THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0007

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY

Petition for Approval of Gas Infrastructure Contract with
Algonquin Gas Transmission, LLC
NHPUC Docket No. DE 16-241

APPEAL OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
PURSUANT TO RSA 541:6 AND RSA 365:21
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

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Oral Argument Requested: Mr. Glahn will argue on behalf of Eversource.

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1. The Electric Utility Restructuring statute, RSA Chapter 374-F, states that "the most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for consumers" and contains fifteen restructuring policy principles intended to be "interdependent" and to "guide the New Hampshire Public Utilities Commission." The Commission found that one of these policy principles, namely, the principle concerning the functional separation of generation and transmission, reflected the overall purpose of the law and "overrides, or supersedes, all other restructuring principles" and "therefore prohibit[ed]" a contract for Eversource to purchase gas capacity from Algonquin Gas Transmission, LLC. Is this conclusion unlawful and unreasonable?

2. Other New Hampshire statutes passed before and after RSA Chapter 374-F provide authority for Eversource to contract for gas capacity, or require the company to plan for reliable service for its distribution customers. Based on the one principle it claimed to be the "overriding purpose of RSA Chapter 374-F," the Commission concluded that the authority or obligations under these statutes no longer existed or had been impliedly repealed. Is this finding unlawful and unreasonable?

The questions above were addressed and preserved in Eversource's Initial Legal Memorandum dated April 28, 2016 at 7-18, its Reply Legal Brief dated May 12, 2016 at 4-13, and its Motion for Reconsideration dated November 7, 2016 at 1-12. *See* Joint Appendix ("App.") filed herewith at 353, 359-371; 394, 397-406; and 427-439.

STATUTES INVOLVED IN THE CASE

The constitutional provisions, statutes and rules involved in this case are: RSA 293-A:3.02(7); RSA Chapter 362-A; RSA Chapter 362-F; RSA 365:21; RSA 374:1, 2 and 57; RSA Chapter 374-A; RSA Chapter 374-F; RSA 374-G:2; RSA 378:37, 38; RSA 541:6; Laws 1996, c. 129:1 and Laws 2002, c. 212:7. The applicable portions of these statutes and laws are set forth in the Joint Appendix.

STATEMENT OF THE CASE

This is an appeal under RSA 541:6 and RSA 365:21 from Order No. 25,950 of the Public Utilities Commission dated October 6, 2016, Commission Docket No. DE 16-241 (the "Order") Addendum ("Add.") at 34. On February 18, 2016, Public Service Company of New Hampshire,

d/b/a Eversource Energy ("Eversource") filed a Petition and supporting testimony with the Commission. That Petition sought approval of a proposed 20-year interstate pipeline transportation and storage contract ("the ANE Contract") between Eversource and Algonquin Gas Transmission, LLC ("Algonquin") on the proposed Access Northeast pipeline (the "ANE Project"). App. at 200. Under the Contract, Eversource proposed to purchase natural gas transmission capacity from Algonquin. Several parties, including Algonquin, were granted party intervenor status by the Commission.[1]

As explained in the Statement of Facts below, the Commission determined that prior to any analysis of the "appropriate economic, engineering, environmental, cost recovery, and other factors presented by the proposed contract, it would consider legal memoranda to determine whether the Eversource proposal to acquire gas capacity "is allowed under New Hampshire law." Order of Notice in Docket No. DE 16-241 dated March 24, 2016. App. at 332. Initial Briefs and Reply Briefs regarding Phase I issues were submitted on or about April 28, 2016 and May 12, 2016, respectively.

On October 6, 2016, the Commission issued the Order, which dismissed the Petition as "contrary to the overriding principle of restructuring." The Commission found that "overriding principle" to be the "introduc[tion] [of] competition to the generation of electricity." Add. at 42. Algonquin and Eversource timely filed motions for rehearing pursuant to RSA 541:3. App. at 410 and 427. On December 7, 2016, the Commission issued Order No. 25,970, denying the

[1] The Order refers to two groupings of parties or intervenors. The Commission described the parties as "Supporters" and "Opponents" of the Eversource Petition. The "Supporters" included Eversource, Algonquin and the Coalition to Lower Energy Costs. The "Opponents" included the Conservation Law Foundation, Inc.; Exelon Generation Company, LLC; ENGIE Gas & LNG LLC ("ENGIE"); Office of Consumer Advocate ("OCA"); New Hampshire Municipal Pipeline Coalition; NextEra Energy Resources, LLC; and Pipe Line Action Network for the Northeast. *See* Order, Add. at 37-39.

motions for rehearing and restating the conclusions of the Order. Add. at 50. This appeal followed.

STATEMENT OF FACTS

Background-PUC Docket No. IR 15-124

When it enacted the Electric Utility Restructuring law, the General Court found that "New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high." Laws 1996, c. 129:1, I. This case began on April 17, 2015, when the Commission, on its own motion, issued an order of notice announcing an investigation into potential approaches to address cost and price volatility issues affecting wholesale electricity markets involving New Hampshire's electric distribution companies ("EDCs"). April 17, 2015 Order of Notice in Docket No. IR 15-124 (the "2015 Order"); App. at 440.

The 2015 Order noted that despite the development of competitive electricity markets in New Hampshire in the two decades following the 1996 reorganization of the electric utility industry, the regional electricity market administrator, ISO-New England ("ISO-NE"), had recently identified "an increasing reliance on natural gas-fueled generation plants in the region." *Id.* at 441. The Commission further noted that in "recent winters, significant constraints on natural gas resources have emerged in New England" and that "these constraints have led to extreme price volatility in gas markets in the winter months, which, in turn, have resulted in higher wholesale electricity prices," and a corresponding sharp escalation in rates for Default Service charged by EDCs. *Id.* The Commission "share[d] ISO-NE's view....that the potential development of additional natural gas resources for the benefit of the electricity supply in our region should be carefully considered." *Id.*

Recognizing its "fundamental duty to ensure that the rates and charges assessed by EDCs are just and reasonable," the 2015 Order required a "targeted Staff investigation to examine the

gas-resource constraint problem that is affecting New Hampshire's EDCs and electricity consumers generally" and the "potential means of addressing these market problems." *Id.* at 442. The Commission Staff was directed to prepare a report addressing those issues and potential solutions by September 15, 2015.

