THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0007

Appeal of Algonquin Gas Transmission, LLC

and

Appeal of Public Service Company of New Hampshire d/b/a Eversource Energy

BRIEF OF APPELLANT OFFICE OF THE CONSUMER ADVOCATE

Representing the interests of residential utility customers
Pursuant to RSA 363:28

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Oral Argument Requested: Mr. Kreis will argue on behalf of the Office of the Consumer Advocate.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

QUESTION PRESENTED FOR REVIEW 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 11

ARGUMENT 14

A. The classic ratemaking concept of "used and useful" looms large. 16

B. The fundamental purpose of the Restructuring Act is to remove the Business risk of generation from the backs of retail ratepayers. 18

C. The Commission's decision is not an affront to the objective of a reliable electricity grid. 22

D. The Commission did not treat any pre-restructuring statutes as repealed by implication 24

E. RSA 374:57 does not authorize an electric utility to invest in natural gas transmission capacity 28

F. The Court must resolve this case, and interpret the Restructuring Act, in light of the New Hampshire Constitution's commitment to "free and fair competition." 30

CONCLUSION 31

REQUEST FOR ORAL ARGUMENT 31

CERTIFICATE OF SERVICE 32

TEXT OF ORDERS APPEALED FROM . . . . . .Addendum

TABLE OF AUTHORITIES

Page(s)

Cases

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) 31

Appeal of Denton,
147 N.H. 259 (2001) 29

Appeal of Old Dutch Mustard Co.,
166 N.H. 501 (2014) 14, 20, 29

Appeal of Public Service Co. of N.H.,
141 N.H. 13 (1996) 30

Appeal of Public Service Co. of N.H.,
130 N.H. 748 (1988) 18, 19

Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n,
262 U.S. 679 (1923) 19, 20

Emera Maine v. FERC,
854 F.3d 662, 666 (CADC 2017) 5

ENGIE Gas & LNG LLC v. Department of Public Utilities,
475 Mass. 191 (2016) 7, 29

General Insulation Co. v. Eckman Constr.,
159 N.H. 601 (2009) 28

Henson v. Santander Consumer USA Inc.,
2017 U.S. Lexis 3722 (June 12, 2017) 19

Hughes v. Talen Energy Marketing, LLC,
136 S.Ct. 1288 (2016) 22, 23

In re New Hampshire Pub. Utilities Comm'n Statewide Elec. Utility Restructuring Plan,
143 N.H. 233 (1998) 21

In re Public Service Co. of N.H.,
130 N.H. 265 (1988) 16, 17

Legislative Utility Consumers Council v. Public Service Co. of N.H.,
119 N.H. 332 (1979) 17

New York v. FERC,
535 U.S. 1 (2002) 18

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 19

Public Service Co. of N.H. v. Patch,
167 F.3d 15 (CA1 1998) 4

Public Service Co. of N.H. v. Patch,
962 F. Supp. 222 (D.N.H. 1997) 3

Rodriguez v. United States,
480 U.S. 522 (1987) 19

State v. Wilson,
2017 N.H. Lexis 74 24

Williams v. Babcock,
121 N.H. 185 (1981) 26

Constitutional Provisions, Statutes and Rules

N.H. Const., Part 2, Article 83 . . . . . 1, 14, 30

RSA 363:1 8

RSA 363:27 8

RSA 363:28 2

RSA 374:3 15

RSA 374:8 15

RSA 374:22 15

RSA 374:57 . . . . . 13, 28, 29, 30

RSA 374-A:1 25

RSA 374-A:2 . . . . . 24, 25, 26

RSA 374-F:1 . . . . . .4, 19, 30

RSA 374-F:3 . . . . . .1, 16, 18, 20, 21, 22, 23, 24, 26, 27

RSA 374-F:4 . . . . . .15, 20, 21

RSA 374-F:8 . . . . . .23, 24

RSA 378:27 16

RSA 378:28 16

RSA 378:30-a 3, 16

RSA 378:37 . . . . . .13, 27

RSA 378:38 . . . . . .13, 27

RSA 378:38-a 13, 27

RSA 541:3 9

N.H. Superior Court Rule 9(b) 2

Orders of the New Hampshire Public Utilities Commission

Order No. 25,967 in Docket DE 16-817 (Nov. 10, 2016),
2016 N.H. PUC Lexis 107,
reh'g den., Order No. 25,973 (Dec. 23, 2016)
2016 N.H. PUC Lexis 113. 5

Order No. 25,920 in Docket Nos. DE 11-250 and DE 14-238 (July 1, 2016),
2016 N.H. Lexis 62 6

Order No. 25,828 in Docket No. DE 15-248 (Oct. 19, 2015),
2015 N.H. PUC Lexis 100 27

Order No. 24,050 in Docket No. DE 02-075 (Sept. 12, 2002),
2002 N.H. PUC Lexis 135 5

Order No. 23,967 in Docket No. DE 99-099 (May 10, 2002),
2002 N.H. Lexis 51 4

Articles and Treatises

Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) 19

ISO New England, "State of the Grid: 2017," (Jan. 30, 2017) 10

Sharon Reishus, "Electric Restructuring in New England: A Look Back" (New England States Committee on Electricity, 2015) 4, 5, 7

"Report on Investigation into Market Conditions, Default Service Rate, Generation Ownership and Impacts on the Competitive Electricity Market" (Jun. 7, 2014) in Docket No. IR 13-020. 6

QUESTION PRESENTED FOR REVIEW

Did the Public Utilities Commission correctly conclude that New Hampshire law precludes an electric distribution "poles and wires" utility from putting natural gas pipeline costs in nonbypassable retail rates given that the utility is exiting the generation business?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Office of the Consumer Advocate concurs with the list of Statutes Involved in the Case provided by appellant Public Service Company of New Hampshire, with this addition: New Hampshire Constitution, Part. 2, Article 83, providing in relevant 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."

STATEMENT OF THE CASE

Public Service Company of New Hampshire (PSNH), an electric utility that currently does business in New Hampshire under the trade name of its parent company Eversource Energy, has appealed a decision of the Public Utilities Commission (Commission) in Docket No. DE 16-241 dismissing a PSNH petition as a matter of law. At issue was PSNH's request for permission to invest in natural gas pipeline capacity and recover the associated costs from PSNH's captive retail customers on a nonbypassable[1] basis. Also appealing the Commission determination is Algonquin Gas Transmission LLC (Algonquin), an intervenor in the proceeding below and developer of the proposed Access Northeast pipeline project on which PSNH sought to purchase capacity. Eversource and another major New England electric utility, National Grid,

[1] "Nonbypassable" in this legal context refers to a rate or charge that an electric utility's customer may not avoid by relying on an unregulated competitive supplier for energy service. *See, e.g.*, RSA 374-F:3, XII(d) ("Any recovery of stranded costs should be through a nonbypassable, nondiscriminatory, appropriately structured charge").

are among the joint owners of the Access Northeast project, which would span southern New England and not enter into New Hampshire. *See* App. at 255 (noting that Eversource is part of the Access Northeast "joint venture") and 467-471 (describing project and joint owners).

The Commission divided the case into two phases, indicating that the first phase would involve a purely legal inquiry: Could the Commission even consider such a petition under applicable New Hampshire law, particularly the Electric Industry Restructuring Act, RSA 374-F. App. at 328. The Commission answered the question in the negative in Order No. 25,950 on October 6, 2016, and denied the appellants' rehearing motions in Order No. 25,970 on December 7, 2016, rendering unnecessary (pending appeal) the development of a factual record on the merits of the petition in phase 2.[2] In essence, the case comes to the Court in a posture similar to that of a civil case in which a trial court has granted a motion to dismiss pursuant to Superior Court Rule 9(b).

The Office of the Consumer Advocate (OCA), tasked pursuant to RSA 363:28 with representing the interests of residential utility customers, was among the parties arguing successfully to the Commission that the agency lacked authority to entertain the PSNH petition. We appear here to contend that the Commission's ruling is sound as a matter of law and, in particular, consistent with the fundamental purpose of electric industry restructuring to relieve electric customers of the investment risk associated with electricity generation.

[2] Pursuant to Rule 16(1)(i) of the Rules of the New Hampshire Supreme Court, both orders are appended to this brief; when cited, references are to the pagination of the orders as issued by the Commission.

