THE STATE OF NEW HAMPSHIRE
SUPREME COURT
No. _____

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

PUC 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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i. PRESERVATION OF ISSUES FOR APPELLATE REVIEW 29

Pursuant to RSA 541:6, RSA 365:21 and Supreme Court Rule 10, Public Service Company of New Hampshire, d/b/a Eversource Energy ("Eversource") appeals to this Court from Order No. 25,950 (the "Order") of the New Hampshire Public Utilities Commission (the "Commission") dated October 6, 2016 and the Commission's Order on Reconsideration, Order No. 25,970, dated December 7, 2016 ("Order on Reconsideration"). In support of this Petition, Eversource states as follows:

a. PARTIES AND COUNSEL

1. Name and Counsel of Parties Seeking Review

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2. Names and Addresses of Parties and Counsel

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b. ADMINISTRATIVE AGENCY'S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED

Copies of the Order and the Order on Reconsideration and the following documents are contained in the Joint Appendix of Algonquin Gas Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy ("Appendix" or "App.") filed with this Petition:

Commission Order Dismissing Petition Order No. 25,950 October 6, 2016	Appendix page 1
Algonquin Gas Transmission, LLC's Motion for Rehearing and/or Reconsideration November 7, 2016	Appendix page 20
Public Service Company of New Hampshire d/b/a Eversource Energy Motion for Reconsideration November 7, 2016	Appendix page 37
Response of the Coalition to Lower Energy Costs to Algonquin and Eversource Motions for Reconsideration November 14, 2016	Appendix page 50
Objection of Conservation Law Foundation to Motions for Rehearing and/or Reconsideration November 15, 2016	Appendix page 58
Opposition of the Office of the Consumer Advocate to Motions for Rehearing and Reconsideration November 15, 2016	Appendix page 63
NextEra Energy Resources, LLC Objection to Motions for Rehearing and/or Reconsideration of Order No. 25,950 November 15, 2016	Appendix page 74
Commission Order Denying Motions for Reconsideration Order No. 25,970 December 7, 2016	Appendix page 93

c. QUESTIONS PRESENTED FOR REVIEW

1. The Electric Utility Restructuring statute, RSA Ch. 374-F, contains fifteen restructuring policy principles intended to be "interdependent" and to "guide the New Hampshire public utilities commission." The Public Utilities Commission found that one of these principles concerning the functional separation of

generation and transmission "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 Ch. 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 Ch. 374-F", the Public Utilities Commission concluded that the authority or obligations under these statutes no longer existed or had been impliedly repealed. Is this finding unlawful and unreasonable?

d. PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS

The constitutional provisions, statutes and rules involved in this case are:

1996 N.H. Laws, 129:1	Appendix page 101
RSA 4-E	Appendix page 108
RSA 21:2	Appendix page 109
RSA 362:4	Appendix page 110
RSA Chapter 362-A	Appendix page 112
RSA Chapter 362-F	Appendix page 121
RSA 365:21	Appendix page 132
RSA 374:1	Appendix page 133
RSA 374:2	Appendix page 134
RSA 374:57	Appendix page 135
RSA Chapter 374-A	Appendix page 136
RSA 378:37	Appendix page 150
RSA 378:38	Appendix page 151
RSA 541:6	Appendix page 152

e. PROVISIONS OF INSURANCE POLICIES, CONTRACTS OR OTHER DOCUMENTS

The following documents are contained in the Appendix filed with this Petition:

NHPUC Docket No. DE 16-241 Petition for Approval of Gas Infrastructure Contract Between Public Service Company of New Hampshire d/b/a Eversource Energy and Algonquin Gas Transmission, LLC February 18, 2016 (the "Petition")	Appendix page 153
NHPUC Docket No. DE 16-241 Precedent Agreement Attachment EVER-JGD-2 to the Petition February 18, 2016 (the "Precedent Agreement")	Appendix page 168
ICF International Access Northeast – Reliability Benefits and Energy Cost Savings to New England Consumers Attachment EVER-KRP-2 to the Petition December 18, 2015 (the "ICF Study")	Appendix page 253
NHPUC Docket No. DE 16-241 Commission Order of Notice March 24, 2016 (the "Order of Notice")	Appendix page 294
NHPUC Docket No. DE 16-241 Transcript, Prehearing Conference April 13, 2016	Appendix page 301
NHPUC Docket No. IR 15-124 Order of Notice April 17, 2015 (the "IR 15-124 Order of Notice")	Appendix page 343
NHPUC Docket No. IR 15-124 Memorandum re: Gas Capacity Acquisitions by N.H. Electric Distribution Utilities July 10, 2015 (the "Staff Legal Memorandum")	Appendix page 348