As part of its investigation, in July 2015 the Staff issued a legal memorandum in Docket No. IR 15-124 entitled "Gas Capacity Acquisitions by N.H. Electric Distribution Companies." *Id.* at 445. That Legal Memorandum evaluated three issues: whether the Electric Utility Restructuring statute (RSA Chapter 374-F) (the "Restructuring Statute") prohibits New Hampshire EDCs from acquiring natural gas capacity; whether those EDCs have the corporate power to acquire natural gas capacity; and whether the EDCs may recover the costs associated with natural gas capacity acquisition in rates. While acknowledging that its analysis might adapt to a specific future proposal, the Staff determined (among other conclusions) that EDCs such as Eversource could be authorized under existing New Hampshire law to enter into contracts for natural gas transmission capacity. The Staff also found that the Commission was authorized to review and approve requests by EDCs for recovery of costs related to such contracts from their electric customers. More specifically, the Staff noted that the Commission "could rule that EDC acquisition of gas capacity for the benefit of gas-fired generators does not violate" the Restructuring Statute or the policy principle in that Statute that generation services should be "at least functionally separated from transmission or distribution services." App. at 447. The Staff identified two statutes as potential sources of EDC authority to enter into contracts for natural gas capacity; namely, RSA 374-A:2 and RSA 374:57.

The Staff's final report on "Investigations into Potential Approaches to Mitigate Wholesale Electricity Prices" in Docket No. IR 15-124 was issued in September 2015 ("Staff

Final Report"). App. 356. The Report stated that there was a near universal opinion that "the root cause of the high and volatile winter period wholesale and/or retail electricity prices . . . can be attributed to a wholesale market imbalance of supply and demand for natural gas," and that parties in the docket had identified that imbalance as attributable to limited natural gas pipeline infrastructure. App. at 453.

The Staff Final Report also reaffirmed the findings of its July memorandum that EDCs possessed legal authority to contract for natural gas capacity, including the finding that "the Commission *could* conceivably hold that RSA 374-F allows such activity." *Id.* at 462 (emphasis in original).[2] More specifically, the Staff determined that the policy principle in RSA 374-F:3, III regarding the "functional separation of generation services from transmission and distribution" "could be complied with by an EDC acquiring capacity on behalf of merchant generators, insofar as separate ownership of the actual generation plants will remain in the hands of the merchant generation companies, rather than the EDCs." *Id.* In such an instance, "the Commission could therefore find that an adequate level of 'functional separation' for the purposes of RSA 374-F:3, III is thereby maintained." *Id.* The Report also concluded that the Commission could "reasonably find" that the "functional separation principle . . . should be read in concert with other Restructuring Policy Principles of RSA Chapter 374-F," which the Staff considered "to be of similar importance to the functional separation principle." *Id.*

Addressing those other policy principles, the Staff specifically pointed to RSA 374-F:3, I, which states: "Reliable electricity service must be maintained while ensuring public health, safety, and the quality of life." *Id.* The Staff concluded that when all of the interdependent policy principles were read together, the Commission could find that "the potential benefits of

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[2] The Staff's conclusions on issues of law are set forth at pages 9-13 of the Staff Final Report. App. at 461-465.

gas-capacity acquisition would foster the overall goals of the Restructuring Policy Principles of RSA 374-F." *Id.* 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.[3]

On January 19, 2016, after review of the Staff Final Report, and additional material submitted by the numerous parties in the investigation, the Commission issued Order No. 25,860 in Docket No. IR 15-124, accepting the Staff Final Report and setting out the Commission's expectations for the submission and review of potential gas-capacity-contract-related filings by EDCs:

> The Commission thus intends to rule on the question of whether a New Hampshire EDC has the legal authority to acquire natural gas capacity resources to positively impact electricity market conditions, only within the context of a full adjudicative proceeding conducted pursuant to the New Hampshire Administrative Procedure Act, RSA Chapter 541-A, and only in response to an actual (as opposed to hypothetical) petition. Such a proceeding would be opened if and when a New Hampshire EDC files a petition for a proposed capacity acquisition, and related cost recovery.

Order No. 25,860, App. at 502, 507.

The Eversource Petition and Commission Proceedings - Docket No. DE 16-241

In response to the invitation in Order No. 25,860, Eversource filed its Petition and testimony seeking approval of the ANE Contract in February 2016.[4] App. at 200. The

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[3]Remarkably, in the very Order under appeal, the Commission itself "acknowledge[d] 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...." Add. at 48.

[4] Eversource's Petition requested the Commission's approval of: (1) the ANE Contract, a 20-year interstate pipeline transportation and storage contract providing natural gas capacity for use by electric generation facilities in the ISO-NE region; (2) an Electric Reliability Service Program ("ERSP") to set parameters for the release of capacity and the

Commission then issued an Order of Notice in Docket No. 16-241 on March 24, 2016 (App. at 325), stating:

> As indicated by the Commission in Order No. 25,860, issued in Docket No. IR 15-124, the Commission will divide its review of this petition into two phases. In the first phase, the Commission will review briefs submitted by Eversource, Staff and other parties regarding whether the Access Northeast Contract, and affiliated program elements, is allowed under New Hampshire law. If the Commission were to rule against the legality of the Access Northeast Contract, this petition will be dismissed. If the Commission were to rule in the affirmative regarding the question of legality, it will then open a second phase of the proceeding to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by Eversource's proposal. This Order of Notice opens the first phase of this review proceeding.

App. at 328.

The ANE Project is designed to provide increased natural gas deliverability to the New England region for all end-users, including support to the gas-fired electric generating plants on the Algonquin and Maritimes & Northeast Pipeline systems. The Project was to provide access to the gas supplies in the Marcellus Shale region in Northeastern Pennsylvania through Algonquin's existing direct connections to pipelines, and access to a proposed market-area domestic LNG storage facility. In the aggregate, the ANE Project's transportation and storage facilities would provide a total of 900,000 MMBtu/day of firm, incremental, integrated transportation and LNG deliverability to multiple generators in New England, and thereby create net cost and reliability benefits to electric customers.

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sale of liquefied natural gas ("LNG") supply available by virtue of the ANE Contract; and (3) a Long-Term Gas Transportation and Storage Contract tariff, which allows for recovery of costs associated with the ANE Contract. If approved by the Commission, Eversource would, through a capacity manager, release the natural gas capacity for which it has contracted to the market in accordance with Algonquin's Electric Reliability Service ("ERS") tariff to carry out the terms of the state-approved ERSP. The Algonquin ERS tariff is subject to the jurisdiction of and approval by the Federal Energy Regulatory Commission ("FERC"), which regulates the capacity release market. The net revenues received by virtue of the sale of the released capacity under the Algonquin ERS would be credited back to Eversource's customers and offset the costs of the capacity purchased under the ANE Contract.

Eversource did not propose to purchase generation or to purchase natural gas through the ANE Contract. Instead, it proposed to acquire the right to receive transmission capacity from the pipeline, which it would then offer for sale to any interested buyer, whether a gas-fired generation plant, an industrial end-user, or local gas distribution companies. The quantities applicable to Eversource in New Hampshire under the ANE Contract were to be determined through a computation of New England electric load share, and were to represent the proportional load share served by Eversource.

Commission Order No. 25,950

The Commission began its analysis of whether Eversource was permitted to enter into the ANE Contract by addressing what it stated to be a "threshold question regarding any potential proposal for gas capacity acquisition by a New Hampshire EDC...." The Commission described this question as "whether RSA Ch. 374-F prohibits such activity." Order, Add. at 39. More specifically, it found that it must determine:

> 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 ... if yes, whether this directive of the Restructuring Statute overrides or supersedes all other restructuring principles and thereby prohibits the Capacity Contract.