STATEMENT OF FACTS

Historical Ratepayer Risk in New Hampshire

On January 28, 1988, Public Service of New Hampshire filed a Chapter Eleven petition in United States Bankruptcy Court, seeking relief from financial difficulties it encountered as the principal owner of the Seabrook power generating station. *Public Service Co. of N.H. v. Patch*, 962 F. Supp. 222, 225 (D.N.H. 1997). In doing so, PSNH—the largest electric utility in New Hampshire—became the first regulated electric utility in the U.S. to file for bankruptcy protection since the Great Depression. *Id.*

Although New Hampshire's Anti-CWIP statute[3] and related decisions of the Commission temporarily shielded ratepayers from costs overruns associated with PSNH's long term investment in Seabrook's generation services, the eventual bankruptcy of the utility ultimately led to a reorganization agreement through which ratepayers were burdened with significant rate increases as a result of the uneconomical Seabrook investment, the associated bankruptcy, and the subsequent acquisition of PSNH by a Connecticut-based utility holding company. *Id.* at 226. To amortize the burdens of these increases, the Bankruptcy Court adopted a post-bankruptcy and acquisition Rate Agreement allowing an annual increase in electric rates of 5.5 percent annually for a seven-year period, after which time the acquiring utility holding company would be able to recover the remainder of its investment in PSNH's assets, plus a return on the investment. *Id.*

These bankruptcy-related rate hikes motivated New Hampshire legislators and regulators to examine how competitive electric markets might assume responsibility for the financial risks (and presumably accept the financial rewards) associated with the generation of electricity. An

[3] "CWIP" is an acronym for "construction work in progress." An Anti-CWIP statute bars a regulated utility from recovering the costs of an investment from ratepayers that remains a construction work in progress until that construction project becomes used and useful. The legal significance of these concepts is discussed *infra*. New Hampshire's Anti-CWIP statute, adopted in 1979, is codified as RSA 378:30-a.

excerpt from testimony by Senator Burton J. Cohen on House Bill 1392, the legislation that would ultimately become New Hampshire's restructuring law, illuminates this motivation: "Part of the problem that the ratepayers have faced is footing expensive, unnecessary utility investments. The ratepayers thus far have been eating poor decisions and it's time to leave it up to the free market. Let the utility bear responsibility for their own actions." App. *at* 82.

Electric Utility Restructuring in New England

Building on sentiments expressed by Senator Cohen and others, the General Court passed House Bill 1392 and thereby enacted RSA 374-F in 1996. This statute's purpose was to facilitate lower rates by shifting the risks associated with electric generation investments away from a utility's captive ratepayers and toward third party merchant generators through the "functional separation of centralized generation services from transmission and distribution services" RSA 374-F:1, I. In taking these steps, New Hampshire became the first state in the country to enact legislation enabling restructuring of their electric utility industry.[4] Sharon Reishus, "Electric Restructuring in New England: A Look Back" (New England States Committee on Electricity, 2015) (hereinafter, "Reishus") at 12.[5]

[4] Ironically, New Hampshire ultimately proved to be among the last of the states with restructuring statutes to complete the actual implementation of restructuring. The reason is that on March 3, 1997 – the Monday after the Friday on which the Commission issued its restructuring plan pursuant to RSA 374-F -- the state's electric utilities filed a federal lawsuit and obtained an injunction to block implementation. *See Public Service Co. of N.H. v. Patch*, 167 F.3d 15 (CA1 1998). The litigation was ultimately resolved individually as to each affected utility; as to PSNH, its service territory was opened to retail competition in electric supply on May 1, 2001. *See* Order No. 23,967 in Docket No. DE 99-099, 2002 N.H. Lexis 51, at *2 n.2.

[5] The New England States Committee on Electricity (NESCOE) is a nonprofit organization organized to represent the collective perspective of the six New England states in regional electricity matters; it is funded via electric transmission rates as approved by the Federal Energy Regulatory Commission. The referenced NESCOE report is available at http://nescoe.com/wp-content/uploads/2015/12/RestructuringHistory_December2015.pdf.

By the early 2000s, almost every state in the Northeastern United States had directed its investor-owned electric utilities to divest their generating assets.[6] Although the exact language of each state's restructuring statute varied, NESCOE has described a common scheme of shared elements, with the first among them being the "[d]ivestiture or structural separation of all or a significant portion of the generation fleet held by the formerly vertically integrated utility." *Id.* at 13. Congress, and the Federal Energy Regulatory Commission (FERC), tacitly supported and facilitated these transitions by opening up federally regulated wholesale electricity to competition, allowing the entry of non-utility generators into the marketplace, and requiring open access to the federally regulated bulk power transmission system. *See id.* at 4-7. New England's utilities turned operational control over their transmission facilities to a nonprofit, ostensibly independent, federally regulated regional transmission organization, ISO New England. *See* App. at 511 (self-description in ISO New England press release) and *Emera Maine v. FERC*, 854 F.3d 662, 666 (CADC 2017) (describing ISO New England as "the FERC-approved regional transmission organization whose tariff governs transmission service and wholesale electric markets in New England — and its participating transmission owners").

As a result of various judicial, legislative, and regulatory developments subsequent to the enactment of RSA 374-F, PSNH remained an outlier among New England's newly restructured distribution utilities, retaining many of its legacy generating assets.[7] During the initial years following the restructuring statute, PSNH was able to operate these facilities at costs below prevailing wholesale market prices and their retention was viewed as beneficial to ratepayers.

[6] One notable exception is Vermont, which has remained vertically integrated.

[7] The Commission approved the sale of PSNH's interest in Seabrook Station to a subsidiary of what was then known as FPL Group, Inc. in 2002. *See* Order No. 24,050 in Docket No. DE 02-075 (Sept. 12, 2002), 2002 N.H. PUC Lexis 135. The sale of PSNH's remaining fleet of fossil and hydro generation facilities is currently in process. *See* Order No. 25,967 in Docket DE 16-817 (Nov. 10, 2016), 2016 N.H. PUC Lexis 107 (approving design of asset auction), *reh'g den.*, Order No. 25,973 (Dec. 23, 2016), 2016 N.H. PUC Lexis 113.

But, as circumstances changed, so did the perceived value of the assets in question. Commission Staff summarized the risks associated with regulated generation investments in a 2013 Report:

> Bringing the state's electricity rates down to regional levels comprised a major goal of restructuring in the late 1990s. The legislature, the New Hampshire Public Utilities Commission, and the overwhelming number of stakeholders involved in restructuring saw the fossil and hydro resources of Public Service Company of New Hampshire's as a major asset in achieving that goal. A little over a decade later, those resources, taken as a whole, have gone from saving customers money to costing them significantly, relative to available market alternatives. One measure of the gap that now exists is to measure the difference between PSNH's default service rate, 9.5 cents per kilowatt-hour (kWh), and prevailing retail market prices, 7.0– 8.0 cents per kWh, which are lower than PSNH's rate by approximately 15 to 25 percent.

"Report on Investigation into Market Conditions, Default Service Rate, Generation Ownership and Impacts on the Competitive Electricity Market" (Jun. 7, 2014) in Docket No. IR 13-020 at 1.[8] Recognizing that seemingly prudent regulated investments in generation services can quickly and unforeseeably become a burden on ratepayers, the Commission would eventually issue an order outlining the process through which PSNH will ultimately divest of its investments in generating assets. Order No. 25,920 in Docket Nos. DE 11-250 and DE 14-238 (July 1, 2016), 2016 N.H. Lexis 62. *Inter alia*, this 2016 decision approved a settlement whereby PSNH ratepayers bore the brunt of one last uneconomical and significant generation-related utility investment prior to divestiture – the $416 million PSNH spent on mercury scrubber equipment at its coal-fired Merrimack Station in Bow, of which PSNH agreed to have a notably modest $25 million disallowed for rate recovery. *Id.* at *28 to *36 and *50.

Electric Restructuring in the Age of Marcellus Shale

In the years that passed between New Hampshire's initial legislative embrace of restructuring in 1996 and the Commission's 2016 Order approving a plan for final divestiture of

[8] The referenced report is available at www.puc.nh.gov/Electric/IR%2013-020%20PSNH%20Report%20-%20Final.pdf.

PSNH's remaining generation assets, New England's electric generating fleet changed dramatically. Reishus at 22-24. State policies have increasingly supported energy efficiency and other distributed energy resources, depressing electric demand growth in a manner unforeseeable by even ISO-New England just five years ago. *Id.* at 24. The advent of hydraulic fracturing has led to unexpectedly low gas prices, and an increasingly homogeneous electric generation mix. *Id.* New England's electric generators have increasingly relied on gas supplies originating in the Marcellus shale formation, but have been reluctant to sign firm contracts for gas capacity since there is no guarantee from the market that costs will be recovered. App. at 223-224. This hesitancy has resulted in gas supply constraints, culminating in volatile spot market pricing for electricity during the winter of 2013-14. *Id.* at 309. ISO New England reacted to this volatility by implementing several market reforms, including pay-for-performance and winter reliability programs designed to ensure price stability and system reliability should gas scarcity conditions re-appear. Reishus at 22-24.