NHPUC Docket No. IR 15-124 Appendix, page 356
Report on Investigation into Potential Approaches
to Mitigate Wholesale Electricity Prices
September 15, 2015
(the "Staff Final Report")

Press Release, ISO New England Appendix, page 413
Managing Reliable Power Grid Operations This
Winter
December 5, 2016

f. STATEMENT OF THE CASE

1. Background-Docket IR 15-124

When it enacted the Electric Utility Restructuring law (1996 N.H. Laws 129), the General Court found "New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high." 1996, 129:1, I. This case began on April 17, 2015, when the Commission 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"). That order, issued on the Commission's own motion, required a "targeted Staff investigation to examine the gas-resource constraint problem that is affecting New Hampshire's EDCs and electricity consumers generally" and "potential means of addressing these market problems." April 17, 2015 Order of Notice in Docket No. IR 15-124. App. at 345. The Commission Staff ("Staff") was directed to prepare a report regarding the natural gas resource constraint issues facing the New England electricity market and New Hampshire customers, and potential solutions to those issues, by September 15, 2015.[1]

[1] The concerns relating to New England's natural gas pipeline infrastructure are described in greater detail in Section (e) of the Appeal By Petition Pursuant to RSA 541:6 and RSA 365:1 of Algonquin Gas Transmission LLC.

As part of its investigation, the Staff issued a legal memorandum in Docket No. IR 15-124 in July 2015. App. 348. The Staff Legal Memorandum evaluated three issues: 1) whether the Electric Utility Restructuring statute (RSA Ch. 374-F) (the "Restructuring Statute") prohibits EDCs from acquiring natural gas capacity; 2) whether New Hampshire EDCs have the corporate power to acquire natural gas capacity; and 3) whether New Hampshire 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, and that the Commission was authorized to review and approve requests by EDCs for recovery of costs related to such contracts from 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" RSA Ch. 374-F or the policy principle set out in that Chapter that generation and transmission/distribution functions be separated. App. 350. Staff also 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 Final Report in Docket No. IR 15-124 was issued in September 2015. App. 356. Among other things, the report concluded that there is 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." App. at 369. The Staff Final Report also noted that various commenters identified the imbalance as attributable to limited natural gas pipeline infrastructure. *Id.*

With respect to the legal authority for EDCs to enter into contracts for natural gas capacity, the Staff reaffirmed the findings in its July memorandum, including the finding that "the Commission could conceivably hold that RSA 374-F allows such activity." *Id.* at 365 (emphasis in original).[2] More specifically, the Staff addressed the policy principle in RSA 374-F:3, III regarding the "functional separation of generation services from transmission and distribution." *Id.* The Report concluded that this principle "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.* The Staff concluded that 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.* In addition, the Staff 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.* Among other principles in the statute, the Staff point 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 reading all of the principles together, the Commission could find that "the potential benefits of gas-capacity acquisition *would foster the overall goals* of the Restructuring Policy Principles of RSA 374-F." *Id.* (Emphasis added.)

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, that the Commission could rule that New Hampshire's EDCs have the authority under New Hampshire law to enter into contracts for

[2] The Staff's conclusions on issues of law are set forth at pages 9-13 of the Staff Final Report. App. at 364-368.

natural gas capacity, and that the Commission could rule that it has the authority to authorize cost recovery from electric customers under those contracts.

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. App. 405. That order accepted the Staff Report and set 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 407.

