricity and there are some examples of what that might include, but not necessarily. It just depends. Full and Fair Competition: choice of a variety of viable suppliers. Environmental Improvement: a point that increased competition should be implemented in a manner that supports and furthers the goals of environmental improvement. There is no reason why we can't do this. In fact, a lot of indications are that competition will give us opportunities to much more cost-effectively meet our environmental goals. Renewable Energy Resources: we recognize that increased commitments have to be balanced against their costs and that it can be more of a market function by allowing retail customers to choose their supplier and even pay a premium for generators that are less polluting and more renewable. People should have an opportunity to interconnect their decentralized renewable generating sources, a reasonable opportunity. Item number eleven is near and dear to all of our hearts. It is a call for Near-Term Rate Relief given New Hampshire's higher than average regional prices - in fact the highest average in the entire nation. We call for utilities to work to produce lower rates that to the greatest extent possible approach competitive regional rates. We also recognize that some state policies contribute to our high costs and that we should look to ourselves for ways to mitigate those costs. Skipping the section on Recovery of Stranded Costs for Jeb and turning to page 520, Roman numeral XIII, it is a principle on Regionalisim. It calls for continued reform of NEPOOL and notes that working with other regional states, New Hampshire should assert maximum state authority over the entire electric industry restructuring process. That is sort of a jurisdictional issue between us and the Federal government. Also, there is a note that any restructuring should not preclude bilateral contracts. Administrative Processes emphasize a market framework for electric service that reduces reliance on administrative processes and streamlines regulation. The Timetable calls for introducing customer choice in the most expeditious manner possible. The last principle, number XVI, I think is very important. It recognizes that consensus and settlements are more likely than litigation to move restructuring forward. This is a key point. Where we want to get to is markets, competitive markets. Where we are now, we have regulation, we have a rate agreement with PSNH. The best way to get there, the quickest way to get there is negotiated settlement if we can achieve it. Litigation, going to the courts, has the risk of delaying the process. We've tried to structure this bill so that even if there are legal challenges there is the possibility to move ahead while minimizing delay. The goal is to try to build a negotiated settlement. That is our best bet for lowering rates in the near term.

Going into the implementation section, 374-F:4, Restructuring Plans, calls for submission of plans by the end of this June substantially consistent with the principles. It provides a process for revision of those plans over the course of the year following that and provides that notwithstanding any provision of law to the contrary, meaning anything in the current laws that may indicate an exclusive franchise, any statutes that stand in the way, the Commission will have the authority to impose a plan to provide for retail customer choice on any utility if they haven't negotiated a settlement by June 30, 1997. The implementation section, 374-F:5, gives the Commission the authority to implement. It calls for them to implement customer choice between July 1, 1997 and June 30, 1998 or at the earliest date to be determined in the public interest by the Commission. We haven't set an arbitrary "drop dead" date because we feel that there may be public interest requirements such as technical problems that are being worked out that may require some adjustment.

Turning to page 521, we're getting near the end here. Roman number II makes it clear that the Commission can implement the charges and changes in service. Roman numeral IV provides that if a utility does not adhere to a restructuring plan the Commission can come back and modify

the determination of allowable stranded cost recovery. Finally, there is a legislative oversight committee established that can oversee this process and work for any legislative changes that are necessary to implement it. Thank you.

Rep. Below yielded to questions.

Rep. Fields: In this chapter that you have here on 518, can you explain what it means when it says "renegotiate commitments approved by the commission and new mandated commitments..." What would be the difference between renegotiated and a mandated commitment?

Rep. Below: That refers to the idea that costs and investments that might be stranded are cut off as of the effective date of this legislation, except for the fact that some commitments such as purchased power contracts, which we call for utilities to try to mitigate, to reduce and renegotiate those above-market costs, if they are renegotiated they could still be approved by the Commission for recovery as a stranded cost. It has been mitigated. A new mandated commitment might be something like a pollution control requirement that is mandated by government that comes after the effective date of this but that is something that should be recovered.