Id. at 40.

By framing the "threshold question" and its required analysis in this manner, the Commission focused on one sentence in one of the fifteen interdependent Restructuring Policy Principles in RSA 374-F:3; namely, that "[g]eneration services *should* be subject to market competition and minimal economic regulation and at least functionally separate for transmission and distribution services." RSA 374-F:3, III (emphasis added). Although RSA 374-F:1, III describes the policy principles in RSA 374-F:3 as "interdependent" and "intended to guide the

Commission," the Commission defined the functional separation principle in RSA 374-F:3, III as a "directive," and then asked whether that directive trumped all other policy principles in the statute. This initial – and faulty – conclusion colored the entirety of the Commission's Order.

Although recognizing that "the Restructuring Statute contains numerous policy directives," the Commission ignored the other fourteen principles and other portions of RSA Chapter 374-F and erroneously concluded that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity." *Id.* It then decided that "to achieve that purpose, RSA 374-F:3, III directs the restructuring of the industry, separating generation activities from transmission and distribution activities." *Id.* at 42.

Having converted one sentence in one policy principle out of fifteen to a "directive" with an "overriding purpose," the Commission then found that the ANE Contract "is a component of 'generation services' under RSA 374-F:3, III" and was therefore prohibited. *Id.* The Order provided no definition of "generation services" (nor does RSA Chapter 374-F) and provided no explanation of why the ANE Contract constituted such services or was a "component" of "generation activities" (terms also not defined in the Statute). Nevertheless, it concluded that the "acquisition of gas capacity is clearly related to an effort to serve New England gas-fired generators with less expensive, more reliable fuel supplies" and that "generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principle." *Id.*

After finding that the "basic premise" of Eversource's proposal to purchase long-term gas capacity as an EDC "runs afoul of the Restructuring Statute's functional separation requirement" (*id.*), the Commission then analyzed each of the statutes that Eversource and other Supporters of its proposal (and the Commission Staff) had cited as allowing the ANE Contract. It did so to

determine whether "standing alone," those statutes would support the ANE Contract and, if so, how they "were affected by the subsequent enactment of the Restructuring Statute." *Id.* at 10. Because it had already found that the Restructuring Statute mandated the functional separation of generation and transmission above all else, the Commission rejected each of these statutes as offering a basis to support the ANE Contract.

First, the Commission concluded that the ANE Contract could not be justified by the requirement in RSA 374:1 and 2 that EDCs provide "safe and reliable service at just and reasonable rates." *Id.* The Commission found that as a result of RSA Chapter 374-F, EDCs were no longer "responsible for either the reliability of the generation supply, or the price of such supply." *Id.* It reached this finding despite the statutorily mandated principle in RSA 374-F:3, I, that "[r]eliable electricity service *must* be maintained." (Emphasis added.) The Commission did not specify what person or entity would, or could, meet the requirement to maintain reliable electric service, if not the EDC.

Second, the Commission rejected the contention of the Supporters that the least-cost planning statutes, RSA 378:37 and 38, created an affirmative obligation for Eversource to plan for energy supply resources. *Id.* at 43-44. Again, it concluded that when considering the directive the Commission had read into RSA 374-F:3, III, "electric utilities are no longer required to conduct long-term planning for electric supply." *Id.* at 45. In sum, the Commission's conclusions relating to RSA Chapter 374-F were found to constitute an implied repeal of portions of the planning statutes, at least as to EDCs. The Commission's determination was made despite the fact that RSA 378:37 and 38 were amended by the General Court in 2014 and 2015, long after the enactment of the Restructuring Statute in 1996, and remain effective.

Third, the Commission rejected the Supporters' claim that RSA 374:57, which requires electric utilities entering into long-term contracts for "transmission capacity" to file such agreements with the Commission, provided support for the ANE Contract. *Id.* at 46. Although finding the argument "plausible," the Commission inserted the word "electric" into the statute in front of the word "transmission" and thus concluded that the statute did not authorize EDCs to purchase gas capacity under long-term contracts. *Id.*

Finally, the Commission rejected the claim by Supporters – and originally proposed by its Staff – that the provisions of RSA 374-A:2, granting domestic electric utilities the authority "to own . . . or otherwise participate in electric power facilities or portions thereof" or "to enter into and perform contracts for such joint or separate . . . ownership . . . of or other participation in electric power facilities" provided support for the ANE Contract. *Id.* at 46-47. RSA 374-A:2 provides that the authority granted to utilities thereunder applies "[n]otwithstanding any contrary provision of any general or special law relating to [such] powers." But, despite that language, which gave RSA Chapter 374-A primacy over any other conflicting law, the Commission found that the statute "no longer applies to an EDC like Eversource." *Id.* at 47. The sole justification for that implied repeal of RSA 374-A:2 was the adoption of the Restructuring Statute and the alleged "centrality of the separation of functions between distribution and generation" the Commission found to exist in that statute. *Id.* The Commission concluded that reading RSA Chapter 374-A to allow the ANE Contract "would make little sense" given the "centrality" of the functional separation principle. *Id.*[5]

[5] All parties to Docket No. DE 16-241 addressed the issue of whether federal law, and specifically the Natural Gas Act, the Federal Power Act, or the terms of FERC's rules and regulations, preempted the ANE Contract or prevented its implementation. Having found that the Contract could not be approved under State laws, the Commission declined to address this issue. *Id.* at 47-48.

SUMMARY OF ARGUMENT

The average retail price of electricity in New England is among the highest in the United States, and is nearly 50 percent higher than the national average. Twenty years ago, when the New Hampshire Legislature passed the Restructuring Statute, it stated that "the *most compelling reason* to restructure the New Hampshire electric utility industry is to reduce costs for consumers." RSA 374-F:1, I (emphasis added). This Court endorsed that purpose as early as 1998.

The competition among electric suppliers resulting from restructuring was the means to achieve lower and more competitive rates. But twenty years later, the Commission and ISO-NE have recognized that competition has not achieved its stated purposes. In fact, New England has experienced extreme price volatility in the winter months, and ISO-NE has described the existing competitive electricity market as "precarious" and "unsustainable." The ANE Contract offered a regional solution to this problem. Yet the Commission rejected that potential solution by determining that it was prohibited by RSA Chapter 374-F.

This is a case of statutory construction. Based solely on its interpretation of one subsection of RSA 374-F:3, the Commission found, contrary to the actual purpose explicitly expressed in Section 1 of the Restructuring Statute, that the "overriding purpose of the … Statute is to introduce competition to the generation of electricity." The Restructuring Statute contains fifteen interdependent policy principles designed to "guide the Commission" in implementing restructuring. The Commission ignored fourteen of those principles and read RSA 374-F:3,III, as a mandate that required the complete separation of any generation and transmission services above all else. This not only ignored the fact that the language of that subsection does not mandate anything, but also elevated the "functional separation doctrine" over all other principles.

