THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0007

Appeal of Algonquin Gas Transmission, LLC;
Appeal of Public Service Company of New Hampshire d/b/a Eversource Energy

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APPEAL BY PETITION PURSUANT TO RSA 541:6 AND RSA 365:21
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

REPLY BRIEF OF APPELLANT ALGONQUIN GAS TRANSMISSION, LLC

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Algonquin Gas Transmission, LLC ("Algonquin") offers the following reply to briefs filed by Conservation Law Foundation ("CLF"), NextEra Energy Resources, LLC ("NEER"), and the current and former state senators and representatives ("Amici") dated June 29, 2017, and the brief filed by the Office of the Consumer Advocate ("OCA") (collectively with NEER, CLF and Amici, the "Opponents") on June 30, 2017.

I. ARGUMENT

In their briefs, the Opponents attempt to obfuscate the issues before this Court. For instance, they argue that RSA Chapter 374-F (the "Restructuring Statute") does not permit an electric distribution company ("EDC"), like Public Service of New Hampshire d/b/a Eversource Energy ("Eversource"), to ***own*** electric generation facilities. CLF Br. at 24; NEER Br. at 11-23, 25-26; OCA Br. at 18-21; Amicus Br. at 5-11. However, the contractual relationship (the "Access Northeast Program") described in Eversource's February 2016 petition (App. at 200, the "Petition") to the Public Utilities Commission (the "Commission") would not result in Eversource owning generation. The central question before this Court is: whether, despite numerous statutes[1] that authorize Eversource to enter into a contract for natural gas transmission capacity (the "Authorizing Statutes"), did the Commission err in implicitly repealing those Authorizing Statutes and concluding that the Access Northeast Program violates the principles of the Restructuring Statute? Quite simply, the answer is: Yes, for all the reasons set forth below and in Algonquin's initial brief and Eversource's initial and reply briefs.

[1] Specifically, RSA 374:1 and 374:2 (responsibility of EDCs to provide safe and reliable service at just and reasonable rates); RSA 374:57 (providing for Commission approval of certain contracts for transmission capacity); RSA Chapter 374-A (authorizing EDCs to participate in, or enter contracts related to participation in, electric power facilities); and RSA 378:37 and 378:38 (resource planning statutes). *See* Algonquin Br. at 20-25; Eversource Br. at 25-32.

A. Standard Of Review

All of the parties agree that the issues presented by this appeal are questions of law, not fact.[2] This Court reviews "an agency's interpretation of a statute *de novo.*" Algonquin Br. at 11-12 (*citing Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501, 506 (2014)). While the Court has afforded some deference to administrative agencies, as the Opponents concede, that deference "is not absolute." *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012); *see also* CLF Br. at 9; NEER Br. at 9; OCA Br. at 14. This Court is "still the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole...and [is] not bound by an agency's interpretation of a statute..." *Seabrook*, 163 N.H. at 644 (internal citations omitted). As such, this Court "will not defer to an agency's interpretation if it clearly conflicts with the ***express statutory language***...or if it is plainly incorrect..." *Id.* (emphasis added); *see also Appeal of Weaver*, 150 N.H. 254, 256 (2003) (reversing an order of the New Hampshire Compensation Appeals Board because it, like the Commission in this case, improperly read a statutory provision in isolation and not in the context of the larger statutory scheme). The deference urged by Opponents is clearly misplaced given the Commission's incorrect interpretation, in conflict with express statutory language.

B. The Access Northeast Program Is Authorized By New Hampshire Law

Opponents argue that the Restructuring Statute (specifically RSA 374-F:3, I) "does not provide the Commission with the authority to allow" the Access Northeast Program. OCA Br. at 24; *see also* CLF Br. at 17-19. However, such a claim is just another attempt to obfuscate the issues before this Court and should be ignored. The Appellants have not argued nor did the Commission examine whether the Restructuring Statute ***authorizes*** the Access Northeast

[2] To the extent that Algonquin offered facts in its brief, they were offered to provide the Court with context to assist it in evaluating the legal issues presented. *See* Supreme Court Rule 16(3)(d); *cf.* Commission Order No. 25,860 (Jan. 19, 2016), at 3 (recognizing the legal issues at play are best understood in the context of specific facts).