Rep. John Chandler: On your section on Universal Service at the top of page 519, you indicate that a utility providing distribution service must have an obligation to connect all customers in their service territory. My question is, it is my understanding, I am in the electric cooperative area, that when extending distribution lines to properties that the property owner is asked to pay at least a portion of the cost of that extension. Will that continue under these guidelines or are you proposing that the entire cost be borne by the utility servicing that area?

Rep. Below: No. We are not proposing that kind of change. The obligation of connecting the customer, similar to the current policies, if they are too far away from the powerlines, yes the Commission can say you have to share a portion of that cost. But if they are willing to share it and they service that area then they should be willing to connect them.

Rep. John Chandler: A second question on this paragraph. I notice that you say a restructured electric utility industry should include an electricity supplier of last resort. Is there any possibility that that would become the government? A government responsibility?

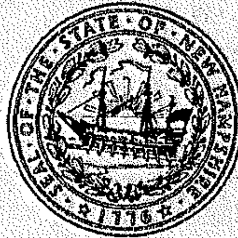
Rep. Below: No. I can't imagine that would happen. The utilities usually feel that they are happy to be the supplier of last resort, the existing incumbent utility. But the notion is that if somebody is out there under some procedure that there is somebody that they can get their supply from. Of course it doesn't mean that you can avoid credit problems. If you don't pay your bills there will still be the mechanisms for cutting you off as there are now.

Rep. Abbott: Could you discuss any significant amendments that were proposed to your Committee that the Committee rejected.

Rep. Below: There were no amendments moved in the Committee other than the one that is before you today. There were some suggested changes that came from the public hearing process and in our work sessions. Just an example of one or two of those, there was a suggestion that in the one-year period that utilities have to negotiate a settlement, that that negotiation not be effective unless every party to the negotiation, including all stakeholders who are interested in the issue, approve of that settlement. And that furthermore, if not everyone signs off on that settlement, that utilities then only be allowed the minimum stranded cost recovery allowed by law. We think that is a setup for failure and I believe that is why the Committee rejected that proposal. It would result in an impasse in all likelihood and certainly Rep. Bradley and I are as strong believers as anyone in a collaborative consensus building process, but mandating that everyone agree on the plan is not the way to have productive negotiations. Furthermore, trying to require the minimum stranded costs recovery allowed by law is something that nobody knows what it is. The law points in a lot of different directions on that issue. The only way to find it out is extensive protracted litigation to the New Hampshire Supreme Court, probably through Federal Bankruptcy Court and certainly to the U.S. Supreme Court. That is not something we want. The Supreme Court has found that for any regulatory scheme to pass Constitutional muster it must have an overall effect of being just and reasonable. That is why we see some of the language in here about balancing the interests of utilities and consumers. It was also suggested that we allow no stranded costs recovery. Such a position would ensure protracted litigation and keep us from getting to our goal of open markets.

Rep. Martin: I know that one of the questions that I am going to be facing is once we open the market to competition, some are concerned that the companies will come in and grab off the

STATE OF NEW HAMPSHIRE



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CONVENING DAY

January 3, 1996

The Senate met at 10:00 a.m.

A quorum was present.

The prayer was offered by the Rev. David Jones, Senate Guest Chaplain.

Lord of all, even of the political process, draw near and stay close to these twenty-four good men and women who are here to do work for the benefit of all the rest of us. Preserve them from decisions which serve only some of the people, from editorials which tell only some of the story, from lobbyists who see only some of the picture, and from a fickle electorate who hears only some of what we need to. Fire their convictions with Your priorities - and all will be well. Amen

Senator F. King led the Pledge of Allegiance.

INTRODUCTION OF GUESTS

RESOLUTION

INTRODUCTION OF SENATE BILLS

Senator Barnes offered the following Resolution:

RESOLVED, that in accordance with the list in the possession of the Clerk, Senate Bills numbered 500 - CACR 34 shall be by this resolution read a first and second time by the therein listed titles, laid on the table for printing and referred to the therein designated committees.