2. The Eversource Petition and Commission Proceedings - Docket DE 16-241.

On February 18, 2016, Eversource filed a Petition and supporting testimony seeking approval of a proposed 20-year interstate pipeline transportation and storage contract ("the ANE Contract") between it and Algonquin Gas Transmission, LLC ("Algonquin") on the proposed Access Northeast pipeline (the "ANE Project"). App. at 153. The ANE Project would upgrade the existing Algonquin Pipeline to provide firm natural gas delivery targeted to natural gas-fired generators. *Id.*[3] That submission was docketed as Docket No. DE 16-241. Several parties,

[3] As described in the Petition, Eversource requested the Commission's approval of: (1) the ANE Contract, (2) an Electric Reliability Service Program to set parameters for the release of capacity and the sale of liquefied natural gas supply available by virtue of the ANE Contract; and (3) a Long-Term Gas Transportation and Storage Contract tariff, which would allow for recovery of costs associated with the ANE Contract. Eversource proposed that if the contract was approved by the Commission, Eversource would release the natural gas capacity for which it has contracted to the electric 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 approval by the Federal Energy Regulatory Commission, which regulates the capacity release market. The net revenues received by virtue of the

including Algonquin, intervened and were granted party intervenor status by the Commission.[4]

The Commission issued an Order of Notice on March 24, 2016 (App. at 294) 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 297.

The ANE Project is designed to provide increased natural gas deliverability to the New England region to support electric generation, including most directly, the gas-fired electric generating plants on the Algonquin and Maritimes & Northeast Pipeline systems. The ANE Project was to provide: (1) access to the gas supplies in the Marcellus Shale region in Northeastern Pennsylvania through Algonquin's existing direct connections to pipelines; and (2) access to a proposed market-area domestic LNG (liquefied natural gas) 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. The contract quantities applicable to Eversource in New Hampshire under

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sale of the released capacity under the Algonquin ERS would be credited back to Eversource customers and help offset the costs of the capacity purchased under the ANE Contract.

[4] The Commission's Order No. 25,950 in Docket DE 16-241 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; 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, App. at 4-5.

the ANE Contract were determined through a computation of New England electric load share, and represent the load share served by Eversource within the load served by investor-owned EDCs in New England.

The issues addressed in the first phase were decided solely on legal memoranda submitted by parties and intervenors. 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 addressed Phase I issues. The Order dismissed the Petition as "contrary to the overriding principle of restructuring."

3. 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 for gas capacity acquisition by a New Hampshire EDC" namely, whether RSA Ch. 374-F *prohibits* such activity. Order. App. at 6. In addressing this "threshold question," the Commission focused on one sentence in one of the fifteen 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." *Id.* (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 described this one functional separation principle as a "directive," and then stated that it was required to determine whether that "directive" would be violated by the ANE Contract and, if so, whether the directive "overrides, or supersedes, all other restructuring principles and therefore prohibits the Capacity Contract." *Id.*

Although recognizing that "the Restructuring Statute contains numerous policy directives" and without addressing the issue of whether any of those "directives" permitted or prohibited *any activity*, the Commission ignored the other fourteen principles and concluded that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity." *Id.* It then concluded 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 9. (Emphasis added). Having converted one sentence in one policy principle out of fifteen to a "directive" and "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 Commission did not provide an explanation of why the ANE Contract constituted generation services, despite the fact that the Restructuring Statute itself refers to "centralized" generation services in its purpose section at RSA 374-F:1, I.

After concluding 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*" (emphasis added), 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 to determine whether "standing alone" they 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 concluded that the Restructuring Statute mandated the functional separation of generation and transmission in all circumstances, the Commission rejected each of these statutes as offering a basis to support the ANE Contract.

First, it 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 Ch. 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).

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 10-11. Again, it concluded that when read with the directive the Commission had read into RSA 374-F, "electric utilities are no longer required to conduct long-term planning for electric supply." *Id.* at 12. In sum, the Commission's conclusions relating to RSA Chapter 374-F may actually work an implied repeal of portions of the planning statutes, at least as to EDCs.[5]

Third, the Commission rejected the Supporters' claim that RSA 374:57, which requires electric utilities entering into long-term contracts for "transmission capacity" to obtain approval from the Commission, provided support for the ANE Contract. *Id.* at 13. Although finding the argument "plausible," the Commission read 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.* at 13.

Finally, the Commission rejected the claim by Supporters – and as 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 13-14. RSA 374-A:2

[5] 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.

