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)

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

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ARGUMENT

Appellees NextEra Resources, LLC ("NextEra"), the Conservation Law Foundation ("CLF") and the Office of Consumer Advocate ("OCA") (collectively, the "Opponents") assert that the Order of the Commission should be upheld because: (1) the ANE Contract would violate the primary purpose of the Restructuring Act, RSA Chapter 374-F, which they claim not to be cost reduction for customers, but the advent of competition by separation of generation from an electric utility's transmission and distribution business; (2) the ANE Contract constitutes a generation service; and (3) the Restructuring Act requires the separation of *any and all* generation from the "poles-and-wires" distribution and transmission business.[1] The Opponents are wrong on all counts.[2]

The Opponents argue that this Court should give significant deference to the Commission's findings of fact and discretionary policy choices given that the Commission interpreted statutes it administers. *See, e.g.*, NextEra at 9. However, they concede that this deference is not absolute, *id.*, and this Court has made clear that it is not bound by an agency's interpretation of a statute. *Appeal of Morrissey,* 165 N.H. 87, 91 (2013). Rather, the Court reviews an agency's interpretation of a statute *de novo* and will not defer to an agency's interpretation if it is inconsistent with the statute's purpose, or clearly conflicts with the statute's express language. *Appeal of Michele*, 168 N.H. 98, 101-02 (2015); *Appeal of Morrissey*, 165 N.H. at 91-92; *In Re Town of Seabrook*, 163 N.H. 635, 644 (2012).

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[1] The Opponents also argue that the ANE Contract is not authorized by other statutes. This argument is addressed in the Reply Brief of Co-Appellant Algonquin Gas Transmission, LLC.

[2] The *Amicus* brief filed by former legislators contains only their anecdotal recollections of the enactment of the Restructuring Law and adds nothing to the Court's interpretation of the actual statutes that were enacted. Furthermore, according to one of the Opponents, "the Act's legislative history is irrelevant and need not be considered." CLF at 14-15. (The briefs of the Opponents will be cited in this Reply by reference to the name of the party and the page of the brief, for example "CLF at___.")

As the OCA concedes in its brief, OCA at 2, the Commission decided this case in a manner similar to a motion to dismiss for failure to state a claim, looking only at whether the ANE Contract violated the Restructuring Act or any other New Hampshire or federal law. Order, Add. 39;[3] *see also*, Order of Notice in Docket No. DE 16-241, Joint Appendix of Eversource and Algonquin at 328 ("The Commission will divide its review of this petition into two phases. In the first phase, the Commission will review briefs . . . regarding whether the [ANE] Contract and affiliated program elements, *is allowed under New Hampshire law*." (Emphasis added)).[4] As a result, the Commission made no factual findings requiring deference, and its Order concerning the requirements of New Hampshire law is subject to *de novo* review.

I. The Purpose of RSA Chapter 374-F was the Reduction of Costs For Consumers; Generation Separation was the Means to an End, and Not the End Itself.

RSA 374-F:1, I, provides that the "most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers by harnessing the power of competitive markets," thereby linking the introduction of competitive markets to reduction in rates. Despite this language, the Opponents argue that the Commission properly found that the overriding purpose of the Restructuring Act is the introduction of competition into the generation of electricity. OCA at 12, 19; NextEra at 18–19; CLF at 16–18. In the Opponents view, this effectively prevents the Commission from considering any proposal that might arguably affect competition, without regard to the impact on rates. By contrast, they claim that under the

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[3] Unless otherwise indicated, all references to the Order and the Addendum ("Add.") will be to the Addendum of the Eversource brief.

[4] While contending that the Commission's Order "render[ed] unnecessary . . . the development of a factual record on the merits of the petition," OCA at 2, the OCA spends a substantial portion of its brief arguing that, if approved, the gas capacity purchased under the ANE Contract could not be included in PSNH's rates because it would not be "used and useful." *Id.* at 11-12, 16-18. OCA goes so far as to claim that the Commission did not find the ANE Contract invalid under the "functional separation principle of RSA 374-F:3, III—only that it could not include the costs in the distribution rates." *Id.* at 27. This claim is meritless. The Commission found the ANE Contract to violate the principles in RSA 374-F:3, III, Order, Add. 42, and specifically reserved for the second phase of the Docket "appropriate economic, engineering, environmental, *cost recovery*, and other factors." Order of Notice in Docket No. DE 16-241, App. at 328 (emphasis added).

Appellants' view of the Act, "the Commission may approve anything an electric distribution (sic) [company] ["EDC"] might conjure that could possibly be justified as potentially lowering rates." OCA at 12, 19. They then buttress these arguments with citations to Part II, Article 83 of the New Hampshire Constitution, effectively contending that any involvement by an EDC in generation would be unconstitutional. *See, e.g.*, NextEra at 17-19.