Adopted.

First and Second Reading and Referral

SB 500 3024L 96-2088
relative to the purchase of paper products by the state. (Russman, Dist 19; Barnes, Dist 17; Pignatelli, Dist 13; J. Bradley, Carr 8; Schotanus, Sull 3; Merritt, Straf 8; A. Merrill, Straf 8: Environment)

SB 501 3038L 96-2164
repealing a requirement for keeping records of sales of pistols and revolvers. (Rodeschin, Dist 8; McRae, Hills 7; Patenaude, Merr 3: Fish & Game/ Recreation)

SB 502 3619L 96-2179
relative to planning board membership and terms. (Roberge, Dist 9; Wheeler, Dist 11; Colantuono, Dist 14; Hallyburton, Hills 12; Thulander, Hills 6: Executive Departments and Administration)

I have talked to, can see as to why some businesses get them and some don't. That is the issue that I am trying to address in this legislation. We have also seen in the past few months the campaign for ratepayers' rights and the consumer advocate have filed a lawsuit in Merrimack Superior Court over this issue. The problem has not been solved, folks. The problem is getting worse. Unless we take some action today, it is going to continue to get worse. I think the same can be said about SB 48. In killing that bill, the committee said, "We don't need this legislation" which authorizes the PUC to authorize retail wheeling. It gives them the authority to do that. The committee said, "Well, we have already done that. That was adopted as part of the restructuring." Well, I challenge anybody on that committee to show me where, in the principles, that legislation has been listed. They can't do it because it is not there. It is not there and it is not in the version of HB 1392 that has been filed. PSNH says that one of the reasons we can't move to open competition is because the PUC has no authority over retail wheeling. That is exactly what this bill is designed to do. While I know that it is going to take some time to resolve this issue, I think that it is absolutely critical for us to begin to take a stand. It is time for us to do more than just study. It is time for us to take some action. To vote against SB 47 and SB 48, and to claim that you are concerned about electric rates, and favor competition in New Hampshire is nothing more than a shell game for the ratepayers of this state. I believe it is time for us to act, to show the people of New Hampshire that we are willing to do whatever it takes to promote competition and to lower electric rates in this state. So I urge you to vote against the committee report and to support passage of both of these bills. Mr. President, I am going to ask for a roll call on SB 47 and SB 48 when the time is appropriate. Thank you.

SENATOR RODESCHIN: Senator Shaheen, SB 533, which deals with special contracts, the title of which is prohibiting the recovery of certain costs associated with special utility contracts. Is that not a better bill than what is before us right now?

SENATOR SHAHEEN: Well, Senator Rodeschin, as you know, I am also the sponsor of SB 533. In fact, I think that bill addresses a totally different issue than SB 47, which is currently before us. You are right. What that bill addresses is whether or not a utility is going to be able to pass along the costs of those special contracts which, in PSNH's case are estimated at about $45 million, whether they are going to be able to pass along those costs to the rest of the ratepayers at the end of the fixed rate period. So I think that is a very critical issue. But I also think in the meantime that we have got a situation where there is no equity with respect to how businesses are allowed to have special contracts. I think that is what SB 47 is designed to address. Now Textron Automotive, I think, is not going to be real concerned about SB 533 when that comes along, but I think that they are very concerned about this bill, because they don't feel like they are being treated fairly.

SENATOR RODESCHIN: Senator Shaheen, there are several special contracts issues before the PUC right now that they haven't acted on, and is not one of them UNH?

SENATOR SHAHEEN: Yes.

SENATOR RODESCHIN: Would you have a concern that if they come up with some guidelines for those businesses that are not choosing to

leave the state or plan expansions but have a guideline to follow that they won't hear that request for the special contract in those guidelines? Don't we need flexibility?