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, the Commission found that the statute "no longer applies to an EDC like Eversource." *Id.* at 14. The sole justification for this implied repeal of RSA 374-A:2 was adoption of RSA Ch. 374-F and "the centrality of the separation of functions between distribution and generation" the Commission found to exist in that statute. App. at 14. Despite the plain meaning of the language in RSA 374-A, the absence of any explicit repeal of that statute in RSA Ch. 374-F, and the General Court's express direction that RSA Ch. 374-A would apply notwithstanding any contrary law, the Commission decided that reading RSA Ch. 374-A to allow the ANE Contract given this "centrality" "would make little sense." *Id.*[6]

Algonquin and Eversource timely filed motions for rehearing and/or reconsideration pursuant to RSA 541:3. App. 20, 37. Various Opponents filed oppositions. App. 58-92. On December 7, 2016, the Commission issued its Order on Reconsideration (Order No. 25,970) denying the motions for rehearing and/or reconsideration and re-stating the conclusions it articulated in the Order. App. 93.

g. JURISDICTIONAL BASIS FOR APPEAL

RSA 541:6 and RSA 365:21 supply the jurisdictional basis for this appeal.

h. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE CORRECT INTERPRETATION OF MULTIPLE STATUTES. THE ACCEPTANCE OF THE APPEAL WOULD PROVIDE AN OPPORTUNITY TO CORRECT PLAIN ERRORS BY THE COMMISSION, CORRECTLY INTERTPRET A LAW OF IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

[6] 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 Federal Energy Regulatory Commission 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 14-15.

This case presents an opportunity for the Court to interpret – and clarify – the Electric Utility Restructuring Statute, RSA Ch. 374-F, and the policy principles of that statute, which the New Hampshire Legislature expressly described as "guidelines" for the Commission. The Commission misconstrued the statute, and divined an "overriding principle" or Legislative intent of the statute from one policy principle (while ignoring others). It then found that one principle to create a directive or mandate in favor of competition, and the separation of generation from distribution and transmission. Having done so, the Commission applied this supposed mandate to find that it prohibited the ANE Contract. Then, based on this newly discovered mandate, the Commission found that the Legislature intended RSA Ch. 374-F to repeal prior statutes and to eliminate rights granted to EDCs or imposed on them in those statutes. The Commission's faulty reasoning as to the meaning of the policy principles in the Restructuring Statute and failure to harmonize the Restructuring Statute with other existing law colors its entire Order and constitutes plain error.

The Commission itself concedes 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, App. at 15. Moreover, less than a month before the Commission issued the Order, ISO-New England, the independent organization authorized by the Federal Energy Regulatory Commission to oversee the day-to-day operation of New England's power grid, described the existing competitive electricity market as "precarious" and "unsustainable."[7] The Access Northeast Project offers a regional solution to this regional problem, and the Commission itself concedes that the Eversource proposal has "the

[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 at:http://www.unionleader.com/enerey/New-Englands-energy-situation-orecarious-ISO-leader-says-092916. App. 411.

potential to reduce [electric price] volatility." *Id.* The Commission's Order prevents that solution, to the detriment of the State and the region.

1. **The Order Misconstrues the Language and Intent of the Restructuring Statute.**

Rather than first addressing statutes that provide authority for Eversource to enter into the ANE Contract, the Commission's analysis began by asking whether RSA Ch. 374-F prohibited it. It found a prohibition by concluding that the "overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity" and that RSA 374-F:3, III "directs the restructuring of the industry, separating generation from transmission and distribution activities." Order, App. at 8-9. The Commission's interpretation of the Restructuring 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 broad 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.[8]

First, contrary to the Commission's determination of "the overriding purpose of the Restructuring Statute," the Legislature has explicitly stated a different purpose, and it is not, as the Commission concluded, "to introduce competition to the generation of electricity." App. at 8-9. At its outset, the Restructuring Statute states that "**The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers**

[8] 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 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.).

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 (emphasis added).

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

Although the legislative findings in Laws 1996, c.129, were not included in RSA Ch. 374-F, the findings 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). App.101. The concern the General Court intended to address is clear: the goal was to reduce rates. Competition was only a means to achieve that stated end.

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. 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 restructuring policy principles merely provide guidance; they enumerate matters the Commission "should" consider. Courts have consistently interpreted the word "should" in a statutory context as a recommendation, and not a mandate.[9] While in the Restructuring Statute, the Legislature chose to use the word "shall," designating a mandate, sixty-seven times, it used mandatory words in the interdependent 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.

By contrast, the Legislature did not use the words "must" or "shall" in subsection 374-F:3,III. The subsection uses the word "should" three times, provides that generation services

[9] "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) (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).

"*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.