Alongside ISO-NE's market-based actions to resolve winter volatility issues, policymakers throughout New England began to discuss additional strategies for smoothing price volatility, including the concept of placing a surcharge on electric distribution bills as a means of financing firm contracts for gas pipeline capacity. The Commission was one of several in New England to examine whether electric distribution utilities could contract for longterm gas capacity, opening an investigative docket for this purpose on April 17, 2015.[9] App. at 440-444. After an initial review of the issues involved, Commission Staff released an inter-department

[9] Elsewhere in New England, after an initially favorable determination by the Massachusetts Department of Public Utilities, the Supreme Judicial Court of Massachusetts became the first state court in New England to adjudicate whether restructured electric distribution utilities could legally contract for longterm natural gas transmission capacity. *ENGIE Gas & LNG LLC v. Department of Public Utilities*, 475 Mass. 191 (2016). The court found that reallocating risk onto the ratepayers… contravenes the fundamental policy embodied in the [Massachusetts] restructuring act." *Id.* at 211.

communication in July 2015 regarding the legality of gas capacity acquisitions by electric distribution companies in New Hampshire. *Id.* at 445. With reference to the Restructuring Act, the memorandum noted that "the Commission could reasonably conclude that an EDC [electric distribution company] acquisition of gas capacity for the use of gas-fired generators and, by extension, the benefit of EDC customers, would violate the principle of separation of distribution and generation functions, and is therefore prohibited." *Id.* at 446. The Staff equivocated on this point, however, noting that the Commission could also focus on the references to reliability in the Restructuring Act and reasonably conclude that the functional separation principle "does not preclude such an EDC capacity purchase" *Id.* at 447. This memorandum formed the basis of a final report on the issue, filed with the Commission in September 2015.[10] App. at 453, 461-464.

On January 19, 2016, the Commission issued an order accepting Staff's report, and outlining a potential approach moving forward. App. at 502. At that juncture, he Commission unabashedly declared its concerns about the legality of such a proposal, noting:

> It is clear to the Commission, from a review of the Staff Report, stakeholder comments, and ancillary materials made publicly available through this investigation, that no consensus exists regarding the potential legality of such an acquisition of gas capacity by a New Hampshire EDC.

[10] In PSNH's Statement of Facts, the company takes account of this staff-level inquiry as follows: "In sum, the Staff Final Report confirmed that natural gas pipeline constraints are the cause of high and volatile electric prices, that additional pipeline capacity would help address the problems resulting from constrained capacity, and that the Commission could rule that New Hampshire's EDCs have the authority under New Hampshire law to enter into contracts for natural gas capacity." PSNH Brief at 6. To the extent this implies Staff-level consensus at the Commission about the lawfulness of a proposal such as the one at issue in this appeal, the characterization is a misleading one. The only reasonable inference to be drawn from Staff's repeated use of the word "could" in relation to possible Commission action is that Staff was avoiding any definitive position. Moreover, PSNH does not draw the Court's attention to the remainder of the Staff legal analysis as reflected in the September 15, 2015 report to the Commission. *See* App. at 464 ("Staff would expect the Commission to apply the traditional ratemaking criteria of least-cost procurement, prudency and allocation fairness to any surcharge sought by an EDC for gas capacity activities, and that any surcharge should be justified by a proposing EDC under a specific statutory provision, or provisions, of New Hampshire law."). For the reasons we explain, *infra*, these concerns loom large. In any event, at the risk of stating the obvious, Commission employees below the commissioner level cannot bind the agency; their role is strictly to advise and to provide support. *Cf.* RSA 363:1 (Commission comprised of three commissioners) and RSA 363:27 (authorizing Commission to "employ ... such regular staff . . . as it shall deem necessary").

Id. at 504 (noting that any such acquisition plan would be "highly controversial"). The Commission therefore decided it would rule of the legality of the concept "only in response to an actual (as opposed to hypothetical) petition," and decided such review would only take place in separate phases, with the first phase considering the legality of the proposal, and the second examining economic, environmental, engineering, cost recovery, and other factors in the proposal. *Id.*

On February, 18 2016, Eversource filed a petition for approval of a 20-year contract with Algonquin for the procurement of natural gas capacity on the Access Northeast project and the Commission opened Docket No. DE 16-241 to consider the petition. As noted by PSNH, the petition sought approval of both the arrangement itself and a tariff providing for recovery of the costs from PSNH's distribution service customers. PSNH Brief at 6-7 n.4. In dismissing the petition nearly nine months later and after extensive briefing, the Commission concluded that the PSNH proposal is "fundamentally inconsistent with the purposes of restructuring." Order No. 25,950 at 9. The denial of timely motions for rehearing pursuant to RSA 541:3, *see* Order No. 25,970 (Dec. 7, 2016) led to this appeal.

In the meantime, the situation on the New England electricity grid relative to generation and the availability of fuel for natural gas generators has continued to evolve. The Appellants concluded their appendix with a news report which, like many similar accounts, made much of the use in September 2016 of the word "precarious," by the Chief Executive Officer of ISO New England, in describing the state of the region's electric grid. *See* PSNH Brief at 14 (referencing this claim). However, in January 2017 ISO New England issued a "State of the Grid" report in which the regional transmission organization declared that (1) "[n]early twenty years of competitive markets have attracted investment in the power plants and the demand-side

resources to meet consumer demand," ISO New England, "State of the Grid: 2017" (Jan. 30, 2017) at 6,[11] (2) [i]n 2016, wholesale electricity prices were the lowest since the current markets were launched in 2003," *id.* at 7[12], and (3) although "fuel security" for natural gas generation facilities "on the coldest days of the year" remains a pressing challenge, with "[e]xpanded natural gas pipeline capacity . . . one solution, . . . it is not the only way to solve the region's fuel infrastructure needs," *id.* at 8 (noting that more liquefied natural gas storage, more generators with duel-fuel capability, offshore wind generation and more hydro power from Canada are among other possible solutions).

ISO New England made clear it remains concerned about the ability of natural gas generators to procure adequate fuel supplies on certain days of the year, but the grid operator stressed that its "last resort" as the regional reliability guardian is not blackouts but "special reliability contracts to some non-gas resources to convince them to postpone retirement." *Id.* at 21 (noting this may have unwelcome financial and environmental consequences). This certainly presents significant issues and challenges for policymakers, but it is clear as a practical matter that if the Court rules in favor of the appellees here the lights will not go out.[13]

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[11] The referenced report of ISO New England is available at www.iso-ne.com/static-assets/documents/2017/01/20170130_stateofgrid2017_remarks_pr.pdf.

[12] It is, admittedly, difficult to square this assertion from the regional transmission organization with the unsupported claim in the PSNH Brief that two decades after the Legislature passed the Restructuring Act electricity costs "have not been reduced." PSNH Brief at 14. The only reasonable explanation is that consumer-favorable trends in wholesale electricity prices have not been finding their way into retail rates.

[13] Beyond that which the OCA has addressed, *supra*, there are numerous factual allegations in the Statements of Facts in the appellants' briefs with which the OCA does not necessarily agree. We have not attempted a point-by-point rebuttal of them because they are not germane to the purely legal question the Court confronts in this appeal. For example, both PSNH and Algonquin rely on an Order of Notice issued by the Commission in 2015 for the proposition that the average retail price of electricity in New England is the highest in the continental U.S. *See* PSNH Brief at 14 and Algonquin Brief at 3, citing App. at 441. Both briefs are amply cushioned with factual assertions about the natural gas industry, the electric industry, their interactions and their challenges – but, assuming its veracity, none of this contemporary information sheds any light whatsoever on the intent of the Legislature when it adopted the Restructuring Act in 1996. The Court should disregard this material except insofar as it, in combination with the referenced 2017 update from ISO New England, provides reassurance about the practical consequences of affirmance.

SUMMARY OF THE ARGUMENT

In the wake of the rate shock induced by the effects of the Seabrook-driven bankruptcy of Public Service Company of New Hampshire, the General Court took the historic step in 1996 of adopting the Electric Industry Restructuring Act, RSA Chapter 374-F. The fundamental purpose of the Restructuring Act was to prevent the Seabrook scenario from recurring – i.e., to transfer the business risk associated with generation investments from captive utility ratepayers to the owners of the facilities. This decisive shift in public policy was made possible by technological changes, and reforms in federal electricity regulation, that meant generation was no longer a natural monopoly but, rather, a form of enterprise that could and should be subject to market forces so that competition could be harnessed as a means of price discipline. At the same time, the network itself – poles and wires (or, in the parlance of the industry, transmission and distribution) remains a natural monopoly whose costs and rates are still fully regulated in New Hampshire.