SENATOR SHAHEEN: Senator Rodeschin, I think the concern is that there is a perception among businesses that special contracts are not being issued with any kind of overall framework in mind, or with any particular guidelines, that people don't know what those are in advance. I think that is the problem, and that is what this bill is designed to address. I think that applies to the university system, and it applies to Lockheed Sanders, and it applies to everybody else. I think that we ought to say that they are going to be given based on certain criteria, and if you meet those criteria, you qualify, and if you don't, you don't.

SENATOR KEOUGH: I agree with much of what Senator Shaheen had to say, that is why I am surprised that we could reach such diametrically opposed conclusions about what to do with SB 47 and SB 48. In general, I would say the following. I agree with Senator Shaheen that there seems to be a fair amount of consensus, in fact, widespread consensus, that bringing about competition in the electric utility industry is something that we should all do. Now comes the hard part of my opinion. Now comes the part of distinguishing between what things, what proposals, have actual substance and what don't. I can assure you that we will hear throughout the debate on various specific proposals, that every vote in every decision is a litmus test. And if you choose to say, "No, I don't think that is a good idea." you will run the risk that you are anti-consumer, and that you are all talk, and that you are not for deregulation, and you are not for competition. Well, I am here to tell you that is baloney and to ask you all to put that aside and recognize you'll hear that and that you will be labeled in ways that are inappropriate, but that is why you are here. It is to do the right thing despite that. The right thing to do on SB 48, since we seem to be dealing with both of the bills at the same time, is to put it into perspective. This bill was introduced before the legislature had spent hundreds, if not thousands, of hours thinking about the way in which it wants retail wheeling to be implemented. At the time that SB 48 was introduced, there was really nothing more to say other than we would like the PUC to implement retail wheeling. But because we knew that there ought to be more to say, the bill was re-referred, and the legislature went about its business. Senator Shaheen, to her credit, took a leadership role, and, I think, did a very good job in helping to lead the legislature in doing its business well. So where we are today is that we have a lot to say about how the PUC should implement retail wheeling and we will be voting on a bill. In the hearing that Senator Shaheen attended, a work session on this bill, it was made clear that if the legal authority of the PUC is an issue that has not been addressed in legislation that is going to come before the senate, I, for one, will not vote for it unless that has been addressed, and I believe it will be. With respect to SB 47 and the issue of special contracts, I don't think that there is anyone here who wouldn't be happier if we didn't have to have special contracts, if we could move deregulation and competition forward on a timetable that would obviate the need for special contracts; but we can't. In the meantime, there are going to be special situations that do not lend themselves to precise prescriptions and descriptions in advance, that need to be dealt with for one reason. They need to be dealt with to keep jobs in New Hampshire, so that working men and women have a place

to go to work and so that those jobs do not leave to go to a different part of the country that has lower electric rates (TAPE CHANGE) and flexibility and the ability of the PUC to weigh the merits of those special situations and to act quickly. Because, once again, the legislature has felt compelled to micro-manage every situation that might come down the road. That is why I urge you to vote with the committee in finding SB 47 inexpedient to legislate and to vote with the committee in finding SB 48 inexpedient to legislate. Thank you.

SENATOR SHAHEEN: Senator Keough, you said that you wouldn't vote for a bill on restructuring that didn't give the PUC the authority to authorize retail wheeling. Is that correct?

SENATOR KEOUGH: What I said was that the legislature has a lot to say about retail wheeling that will be embodied in Representative Bradley's bill that comes over. If a deficiency in implementing retail wheeling truly is - I am not a lawyer, so I don't know if the legal authority does or does not exist, but if that is a problem, then we are going to need to address that in that bill, and give the PUC the statutory authority it needs to implement our wishes.

SENATOR SHAHEEN: Can you show me where in the bill that authority exists now?

SENATOR KEOUGH: No, I can't. But I believe that I have said in the event that it doesn't, then we will put it in there.

SENATOR SHAHEEN: So should I assume then that you are willing to rely on the House in addressing this issue? I guess my thought is that if the senate recognizes that this is an issue that needs to be addressed, then we should go ahead and do it and not wait for the House. What happens if the House kills that bill?