The Commission's finding of an "overriding purpose" in favor of competition and a directive to separate generation from distribution and transmission is simply wrong. The principal purpose of the 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.

Third, the Commission also erred in applying this supposed "directive" to prohibit the ANE Contract. Nothing in the Restructuring Statute prohibits utilities from owning electric supply related assets. To the contrary, the Restructuring Statute itself notes that "market forces can now play the ***principal*** role in organizing electricity supply," *not* the "exclusive" role. 1996, N.H. Laws 129:1, IV (Emphasis added). App. 102. In addition, the Restructuring Statute at RSA 374-F:1, I references as a "purpose" the "functional separation of centralized generation services from transmission and distribution services." Contracting for pipeline capacity via the ANE Contract is not a "centralized generation service."[10]

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[10] The Restructuring Statute does not define the term "centralized generation service." FERC considers generation that is centrally dispatched to be "centralized generation." *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61074 (Oct. 21, 2011). This Commission has contrasted "centralized generation" to "distributed generation." *In Re Wyrulec Co. of New Hampshire*, Order No. 23,443 (April 19, 2000) at 270. The Environmental Protection Agency describes "centralized generation" as "large-scale generation of electricity at centralized facilities. These facilities are usually located away from end-users and connected to a network of high-voltage transmission lines. The electricity generated by centralized generation is distributed through the electric power grid to multiple end-users. Centralized generation facilities include fossil-fuel-fired power plants, nuclear power plants, hydroelectric dams, wind farms, and more." U.S. EPA Website, *Centralized Generation of Electricity and its Impacts on the Environment*, https://www.epa.gov/energy/centralized-generation-electricity-and-its-impacts-environment .

Eversource is not proposing to combine any generation and distribution functions and it is also not proposing the ANE Contract as a means to engage in "generation services" as described in RSA 374-F:3, III. Rather, and consistent with RSA 374-F:3, I, as noted, Eversource is seeking to ensure long-term electric system reliability by supporting the delivery of adequate natural gas supplies to the region's competitive gas-fired electric generators.

The ANE Contract does not require or result in Eversource engaging in the production, manufacture, or generation of electricity for sale at wholesale or retail. Instead, the Eversource proposal was to contract for long-term gas 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 make new fuel delivery and storage resources available to the market, and the introduction of that capacity will provide long-term reliability benefits and cost savings to Eversource electric customers. However, the generators are not required to purchase that capacity, there is no intervention or participation in the wholesale market, and electric generation will remain subject to market competition.

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 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, the Commission erred by focusing solely on competition as the goal of the Restructuring Statute and as a result, matters pertaining to competition under that Law were all that it saw. It then further erred by using that focus to conclude that the statute imposed a mandate where none exists, particularly in RSA 374-F:3, III. That conclusion, and the conclusions that flowed from it, ignore the true purpose of the Restructuring Statute and the interdependent policy principles therein. And that conclusion, and the erroneous conclusions that flow from it, permeate the remainder of its Order.

2. **Several Statutes Grant Eversource the Authority to Contract for the Purchase of Long-Term Gas Capacity. However, Based on one Policy Principle, the Commission Concluded That These Statutes No Longer Apply or Have Been Repealed by Implication.**

Because it concluded that the Restructuring Statute *prohibited* Eversource from entering into the ANE Contract, the Commission gave short shrift to those statutes that Eversource – and the Commission's own Staff – identified as providing authority for: the purchase of gas capacity. Armed with that conclusion, the Commission rejected any claim that other statutes authorized that Contract by finding that RSA Ch. 374-F either 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.

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:
>
> > 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). RSA 374-A:1 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." Although the Commission quoted this definitional section, it nonetheless concluded that "RSA 374-A no longer applies to an EDC like Eversource." Order, App. at 14.

But RSA 374-A:1, IV, pertains 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. 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 NH 365, 366 (2002).[11] 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. Thus, absent a repeal by the

[11] 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 Commc'ns, LLC d/b/a Bayring Commc'ns*, Order No. 24,837 (March 21, 2008). The Commission referenced this principle in the Order itself. Order, App. at 7.

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 this language only by concluding that RSA Ch. 374-F had impliedly repealed the prior statute. And 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, App. at 14.