The proposal for which PSNH sought the approval of the Commission in Docket No. DE 16-241 – to purchase natural gas pipeline capacity on the proposed Access Northeast project and force its captive transmission and distribution customers to pay for it – is fundamentally at variance with the concept enshrined in the Restructuring Act. Therefore, the Commission correctly determined it could not lawfully entertain such a petition.

Although a shift in paradigm, the Restructuring Act did not wipe clean the slate of applicable public utility law as codified in Title 34 of the Revised Statutes Annotated. The General Court left restructured electric utilities like PSNH subject to fundamental precepts of utility regulation. Among them is the requirement that to be included in rates, assets must be "used and useful" – i.e., the utility must be actually using the assets to provide the service for

which the utility is being compensated by its customers via their electric rates. Including natural gas pipeline capacity in electric distribution rates violates the used-and-useful requirement because, at the risk of stating the obvious, fuel has nothing to do with the transmission and distribution service of which PSNH remains the monopoly provider post-restructuring.

All arguments to the contrary can and should be rejected as efforts to drag the analysis into the thicket of specific words and phrases in what is, admittedly, a complex and sometimes confusingly worded statute. Relying largely on various references in the statute to the objective of rate relief, the Appellants would have the Court believe that these phrases mean the Commission may approve anything an electric distribution might conjure that could possibly be justified as potentially lowering rates. This ignores the reality that making rates as low as possible, while continuing to provide the owners of the regulated assets their constitutionally required opportunity to earn a reasonable return on their investment, has *always* been – *and remains* – the reason we have a Public Utilities Commission in the first place.

As the Appellants correctly note, the reliability of the electricity grid also remains a key objective of utility regulation in New Hampshire. This, too, has been a constant – a public policy precept that antedated the Restructuring Act and remains as viable as ever. However, as the General Court was aware in 1996, restructuring the electric industry inevitably changed the means by which reliability is assured. Prior to restructuring, the adequacy of available generation assets was entirely a state responsibility. In the wake of restructuring, in New Hampshire as in other states that moved beyond monopoly electric generation, the responsibility for assuring the adequacy of generation resources is now vested in a Regional Transmission Organization – in this case, ISO New England – which is subject to federal rather than state oversight. One may debate the wisdom of this choice, in practical terms or as a matter of

optimizing federalism. But this reality has the effect of rendering unpersuasive the Appellants' claims that the references to reliability in the Restructuring Act form a basis for allowing the Commission to consider the PSNH plan to make more fuel available to the region's natural gas generators and include the costs in retail transmission and distribution rates. In fact, the references to reliability in the Restructuring Act are directives to the utilities, the Commission, and the public to focus their attention on regional and federal forums.

Because the Restructuring Act is nested within the overall body of Title 34, the Appellants find it convenient to argue that other provisions in Title 34 that predate the Restructuring Act either provide a separate basis for the PSNH proposal and/or were misinterpreted by the Commission as having been repealed by implication. These arguments are unpersuasive.

RSA 374-A continues to allow certain investments but, even assuming its reference to "electric power facilities" somehow includes natural gas pipeline capacity, the Restructuring Act precludes its inclusion in retail transmission and distribution rates. RSA 378:37 and :38 continue to require least-cost planning by electric utilities like PSNH and include supply options (i.e., generation) in the planning process, but as a concession to restructuring a separate provision (RSA 378:38-a) contemplates that the Commission will exempt restructured utilities from planning for generation. RSA 374:57 allows a restructured electric utility to invest in transmission assets, but the Appellant's claim that this includes *natural gas* transmission amounts to a strained and ultimately unsustainable interpretation of this provision. For these reasons, according to the Court's longstanding approaches to statutory interpretation these provisions can properly be harmonized with the Restructuring Act in a manner that advances the key objective of RSA 374-F and sustains the Commission's interpretation of the Act.

Finally, the Court has previously indicated that when it considers the question of electric industry restructuring, it keeps in mind the language in Part 2, Article 83 of the New Hampshire Constitution that enshrines the principle of "free and fair competition" in the Granite State's ongoing experiment in self-government. The General Court likewise made explicit reference to Article 83 in articulating the purposes of the Restructuring Act. Forcing captive electric ratepayers to pay for natural gas pipeline capacity via their electric distribution rates is the very opposite of the kind of "free and fair competition" that both the Restructuring Act and the New Hampshire Constitution strive to advance.

AGRUMENT

This case presents the Court with a pure question of law: whether the Public Utilities Commission correctly construed the applicable provisions of its enabling statutes in concluding it could not consider the petition at issue in this appeal. Therefore, as noted by PSNH in its brief, the Court's decision in *Appeal of Old Dutch Mustard Co.*, 166 N.H. 501 (2014), lays out the framework for the Court's analysis. The Court is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered *as a whole*." *Id.* at 506 (citation omitted; emphasis added). "[A]n interpretation of a statute by the agency charged with its administration is entitled to deference." *Id.* (citation omitted, noting that the deference is "not total"). If possible, the Court construes the language in a statute "according to its plain an ordinary meaning" and, significantly for purposes of this appeal, the goal is to interpret statutory language "in the context of the overall statutory and regulatory scheme . . . not in isolation." *Id.* (citations omitted).

In the particular circumstances of this case, the overall statutory and regulatory scheme the Court must examine is not just RSA Chapter 374-F (the Electric Industry Restructuring Act) or any of the other specific statutory provisions that were the subject of extensive argumentation below but, rather, all of Title 34 of the Revised Statutes annotated – i.e., the entirety of the Public Utilities Commission's enabling statutes. This is because the Legislature, when it ordered the restructuring of the state's electric utilities by adopting RSA 374-F in 1996, did not wipe the legal and regulatory slate clean with respect to post-restructuring electric utilities; rather, it left them subject to the overall regulatory regime that had developed over time, though statutes dating back to 1911 and their interpretation by the Commission and the Court.

The implementation provisions of the Restructuring Act specifically indicate that nothing in RSA 374-F "shall be construed to prohibit the commission from otherwise exercising its lawful authority under title 34, in proceedings which relate to the introduction of competition in the retail electric utility industry." RSA 374-F:4, X. This specific directive, and the lack of any language in RSA 374-F that would wrest restructured electric utilities from the general purview of Title 34, have important consequences. The electric distribution utilities that emerged from the restructuring process mandated by RSA 374-F remain subject to all of RSA Chapter 374, the "General Regulations" applicable to utilities, *see* e.g., RSA 374:3 (utilities subject to the "general supervision" of the Commission) RSA 374:8 (utilities must conform to a "uniform system of accounts") and RSA 374:22 (requiring Commission approval to embark upon new businesses), as well as the ratemaking principles set forth in RSA Chapter 378.

PSNH and Algonquin have sought to drag this case into the weeds by casting it as an a matter of the Commission focusing obsessively and inappropriately on a particular phrase in the Restructuring Act – the reference to the functional separation of generation from transmission

and distribution in RSA 374-F:3, III. This is a classic example of an invitation to ignore the context of the words in a statute and, as explained more fully below, it is also reflects a misunderstanding of what the Commission actually decided.

A. The classic ratemaking concept of "used and useful" looms large.

One of the core statutory principles that remains squarely applicable to post-restructuring distribution utilities is the so-called "used and useful" requirement. The Commission explicitly acknowledged its applicability to this case in its October 6, 2016 Order. *See* Order No. 25,950 at 14.

Specifically, New Hampshire law has long prohibited the Commission from including in the rates of a regulated utility any return on an investment that is not "used and useful in the public service." RSA 378:27 (temporary rates); *see also* RSA 378:28 (applying RSA 378:27 to permanent rates "[s]o far as possible" and declaring that the commission "shall not include in permanent rates any return on any plant, equipment, or capital improvement which has not first been found by the commission to be prudent, used, and useful"). Although not constitutionally required, "used and useful" is "a constitutionally *permissible* legislative articulation of the perceived interest of consumers in paying directly only for the costs of a project actually in use and providing service to the public." *In re Public Service Co. of N.H.*, 130 N.H. 265, 279 (1988) (citation omitted, emphasis added).