SENATOR KEOUGH: Well the House is in possession of that bill. I don't think there is any senator who introduced that bill into the Senate, HB 1392. If what you had proposed was an amendment to this bill, that effectively was that, that not only addressed that issue, but reflected all of the other things that the legislature has to say about retail wheeling, I would feel much differently about it. But, in fact, you haven't done that. I think this is only about one thing. This is only about giving you the opportunity to stand here before this body and label people as pro-competition and pro-regulation or anti-competition and anti-regulation, and I resent that and I will not stand for it.

SENATOR RUBENS: As I read over SB 48 I see that the commission may authorize competition if for the public good. Then may I read from the latest amendment to HB 1392 as introduced by Rep. Bradley? "The commission is authorized to require and shall require the implementation of retail choice among electric suppliers for all customer classes." This is in the version over in the House, which in my view is not an important TAPE INAUDIBLE and if it were, makes a clearer statement TAPE INAUDIBLE

SENATOR SHAHEEN: Well, I am delighted to have you point out that it did make it into the amended version of HB 1392 because I argued with the sponsers of the legislation that that should be a part of it. I guess that I would say what I said to Senator Keough earlier, and that is that if we think that this is something that needs to be done, I think we ought

to pass it out of the Senate, just as when we were dealing with education funding last session. The Senate wasn't willing to rely on the House to get the job done. We wanted to let our own version be passed and I would argue that that is what we should do in this case as well.

SENATOR RUBENS: TAPE INAUDIBLE.

Recess.

Out of recess.

SENATOR SHAHEEN (Rule #44): I don't know if this is exactly a Rule #44, but I think that it is important for me to say to the senators in this room that my concerns about this issue have to do with exactly that, my concerns about the issue, that I believe this is a critical issue that is facing the state of New Hampshire. I think that it is important for people to know where all of us stand on it and that is my intent in asking for a roll call today. I will leave it at that.

SENATOR COLANTUONO: This bill had an extensive hearing last year along with some of the other bills on similar subjects in our committee. I recall the debate on certain questions that I had about the bill, and we have to keep in mind that debates over bills aren't really about who is pro this or anti that. The debate on this bill, as on any other bill, is whether it is a good bill. I remember being opposed to the bill because I didn't think it protected our consumers sufficiently and I wanted the bill to be inexpedient last year, but the committee agreed to re-refer it, together with all of the other bills that we have on the schedule today, as a package to wait to see what happened with SB 168. SB 168 basically dealt with most of this issue, in what, I believe, to be a much far superior manner and right now we have statutory authority for the PUC to allow special contracts for business retention or economic development. But the concern I have with the language of this bill is that in simply granting the PUC the power to allow special contracts, it does not give the consumer the protection to say that when a business gets a special contract, allowing it to buy electricity cheaper than other businesses, who is going to pay the extra money? Under our traditional rate of return regulations, where a utility is entitled to collect its costs plus a reasonable rate of return, the only place that you can get it is from the other users of that electric utility, mainly consumers. I don't want to see that happen. I am leery of giving over power to any administrative agency, especially the PUC, on matters as important as this without specific, defined requirements as to exactly how they are going to approach the issue. And that is what is being done through our special committee, which nine senators and nine representatives spent all summer and fall on. And we are continuing to spend time on that. We are going to come up with a bill relating to the whole issue of restructuring electric utilities, where we are going to tell the PUC what to do in the best interest of our constituents. We are not simply going to hand over a blank check to them and tell them to do our job for us. That is why I believe that it is prudent for us to vote this bill inexpedient, continue the work on the study committee and the other legislation that is going forward, so that we can adequately address the issue of how to protect our consumers having to pick up the slack of the extra costs that will be generated when certain specialized businesses get special contracts.