Program. *See, e.g.,* App. at 327-28 (asking "whether Eversource has the corporate authority to enter into the Access Northeast Contract ***under*** RSA Chapter 374-A and RSA 374:57") (emphasis added). Rather, as NEER and OCA concede and the Appellants noted in their briefs, the authority for the Access Northeast Program is found in the Authorizing Statutes. *See* OCA Br. at 24-25 (acknowledging that Eversource "could indeed still invest or otherwise 'participate in' electric power facilities"); NEER Br. at 28-29 (noting that the Authorizing Statutes can be read to permit Eversource to enter the Access Northeast Program only to the extent allowed by the Restructuring Statute); Algonquin Br. at 20-25; Eversource Br. at 30-31.

In a futile attempt to undermine the Authorizing Statutes, CLF argues that, if Eversource had been "truly confident in its reliance on RSA 374:57," it would have simply furnished the contract for Commission approval, rather than filing the Petition. CLF Br. at 26. This argument is without merit and completely ignores the fact that the Commission specifically directed Eversource to submit the Petition. Order No. 25,860 (Jan. 19, 2016), at 3. Concomitantly, OCA erroneously argues that "by virtue of its plain language," RSA 374:57 is limited to electricity, and that the "triad" of terms "generating capacity, transmission capacity, or energy" all relate to electricity. OCA Br. at 28-29. First, the word electricity does not appear anywhere in the "plain language" of the statute. Moreover, as Algonquin explained in its opening brief, the term transmission capacity can refer to either electric or natural gas capacity and the General Court has used the word "energy" to include more than just electricity so those three terms have not and should not be considered a "triad" applicable only to electricity. Algonquin Br. at 20-22.

The Opponents also misconstrue RSA 374-A:2. In particular, they assert that this provision does not authorize the Access Northeast Program "because . . . the Access Northeast

pipeline [sic],[3] is not an 'electric power facility' for purposes of RSA 374-A:2." CLF Br. at 24-25; *see also* OCA Br. at 25-26. However, neither the Algonquin Pipeline nor the Access Northeast Program need to be electric power facilities themselves for the statute to apply. RSA 374-A:2 authorizes Eversource 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 ..." RSA 374-A:2, II (emphasis added). The Access Northeast Program contract is an agreement pursuant to which Eversource would be providing a service to generators (i.e., for "other participation in electric power facilities"). Thus, it is specifically authorized by RSA 374-A:2, II.

C. The Access Northeast Program Is Consistent With The Restructuring Statute

In an attempt to support the Commission's flawed conclusion that the Access Northeast Program is inconsistent with the policy principles set forth at RSA 374-F:3 (the "Restructuring Policy Principles"), the Opponents erroneously claim that the Access Northeast Program would permit Eversource to re-bundle electric generation with transmission/distribution services (CLF Br. at 12-21; NEER Br. at 11-17; OCA Br. at 18-21) and would perpetuate a monopoly or otherwise impinge on the New Hampshire Constitution's commitment to "free and fair competition." (CLF Br. at 11-12; NEER Br. at 18-19; OCA Br. at 30-31; Amicus Br. at 5-9). However, the Opponents' claims evince either a misunderstanding or deliberate clouding of the structure of the Access Northeast Program.

For instance, CLF argues that "Appellants' interpretation would enable Eversource, post-restructuring, to purchase, own, and operate electric power facilities..." CLF Br. at 24.

[3] There is no such thing as the "Access Northeast pipeline." The existing Algonquin Pipeline and Maritimes & Northeast Pipelines have served New Hampshire, and the rest of New England, for many years. Access Northeast is the name for a suite of critical infrastructure upgrades to the existing Algonquin Pipeline.

However, the Access Northeast Program would not result in Eversource's purchase, ownership or operation of electric generation. In fact, as OCA admits "the fuel supply itself or the means of getting that supply to the generator ***are no more a part of the generation facility*** than are other key inputs, from waste disposal to water supply to the infrastructure that makes and delivers spare generator components." OCA Br. at 25 (emphasis added). Thus, the Access Northeast Program will not, as the Opponents baselessly claim, re-bundle electric generation with transmission/distribution services; it will simply allow Eversource to offer a service to electric power generators as it is permitted to do and does today. *See, e.g.*, Eversource's Tariff for Electric Delivery Service (effective May 1, 2016) ("Eversource Tariff"),[4] at 71-73 ("Backup Delivery Service Rate B," which offers backup service, including the provision of energy, to electric generators). Accordingly, consistent with the Restructuring Statute, the Access Northeast Program would retain the functional separation of generation from transmission and distribution.

