

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket No. DE 23-068

Electric and Gas Utilities

2024-2026 Triennial Energy Efficiency Plan

**JOINT INTERVENOR BRIEF IN RESPONSE TO
SEPTEMBER 7, 2023 PROCEDURAL ORDER**

NOW COMES Conservation Law Foundation, LISTEN Community Services, The Nature Conservancy, Clean Energy New Hampshire, and Southern New Hampshire Services, Inc. (collectively, “Joint Intervenors”) who submit the following brief in response to the Commission’s September 7, 2023 procedural order, in which the Commission requests briefing on several matters. The Joint Intervenors appreciate the opportunity to address these issues in advance of the hearing in this proceeding.

I. INTRODUCTION

On November 12, 2021, the Commission issued Order No. 26,553, in which it rejected the Joint Utilities’ proposed 2021-2023 triennial energy efficiency plan (“2021-2023 Plan”) and partial settlement on the 2021-2023 Plan. However, not only did the Commission reject the 2021-2023 Plan and related settlement agreement, but the Commission also dictated that the main NH Saves’ funding mechanisms, *i.e.*, the System Benefits Charge (“SBC”) and Local Delivery Adjustment Clause (“LDAC”), “descend gradually year-on-year until they return to a reasonable level, and transition toward market-based programs,” pursuant to a schedule devised by the Commission. Order No. 26,553, at 36 (Nov. 12, 2021). This directive sought to eliminate funding for the long-established NH Saves Program, undermining nearly 20 years of

Commission precedent on energy efficiency, as well as programs that help New Hampshire utility customers save money on energy.

In direct response to the Commission’s extraordinary decision to weaken the NH Saves program in Order No. 26,553, the New Hampshire General Court unanimously passed HB 549 (2022), which amended RSA 374-F:3, VI-a and overruled much of the Commission’s Order. As explained by the sponsors of the amended (and final, enacted) version of the bill, its purpose was to “restore the programs and help people that benefit from them,” “restore[] the energy programs that have had broad bipartisan support,” and to provide “stability [and] transparency” to the NH Saves program. HB 549 (2022) Minutes at 2, Senate Energy and Natural Resources Committee (Jan 18, 2022). Additionally, the sponsors noted that HB 549 “puts into statute a description of the energy efficiency programs” contained in triennial plans in order to prevent the Commission from “reject[ing] future plans.” *Id.* According to its sponsors, HB 549 “places into statute the *programming framework and components necessary for energy efficiency programs to go forward without the possibility of tampering by the PUC.*” *Id.* (emphasis added). The sponsors also warned that the Commission “does not make State law, it implements State law.” *Id.*

Thereafter, as directed by HB 549, the Commission approved the Joint Utilities’ refiled and abbreviated 2022-2023 energy efficiency plan. However, in approving the plan, the Commission interpreted a provision in HB 549 mandating that in “no instance shall an electric utility’s planned electric savings fall below 65 percent of its overall planned energy savings,” to mean that electric savings must not just be calculated on an annual basis, but “must be calculated over the lifetime of the proposed program offerings.” Order No. 26,621, at 22-23 (April 29, 2022). The Commission’s interpretation of this provision had the effect of significantly limiting weatherization programs funded by the SBC, including those serving low-income ratepayers.

In response to the Commission’s 2022 Order, the General Court passed a second law, contained in SB 113 (2023), clarifying that electric savings should be calculated on an annual basis, rather than a lifetime basis. As explained by the chief sponsor of SB 113, Senator Kevin Avard, the Commission’s interpretation of HB 549 “puts the NH Saves program at risk, and this bill would clarify the language to save the program” to “ensure that the NH Saves energy program is protected in statute.” SB 113 (2023) Minutes at 2, Senate Energy and Natural Resources Committee (Jan. 31, 2023). Senator Avard also reminded the Commission that the General Court is the body “who has the power to make legislative decisions.” *Id.*

Twice in two years the General Court has expressed its disagreement with the Commission’s recent decision-making on energy efficiency by enacting legislation that directly overrules the Commission’s decisions that sought to undermine energy efficiency programs. In considering the questions presented in its September 7, 2023 procedural order, as well as the proposed 2024-2026 triennial energy efficiency plan (“2024-2026 Plan”) more generally, the Commission must consider its authority over energy efficiency matters through the lens of HB 549 and SB 113, which amended RSA 374-F:3, VI-a. In enacting these bills, the General Court intended to prevent the Commission from undermining the NH Saves programs; this overarching intention is reflected in the plain language of the amended statute, which severely curtails the Commission’s review of the 2024-2026 Plan. As discussed below in response to the Commission’s questions, the Commission’s limited discretion in its review of the 2024-2026 Plan, as established by the recent amendments to 374-F:3, VI-a, precludes the Commission from making changes to the frameworks and main components of the NH Saves program.

