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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)

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**BRIEF FOR THE AMICUS CURIAE**  
FORMER SENATORS, BURT COHEN and RICHARD RUSMAN  
FORMER STATE REPRESENTATIVE AND SENATOR CLIFTON BELOW  
STATE REPRESENTATIVE ROBERT BACKUS

Respectfully submitted,

**BURTON COHEN, RICHARD RUSMAN  
CLIFTON BELOW, ROBERT BACKUS  
PRO SE**

Burton Cohen, NewCastle, NH, 603-431-0066  
Richard Russman, Kingston, NH 603-548-7448  
Clifton Below, Lebanon, NH, 603-448-2519  
Robert A. Backus, Manchester, NH, 603-232-0525

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**ELECTRIC UTILITY RESTRUCTURING**

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I. The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. The overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services.

II. A transition to competitive markets for electricity is consistent with the directives of part II, article 83 of the New Hampshire constitution which reads in part: "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.

III. The following interdependent policy principles are intended to guide the New Hampshire public utilities commission in implementing a statewide electric utility industry restructuring plan, in establishing interim stranded cost recovery charges, in approving each utility's compliance filing, in streamlining administrative processes to

make regulation more efficient, and in regulating a restructured electric utility industry. In addition, these interdependent principles are intended to guide the New Hampshire general court and the department of environmental services and other state agencies in promoting and regulating a restructured electric utility industry.

**RSA 374-F:3**.....6

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

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

III. Regulation and Unbundling of Services and Rates. When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future. However, distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs. Performance based or incentive regulation should be considered for transmission and distribution services. Upward revaluation of transmission and distribution assets is not a preferred mechanism as part of restructuring. Retail electricity suppliers who do not own transmission and distribution facilities, should, at a minimum, be registered with the commission.

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

V. Universal Service. (a) Electric service is essential and should be available to all customers. A utility providing distribution services must have an obligation to connect all customers in its service territory to the distribution system. A restructured electric utility

industry should provide adequate safeguards to assure universal service. Minimum residential customer service safeguards and protections should be maintained. Programs and mechanisms that enable residential customers with low incomes to manage and afford essential electricity requirements should be included as a part of industry restructuring.

(b) As competitive markets emerge, customers should have the option of stable and predictable ceiling electricity prices through a reasonable transition period, consistent with the near term rate relief principle of RSA 374-F:3, XI. Upon the implementation of retail choice, transition service should be available for at least one but not more than 5 years after competition has been certified to exist in at least 70 percent of the state pursuant to RSA 38:36, for customers who have not yet chosen a competitive electricity supplier. Transition service should be procured through competitive means and may be administered by independent third parties. The price of transition service should increase over time to encourage customers to choose a competitive electricity supplier during the transition period. Such transition service should be separate and distinct from default service.

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

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

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

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

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



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

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

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

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

(7) For purposes of consumer protection and the maintenance of program integrity, reasonable efforts should be made to assure that the renewable energy source component of an RES option is not separately advertised, claimed, or sold as part of any other electricity service or transaction, including compliance with the renewable portfolio standards under RSA 362-F.

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

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

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

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

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

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

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

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

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

XII. Recovery of Stranded Costs.

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

recovery than is available under applicable regulation or law on the effective date of this chapter.

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

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

- (1) Reduction of expenses.
- (2) Renegotiation of existing contracts.
- (3) Refinancing of existing debt.

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

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

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

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

XV. Timetable. The commission should seek to implement full customer choice among electricity suppliers in the most expeditious manner possible, but may delay such



implementation in the service territory of any electric utility when implementation would be inconsistent with the goal of near-term rate relief, or would otherwise not be in the public interest.

**Laws 1996, c. 129:1**..... 7

## **IDENTY OF THE AMICUS CURIAE**

Senators Cohen and Russman served on the relevant Senate committee during the adoption of New Hampshire's electric Restructuring Statute, RSA 374-F in 1996. Senator Cohen was one of the sponsors of HB 1392 of the 1996 session that created RSA 374-F. Senator Below, then Representative Below, was also a sponsor of HB 1392, served as the ranking minority member of the House Science, Technology and Energy Committee in 1996 that unanimously recommended passage of HB 1392 to the full House, and served as Chair of the Policy Principles, Social and Environmental Issues Subcommittee of the 1995 Retail Wheeling and Restructuring Study Committee whose report provided much of the text of RSA 374-F. Representative Backus, currently serving, testified at both House and Senate hearings on the bill that became RSA 374-F in January and February 1996. They file this brief in the hope of assisting the Court in ascertaining the legislative intent behind the Restructuring Statute.

## **STATEMENT OF THE FACTS**

### **A. POSITION OF THE AMICI**

Your Amici support the position of the appellees in this docket. They believe that, if the statute on its face is deemed unclear, reference to the legislative history supports the position of the Public Utilities Commission in determining that the proposed gas pipeline access capacity contract is inconsistent with the provisions of the Restructuring Statute.