The "anti-CWIP" statute, RSA 378:30-a, adopted by the Legislature in 1979 and referring to "construction work in progress," is an application of this principle. *Id.* Under RSA 378:30-a, a regulated utility may not recover in rates charged to captive customers the costs of any capital project, however prudent or even virtuous, until the project is actually in service. As such, the purpose of the anti-CWIP statute is to allocate the "direct consequences of investment

risk for new plant" to investors as opposed to captive customers during the construction period. *Id.* at 285-86.[14] The purpose of the 1979 enactment was to contravene the Court's then-recent determination that the "elastic" concept of "used and useful" allowed the commission to determine as a factual matter that Public Service Company of New Hampshire's investments in the Seabrook nuclear power plant were, at a time that ultimately proved to be more than a decade before the facility's in-service date, reflected "an expenditure incurred in raising capital to finance a reasonable construction program that will inure to the benefit of energy consumers by assuring a future supply of electricity." *Legislative Utility Consumers Council v. Public Service Co. of N.H.*, 119 N.H. 332, 344 (1979). In essence, the Legislature via the anti-CWIP statute directed the Commission conclude as a matter of law that the mere possibility of a potential future benefit to customers of a major utility investment today is not sufficient to render the investment "used and useful" for ratemaking purposes.

The Restructuring Act has precisely the same effect and purpose with respect to the type of investment that Eversource, as the successor owner of the once-bankrupt PSNH, is seeking to place into non-bypassable rates here.[15] Whether the commission would or could determine in the underlying docket that PSNH's proposed investment in natural gas pipeline capacity will as a factual matter assure a future supply of electricity is irrelevant. The Restructuring Act mandated a process – one that has taken more than 20 years to complete – that transformed PSNH from a

[14] When the construction period is protracted on a longterm and unexpected basis, the consequences for utility shareholders can be dire indeed, as the bankruptcy of Public Service Company of New Hampshire arising out of its investment as lead owner of the Seabrook nuclear power plant demonstrated.

[15] The "used and useful" concept in its classic formulation refers to recovery, via rates, of a direct investment by a regulated utility (as well as the recovery of the carrying costs of such an investment), whereas at issue in this case is recovery from retail ratepayers of costs associated with a longterm contract into which PSNH has entered with Algonquin Gas Transmission, which would make the actual investment. *See* App. at 200. As the commission implicitly acknowledged in its discussion of the "used and useful" principle below, the rate effects are identical and thus the principle is squarely applicable.

full-service electric utility to strictly a poles-and-wires company whose customers are captive only in the sense that they depend on PSNH to provide them with the physical assets necessary to allow them to acquire electricity from (and in some instances inject energy into) the grid.[16] Natural gas pipeline capacity is not "used and useful" in the provision of the transmission and distribution service with which PSNH is tasked under RSA 374-F. Thus, just as the anti-CWIP statute assigned to shareholders the investment risk of assets still under construction, the Restructuring Act assigned to shareholders the investment risk related to all generation – including the risks associated with fuel supply. And, as the Commission correctly concluded, gas pipeline capacity cannot be "used and useful" in the provision of electric distribution service so a proposal to include such a cost in nonbypassable retail rates transgresses the most fundamental principles of public utility law in New Hampshire. No efforts to limn specific language of the Restructuring Act, or to square it with language from pre-existing elements of Title 34, can obscure this fundamental reality.

B. The fundamental purpose of the Restructuring Act is to remove the business risk of electric generation from the backs of retail ratepayers.

The failure to consider the Restructuring Act in its proper context also leads to the central and erroneous argument of the appellants that the chief purpose of the 1996 enactment was lowering rates rather than, as the Commission suggested, the promotion of competition. Limiting rates so that they are as low as possible, but without depriving utilities of their constitutionally required opportunity to earn a reasonable return on shareholder investment, has always been a central purpose of utility regulation. *See, e.g., Appeal of Public Service Co. of*

[16] In the parlance of the electric industry, and consistent with the language used in the Restructuring Act, the "poles and wires" business is described as the provision of "transmission" and "distribution" service. *See, e.g.*, RSA 374-F:3, IV (referring to "open access to transmission and distribution facilities"). The distinction between transmission and distribution is a sometimes controversial matter because, generally speaking, the Federal Power Act has preempted the regulation of transmission (as an exercise of federal Commerce Clause authority) while leaving regulation of distribution to the states. *See, e.g., New York v. FERC*, 535 U.S. 1, 5-10 (2002) (describing the jurisdictional framework). Fortunately the distinction is not an issue in this appeal.

N.H., 130 N.H. 748, 750 (1988) ("a utility's charges to customers are appropriate if they fall within a zone of reasonableness between the extremes of confiscating a utility's property, at one end, and exploiting customers for the utility's benefit, at the other") (citations omitted). The change effected via adoption of the Restructuring Act, therefore, was not to task the Commission with making rates as low as possible – this was a constant – but, rather, to follow a new path to that end – i.e., "to reduce costs for all consumers of electricity by harnessing the power of competitive markets," as set forth in the statute's purpose statement. RSA 374-F:1, I. As a matter of common sense, the essence of competition is choice – and when a consumer has the choice to favor one electricity supplier over another she, by definition, has shed the business risk arising out of the possibility the supplier has made the sort of improvident investment decisions that landed PSNH in Bankruptcy Court.

The U.S. Supreme Court has counseled that it is simplistic to assume that whatever advances a statute's primary objective must be the law. *Henson v. Santander Consumer USA Inc.*, 2017 U.S. Lexis 3722 (June 12, 2017) at *16 (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (noting that "no statute yet known pursues its stated purpose at all costs"); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-67 (1990) (same).[17] In the present context, it would be simplistic to assume that the Restructuring Act authorizes the Commission to consider any proposal of any kind made by a restructured electric utility if it is accompanied by a claim, of whatever degree of credibility, that the proposal would result in lower rates. Indeed, because a legislature cannot simply mandate lower rates by fiat, *see Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 690 (1923)

[17] To similar effect is the advice of professors Hart and Sacks in their famous treatise on *The Legal Process* that "the concept of [statutory] purpose is not simple. . . . Purposes may be shaped with differing degrees of definiteness. . . . Purposes, moreover, may exist in hierarchies or constellations. E.g. (to give a very simple illustration, to do *this* only so far as possible without doing *that*." Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) at 1377.

(explaining constitutional prohibition of "confiscatory" rates), lawmakers hoping for rate relief must employ indirect techniques inevitably involve the resolution of competing policy imperatives.

When applying the principles of plain meaning and holistic interpretation described in *Old Dutch Mustard*, it becomes clear from the language actually used by the General Court in RSA 374-F that the Restructuring Act is not a simplistic command to the Commission to lower rates but is, rather, essentially a set of complex instructions to the commission for transitioning electric utilities out of the vertically integrated *status quo ante* in which their customers were fully captive and reliant on their local utility for the provision of not just a reliable transmission and distribution grid but also the electricity delivered by the grid to consumers. In particular, the implementation provisions of the Restructuring Act, which are set forth in RSA 374-F:4, are properly viewed as the heart of the statute. This section 4 of the Act is a set of specific directives to the Commission "to require the implementation of retail choice of electric suppliers for all customer classes," to undertake a generic proceeding so that restructuring would occur on a statewide basis according to a comprehensive plan, to allow for stranded cost recovery when consistent with the public interest, and "to order such charges and other service provisions and to take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in this chapter." RSA 374-F:4.[18]

The reference to "such other actions that are necessary to implement restructuring that are substantially consistent with the principles established in this chapter" both invokes the Restructuring Policy Principles set forth in the preceding section, RSA 374-F:3, and fatally

[18] Other directives in the implementation provisions set forth in section 4 of the Restructuring Act are not relevant here. They concern, for example, interim stranded cost charges that were applicable during the transition to a fully restructured industry, the implementation of a system benefits charge to fund assistance to low-income customers as well as energy efficiency programs, and the limited degree of oversight by the commission of rural electric cooperatives that have filed certificates of deregulation with the commission.

undermines the appellants' argument about those principles. They devote much space in their briefs to arguing that the Commission erroneously focused on one provision in section 3 – the declaration that "[g]eneration 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." *See* RSA 374-F:3, III. The Commission did not, as appellant Algonquin contends, apply one of the policy principles to the inappropriate exclusion of others. Nor did the commission read too much into the Legislature's use of the word "should" in the so-called functional separation principle as argued by PSNH. Rather, the commission kept faith with its instructions in the implementation section, RSA 374-F;4, to restructure PSNH in a manner that is substantially consistent with the policy principles without deviating from the explicit instructions themselves. Those instructions are effectively a one-way ratchet; the Legislature has declared that in its restructured state New Hampshire's electric industry now relies on the competitive market for everything related to generation. *See In re New Hampshire Pub. Utilities Comm'n Statewide Elec. Utility Restructuring Plan*, 143 N.H. 233, 241 (1998) (quoting the uncodified purpose statement from the bill that enacted RSA 374-F and concluding that "the legislature viewed the [post-bankruptcy] rate agreement as a significant contributor to the exceedingly high electric rates in our State, which motivated it to enact the restructuring statute to deregulate electric generation rates and services while providing a mechanism for stranded costs recovery"). The commission understood this directive well, and correctly grasped the core purpose of the Restructuring Act, which is why it focused for purposes of the proposal at issue in this case on the functional separation principle.