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 Ch. 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 Ch. 374-A, this Court strongly disfavors repeal by implication.[12] If "any reasonable construction of the two

[12] 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 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 Ch. 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

statutes taken 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 Ch. 374-A, was incorrect. There is a way to reasonably construe these statutes harmoniously and there is not an unconscionable conflict between these statutes. It is only the Commission's erroneous interpretation of the Restructuring Statute that creates the conflict in the first place. 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, App. at 10-12.

In this case, nothing in the Restructuring Statute "expressly prescribes" or "expressly proscribes" a utility from participating in a project that would lower electric rates for its customers or from obtaining gas pipeline capacity that would assist in reducing high and volatile electric rates 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. App. 101.

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harmony or that the weight of all evidence shows that RSA Ch. 374-A has been repealed by implication. Here, the weight of evidence plainly is against such a repeal. RSA Ch. 374-A applies "notwithstanding" any other law.

Approving Eversource's 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, and presumably would have, said so. 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 gave the Commission the authority to determine how electricity supply services from a utility may be provided.

At the Commission, Eversource and other Supporters contended that Eversource's authority to enter into the ANE Contract was authorized by several other provisions of law. The Commission found that all of these statutes had no continued viability after the passage of the Restructuring Statute and its alleged mandate to separate generation and transmission.

Eversource contended that RSA 378:37 and 378:38 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. Eversource argued that "[i]f 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 it, and other EDCs, have "the obligation to seek alternative means of meeting the demands of their customers." Once again, the

Commission found that RSA Ch. 374-F eliminated any such obligation. Order, App. at 11-12. Although it did not specifically reference RSA 374-F:3, III, the Commission found that reading these statutes together with the Restructuring Statute, they did not "permit the rejoining of distribution and generation functions in the manner provided by the [ANE Contract]." *Id.* App. at 11. But only by elevating the policy principle relating to functional separation generation and transmission 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 Law to prohibit.

Finally, Eversource and others relied on RSA 374:57, which provides that the Commission has authority to review contracts of more than one year for "the purchase of generating capacity, transmission capacity or energy," as providing support for the ANE Contract. Eversource is an "electric utility" as the term is used in the statute and any potential agreement for natural gas capacity would be a long-term contract of greater than one year. Eversource pointed out that the term "transmission capacity" as used in the statute is not restricted to *electric* transmission capacity and that while there were few uses of the term "transmission" in New Hampshire statutes, where the term was referenced, it was 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.[13] Commission Staff also stated that the term "capacity" did not specify gas or electric transmission. Staff Final Report, App. at 366.

Despite the absence of the word in the statute, and contrary to canons of statutory construction which provide that words may not be added to a statute, *Appeal of Old Dutch*

[13] 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.

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.

In conclusion, the Commission erred by its misreading of the policy principles in RSA 374-F:3, III as directives or mandates, and by its finding that one of those principles (which by its terms is not expressed as a mandate) was the "overriding purpose" of the statute. Beginning with this faulty premise, the Commission reached improper conclusions namely, that the ANE Contract was prohibited by RSA 374-F and that other statutes providing authority for Eversource that allowed for contracts in conflict with that purpose were no longer valid. This Court should accept this appeal to correct these unlawful and unreasonable conclusions.

i. PRESERVATION OF ISSUES FOR APPELLATE REVIEW

Each issue raised in this appeal has been presented to the Commission by Eversource in its Initial Legal Memorandum dated April 28, 2016, its Reply Legal Brief dated May 12, 2016 and its Motion for Reconsideration dated November 7, 2016 and has been properly preserved for appellate review.

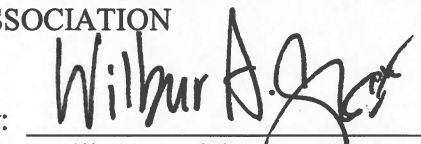
Respectfully submitted,

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

By its attorneys,

McLANE MIDDLETON PROFESSIONAL
ASSOCIATION

Dated: January 6, 2017

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2017, I served the foregoing Notice of Appeal by mailing one copy thereof, along with one copy of the Joint Appendix, by first class mail, postage prepaid, to counsel of record for each party listed in this Notice of Appeal, and also to the following:

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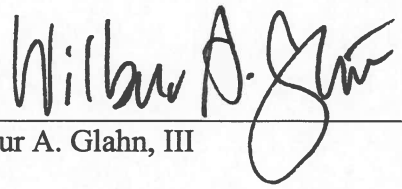

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