### **B. FACTS**

The factual background:

As the legislative history of RSA 374-F makes clear, the extraordinarily high cost of electric service in New Hampshire was the driving force behind the enactment of the Restructuring Statute.

However, another factor was the movement by New England and other states, along with federal policy, to turn away from the century old regulatory and monopoly model in favor of adopting a competitive market in electric generation. The high cost of electricity for New Hampshire consumers, in other words, although the primary reason for moving to a competitive market, was not the sole reason to do so. See, inter alia, the statement of Senator Below at pages 65 to 70 of the joint appendix.

The high cost problem behind the enactment of the Restructuring Statute was, however, as the result of conditions unique at that time to New Hampshire.

Specifically, these high costs were the results of the exorbitant costs to construct the Seabrook nuclear plant. Originally, this project was believed to be a way to achieve cost savings, but construction overruns caused, not only the cancellation of one of the two reactors, but very high rates and ultimately, despite those high rates, the bankruptcy of four of the utility owners, including the largest owner, Public Service Company of New Hampshire, now Eversource.<sup>1</sup>

With Public Service now subject to federal bankruptcy court control, and pressure being applied by the bankruptcy court to protect creditors, the parties negotiated an unprecedented seven year rate agreement. The agreement called for seven annual 5.5% rate increases for Public Service customers, resulting in a total rate increase over the seven year period, of more than a 45%. This history is described in *Appeal of Richards*, 134 NH 148 (1991).

This rate agreement was endorsed by the New Hampshire General Court in a one day special session and was still in effect when the Restructuring Statute was being debated. The implementation of this agreement caused electric rates for New Hampshire, especially the 70% of the state served by Public Service of New Hampshire to soar to the highest levels anywhere in the continental United States.

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<sup>1</sup> In this regard, your Amici urge the Court not to accept at face value the claim of the Appellants that their current project, the Access Northeast pipeline capacity contract, will in fact reduce electric costs.

The legislative history is therefore replete with concern about the very high electric costs in New Hampshire, but that concern is throughout coupled with a belief that the best way to deal with high costs, especially in making future electric bulk supply choices, was to transfer the power to determine what was the best alternative source of electric supply from regulators to market forces. The legislators proceeded in full awareness of the dire consequences that had resulted from reliance on regulators to protect consumers from exorbitant prices.<sup>2</sup>

#### **SUMMARY OF THE ARGUMENT**

The Amici, three of whom were in office in 1996 at the time of the consideration and enactment of RSA 374-F, "the Restructuring State," and the other of whom, Representative Backus, participated in the House and Senate hearings on the bill that become the Restructuring Statute (as did the other Amici). We argue that the legislative history fully supports the decision of the Public Utilities Commission that the paramount purpose of the Statute was, not to merely lowering New Hampshire's highest in the nation electric costs, but to do through a paradigm shift from the traditional monopoly regulated utility model in regard to electric generation to a new model: trust in the power of competitive markets.

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<sup>2</sup> It is noteworthy that the decision to move from a regulated, monopoly model to a competitive model, has been a success. Whereas, as the legislative history shows, the concern in the debates on the Restructuring Statute, were about the very high New Hampshire electric rates - the highest in the continental United States, today the concern is about New Hampshire rates that are consistent with the New England regional average. New England average rates are indeed higher than many other parts of the nation, but this is a longstanding situation generally attributed to the region being at the end of the supply line. Wholesale electric supply rates have dropped by 50% since the start of restructuring.

## **ARGUMENT**

### **1. THE PUC USED THE CORRECT STANDARD OF STATUTORY REVIEW.**

The appellants urge the PUC erred in its standard of review of the Restructuring Statute. They suggest the review of a statute should be de novo. This ignores the long standing principle that an agency's interpretation of its own governing statutes is entitled to deference. See Appeal of Old Dutch Mustard Co., Inc. 166 NH 501 (2014). "However, 'it is well established in our case law that an interpretation of a statute by an agency charged with its administration is entitled to deference.'" The Restructuring Statute was an important governing statute that the PUC had to implement.

### **2. THE PUC CORRECTLY INTERPRETED AND APPLIED THE RESTRUCTURING STATUTE.**

The appellants' principal argument is that the PUC erred in failing to conclude that the overriding principle in the Restructuring Statute was to lower electric rates.<sup>3</sup>

They are right that this was the important reason to adopt the restructuring statute, but they are wrong in saying this could be done by overriding the clear and dominating purpose of the statute: to do this by "harnessing the power of competitive markets," and rejecting the old model of regulated monopoly and administrative determinations based on

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<sup>3</sup> Unsurprisingly, the appellants may not have total confidence in their position in this docket. They supported legislation in the current term to specifically authorize the PUC to consider their Access Northeast capacity contract. That bill, SB 128 passed the Senate, but was retained by the House Science, Technology and Energy Committee and has therefore not come to a vote.



forecasts of the future as the way to supply needed power at the lowest reasonable cost.