C. The Commission's decision is not an affront to the objective of a reliable electricity grid.

In arguing that the commission improvidently focused on functional separation and thereby misconstrued the Restructuring Act, PSNH makes much of the fact that the Legislature began the Restructuring Policy Principles with a declaration that "[r]eliable electricity service must be maintained while ensuring public health, safety, and the quality of life." RSA 374-F:3, I. This is, self-evidently, sound public policy. But this does not mean the Restructuring Act authorizes the commission to undermine the key objective of the Restructuring Act in the name of reliability. Rather, it amounts to an acknowledgement that restructuring did not occur in a vacuum but, rather, against a backdrop of evolving national policy pursuant to the Federal Power Act.

As recently explained by the U.S. Supreme Court in *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016), the trend toward deregulation in the electric industry has caused the role of the Federal Energy Regulatory Commission (FERC) to evolve such that, among other things, in states like New Hampshire that have embraced retail restructuring, "to ensure reliable transmission of electricity from independent generators to [distribution utilities like PSNH], FERC has charged nonprofit entities, called Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), with managing certain segments of the electricity grid." *Id.* at 1292 (noting that this exercise of the FERC's authority is pursuant to the provision of the Federal Power Act that authorize the agency to oversee "the sale of electric energy at wholesale in interstate commerce"). As Maryland discovered to its peril in the *Hughes* case, this can leave a restructured state with significant limitations on its ability protect its in-state supply of wholesale electricity. *See id.* at 1294 (noting that in 2009 Maryland regulators "became concerned that the [RTO's regional] capacity auction was failing to encourage development of

sufficient new in-state generation" and "[b]ecause Maryland sits in a particularly congested part of the [transmission] grid, importing electricity from other parts of the grid into the State is often difficult"); *id.* at 1300 (invalidating Maryland program to incentivize in-state generation because "States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation"). The point here is not to argue that the PSNH proposal for acquisition of natural gas pipeline capacity would, like the "contract for differences" plan invalidated in *Hughes*, transgress applicable federal law; this is a question the commission explicitly declined to address in light of its conclusions about the Restructuring Act. *See* Order No. 25,950 at 14-15. Rather, the point is that to a not-insignificant extent the combined effect of the Restructuring Act (including its expressed commitment to reliable electric service) and the Federal Power Act is that, in New Hampshire, a distribution utility meets its reliability obligation by participating in our regional transmission organization, ISO New England, which is responsible for assuring the adequacy of regional generation resources under the aegis of the FERC.

In blunt terms, reliability at the bulk power level has essentially been federalized in restructured states. This process may have gone further than the Legislature realized in 1996 as the result of *Hughes* but it is clear from the terms of the Restructuring Act itself that the Legislature knew that in the era of restructured electric utilities New Hampshire would be relying on regional mechanisms that the state cannot control. *See, e.g.*, RSA 374-F:3, XIII ("New Hampshire should work with other New England and northeastern states to accomplish the goals of restructuring" and the New England Power Pool "should be reformed") and RSA 374-F:8 ("The commission shall advocate for New Hampshire interests before the Federal Energy

Regulatory Commission and other regional and federal bodies . . . . to assure nondiscriminatory open access to a *safe, adequate, and reliable* transmission system at just and reasonable rates") (emphasis added).

"It is a fundamental principle of statutory construction that whenever possible, a statute will not be construed to as to lead to absurd consequences." *State v. Wilson*, 2017 N.H. Lexis 74 at *18 (citation omitted). Interpreting the Restructuring Act so as to assume legislative indifference to the reliability of the electric grid would be such an absurd consequence. However, relying on the federally regulated regional transmission organization to assure reliability does not constitute indifference. The Legislature could certainly revisit this policy choice in the future, at the risk of *Hughes*-type troubles, but the current state of New Hampshire statutory law is clear. The reference to reliability in RSA 374-F:3, I does not provide the Commission with authority to allow a restructured electric utility to put generation fuel supply costs into nonbypassable rates charged to captive customers.

D. The Commission did not treat any pre-restructuring statutes as repealed by implication.

The appellants contend at length that the commission's order is fatally flawed because the agency's interpretation assumes an implied repeal of certain statutes that antedate the Restructuring Act. *See* PSNH Brief at 25-32 and Algonquin Brief at 22-26. This claim is unpersuasive. The commission did not explicitly determine that any prior statutes had been impliedly repealed; instead, it correctly concluded that the Restructuring Act can be harmonized with the prior enactments referenced by the appellants.

RSA 374-A authorizes an electric utility in relevant part "[t]o jointly or separately plan, finance, construct, purchase, operate, maintain, use, share costs of, own, mortgage, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within or

without the state." RSA 374-A:2, I. Such utilities may also "enter into and perform contracts and agreements" for such joint or separate activities. *Id.* at II.

In light of this language, and in light of the correct assertion by PSNH that it has authority as a matter of corporation law to exercise essentially the same powers as non-regulated corporate entities, *see* PSNH Brief at 26, PSNH could indeed still invest or otherwise "participate in" electric power facilities. What PSNH cannot do is recover the costs of such investment or participation in nonbypassable rates charged to its captive distribution customers.[19] It is in this sense that RSA 374-A is no longer applicable to PSNH since the practical and accounting difficulties of an investment that cannot be included in rate base would be enormous.

Moreover, capacity on a natural gas pipeline does not fit within the statute's definition of "electric power facilities or portions thereof." *See* RSA 374-A:1, III (defining "electric power facilities" as "generating units rated 25 megawatts or above and transmission facilities rated 69 kilovolts or above planned to be placed in service in New England after June 24, 1975"). Although natural gas and its delivery are important to the operation of a generation facility that uses such fuel, the fuel supply itself or the means of getting that supply to the generator are no more a part of the generation facility than are other key inputs, from waste disposal to water supply to the infrastructure that makes and delivers spare generator components. If natural gas pipeline capacity is an electric power facility or portion thereof, then anything in the economy that could be deemed critical to the operation of a generation facility – from fuel to waste disposal to anything in between, including the fuel truck that feeds employees in the parking lot

[19] The PSNH petition dismissed by the Commission explicitly requested a determination that the tariff accompanying its petition "would properly allow for recovery of costs associated with agreements executed by PSNH for the provision of interstate pipeline transportation and gas storage services to electric generation facilities in the ISO-NE region." App. at 214. The joint testimony of PSNH witnesses Christopher J. Goulding and Lois B. Jones appended to the petition describe a special "Long-Term Gas Transportation and Storage Contracts" charge that would be applicable to "all delivered kWh for all customer classes" – i.e., on a nonbypassable basis.

during the lunch hour -- could be justified as a permissible utility investment pursuant to RSA 374-A. This cannot be what the Legislature intended.

Indeed, PSNH itself did not initially view RSA 374-A as a source of authority to purchase natural gas pipeline capacity prior to the submission of its petition to the Commission. *See* PSNH Brief at 30 ("Eversource did not see the statute as "directly applicable"). As recently as its initial brief in the proceedings below, PSNH was only willing to go as far as referring to the "potential applicability" of RSA 374-A in light of suggestions from Commission staff that this provision might be useful to the company's cause.[20] In seeking to circumnavigate this unhelpful position now, PSNH accuses the Commission of seeking to "have it both ways" by deeming the Access Northeast contract a component of "[g]eneration services" pursuant to the RSA 374-F:3, III policy principle stating that such services "should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services." *See* PSNH Brief at 30, citing Order No. 25,950 at 9. According to PSNH, if the Commission was right about that, then the contract must also be "participation in electric power facilities" for purposes of RSA 374-A:2 and therefore permissible under the authority granted by that statute.