SENATOR J. KING: I am a little confused here. Did I hear someone say that they're for the bill, that they agree with what is in there and that it should be done. But now it is going to go into a different bill. If it should

be done and there is an agreement on it, you don't have to have the whole bucketful. Sometimes you're better off addressing just one specific issue, and this one should be addressed specifically. The other one, SB 48, should be addressed specifically, too. Then if you want to go further, get another bill to do it. One question that I would have is how come this one here was not amended if it would incorporate some of those others? Does anybody have the answer to that? I would like to know.

Question is on the committee report of inexpedient to legislate.

A roll call was requested by Senator Shaheen.

Seconded by Senator Cohen.

The following Senators voted Yes: F. King, Gordon, Johnson, Fraser, Lovejoy, Currier, Rodeschin, Roberge, Wheeler, Stawasz, Colantuono, Podles, Russman, Danais, Delahunty, Keough.

The following Senators voted No: Rubens, Blaisdell, Larsen, Barnes, J. King, Shaheen, Cohen.

Senator Pignatelli Rule #42.

Yeas: 16 - Nays: 7

Inexpedient to legislate is adopted.

SB 48, an act relative to retail wheeling of electric power. Executive Departments and Administrative Committee. Vote: 4-1. Inexpedient to legislate. Senator Rodeschin for the committee.

SENATOR RODESCHIN: Thank you. SB 48 is really an unnecessary bill at this time. We had some discussion on SB 48 and there is a bill in the house which has several senators and House members on it. That is a much better bill than this one. Senator Shaheen's bill, SB 48, gives the PUC discretion on whether to implement retail wheeling. HB 1392 has specific guidelines, and that is the direction that we are going in. Senator Shaheen and three others, myself included, have spent since December of 1994 on restructuring the electric utilities from the PUC Business Roundtable. At the hearing this past Tuesday on the principles of HB 1392, the senate, eighteen republicans, support HB 1392. It is a much stronger bill. We do not need SB 48. It is not doing the job that I know that Senator Shaheen wants. So I would ask you to support the committee and make this discussion a little bit briefer. The committee urges inexpedient to legislate. One more thing, one senator on our committee that was on the dissenting vote, the only reason that senator voted in the dissenting vote was because she didn't want to be labeled as against retail wheeling.

SENATOR COHEN: What I am about to say could also apply to SB 47, but it is more addressed to SB 48. Over the years this body has had many, many opportunities to stand up for the ratepayers in the state of New Hampshire. We have had many opportunities and we have let them down, again, again, and again. Unfortunately, we have let the monopoly, the electric monopoly, ride roughshod over the state of New Hampshire. This is a fact. We all recognize this now, but we are missing an opportunity again. Here is another opportunity to take meaningful action. It is appropriate to authorize the PUC to take action to bring about competition. This bill works in concert with the House Bill. We shouldn't just leave it up to the House to take the action. This bill works in concert

XI. Any administrative or adjudicative proceeding or public hearing relating to this chapter shall be subject to the provisions of RSA 541-A.

374-F:5 Oversight Committee; Establishment; Report; Meetings.

I. There is established a legislative oversight committee on electric utility restructuring consisting of 14 members as follows:

(a) Seven members of the house, at least 5 of whom shall be members of the science, technology and energy committee, or its successor, and at least 2 of whom shall be members of a minority party, appointed by the speaker of the house.

(b) Seven members of the senate, at least 2 of whom shall be members of the executive departments and administration committee, or its successor, and at least one of whom shall be a member of the minority party, appointed by the president of the senate.

II.(a) Committee members shall be appointed to an initial term expiring on December 4, 1996. Subsequent terms shall be for up to 2 years expiring on the first Wednesday of even numbered years. Members may succeed themselves.

(b) A chairperson shall be selected by a majority of the committee members.

III. The committee shall provide an annual report on or before November 1 to the governor, the speaker of the house, the senate president, the state library, and the public utilities commission on the status of electric utility restructuring.

IV. The committee shall meet quarterly or as often as is necessary to conduct its business.

V. Members shall receive mileage when attending to the duties of the committee.

374-F:6 Duties. The committee shall be responsible for the following:

I. Following up the work of the retail wheeling and restructuring study committee established in 1995, 272.

II. Working with the commission to assess the results of the pilot program allowing for the competitive retail purchase of electricity established in 1995, 272.