The Access Northeast Program is also consistent with the Restructuring Policy Principle that "[g]eneration services should be subject to market competition and minimal economic regulation." RSA 374-F:3, III. If the Access Northeast Program is approved, generators would still be free to continue to independently secure firm transportation on the Algonquin and/or Maritimes & Northeast Pipelines (the pre-existing pipelines to be expanded through the Access Northeast project), secure firm transportation on the competing Tennessee Gas Pipeline or Portland Natural Gas Transmission System, or rely on the capacity release market for natural gas transportation capacity. However, natural gas-fired generators would also have the option to secure the natural gas transmission capacity associated with the Access Northeast Program from

[4] Available at: https://www.eversource.com/Content/docs/default-source/rates-tariffs/electric-delivery-tariff.pdf?sfvrsn=26.

Eversource, which would enhance the opportunities for those generators to be available to compete in the wholesale electric market; thereby, increasing available supply choices and decreasing prices. Algonquin Br. at 18. In the end, all of the many layers of competition in the electric supply chain would remain: generators would still competitively secure the natural gas commodity and pipeline capacity; generators would still compete in the wholesale electric marketplace; and retail electric suppliers would still competitively procure energy and compete for end-user market share.[5] Thus, consistent with the Restructuring Statute, "[g]eneration services [would] be subject to market competition and minimal economic regulation." Accordingly, the Access Northeast Program would not, as the Opponents incorrectly assert, perpetuate a monopoly or otherwise impinge on the New Hampshire Constitution's commitment to "free and fair competition." Algonquin Br. at 18-20.

D. The Authorizing Statutes Remain In Effect

Opponents attempt to support the Commission's erroneous conclusion that, since the passage of the Restructuring Statute, the Authorizing Statutes no longer provide Eversource authority for the Access Northeast Program; resulting in an implied repeal of the Authorizing Statutes. CLF Br. at 23-28; NEER Br. at 27-30; *cf.* OCA Br. at 24-27 (arguing that the Authorizing Statutes had not been repealed by implication but that RSA Chapter 374-A "no longer applies" to Eversource). However, repeals by implication are generally disfavored. *Board of Selectmen v. Planning Board*, 118 N.H. 150, 152-53 (1978). As the Commission (and CLF and OCA) conceded, "the Court construes statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other." Order at 7 (*citing Old Dutch*

[5] Opponents imply that the Access Northeast Program will impede retail choice. CLF Br. at 11-12; NEER Br. at 25-26; OCA Br. at 18-20. Tellingly, Opponents fail to articulate how retail choice would be threatened by the Access Northeast Program. References to retail choice are a red herring and are not relevant to this appeal. The Access Northeast Program would in no way limit ratepayers' ability to choose a competitive electric supplier.

Mustard, 166 N.H. at 509); CLF Br. at 22 n. 15; OCA Br. at 20; *see also Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the ***only*** permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.") (emphasis added); *Board of Selectmen*, 118 N.H. at 153 (holding that this Court will not find an implied repeal if two statutes can be reasonably construed together). As a consequence, a repeal by implication must be demonstrated "by evidence of convincing force." *Board of Selectman*, 118 N.H. at 153. Moreover, the scope of such a repeal must be "confined to repealing as little as possible of the preceding statute." *State v. Wilson*, 43 N.H. 415, 418 (1862).

OCA asserts that "[t]he commission did not explicitly determine that any prior statutes had been impliedly repealed." OCA Br. at 24-27. This argument is simply unavailing. There is no requirement that the Commission use any magic words. The Commission concluded that "[t]he change in the industry through the Restructuring Statute, first passed in 1996, ***effectively ended*** a restructured EDC's ability to participate in the generation side of the electric industry." Order at 14 (emphasis added); *see also* Order on Reconsideration at 5 ("We stand by our conclusions that 'RSA 374-A ***no longer applies*** to an EDC like Eversource…") (emphasis added). While it did not use the words "implied repeal," the Commission determined that Eversource was no longer authorized to undertake actions specifically permitted by statute. As such, it repealed RSA Chapter 374-A by implication.[6] *See also* Algonquin Br. at 22-25.