Notwithstanding the Opponents' arguments, and their reference to the Constitution, Legislative actions since the enactment of the Restructuring Act demonstrate that the primary concern of the Legislature was to reduce electric rates for customers. For example, shortly after the Restructuring Act was approved, the Legislature reconsidered the public policy of divestiture of generation assets. By enacting Laws 2001, ch. 29:13, the Legislature did a 180-degree turn, changing its mandate for PSNH's divestiture of its generating stations by 2001 into a prohibition against such divestiture until 2004 at the earliest. Two years later, the Legislature amended RSA chapter 369-B, adding RSA 369-B:3-a, further extending the prohibition on the sale of those same assets through at least April 30, 2006. The revised statute provided that: "subsequent to April 30, 2006, PSNH may divest its generation assets *if the commission finds that it is in the economic interest of retail customers of PSNH to do so*." RSA 369-B:3-a (2003) (emphasis added).

The Legislature, therefore, expressly set forth a statutory standard that reducing costs to retail customers of PSNH was a condition precedent to the separation of generation from the transmission/distribution utility. This same language conditioning generation divestiture on cost reduction was retained by the Legislature as recently as a 2015 amendment to RSA 369-B:3-a. Laws 2015, ch. 221:10 (repealing and reenacting RSA 360-B:3-a). These repeated enactments

placing the economic interest of customers over generation separation clearly demonstrate that the Legislature's goal was to reduce costs of electric service to customers.

II. The Purchase of Gas Capacity through the ANE Contract Does Not Constitute a Generation Service.

The Commission did not find that the purchase of gas capacity under the ANE Contract was a "generation service," but instead found only that it was "a component of generation services" and "related to an effort to serve gas fired generators." Order, Add. at 42.[5] Because Phase I of the Docket addressed only the legality of the Contract under RSA Chapter 374-F, the Commission made no finding as to *why* the purchase of gas capacity constituted a "component of generation services" or was "related to" generation, other than to say that the capacity would be "used by electric generators." Order, Add. at 42.[6]

The Opponents concede that RSA Chapter 374-F does not define "generation services," "centralized generation services," or what constitutes a "component of generation services." NextEra at 15. They contend, however, that the purchase of gas capacity must be a generation service because natural gas generators need fuel, fuel is important to generation, gas capacity is not needed for the operation of electric distribution and transmission, and the Petition describes the ANE Contract as providing delivery capacity for use by generators. NextEra at 24; CLF at 16. Under this interpretation, the Restructuring Act would require the separation of any undefined "component of" generation and of anything related to generation—no matter how remote—from transmission and distribution, extending the reach of the Restructuring Law

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[5] The ANE Contract was one for "capacity" on a gas pipeline; that is, space on that line (akin to reserving a rental vehicle to deliver goods). It is *not* a contract for the natural gas itself, and hence PSNH would *not* have entitlements to natural gas that customers, including gas-fired generators and natural gas distribution companies, may desire to purchase. *See* Eversource Brief ("E. Br.") at 23-25; Algonquin Brief ("Al. Br.") at 18-20.

[6] NextEra contends that the "Commission's ruling that the Capacity Contract is a component of generation services was based on undisputed facts presented in the Petition." NextEra at 24. However, NextEra does not cite these facts, and neither did the Commission.

beyond limitation. Even CLF concedes that the "functional separation of electric generation from electric transmission is not absolute." CLF at 12.

The Restructuring Act says nothing about the separation of activities "related to" generation from transmission and distribution. If the Act were read as broadly as the Commission's Order, some absurd results would occur. For example, generators also need electricity supplied by PSNH for their operations. Under the Commission's "related to" test, and the Opponents' contention that EDCs may not participate in anything related to generation since to do so would be antithetical to competition, PSNH's delivery of electricity to generators would be a "generation service," thus placing PSNH in the generation business and running afoul of the Restructuring Act.[7] Simply put, under this reading of the Act, the activities of EDCs that "relate to" generation would be unlimited, as would the jurisdiction of the Commission to prevent EDCs from engaging in any such activity.

The Supreme Court of the United States rejected such an expansive reading of statutes in *Federal Energy Regulatory Commission v. Electric Power Supply Association et al.*, 136 S. Ct. 760, 773-74 (2015). There, the Court limited FERC's jurisdiction over rules or practices "affecting" wholesale rates to activities "directly affecting" such rates, lest the "whole economy" become subject to FERC jurisdiction and the statute assume a "near-infinite breadth."[8] The

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[7] In the view of the OCA, RSA Chapter 374-F "transformed PSNH from a full-service electric utility to strictly a poles-and-wires company," and thus the Restructuring Act prohibited PSNH's involvement in any generation related activities at all. OCA at 17-18. Yet PSNH is involved in a number of such activities including in the purchase of power through "net metering," RSA 362-A:9; the obligation to purchase power from certain "qualifying facility" generators under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C.§ 2601, *et seq.*; the purchase of renewable energy sources under RSA Chapter 362-F (the "Electric Renewable Portfolio Standard" statute), and the purchase of distributed energy resources, including "clean and renewable generation." RSA Chapter 362-G. None of these activities are consistent with the claim that PSNH is a mere "poles-and-wires" company. Moreover, under New Hampshire law, the PUC retains the authority to regulate generation services, if the owners of such generation so desire. RSA 362:4-c.