Likewise, the Commission's finding ignored an actual mandate in RSA 374-F:3; I, namely, that "reliable electricity service must be maintained" and the Legislature's determination in RSA 374-F:4, I that the goal of near-term rate relief is paramount to implementation of competition.

In addition to this misreading of the Restructuring Statute, the Commission further erred by concluding that the ANE Contract was a "component of generation services" and "related to an effort to serve generators" and thus violated the functional separation principle. Add. at 42. But even if RSA 374-F:3, III could be read as a mandate (which it cannot), RSA Chapter 374-F relates only to the functional separation of "centralized generation services" from "transmission and distribution services" (RSA 374-F:1, I) (terms that are not defined in the Statute). It says nothing about "components" of such services or activities related to generation. The ANE Contract is not a "component of generation services," as it does not require or result in Eversource engaging in the production, manufacture or generation of electricity. Likewise, the Contract does not provide that the product purchased by Eversource, *i.e.* gas transmission capacity, will necessarily be used by electric generators as opposed to other users of natural gas.

Because the Commission focused on competition as the primary goal of the Restructuring Statute, instead of rate relief, matters pertaining to competition under that Law were all that it saw. That conclusion permeated its entire Order, which resulted in the Commission ignoring the true purpose of the Restructuring Statute and the interdependent policy principles therein. That conclusion also resulted in the Commission finding that other New Hampshire laws permitting the ANE Contract were impliedly repealed. As a result, the Commission never reached the merits of the proposal represented by the ANE Contract, a proposal that would provide additional capacity, and an opportunity for lower electric rates – thus fulfilling the "most

compelling reason" for restructuring expressed by the Statute. This Court should reverse the decision of the Commission.

ARGUMENT

Section 1 of the Restructuring Statute begins by stating: "The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets." RSA 374-F:1, I. In 1998, this Court also described the most compelling reason for enactment of RSA Chapter 374-F as "reduc[ing] costs for all consumers of electricity." *In re New Hampshire Pub. Utilities Comm'n Statewide Elec. Util. Restructuring Plan*, 143 N.H. 233, 241 (1998). Yet nearly twenty years on, those costs have not been reduced, and New England suffers from both a lack of energy supply and some of the highest energy prices in the United States.[6]

The Commission conceded that the issues raised by the ANE Contract are of importance to this State and its citizens: "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." Order, Add. 48. Moreover, less than a month before the Commission issued the Order, ISO-NE described the existing competitive electricity market as "precarious" and "unsustainable." App. 411.[7] The

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[6] "During recent winters, significant constraints on natural gas resources have emerged in New England, despite abundant natural gas commodity production in the Mid-Atlantic States and elsewhere. These constraints have led to extreme price volatility in gas markets in the winter months in our region, which in turn have resulted in sharply higher wholesale electricity prices. Correspondingly, rates charged for Default Service to certain EDCs' customers have escalated sharply in New Hampshire for winter period service. Overall, the average retail price of electricity in New England is the highest in the continental United States, posing a threat to our region's economic competitiveness." Order of Notice, PUC Docket No. IR 15-124, App. at 442 (internal citations deleted).

[7] *See* September 28, 2016 Comments of Gordon van Welie, President and CEO of ISO-New England to New England Council at the New Hampshire Institute of Politics as reported in the Union Leader. App. at 510.

Commission also conceded that the Eversource proposal had "the potential to reduce [electric price] volatility." *Id.*

This Court reviews "an agency's interpretation of a statute *de novo*." *Appeal of Old Dutch Mustard Co., Inc.,* 166 N.H. 501, 506 (2014). The Commission's conclusion that RSA 374-F:3, III prohibits the ANE Contract rests entirely on the erroneous interpretation of that one subsection of the Restructuring Statute, to the exclusion of other express provisions of that Statute and other supportive law. Nothing in RSA 374-F:3, III creates a prohibition – of any kind. Moreover, even if one credits the Commission's finding that RSA 374-F:3, III is a "directive" to "functionally separate" generation and transmission services, the Commission erred by concluding that the Contract constituted "generation services." As a result, the Order is "unlawful and unreasonable." RSA 541:13.

I. The Commission's Order Failed to Properly Construe the Restructuring Statute. That Failure Colored the Entire Order and Should Result in a Reversal of the Order.

The Commission started with the premise that the functional separation principle in RSA 374-F:3, III, prohibited the ANE Contract. Had the Commission not been so intent on finding a way to prohibit the ANE Contract, it would have started by asking a different "threshold question;" namely, what statutes allowed the ANE Contract? For example, RSA 374:57 provides, in pertinent part, as follows:

> 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 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.

This statute, enacted in 1989, permits utilities to enter into agreements to purchase transmission capacity. RSA Chapter 374-F did not repeal this statute.

Eversource is an "electric utility" as the term is used in RSA 374:57, and the ANE Contract for the acquisition of natural gas transmission capacity would be a long-term contract of greater than one year. At the Commission, Eversource pointed out that the term "transmission capacity" as used in the statute is not restricted to *electric* transmission capacity. Moreover, while there are few references to the term "transmission" in New Hampshire statutes, where the term is referenced, it is not limited to electric transmission, thus supporting the conclusion that the Legislature viewed the term as applicable to both electric transmission and other transmission capacity, including natural gas.[8] The Commission Staff also stated that as used in RSA 374:57, the term "capacity" did not specify gas or electric transmission. Staff Final Report, App. at 453. Eversource thus argued that the ANE Contract was permitted under RSA 374:57.[9]

Despite the absence of the word "electric" in the statute, and contrary to the canons of statutory construction which provide that words may not be added to a statute, *Appeal of Old Dutch Mustard*, 166 N.H. 501, 506 (2014), the Commission inserted the word "electric" in front of transmission and concluded that "transmission," as used in RSA 374:57, is limited to "electric" transmission. If the Legislature had intended the statute to be limited in this way, it would have said so. *Maldini v. Maldini*, 168 N.H. 191, 195 (2015) ("Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to

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[8] For example, RSA 378:38, regarding the content of a utility's least cost integrated resource plan, requires every "electric and natural gas utility" to include "an assessment of distribution and transmission requirements" in its plan. RSA 378:38, IV.