The Court should reject these contentions as sophistry. RSA 374-A and RSA 374-F are not *in pari materia* such that they read as a "unified cohesive whole," *Williams v. Babcock*, 121 N.H. 185, 190 (1981) (citations omitted), since the former dates from 1975 and is a holdover from the era of vertically integrated, monopoly electric utilities and the latter was the means for ending that era more than two decades later. The phrases are not identical and no canon of statutory construction demands that vaguely similar terms be reconciled to one another merely

[20] The initial brief of PSNH in the proceedings below is indexed in the certified record as item no. 46. The discussion of RSA 374-A appears at page 12 of the brief.

because they are vaguely similar. Most importantly, a close reading of the Commission's decision clarifies that the agency did not tell PSNH it could not enter into the deal in light of the functional separation principle of RSA 374-F:3, III – only that it could not include the costs in distribution rates . *See* Order No. 25,950 at 9 ("*Including a generation cost in distribution rates* would combine an element of generation costs with distribution rates and conflict with the functional separation principle") (emphasis added).

PSNH further contends that the commission erroneously concluded the Restructuring Act impliedly repealed RSA 378:37 and :38. Once again, the utility has both misconstrued the commission's ruling and made an unpersuasive legal argument.

Sections 37 and 38 of RSA 378 are part of a subchapter that requires electric utilities to submit least-cost integrated resource plans to the commission for approval on a regular basis. *See* RSA 378:38 (providing for biennial reports and listing items for inclusion). Although, as PSNH points out, section 38 tasks the utilities with providing *inter alia* an assessment of energy supply options as well as the environmental, economic, energy price and supply impacts of the plan, the utility omits reference to RSA 378:38-a, which authorizes the commission to "waive any requirement to file least cost integrated resource plans by an electric utility under RSA 378:38 except for plans relating to transmission and distribution." This language, added in 1997, has been interpreted numerous times at the request of PSNH as authorizing the non-inclusion of plan elements that are inconsistent with a restructured electric utility that is no longer vertically integrated and no longer responsible for making generation-related investment choices. *See* Order No. 25,828 in Docket No. DE 15-248 (Oct. 19, 2015), 2015 N.H. PUC Lexis 100 (granting PSNH request for RSA 378:38-a waiver in light of its likely divestiture of generation assets and discussing history of prior and successful PSNH waiver requests).

E. RSA 374:57 does not authorize an electric utility to invest in natural gas transmission capacity.

Alongside their arguments about the Restructuring Act, PSNH and Algonquin each argue that the Commission erred by misinterpreting RSA 374:57. According to PSNH, the Commission's ruling amounts to an improvident determination that RSA 374:57 has been repealed by implication. Algonquin contends in more straightforward fashion that the Commission simply misread the statute.

Section 57 of RSA 374 requires electric utilities to submit certain agreements to the Commission so that the agency may disallow recovery in retail rates upon a determination that an agreement is "unreasonable and not in the public interest." The statute covers any agreement with a term of more than one year "for the purchase of generating capacity, transmission capacity or energy," specifying that the filing is due at the Commission "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 positions of both Algonquin and PSNH on this issue are premised on the notion that the phrase "transmission capacity" is not limited to electric generation capacity but could also include natural gas transmission capacity. To so interpret RSA 374:57 would be to turn the canons of statutory interpretation on their head.

"[T]he court does not consider words and phrases in isolation, but within the context of the statute as a whole." *General Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 606 (2009) (citation omission). Plainly, RSA 374:57 is a statute about electricity and not natural gas, as confirmed by the reference to submission of agreements to the FERC pursuant to the Federal Power Act, which is concerned exclusively with electricity. A statute intended to include

agreements for natural gas capacity would have included a similar reference to the companion FERC enabling statute, the Natural Gas Act.

"Words used with plain meaning in one part of a statute are to be given the same meaning in other parts of the statute, unless a contrary intention is clearly shown." *Appeal of Denton*, 147 N.H. 259, 260 (2001) (citation omitted). Surely this applies to the same word used twice in the same sentence of a statute, as the word "capacity" is used here. It would be a strained gloss on legislative intent indeed to conclude that "capacity" in relation to generation includes only electricity, as it obviously does, whereas in the very next phrase the term "capacity" refers both to electricity and natural gas.

Although PSNH cites the *Old Dutch Mustard* case correctly for the proposition that the Court may not add words to a statute, PSNH Brief at 16, citing *Old Dutch Mustard*, 166 N.H. at 506, the principle undermines rather than supports PSNH's position on this issue. It is not, as PSNH suggests, a matter of inserting the word "electric" before the word "capacity" but, rather, a matter of inserting the phrase "natural gas" before the word "transmission" in a statute that is otherwise entirely about electricity by virtue of its plain language. Indeed, it borders on the absurd to conclude that in a triad of terms in a statute about electric utilities – i.e., "generating capacity, transmission capacity, or energy" – only the middle one refers broadly to electricity or natural gas.[21]

[21] It is noteworthy, as PSNH seems to suggest at page 16, note 9 of its brief, that the Supreme Judicial Court of Massachusetts has construed the directly analogous statute of the Bay State in a manner identical to the Commission's ruling on RSA 374:57, in a case involving the same project (Access Northeast) and the same ultimate question (the nature and purpose of electric industry restructuring). *See Engie Gas & LNG*, 475 Mass. at 198. PSNH's argument for distinguishing the two cases – a supposed contrast in the ultimate purpose of restructuring in the respective states – is not germane to the question of what the words in either state's "capacity" contract approval statute means. In any event, because the meaning of RSA 374:57 is so clear from the plain language, the Court need not look to persuasive authority from another jurisdiction. Nor is recourse to legislative history necessary. Nevertheless, the Court should be aware that an analysis of the legislative history of RSA 374:57 appears in the certified record and clearly demonstrates that the General Court adopted this provision during a 1989 special session called to deal with the effects of the PSNH bankruptcy, at which the sole concern was issues related to *electric*

F. The Court must resolve this case, and interpret the Restructuring Act, in light of the New Hampshire Constitution's commitment to "free and fair competition."

Article 83 of Part 2 of the New Hampshire Constitution provides in relevant 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." The Court has previously acknowledged the special relevance of Article 83 in the context of the Public Utilities Commission given that utility regulation has traditionally involved the taming of rather than the elimination of monopolies. See *Appeal of Public Service Co. of N.H.*, 141 N.H. 13, 19 (1996) (noting that, "[a]gainst this constitutional backdrop, the role and duty of the [Commission] is to oversee and regulate those few necessary monopolies so that the constitutional rights of free trade and private enterprise are disrupted as little as possible") (citation omitted). Accordingly, "legislative grants of authority to the [Commission] should be interpreted in a manner consistent with the State's constitutional directive favoring free enterprise." *Id.* (citation omitted). Limitations on the rights secured by the anti-monopoly provisions of Article 83 "must be construed narrowly, with all doubt resolved against the establishment or perpetuation of monopolies." *Id.* In the purpose statement that begins the Restructuring Act, the Legislature explicitly declared itself to be furthering the "directives" of Part 83. RSA 374-F:1, II.

However much the appellants may claim that they, too, are promoting competition by seeking to improve access by unregulated natural gas generators to fuel delivered by pipeline, the ineluctable reality is that what they seek to do here is to walk back the progress toward retail and wholesale competition in electric markets. Their purpose is to restore a slice of the retail monopoly that PSNH lost via RSA 374-F, based on a theory of attenuated impacts on a

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generation and transmission. The document in question is item no. 42 in the certified record of the proceedings below.

wholesale market that is itself supposed to rely on market forces to address problems like input scarcity. To interpret RSA 374-F as permitting such a step backward would be an affront to Part 83, the applicable case law and the Legislature's own gloss on this constitutional directive.

CONCLUSION

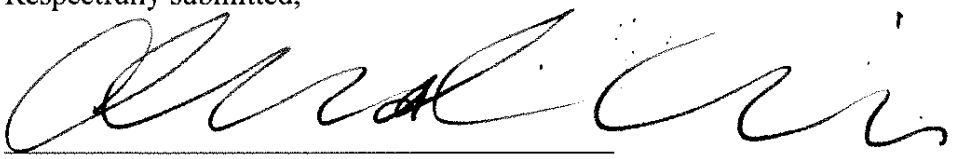
For the appellants to prevail here, the Court would have to adopt a view of the Restructuring Act that essentially reduces a complex and detailed statute to this sort of legislative directive to the Commission: Reduce rates, doing so by via any approach and with any degree of competition and deregulation you deem necessary. This would be an example of "delegation running riot," in Justice Cardozo's famous formulation. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). It would also require the Court to ignore everything about the Restructuring Act – its purposes, its basic structure, its plain language, its place in the history of utility regulation in New Hampshire, its nest within the broader context of the law of utility ratemaking, and its relationship to the anti-monopoly provisions of the New Hampshire Constitution. For the foregoing reasons, the decision of the Public Utilities Commission in Docket No. DE 16-241, dismissing the petition of Public Service Company of New Hampshire, should be affirmed.