RSA 374-F:1, 1.

The appellants' make much of the fact that there are 15 restructuring principles in the Statute, RSA 374-F:3, and claim that the PUC's decision elevated one, adopting the competitive market, over the others. This ignores the fact many of the other 14 principles in fact reinforce the centrality of committing to the power of competitive markets to achieve cost savings for customers.<sup>4</sup> For example:

II. "Customer Choice. Allowing customers to choose among electricity suppliers will help ensure fully competitive and innovative markets. . . ."

III, "When customer choice is introduced, services and rates should be unbundled . . . . Generation services should be subject to market competition and minimal economic regulation . . . ."

V(b). "As competitive markets emerge, customers should have the option of stable and predictable ceiling electricity prices through a reasonable transition period . . . ."

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<sup>4</sup> Many others are solely related to directing principles the PUC should use to address Seabrook's so called stranded costs; irrelevant to the question of competitive energy supply.

V(c) "Default service should be procured through the competitive market . . . ."

VII: "Full and Fair Competition. Choice for customers cannot exist without a range of viable suppliers . . . ."

XI: "*The goal of restructuring is to create competitive markets that are expected to reduce to produce lower prices for all customers than would have been paid under the current regulatory system.*" (Emphasis Added).

XII. "Regionalism. . . . efforts to enhance competition and to complement industry restructuring on a regional basis should be encouraged. . . ."

XIV. "Administrative Processes. . . . The market framework for competitive electric service should, to the extent possible, reduce reliance on administrative process."

It also very instructive to consider paragraphs III, IV, and V in the legislative findings made as part of the passage of HB 1392 that are not included in RSA 374-F but that were enacted into state law as session law in Chapter 129:1 of the Laws of 1996:

"129:1 Findings. The general court finds that:

- I. New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high. The general court also finds that electric rates for most citizens may further increase during the remaining years of the Public Service Company of New Hampshire rate agreement and that there is

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.

- II. New Hampshire's extraordinarily high electric rates disadvantage all classes of customers: industries, small businesses, and captive residential and institutional ratepayers and do not reflect an efficient industry structure. The general court further finds that these high rates are causing businesses to consider relocating or expanding out of state and are a significant impediment to economic growth and new job creation in this state.
- III. Restructuring of electric utilities to provide greater competition and more efficient regulation is a nationwide phenomenon and New Hampshire must aggressively pursue restructuring and increased customer choice in order to provide electric service at lower and more competitive rates.
- IV. Monopoly utility regulation has historically substituted as a proxy for competition in the supply of electricity but recent changes in economic, market and technological forces and national energy policy have increased competition in the electric generation industry and with the introduction of retail customer choice of electricity suppliers as provided by this chapter, market forces can now play the principal role in organizing electricity supply for all customers instead of monopoly regulation.

- V. It is in the best interests of all the citizens of New Hampshire that the general court, the executive branch, and the public utilities commission work together to establish a competitive market for retail access to electric power as soon as is practicable and that interim stranded cost recovery charges be determined and put into effect for each utility operating in this state to expedite and facilitate the transition for such a market.”

The legislative history fully supports what we consider to be the plain language of the statute. The goal was indeed lower electric cost, but that goal was to be achieved by leaving behind the old regulated monopoly model that had so disastrously failed in the Seabrook debacle, and instead trust to a newly emerging competitive model, being advanced not only in New Hampshire, but throughout New England and several other states.

### **CONCLUSION**

The Amici believe that, in fact, the PUC was clearly correct in its interpretation of the Restructuring Statute. However, if resort is to be had to the legislative history, they also believe that history, considered as a whole, supports the decision that, although the goal was to reduce electric costs, the means to that goal were paramount: to be done by “harnessing the power of competitive markets.” The proposed Access Northeast capacity contract would seriously conflict with the New Hampshire commitment to change our paradigm from a regulatory to a market based solution.

Respectfully Submitted,

**ROBERT BACKUS, PRO SE**

Date: June 30, 2017



Robert Backus, *Pro Se*

**Burt Cohen**  
Richard Russman  
Clifton Below

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of June, 2017, two (2) copies of the *Brief for the Amicus Curiae, former Senators Burt Cohen, and Richard Russman, former State Representative and Senator Clifton Below, and State Representative Robert Backus* was served by U. S. Postal Service First Class Mail, postage prepaid, on:

Robert A. Bersak, Esq.  
Matthew J. Fossum, Esq.  
Wilbur A. Glahn, III, Esq.  
Joey Lee Miranda, *Pro Hac Vice*  
Dana M. Horton, Esq.  
Jennifer R. Rinker, *Pro Hac Vice*  
Burt Cohen  
Richard Rusman  
Clifton Below

Dated: June 29, 2017

By:

  
Robert A. Backus, *Pro Se*