[9] The Massachusetts Supreme Judicial Court recently reversed a decision of the Massachusetts Department of Public Utilities ("DPU") authorizing an electric utility to enter into a long-term contract to purchase gas capacity. *Engie Gas & LNG LLC v. Department of Public Utilities,* 475 Mass. 191, 56 N.E.3d 740 (2016). However, that Court's holding is based on a statute that, unlike RSA 374:57, prohibited gas and electric utilities from entering into contracts for more than a year without the approval of the DPU. And although the SJC also found the proposed contract to be inconsistent with the 1997 Massachusetts restructuring statute, M.G.L. c. 164, it described the "main objective" of the Massachusetts statute as requiring a "move from a regulated electricity supply market to an open and competitive market for power." *Id.* at 208. The New Hampshire law at RSA Chapter 374-F specifies a different compelling reason for restructuring: "reduc[ing] costs for all consumers of electricity."

include."); *New Hampshire Dep't of Envtl. Servs. v. Marino*, 155 N.H. 709, 713 (2007) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include.") The Commission also found that the statute was limited to electric transmission by virtue of the reference to the Federal Power Act, stating that if the statute had been intended to apply to gas capacity, it would have made reference to the Natural Gas Act. Order, Add. at 46. But this ignores the fact that the Statute provides that there are instances where no filing is required by either law: "[O]r, if no such filing is required, at the time such agreement is executed." RSA 374:57.

Before drawing its conclusion about what the Restructuring Statute mandated, the Commission should also have considered what New Hampshire statutes identify as the primary obligation of an electric utility. RSA Chapter 374 provides the answer: "Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable." RSA 374:1. In short, the first duty of every electric utility is to provide safe and adequate service or, put differently, to keep the lights and the heat on. Notwithstanding the Commission's mistaken conclusion that the separation of generation and transmission in RSA 374-F:3, III is a mandate, the very first subsection of RSA 374-F:3 actually does contain a mandate; namely, that "[r]eliable electricity service *must be maintained* while ensuring public health, safety, and quality of life." RSA 374-F:3, I (emphasis added). The ANE Contract is wholly consistent with that mandate as it assures that new fuel delivery and storage resources will become available to the market.

In considering the "threshold question" it identified, the Commission noted that it was applying "traditional New Hampshire principles of statutory construction." Order, Add. at 40. Stating that RSA Chapter 374-F contained "numerous policy *directives*," it cited RSA 374-F:3, I

and II as identifying the purposes of the statute. *Id.* (emphasis added). It then turned to RSA 374-F:3, III, which provides, in part, as follows:

> When customer choice is introduced, services and rates *should be* unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services *should be* subject to market competition and minimal economic regulation and *at least functionally separated* from transmission and distribution services which should remain regulated for the foreseeable future. However, distribution service companies *should not be* absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs. Performance based or incentive regulation should be considered for transmission and distribution services.

(Emphasis added.) As is apparent from the Legislature's use of the word "should," rather than "must," this subsection does not mandate or prohibit any action by electric utilities.

The Commission described the "disagreement" among the Supporters and Opponents of the ANE Contract over whether the primary purpose of the Restructuring Statute was competition or reduced rates as based on the "multiple objectives" in RSA 374-F:1, I-III and RSA 374-F:3. Order, Add. at 41. But weighing the "restructuring policy principles" of the statute, it concluded that the "overriding purpose of the Restructuring Statute" was to "introduce competition to the generation of electricity." And characterizing Subsection III of RSA 374:3 as a "directive" to separate what it now called "generation activities" (rather than the statutory reference to "generation services") from transmission "activities," it then concluded that the ANE Contract was "fundamentally inconsistent with the purposes of restructuring" because "it is a *component of* 'generation services.'" *Id.* at 41-42 (emphasis added). Put differently, the Commission rejected the ANE Contract notwithstanding that it could not define the capacity contract by means of any of the terms actually set out in the Restructuring Statute.

This interpretation of this Restructuring Statute – and the primacy given to one subsection of the Statute – does not comport with the stated purpose of the law, ignores nearly all

of the interdependent policy principles enumerated in it, and undermines the authority the Commission has been granted relative to the implementation of the law. *See* RSA 374-F:1, 3 and 4. The Commission was wrong as to both the expressed purpose of the law and in finding a mandate or directive for the separation of generation and transmission and distribution services within it.

This was not a case where the Commission had been called upon to divine the purpose of the Restructuring Statute from vague or ambiguous pronouncements, incomplete language, or through resort to legislative history. *See, e.g., Forester v. Town of Henniker*, 167 N.H. 745, 749-50 (2015) (restating the common standard that when examining the language of a statute, the New Hampshire Supreme Court ascribes the plain and ordinary meaning to the words used, and unless the language is ambiguous, the Court will not examine legislative history, and it will neither consider what the legislature might have said nor add words that it did not see fit to include). Rather, the language of the Statute is clear. But even if it was not clear, the legislative history confirms that its primary purpose was to reduce rates.

First, as noted above, contrary to the Commission's determination of "the overriding purpose of the Restructuring Statute," the Legislature has explicitly stated a different purpose in the statute and it is not, as the Commission concluded, "to introduce competition to the generation of electricity." Add. at 41-42. At its outset, the Restructuring Statute states that "[t]he most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets." RSA 374-F:1, I (emphasis added). This Court supports this interpretation:

> The purpose section of the restructuring statute specifically identifies "[t]he most compelling reason to restructure the New Hampshire electric utility industry [as] reduc[ing] costs for all consumers of electricity by harnessing the power of competitive markets." RSA 374–F:1, I (Supp.1998). In the public law

> encompassing the restructuring statute, the legislature expressly found that New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high. *The general court also finds that electric rates for most citizens may further increase during the remaining years of the Public Service Company of New Hampshire rate agreement and that there is a wide rate disparity in electric rates both within New Hampshire and as compared to the region.* The general court finds that this combination of facts has a particularly adverse impact on New Hampshire citizens. Laws 1996, 129:1, I.

In re New Hampshire Pub. Utilities Comm'n Statewide Elec. Util. Restructuring Plan, 143 N.H. 233, 241 (1998) (emphasis in original).

Although the legislative findings in Laws 1996, c. 129, were not included in RSA Chapter 374-F, they are instructive in interpreting the statute:

> II. New Hampshire's extraordinarily high electric rates disadvantage all classes of customers: industries, small businesses, and captive residential and institutional ratepayers and do not reflect an efficient industry structure. The general court further finds that these high rates are causing businesses to consider relocating or expanding out of state and are a significant impediment to economic growth and new job creation in this state.
>
> III. Restructuring of electric utilities to provide greater competition and more efficient regulation is a nationwide phenomenon and New Hampshire must aggressively pursue restructuring and increased customer choice *in order to provide electric service at lower and more competitive rates.*

Laws 1996, 129:1 (emphasis added). The concern the General Court intended to address is clear – it was to reduce rates. Competition was only a means to achieve that stated end. In fact, the Commission specifically recognized this in the Order, but then made competition and functional separation the purpose, rather than the means.