REQUEST FOR ORAL ARGUMENT

The Office of the Consumer Advocate requests the opportunity to present an oral argument, which Mr. Kreis would deliver. With respect to the appellees, good cause exists for providing more than 15 minutes of time. This case raises important issues of public policy and the appellees represent diverse interests. The Office of the Consumer Advocate is the only

appellee representing the ratepayers who would ultimately be responsible for the costs of the Access Northeast contract at the heart of the dispute.

Respectfully submitted,



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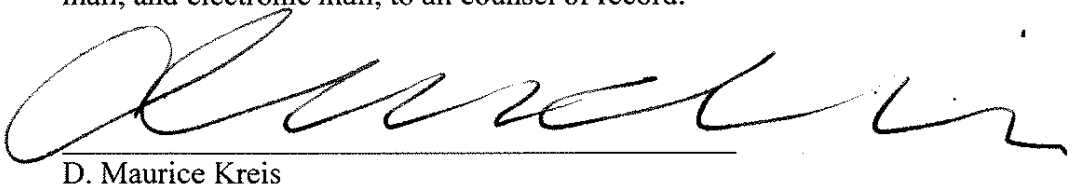
603.271.1172

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I served two copies of the foregoing BRIEF OF THE OFFICE OF THE CONSUMER ADVOCATE by mailing two copies thereof by first class mail, and electronic mail, to all counsel of record.



D. Maurice Kreis

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	Michael J. Iacopino	Kathryn M. Bailey
Chairman	Special Commissioner	Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary

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 Denying Motions for Reconsideration

ORDER NO. 25,970

December 7, 2016

The Commission hereby denies the motions for reconsideration of Order No. 25,950, which dismissed Eversource's petition in this docket.

I. PROCEDURAL BACKGROUND

On February 18, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource), a New Hampshire electric distribution company (EDC) filed a petition for approval of a proposed 20-year contract with Algonquin Gas Transmission, LLC (Algonquin). The contract would have been for natural gas capacity on Algonquin's Access Northeast Pipeline Project (Access Northeast pipeline). Eversource also sought recovery of associated costs through a new distribution rate tariff, to be assessed on all of Eversource's customers. Following the submission of legal briefs by interested persons regarding the Eversource proposal, the Commission dismissed the petition. *See* Order No. 25,950 (October 6, 2016). In that order, the Commission concluded as a matter of law that Eversource's proposal conflicted with the principles and requirements of the Electric Restructuring Statute, RSA Chapter 374-F. For a more extensive description of the procedural history of this matter, together with the Commission's legal analysis regarding its decision to dismiss the petition, see Order No. 25,950.

On November 7, 2016, Eversource filed a timely motion for reconsideration of the Commission's decision to dismiss its petition. Algonquin also filed a motion for reconsideration on November 7, 2016. On November 14, 2016, the Coalition to Lower Energy Costs (CLEC) made a filing styled a "Response" to the Eversource and Algonquin motions for reconsideration, broadly supportive of the Eversource and Algonquin pleadings. On November 15, 2016, the Conservation Law Foundation (CLF) filed a timely objection to the Eversource and Algonquin requests for reconsideration. Also on November 15, 2016, the Office of the Consumer Advocate (OCA) filed a timely objection to the Eversource and Algonquin pleadings. On November 18, 2016, NextEra Energy Resources, LLC (NextEra) filed its own objection to the requests for reconsideration. 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.

II. POSITIONS OF THE PARTIES

A. Eversource

In its motion for reconsideration, Eversource reiterated the core arguments it made in its previously filed legal briefs. Specifically, Eversource argued that the Commission erred in failing to adopt the position that the objective of "lower energy costs" presented by the Legislature within the terms of the Electric Restructuring Statute, RSA 374-F, enabled the Commission to approve the Eversource-Access Northeast pipeline proposal. Eversource disagreed with the Commission's reliance on competition and functional separation of distribution and generation as the core principles of the Restructuring Statute. Eversource Motion at 2-5. Eversource also argued that the New Hampshire State Energy Strategy supports the acquisition of additional pipeline capacity for use by New England generators. Eversource

maintained that the prospect of "market failure" related to merchant generators' inability to acquire gas pipeline capacity militated in favor of the Commission's allowing the proposed activity. Eversource Motion at 5-7. Eversource also argued that RSA 374-A remains applicable to New Hampshire EDCs such as itself, even though Eversource did not rely on RSA 374-A in making its petition. Eversource Motion at 7-12.

B. Algonquin

In its motion for reconsideration, Algonquin alleged that the Commission ignored the various goal-oriented Restructuring Statute principles related to the perceived need for lower energy costs, among others, in favor of the functional separation principle presented in RSA 374-F:3, III, and the general principle of competition. Algonquin Motion at 3-9. Algonquin also reiterated its position that for Eversource to "simply provide a mechanism by which natural gas capacity would be made available" did not implicate RSA 374-F:3, III. Algonquin Brief at 9-11. Algonquin also argued that the Commission erred in not accepting legal arguments regarding the applicability of RSA 374:57 and RSA Chapter 374-A.

C. CLEC

In its pleading,[1] CLEC argued that the Commission was incorrect in concluding that the Eversource-Access Northeast proposal violated the terms of the Electric Restructuring Act. CLEC reiterated its position that there exists a state of "market failure" compelling the Commission to approve the proposal, that the proposal does not violate the functional separation principle of the Restructuring Act, and that the general corporate powers of Eversource enabled it to enter into the proposed activities. CLEC offered its broad support for the Eversource and Algonquin motions for reconsideration.

[1] CLEC's filing was not styled as request for rehearing or reconsideration. Instead, CLEC filed what it called a "response" to the motions of Eversource and Algonquin. The OCA argues that we should ignore CLEC's filing as untimely. In light of our decision, consideration of CLEC's arguments does not affect the result.

D. CLF

CLF opposed the requests for reconsideration, agreeing with the determinations of law made by the Commission in Order No. 25,950, and stated that there was no basis for the Commission to reconsider its decision.

E. OCA

The OCA supported the Commission's legal conclusion that the proposed Access Northeast contract would constitute a component of "generation services" in violation of the functional-separation principle of RSA 374-F:3, III, and the Electric Restructuring Act generally. *See* OCA Objection at 3-5. The OCA also presented arguments in opposition to Eversource's, Algonquin's, and CLEC's arguments regarding the import of the ancillary statutes considered by the Commission in its rulings.

F. NextEra

NextEra offered detailed analysis in support of the Commission's legal conclusions presented in Order No. 25,950.

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3, RSA 541:4, *Rural Telephone Companies*, Order No. 25,291 (November 21, 2011). A successful motion must establish "good reason" by showing that there are matters that the Commission "overlooked or mistakenly conceived in the original decision," *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision," *Hollis Telephone Inc.*, Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a

different outcome. *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015).

Eversource's and Algonquin's motions for reconsideration do not present any new information, nor do they establish that the Commission overlooked or misunderstood issues in connection with its dismissal of Eversource's petition by means of Order No. 25,950. We carefully reviewed all of the statutory authorities relied upon by both supporters and opponents of the Eversource proposal, including RSA Chapter 374-F, and did not develop our legal conclusions in a vacuum. Historical context was of critical importance in our analysis. For instance, we carefully examined the definition of "Electric utility" presented in RSA 374-A:I, IV, and noted that Eversource is no longer the kind of electric utility defined in that section as "any individual or entity or subdivision thereof, private, governmental or other, including a municipal utility, wherever resident or organized, primarily engaged in the generation and sale or the purchase and sale of electricity or the transmission thereof, for ultimate consumption by the public." We stand by our conclusions that "RSA 374-A no longer applies to an EDC like Eversource" and "[t]he 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." *See* Order No. 25,950 at 13-14.

Eversource and Algonquin simply reiterated their arguments that the goals of RSA 374-F, including lower energy costs and concomitant economic benefits, override the requirement to divest, if some alternative means is presented that promises to lower energy costs. Restating

prior arguments and requesting a different outcome is not grounds for rehearing. Therefore, Eversource and Algonquin's motions for reconsideration are denied.

Based upon the foregoing, it is hereby

ORDERED, that the petitions by Eversource and Algonquin for reconsideration are hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this seventh day of December, 2016.

Martin P. Honigberg	Michael J. Iacopino	Kathryn M. Bailey
Chairman	Special Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director