[8] The OCA recognized this problem in noting (albeit with respect to its claim that the ANE Contract did not fit within the provisions of RSA Chapter 374-A) that "[i]f natural gas pipeline capacity is an electric power facility or portion thereof, then anything in the economy that could be deemed critical to the operation of a generation

same logic applies to the Commission's finding that the Restructuring Act was intended to separate any activity "related to" generation from transmission and distribution. If anything "related to generation" was prohibited by the Restructuring Act, nearly every activity an EDC wished to engage in would be prohibited.

While the Opponents claim that "logic and a common understanding of the functional elements . . . required to generate electricity" support their reading of the statute, and that of the Commission, they ignore a common sense reading of the Restructuring Act. NextEra at 24. RSA 374-F:1, I, which sets out the "Purpose" of the Act, calls for the functional separation of "centralized generation services" from transmission and distribution. Although not defined in the Act, "centralized generation" plainly implicates the ownership of centralized generation; *i.e.*, ownership of generating stations. E. Br. at 23-25. NextEra argues for a "parallel construction" of RSA 374-F:1, I, and 374-F:3, III, NextEra at 13, yet misses the more obvious parallelism between those sections. RSA 374-F:3, III exempts from the principle embodied in that Subsection the *ownership* of "small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs." This strongly supports the conclusion that the functional separation principle in RSA 374-F:3, III relates to the ownership of large (centralized) generating stations, with the exemption applying to the ownership of smaller (distributed) resources. Moreover, if the two sections of the Act are to be read in parallel, then it also follows logically that the "generation services" referred to in Subsection 3, III relate back to the centralized generation services in Section 1.[9]

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facility—from fuel to waste disposal to anything in between, including the truck that feeds employees in the parking lot during the lunch hour—could be justified as a permissible utility investment. This cannot be what the Legislature intended." OCA at 25-26.

[9] Despite conceding that the separation of generation and distribution "is not absolute," CLF at 12, CLF asserts that under the principle of *expressio unis est exclusio alterius*, the exemption for the ownership of small scale distribution must be read to exclude any connection between all other forms of generation and transmission and

What the Opponents do not address—and the Commission also failed to address—is that the purchase of gas capacity under the ANE Contract is not the *ownership* of centralized generation services, or the direct ownership or involvement in any generation services. E. Br. at 23; Al. Br. at 18.[10] The ANE Contract would not result in Eversource producing, manufacturing or generating electricity at wholesale. *See also* Reply Brief of Algonquin at Part I, C.

III. The Restructuring Statute Does Not Mandate the Separation of All Aspects of Generation and Transmission

The Opponents advance two arguments in support of the Commission's finding that RSA 374-F:3, III directs, or mandates, the separation of all aspects of generation and transmission and therefore prohibits the ANE Contract. First, they claim that this Court has already held that RSA 374-F:3, III is a directive mandating that separation. NextEra at 11, 13; CLF at 12-13, 17. Second, as noted above, they rely on a parallel construction argument to conclude that the word "require" in RSA 374-F:1, should be read into the policy principle in Subsection 3, III.[11] NextEra at 12.

With respect to the first claim, while the Opponents correctly point out that this Court's decisions in *In re NHPUC*, 143 N.H. 233, 236 (1998), and *Appeal of Campaign for Ratepayers' Rights*, 145 N.H. 671,673 (2001), state that "the legislature directed the PUC to devise a

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distribution. CLF at 18. That argument assumes too much. If the Act does not require the separation of all generation in the first place, then the conclusion is faulty, particularly where, as noted, the exemption applies to the *ownership* of generation services.

[10] The Opponents correctly point out, as Eversource did in its Brief, E. Br. at 16, that the Supreme Judicial Court reversed an order of the Massachusetts DPU which found that a contract for the purchase of gas capacity did not constitute generation and did not violate the Massachusetts Restructuring Statute. *Engie Gas & LNG LLC v. Department of Public Utilities*, 56 N.E.3d 740 (Mass. 2016). The SJC read the specific provisions of the Massachusetts statute to mean that EDCs were required to "leav[e] all aspects of the generation business, including not only power plant construction, but also the planning and fuel management aspects of generation." *Id.* at 206-07. As NextEra concedes, the SJC's interpretation of Massachusetts law is not dispositive in this appeal. NextEra at 25 n.7.