The statutory goal of reducing electric rates was later reaffirmed by the Legislature. In 2002, the Legislature amended RSA 374-F:1 by inserting a provision that would allow competition via retail choice to be delayed if "that implementation of retail choice within the service territory of any electric utility would be inconsistent with the goal of near-term rate relief or would otherwise not be in the public interest." Laws 2002, c. 212:7. Clearly, the

Restructuring Statute itself states that "the goal of near-term rate relief" trumps competition. The Commission got this relationship backwards. Moreover, the Commission has previously recognized this different purpose of the Statute from the purpose identified in the Order: "[W]e must act to further the *overall public policy goal of restructuring* — achieving a more productive New Hampshire economy by *reducing costs to consumers while maintaining safe and reliable electric service.*" *In Re Pub. Serv. Co. of New Hampshire*, 88 N.H.P.U.C. 16 (Jan. 30, 2003) (emphasis added).

Second, contrary to the Commission's finding that RSA 374-F:3, III (and, for that matter, one sentence within that subsection) created a directive mandating the separation of generation from transmission and distribution services in all instances, nothing in that subsection creates a mandate. To achieve the goal of cost reductions, the statute sets out a series of interdependent policy principles that are to *guide the Commission* (and other agencies) in regulating a restructured electric market. RSA 374-F:1, III.[10] The principles include those relating to assuring system reliability and universal service, ensuring benefits to all electric consumers, and improving the environment and the use of renewable energy sources. RSA 374-F:3, I, V, VI, VIII, IX.

The Restructuring Policy Principles set forth in RSA 374-F:3 contain few mandates. Most of the fifteen interdependent principles merely provide guidance; they enumerate matters the Commission "should" consider. In the Restructuring Statute, the Legislature chose to use the word "shall" to designate a mandate sixty-seven times.[11] But it used such mandatory words in

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[10] This Court has characterized "interdependent" to mean "one qualifying and limiting the other; otherwise it would result that due effect could not be given to both at the same time. Neither is supreme in a sense that would deprive the other of its effectiveness as a part of the fundamental law." *State v. Ramseyer*, 73 N.H. 31, 34 (1904).

[11] "The general rule of statutory construction is that the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006)

the restructuring policy principles in only three instances: I. "Reliable electricity service *must* be maintained;" V. "A utility providing distribution services *must* have an obligation to connect all customers in its service territory;" and XII (c) "Utilities have had and continue to have *an obligation* to take all reasonable measures to mitigate stranded costs." RSA 374-F:3 (emphases added).

By contrast, the Legislature did not use the words "must" or "shall" in RSA 374-F:3, III at all. The subsection uses the word "should" three times, and provides that generation services "*should* be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services." RSA 374-F:3, III (emphasis added). If the Legislature had intended the "functional separation" principle to be a mandate, or the principal or overriding purpose of the statute, surely it would have said so, and would have used the mandatory words used in other subsections of RSA 374-F:3. *Whitfield v. United States*, 543 U.S. 209, 216-17, 125 S. Ct. 687, 692 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so").

The Commission's interpretation of the statute as having an "overriding purpose" in favor of competition and as providing a *directive* to separate generation from distribution and transmission is simply wrong. The Order is fatally flawed as a result. The principal purpose of the Restructuring Statute is the reduction of costs to consumers. If there is any mandate in the statute, it is to maintain reliable electricity service. *See* RSA 374-F:3, I. The ANE Contract serves that purpose and that mandate.

(internal citations and quotations omitted). "Where the legislature fails to include in a statute a provision for mandatory enforcement that it has incorporated in other, similar contexts, we presume that it did not intend the law to have that effect and will not judicially engraft such a term." *In re Bazemore*, 153 N.H. 351, 354 (2006).

II. The ANE Contract Does Not Violate the Restructuring Statute. A Contract for the Purchase of Capacity on a Natural Gas Pipeline Is Not a "Component of Generation Services."

The Commission further erred in applying the supposed "directive" in RSA 374-F:3, III to find that the ANE Contract constituted a "component of generation services." Order, Add. at 42. Eversource is not proposing to combine any generation and distribution functions, nor is it proposing the ANE Contract as a means to engage in "generation services" described in RSA 374-F:3, III, or in some "component of generation services," as the Commission found. Rather, and consistent with RSA 374-F:3, I, it is seeking to ensure long-term electric system reliability by supporting the delivery of adequate natural gas supplies to, among other end-users, the region's competitive gas-fired electric generators. Eversource is also not proposing to buy or sell natural gas itself. The actual gas – its amount and availability – would be outside of the ANE Contract, and procuring it, whether by generators or others, would be done in a manner consistent with the rules established by FERC for such transactions.

The Commission based its finding that the ANE Contract is a "component of generation services" on its conclusion that the "acquisition of gas capacity is clearly related to an effort to serve New England gas-fired electric generators." *Id.* While Eversource's Petition conceded that increasing the supply of natural gas capacity to generators was a purpose of the ANE Contract, merely being "related to an effort to serve" generators does not make the contract into one providing "generation services" any more than the delivery of coal to generators by train transforms the railroad business into a "generation service."[12] Moreover, as noted above, the Commission described the statute as directing the separation of transmission and generation

[12] Utilities such as Eversource also deliver and sell electricity to generators, a product that is as necessary as natural gas, coal, or oil for the operation of a "centralized generation service." Clearly, the provision of electricity to generators by an electric utility is not prohibited by the Restructuring Statute as a "generation service."

"activities." The statute makes no reference to such "activities." *In re Laconia Patrolman Assn.*, 164 N.H. 552, 556 (2013) (finding that the PELRB correctly refused to impose a duty on a public employer that would require "adding words to the statute that the legislature did not see fit to include).

The ANE Contract does not result in Eversource engaging in the production, manufacture, or generation of electricity or in the sale of electricity at wholesale or retail. Instead, the Eversource proposal was to contract for long-term gas transmission capacity using its creditworthiness and balance sheet, and in so doing, to support the construction of additional pipeline capacity. The additional pipeline capacity procured through such contracts will allow new fuel delivery and storage resources to become available to the market, and the introduction of that capacity will both provide long-term reliability benefits and cost savings to Eversource's electric customers and enhance competition by making more sources of generation available during periods of peak demand. However, the electric generators are not required to purchase that capacity from Eversource, there is no intervention or participation in the wholesale market, and electric generation will remain subject to market competition. In fact, given the capacity release rules established by FERC, it is possible that natural gas distribution companies and industrial users could buy up all the new capacity and that the capacity would never be used by any electric generator. Nonetheless, the greater availability of gas to all parties (including generators) would result in lower basis differentials, enhance reliability, and lower costs.[13]

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[13] The basis differential is the cost basis of the natural gas at one point on the interstate pipeline, as compared to a different point. It is essentially the difference in the cost of gas that was delivered from point A to point B, as compared to the cost of gas that was delivered from point A to point C. The constrained nature of the existing pipelines in New England means that the cost of moving gas into New England is far more expensive than moving it elsewhere, which increases the costs of all those using the gas. Opening more capacity (widening the roadway) would allow more gas to flow more easily into the region and would reduce the differential.