III. Working with the commission to develop any new legislation necessary to promote electric utility restructuring and retail choice of electricity suppliers and to propose changes to or recodification of existing statutes to be more consistent with the restructuring principles established in this chapter.

IV. Working with the commission and other agencies, where necessary, to implement this chapter and its restructuring principles.

SENATOR KEOUGH: The amendment as offered by the committee, like HB 1392 in the original House version, provides a framework for bringing competition to the electric utility industry. Competition is necessary and critical to reduce long-term rates, to expand customer choice and to bring about increased efficiency in operations and better use of capital resources and other resources. The two main components of the bill consist of a set of principles in a process by which the PUC will go about enacting on those principles. The principles are the product of the Retail Wheeling and Restructuring Committee's work over the summer. As you know nine members of this body participated in that work, along with nine members from the House. The principles address such critical issues as customer choice, system reliability, the unbundling of services and rates and open access in transmission, along with issues such as recovery of stranded costs, environmental improvement, and full and fair competition. The principles in this amendment are substantially un-

changed from the principles that were in the original House bill. The bill also directs and authorizes the Public Utilities Commission to take certain actions in order to bring competition about by January 1, 1998. It is in the definition of this process that the major differences exist between the committee amendment and the House version of the bill. Specifically, the committee amendment directs the PUC to initiate upon passage, a generic proceeding whereby a plan for competition in New Hampshire can be developed. It then directs the PUC to require compliance filings from the various utilities doing business in the state. What is different from this approach, is that the House version of the bill directed utilities to come up with their own restructuring plans. In Massachusetts, where that procedure was adopted, what the Massachusetts PUC discovered, is that utilities had dramatically different views about what a restructured industry ought to look like, and they have since choosen to go with the generic proceeding kind of process that we are adopting in this amendment. The second important difference between this amendment and the original House version of the bill, is that this amendment effectively delinks the implementation of competition from the ultimate resolution of stranded cost recovery; which we all know, is going to be a very complicated issue to resolve. But in delinking the implementation of competition, from the ultimate resolution of stranded cost recovery, it is the committee's belief, that we have substantially reduced an incentive to delay the process. That is important for consumers in New Hampshire who want and need competition to take place at the earliest practical date. HB 1392 reflects the hard work and input of an awful lot of people. Many of those people are in this body, and many of the people are in the House, various customer groups, various representatives of utilities, the BIA, the Business Roundtable. It is my belief that this amendment enjoys widespread support. I fully expect the House to concur with the amendment. Representative Bradley who is chairman of the House Science and Technology Committee, was a critical part of the drafting of this amendment. He has testified before our committee that he strongly supports the changes. The vote comes out of Executive Departments and Administration Committee with the unanimous ought to pass vote. I would urge all of my colleagues to vote in favor of this bill. Thank you.

SENATOR SHAHEEN: I would like to echo Senator Keough's applause for this bill. I think that this has been an excellent bipartisan effort, both in the House and in the Senate. Senator Keough and I have worked closely along with many of the rest of you with coming up with the amendment that we are going to be voting on today. I think that this is the legislature working at its very best in producing this bill. We know that the electricity rates that New Hampshire now has to pay are the highest in the nation. This is something that all of us have recognized that is an issue for our constituents. It is something that we can't allow petty partisan differences to keep us from coming to some kind of a resolution. I have to say, though, that in voting on the bill today, I have two reservations about it. The first, is that I argued in the groups working on the bill, that we should have a cap on the allowable interim stranded cost recovery charge. I think having seen what the PUC has done in the pilot program, that they have allowed too high a stranded cost recovery for the pilot program, and that if we are going to make competition work to lower rates for people in this state, we need to make sure that doesn't happen when we set the interim stranded cost recovery charge in this bill. So I believe that the legislature is putting the PUC, and particularly PSNH, on notice that we will not accept that high interim stranded cost