Both NEER and OCA admit that the Restructuring Statute and Authorizing Statutes can be reasonably read together so as not to contradict each other. OCA Br. at 24-25 (arguing that Commission "correctly concluded that the Restructuring Act can be harmonized with prior

[6] In what appears to be an attempt to support such a repeal, OCA argues that RSA Chapter 374-A is "no longer applicable" (i.e., repealed by implication) because "the practical and accounting difficulties of an investment that cannot be included in the rate base would be enormous." OCA Br. at 25. A passing reference to "practical and accounting difficulties" alone does not constitute the "evidence of convincing force" required to support a repeal by implication. *Cf. Board of Selectman*, 118 N.H. at 153.

enactments referenced by the appellants."); NEER Br. at 28 (conceding that the Authorizing Statutes "and the Restructuring Statute can be consistently construed."). The Appellants agree that these statutory provisions can be read in harmony (albeit in a different way). Algonquin Br. at 22-24; Eversource Br. at 28-32. Thus, the Commission erred when it impliedly repealed the Authorizing Statutes. *Cf. Morton*, 417 U.S. at 550; *Board of Selectmen*, 118 N.H. at 153.

In a fruitless attempt to support the Commission's implied repeal of the Authorizing Statutes, CLF and NEER argue that, if the Authorizing Statutes are read to conflict with the Restructuring Statute, the Restructuring Statute "prevails as it is later in time and addresses the subject matter with specificity." NEER Br. at 28-29 (*citing Petition of Public Service Co. of N.H.*, 130 N.H. 265, 282-83 (1988)); *see also* CLF Br. at 22. "[T]o the extent two statutes conflict, the more specific statute…controls over the general statute." *Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 294 (2012); *see also Morton,* 417 U.S. at 550-51 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, ***regardless of the priority of enactment.***") (emphasis added). The Authorizing Statutes provide Eversource authority to undertake specific, enumerated actions. Conversely, the Restructuring Statute provides "policy principles . . . intended to guide the New Hampshire public utilities commission in implementing a statewide electric utility industry restructuring plan . . . ." RSA 374-F:1, III. Since the Authorizing Statutes are more specific, they control. *Morton,* 417 U.S. at 550-51; *Ford*, 163 N.H. at 294. In fact, RSA 374-A:2 controls "[n]otwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities." *See King v. Sununu*, 126 N.H. 302, 306-07 (1985) (finding that the word "notwithstanding" demonstrates clear direction from the legislature on which statute should prevail in the event of conflict).

Moreover, if the Court were to find that the Restructuring Statute implicitly repealed Eversource's authority to engage in certain activities, the scope of the repeal must be limited to those activities. For instance, if the Court were to conclude that the Restructuring Statute implicitly repealed Eversource's ability to own generation as provided in RSA 374-A:2, I, it does not follow that the Restructuring Statute also implicitly repealed Eversource's authority to enter into agreements related to generation as provided in RSA 374-A:2, II. As OCA recognized, RSA 374-A:2 could be read to authorize Eversource to provide a wide variety of services to electric power generators, from catering to janitorial. OCA Br. at 25-26. Eversource does have that authority pursuant to RSA 374-A:2, II and that broad authority has not been repealed by the Restructuring Statute. Otherwise, all Eversource contractual relationships that relate in any way to electric power generators would be prohibited. This is clearly an absurd result, especially given Eversource's two decades of activity since restructuring.

E. The Commission Erred In Concluding That Eversource Could Not Recover Access Northeast Program Costs

OCA and NEER argue in support of the Commission's erroneous conclusion that the costs related to the Access Northeast Program may not be recovered from ratepayers. OCA Br. at 25, 27; NEER Br. at 28. However, the Commission's erroneous conclusions regarding the Restructuring Statute and Access Northeast Program led to its further improper conclusion that the Access Northeast Program "is designed to support electric generation supply, and therefore expenses related to generation supply would be disallowed in distribution rates." Order at 14. Despite the Opponents' efforts to put forth other justifications for excluding Access Northeast Program costs from Eversource's delivery rates, the Commission did not rely on any other reasoning to support its conclusion and specifically reserved the issue of "cost recovery" to the second phase. App. at 328. Thus, if the Court determines that the Commission erroneously

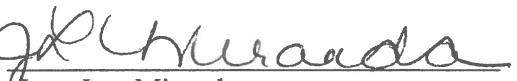
concluded that the Access Northeast Program is "fundamentally inconsistent with the purposes of restructuring," it must also find that it erred in concluding that the costs of the Access Northeast Program were not recoverable.

II. CONCLUSION

For all of the reasons set forth above and in Algonquin's initial brief and Eversource's initial and reply briefs, Algonquin requests that this Court vacate the Order and Order on Reconsideration and remand to the Commission for further proceedings on the Petition.

Dated: July 19, 2017

Respectfully submitted,
ALGONQUIN GAS TRANSMISSION, LLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that two copies of this Reply Brief has this day been sent via first class mail to all counsel of record.

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Dated: July 19, 2017