Furthermore, making arrangements to bring additional gas resources to the region is consistent with other restructuring principles. In particular, assuring an adequate supply of natural gas would help ensure: the availability of universal electric service as supported by RSA 374-F:3, V; that New Hampshire's electric rates will remain competitive with other regional rates, as provided in RSA 374-F:3, XI; and that New Hampshire is a meaningful participant in regional solutions to regional issues, as contemplated in RSA 374-F:3, XIII. An adequate supply of natural gas for electric generation will also help assure that there is reliable electric power as older, less efficient generating facilities retire, and will thus assist in encouraging environmental improvement consistent with RSA 374-F:3, VIII.

In sum, because the ANE Contract was only for transmission capacity, and because that capacity (and the actual gas that would use that transmission capacity) would be available to anyone, it is not a contract for generation services. As a result, the ANE Contract does not violate the Restructuring Statute and the Commission's Order finding to the contrary should be vacated.

III. The Commission Erred in Its Implied Repeal of Other Statutes That Specifically Grant Authority for Eversource to Contract for the Purchase of Long-Term Gas Capacity.

Because it concluded that the goal of the Restructuring Statute was not cost-reduction, but rather a move to competition, the Commission ruled that the Restructuring Statute *prohibited* Eversource from entering into the ANE Contract and gave short shrift to those statutes that Eversource, and the Commission's own Staff, identified as providing authority for the purchase of gas capacity. (For example, see discussion of RSA 374:57 in Part I, above.) Armed with that conclusion, the Commission rejected the claim that other statutes authorized that Contract. It did

so before finding that the Restructuring Statute either impliedly repealed authority given to Eversource by those statutes, or obviated the need for Eversource to provide or plan for safe and reliable service to its customers.

As a prefatory matter, as a New Hampshire corporation, Eversource has corporate authority to enter into contracts. RSA 293-A:3.02(7). In *American Loan Trust Co. v. General Electric Co.*, 71 N.H. 192 (1901), this Court upheld the general authority of a public utility in New Hampshire to exercise its authority under the business corporation laws of this state.

In its July 10, 2015 Memorandum, and its September 15, 2015 Staff Report, the Commission Staff indicated that RSA Chapter 374-A "offered the most foursquare authorization for New Hampshire EDCs to acquire gas pipeline capacity on behalf of merchant generators." Staff Report, App. at 453. RSA 374-A:2 provides, in pertinent part, as follows:

> *Notwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities* or any limitation imposed by a corporate or municipal charter, but subject to the conditions set forth in this chapter, a domestic electric utility shall have the following additional powers:
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> > I. To 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 or the product or service therefrom or securities issued in connection with the financing of electric power facilities or portions thereof; and
> >
> > II. *To enter into and perform contracts* and agreements for such joint or separate planning, financing, construction, purchase, operation, maintenance, use, sharing costs of, ownership, mortgaging, leasing, sale, disposal *of or other participation in electric power facilities, or portions thereof, or the product or service therefrom*.....including, without limitation, ... contracts and agreements with domestic or foreign electric utilities for the sale or purchase of electricity from an electric power facility or facilities for long or short periods of time or for the life of a specific electric generating unit or units.

(Emphasis added). That statute defines a "domestic electric utility" as an entity organized under New Hampshire law "primarily engaged in the generation and sale or the purchase and sale of electricity or the transmission thereof, for ultimate consumption by the public." RSA 374-A:1, IV. Although the Commission quoted this definitional section of the statute, it nonetheless concluded that "RSA 374-A no longer applies to an EDC like Eversource." Order, Add. at 47. It apparently credited the argument of one of the Opponents to the ANE Contract that the statute applied only to "vertically integrated utilities" when enacted, and that this definition had been rendered inapplicable in restructuring. *Id.*

Notwithstanding the Commission's conclusion that the statute no longer applies via the implied repeal of the definition of RSA 374-A:1, IV, Eversource is clearly a "domestic electric utility" under RSA Chapter 374-A, and the Commission's determination to the contrary is clear error. The statute applies to companies that generate and sell electric power, *or that purchase and sell electric power, or that transmit electric power.* Irrespective of what is contained in the Restructuring Statute, and even following Eversource's divestiture of its generating facilities, it will continue to be in the business of purchasing, selling and transmitting electric power for consumption by the public.

This Court interprets statutes according to the plain meaning of the words used. *Forester v. Town of Henniker*, 167 N.H. 745, 749-50 (2015); *Pennelli v. Town of Pelham,* 148 N.H. 365, 366 (2002).[14] Here, the Commission ignored the words of the statute. There can be no doubt that Eversource is "an electric utility ... primarily engaged in ... the purchase and sale of electricity, or the transmission thereof." RSA 374-A:1, IV. That section was not amended

[14] On numerous occasions, the Commission has followed this rule, noting that the language of a statute must be construed according to its plain and ordinary meaning. *See, e.g., New Hampshire Elec. Coop., Inc.*, Order No. 25,426 (October 19, 2012); *Re Investigation of PSNH's Installation of Scrubber Tech. at Merrimack Station*, Order No. 24,898 (September 19, 2008); *Freedom Ring Comm., LLC d/b/a Bayring Comm.*, Order No. 24,837 (March 21, 2008). The Commission referenced this principle in the Order itself. Order, Add. at 40.

during restructuring, nor has it been amended since. Absent a repeal by the Legislature, RSA Ch. 374-A still applies to entities such as Eversource, which continues to have all of the authority granted to it by that statute.

The Commission was able to avoid the language of RSA Chapter 374-A only by concluding that the Restructuring Statute had impliedly repealed the prior statute. Once again, the basis for this finding was the Commission's misreading of RSA 374-F:3, III.

> 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.

Order, Add. at 47.

This conclusion runs smack into the language of RSA 374-A:2. Despite the Commission's view of what "makes sense," the Legislature has already determined which statute prevails in the event of conflict. As shown by the language quoted above, RSA 374-A:2 explicitly provides that "[n]otwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities...." a domestic electric utility, such as Eversource, "shall have" certain powers and authority. To the extent that RSA Chapter 374-A grants certain authority to electric utilities such as Eversource to participate in electric power facilities, that authority exists notwithstanding any other general or special law, including the Restructuring Statute.

Moreover, even absent this plain language in RSA Chapter 374-A, this Court strongly disfavors repeal by implication.[15] If "any reasonable construction of the two statutes taken

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[15] As the Court stated in *In the Matter of Regan & Regan*: "Repeal by implication occurs when the natural weight of all competent evidence demonstrates that the purpose of a new statute was to supersede a former statute, but the legislature nonetheless failed to expressly repeal the former statute. Because repeal by implication is disfavored, if

together can be found" then implied repeal is not operative. *Board of Selectmen of Town of Merrimack v. Planning Board of Town of Merrimack*, 118 N.H. 150, 153 (1978). It applies "only if the conflict between the two enactments is irreconcilable." *Gazzola v. Clements*, 120 N.H. 25, 28 (1980).