[11] NextEra continually refers to the "Separation and Unbundling Requirements" of the Restructuring Act as though that term appeared in the Act, and as though the term required the separation of all aspects of generation and transmission and distribution. *See, e.g.,* NextEra at 11. While this term suits NextEra's argument, it does not appear in the Act, and does not appear in RSA 374-F:3, III, which was the basis for the Commission's decision.

restructuring plan in which electric generation services would be extracted from the traditional regulatory scheme, unbundled and subjected to market competition," NextEra at 6, that statement was not a holding of the Court. The Court did not decide (nor had it been asked to decide) whether—or what—generation services were required to be separated from transmission and distribution. *In Re NHPUC,* 143 N.H. at 234. The opinions thus offer no guidance on those points, and no guidance on the specifics of what the Court meant in referring to the "directive."

Even if this *dicta* arguably provided support for the Commission's finding that RSA 374-F:3, III is a "directive," the language of that Subsection provides no such support. Subsection III does not direct anything. Instead, it is just one of fifteen "interdependent policy principles [that] are intended to guide" the PUC. RSA 374-F:1, III. Nothing in the Subsection or the Restructuring Act mandates or directs the separation of all aspects of generation from transmission and distribution. Likewise, even if the Subsection could be read as a directive, such a reading simply begs the further question of *what* the Legislature directed to be functionally separated. And although the Opponents cite the Court's opinions as support for the Commission's findings, the Commission did not cite either case. Moreover, despite NextEra's claim that the language in Subsection 3, III must be read in a parallel construction with the word "require" in RSA 374-F:1, I, the Commission did not cite Section 1 for that purpose, but only to determine the "overriding purpose of the . . . Statute." Order, Add. at 41. Put simply, the Commission did not find parallels in the two sections; it relied solely on RSA 374-F:3, III.

The Opponents' second claim fares no better. The parallel construction argument does not support NextEra's contention that the Restructuring Act mandates the separation of all aspects of generation from transmission and distribution. First, as discussed, RSA 374-F:1, I, uses the term "require" to relate to the separation of centralized generation from transmission and

distribution. If a requirement is to be read into RSA 374-F:3, III, it would logically relate to the requirement concerning that separation. No broader requirement is found in that Subsection.

Second, although the word "require" is used in Section 1, it appears nowhere in Subsection III of Section 3, and thus there is no parallel language to construct. NextEra urges the Court to interpret the term "should" as used in Subsection 3, III to mean "must" because the sections "complement each other." NextEra at 12. If the Legislature had intended the word "should" in RSA 374-F:3, III to mean "must," it plainly knew how to do so. It used the word "must" in Subsection I of the same section of the Act. RSA 374-F:3, I. This demonstrates that the words "should" and "must" carry different meanings.[12]

NextEra may believe that the common understanding of a direction that one "should" do something is the same as one "must" do something, but the Legislature is deemed to have intentionally used different words, and it plainly drew a difference between, "must," "shall" and "should" throughout RSA Chapter 374-F. This Court interprets statutes according to their plain and ordinary meaning. For example, most parents and children know the difference between "you must each your spinach" and "you should eat your spinach."

In the end, even if Subsection 3, III, could be read as a directive, it says nothing about the complete separation of all aspects of generation from transmission and distribution or, for that matter, all activities "related to an effort to serve generators" as the Commission found. Order, Add. at 42. As a result, nothing in RSA Chapter 374-F should be read to prohibit the ANE Contract.

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[12] *See Ettinger v. Town of Madison Planning Bd.*, 162 N.H. 785, 791 (2011) ("When the legislature uses different language in the same statute, we assume that the legislature intended something different." (citation omitted)); *State Employees Ass'n of N.H., SEIU, Local 1984(SEA) v. N.H. Div. of Pers.*, 158 N.H. 338, 345 (2009) (same principle applied to related statutes).

IV. Conclusion

Because the Commission considered the separation of generation to be an end to itself, it read the "guideline" in RSA 374-F:3, III to prevent any proposal that might be related to generation. As a result, it conducted no examination of the impact of the ANE Contract on competition or rates, and no assessment of the benefits or risk presented to Eversource's customers by that Contract.[13] Yet, since that guideline is not a mandate requiring separation of any activities related to generation from transmission and distribution, the Commission—as even NextEra concedes—had "discretion to use the interdependent policy principles as guides in regulating PSNH in a restructured electric industry." NextEra at 22. The Commission's failure to even consider the merits of the ANE Contract in applying that discretion was unreasonable and unlawful. The Order should be reversed and the matter remanded to the Commission for further consideration.

Respectfully submitted,

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[13] The Commission did note, "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 . . . ." (Order, Add. at 48).

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2017, two copies of this Reply Brief have been sent via first class mail to all counsel of record.

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