The Commission's determination that the Restructuring Statute "trumps" other laws, including RSA Chapter 374-A, was incorrect. It is that erroneous interpretation of the Restructuring Statute that creates the conflict in the first place. In fact, there is a way to reasonably construe these statutes harmoniously, and there is not an unconscionable conflict between these statutes. For example, the Commission has previously indicated in construing a statute that it was proper to determine whether a law "expressly prescribes" or "expressly proscribes" a result. *Public Service Company of New Hampshire*, Order No. 25,305 (December 20, 2011), at 28. In that proceeding, the Commission found ways to harmonize the requirements of the Restructuring Statute with myriad other statutes, including the Limited Electrical Energy Producers Act at RSA Chapter 362-A; the Renewable Portfolio Standard at RSA Chapter 362-F; and New Hampshire's Energy Policy at RSA 378:37, *et seq.* – a law which the Commission now rejects in part as incompatible with the Restructuring Statute. Order, Add. at 43-45.

Had the Commission recognized the true purpose of RSA Chapter 374-F (*i.e.*, "to reduce costs for all consumers of electricity," RSA 374-F:1, I, or "the goal of near-term rate relief," RSA 374-F:4, I, this statutory conflict would not arise. In this case, nothing in the Restructuring Statute "expressly prescribes" or "expressly proscribes" a utility from participating in a project

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any reasonable construction of the two statutes taken together can be found, we will not hold that the former statute has been impliedly repealed." 164 N.H. 1, 7 (2012) (internal brackets, quotations and citations omitted). The permissive language of RSA Chapter 374-F stating that generation and distribution services "should" be separated and that distribution services "should" remain regulated falls short of demonstrating that the laws cannot be read in harmony or that the weight of all evidence shows that RSA Chapter 374-A has been repealed by implication. Here, the weight of evidence plainly is against such a repeal. RSA Chapter 374-A applies "notwithstanding" any other law.

that would lower electric rates for its customers or from obtaining gas pipeline capacity that would assist in reducing high or volatile electric rates (and would enhance reliability) where the competitive market has failed to provide such a solution. In fact, as noted earlier, the Restructuring Statute states that "market forces can now play the principal role in organizing electricity supply" – not the "only" role. 1996 N.H. Laws, 129:1, IV.

Although the Commission Staff deemed RSA Chapter 374-A as offering the principal basis for approving the ANE Contract, the Staff noted that Eversource did not see the statute as "directly applicable" to that Contract. Staff Report, App. at 453. Eversource's position was based on the fact that RSA 374-A:2, I and II grant electric utilities the power to "participate in electric power facilities or portions thereof," or "to enter into and perform contracts and agreements" relating to "electric power facilities or portions thereof." Since Eversource did not believe that the ANE Contract involved any participation in such facilities, it did not refer to the statute as its "primary statutory authority." *Id.*

Now, however, under the logic of the Commission's Order, the statute would clearly apply. The Commission found that the ANE Contract is a component of "generation services." Order, Add. at 42. While Eversource disagrees, the Commission can't have it both ways. If the Contract constitutes "participation in electric power facilities....or the product or service therefrom," then RSA 374-A:2 plainly permits Eversource to enter into the Contract and as explained above, the Restructuring Statute did not repeal RSA Chapter 374-A. And, if the ANE Contract is not a component of "generation services," then the Commission's conclusion that the ANE Contract violates the functional separation principle is wrong in any event.

Eversource's authority to enter into the ANE Contract is also authorized by RSA 378:37 and 378:38, which require EDCs to plan for adequate resources to meet the demands of their

customers. These sections establish an energy policy "to meet the energy needs of the citizens and businesses of the state at the lowest reasonable costs while providing for the reliability and diversity of energy sources" and mandate that utilities engage in "least-cost" planning to meet this goal. If EDCs are to plan for, and ensure that they have, adequate supply, and the generators will not make the necessary contractual commitments to maintain that supply, then Eversource and other EDCs have the obligation to seek alternative means of meeting the demands of their customers. This is particularly true given the primary obligation of utilities to "furnish such service and facilities as shall be reasonably safe and adequate." RSA 374:1.

Once again, the Commission found that RSA Chapter 374-F impliedly repealed any such obligation. Order, Add. at 44-45. Although it did not specifically reference RSA 374-F:3, III, the Commission found that reading these statutes together with the Restructuring Statute did not "permit the rejoining of distribution and generation functions in the manner provided by the [ANE Contract]." *Id.* at 44. But only by elevating the policy principle relating to functional separation in RSA 374-F:3, III to primacy over all other such principles in the Restructuring Statute (including those that *do contain* mandatory language) could the Commission conclude that other statutes would not permit what it found the RSA 374-F:3, III to prohibit.

In sum, apart from the fact that RSA 374-F:3, III does not prohibit the ANE Contract, Eversource is empowered to enter into that Contract by several statutes. Approval of the Eversource proposal would enhance the ability of market forces to provide reliable electricity to Eversource's customers; it would not in any way supplant the "principal role" that the region's competitive generators play in providing the supply of electric energy. Had the Legislature

intended market forces to play the "only" or "sole" role in providing electricity supply it could have done so, and presumably would have done so.[16]

CONCLUSION

The Commission's Order rests entirely on a misconstruction of the overall purpose of the Restructuring Statute and the policy principles set out therein to the exclusion of other statutes that expressly permitted the ANE Contract. In rejecting the ANE Contract, the Commission did not first ask whether those other statutes allowed the Contract and then inquire whether anything in the policy principles of the Restructuring Statute prohibited it. Instead, it identified as a "threshold question" whether one of the policy principles in the Restructuring Statute prohibited the Contract. Not surprisingly, after "putting the rabbit in the hat" by starting with this threshold inquiry, the Commission then concluded that its identified principle was indeed prohibitive. Having pulled that rabbit out of the hat it then found, again to no surprise, that the other statutes could not overcome that prohibition.

As a result, the Commission never reached the merits of the proposal represented by the ANE Contract, a proposal that would have provided additional capacity, and an opportunity for lower electric rates. Accordingly, because the findings of the Commission are unlawful and unreasonable, this Court should reverse the Order and remand the matter to the Commission for further proceedings.

REQUEST FOR ORAL ARGUMENT

Oral argument requested. Mr. Glahn will argue.

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16 Indeed, the Restructuring Statute itself gives the Commission discretion regarding this significant matter: "The commission is authorized to require that distribution and electricity supply services be provided by separate affiliates." RSA 374-F:4, VIII. Notably, by this provision of the Restructuring Statute, the Legislature did not prohibit utilities from providing electric supply, but rather, gave the Commission the authority to determine how electricity supply services from a utility may be provided.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY

By Its Attorneys,

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Dated: May 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I served two copies of the foregoing BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE by mailing two copies thereof by first class mail, postage prepaid, and electronic mail, to all counsel of record:

_____
Wilbur A. Glahn, III

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