II. QUESTION 1: THE COMMISSION IS LEGALLY REQUIRED TO USE THE GRANITE STATE TEST AND CANNOT MODIFY THE TEST

When interpreting the meaning of a statute, the Commission must first look to the language of the relevant statute and “where possible, . . . ascribe the plain and ordinary meanings to words used.” *Appeal of Pub. Serv. Co. of New Hampshire (New Hampshire Pub. Utilities Comm’n)*, 141 N.H. 13, 17 (1996) (citation and quotation omitted). The Commission may not act contrary to the plain meaning of a statute or regulation. *In re Union Tel. Co.*, 160 N.H. 309, 317 (2010). Courts and administrative agencies “can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.” *Appeal of Pub. Serv. Co. of New Hampshire*, 141 N.H. at 17 (citation and quotation omitted). Adjudicators must interpret language “in the context of the overall statutory or regulatory scheme and not in isolation” while avoiding an absurd or unjust result. *New Hampshire Resident Partners of Lyme Timber Co. v. New Hampshire Dep’t of Revenue Admin.*, 162 N.H. 98, 101 (2011).

RSA 374-F:3, VI-a(d)(4) requires that “the commission’s review of the cost effectiveness shall . . . use the Granite State Test (“GST”) as the primary test.” (emphasis added). The statutory language is clear that the Commission must use the GST and that the Commission is legally precluded from changing the GST. The GST was first approved by the Commission in Order No. 26,322, and the costs, benefits, and impacts included in the GST are summarized in Appendix I to that order. In addition, the *New Hampshire Cost-Effectiveness Test Review*, authored by Synapse Energy Economics, Inc. (Synapse), provides a more detailed explanation of the test and how the utilities apply it to screen the energy efficiency programs. *See* Docket No. DE 17-136 Electric and Gas Utilities, 2018-2020 New Hampshire Statewide Energy Efficiency Plan, Tabs 154 (Oct. 21, 2019) and 177 (Dec. 30, 2019), *available at* <https://www.puc.nh.gov/Regulatory/Docketbk/2017/17-136.html> (last accessed Sept. 18, 2023).

When the legislature amended RSA 374-F:3, VI-a and mandated that the Public Utilities Commission (“PUC”) use the GST as the primary test, it was aware of the prior relevant energy efficiency dockets, the *New Hampshire Cost-Effectiveness Test Review*, and Order No. 26,322. “The legislature is presumed to choose the words of a statute advisedly.” *Appeal of Pub. Serv. Co. of New Hampshire*, 141 N.H. at 17 (citation omitted). “The legislative intent is to be found not in what the legislature might have said, but rather in the meaning of what it did say.” *Id.* at 17 (citation and quotation omitted). The legislature did not alter the GST when it passed RSA 374-F:3, VI-a(d)(4), and the plain language of the statute signifies that the legislature intended for the PUC to use the GST as it was approved by the Commission in Order No. 26,322. The Commission cannot “interpolate words” into the statute that the legislature did not add. *Id.* (citation and quotation omitted). The lack of qualifying language in RSA 374-F:3, VI-a(d)(4) regarding the use of the GST indicates that the Commission lacks the authority to modify the test. *Compare* RSA 374-F:3, VI-a(d)(5) (permitting the approval or denial of changes to program offerings) *with* RSA 374-F:3, VI-a(d)(4) (stating the Commission “shall . . . use the Granite State Test” without permitting any changes to the test).

When the legislature passed RSA 374-F:3, VI-a(d)(4), it departed from prior Commission practice with regard to its cost effectiveness review by adopting a different secondary test than the secondary tests previously approved by the Commission. In Order No. 26,322, the PUC approved the B/C Working Group’s recommendation to use the Utility Cost Test and the Secondary Granite State Cost Test as secondary tests. However, in enacting HB 549, the legislature determined that the PUC must now consider the Total Resource Cost Test as a secondary test. RSA 374-F:3, VI-a(d)(4). The fact that the legislature deliberately chose a different secondary test but mandated the continued use of the GST as the primary test when it

amended RSA 374-F:3, VI-a, further demonstrates that the legislature intended to preclude the Commission from either modifying the GST or adopting a different primary cost-effectiveness test.

III. QUESTIONS 1.A-1.C: THE COMMISSION IS LEGALLY PRECLUDED FROM CHANGING THE COSTS, BENEFITS, IMPACTS, AND METHODOLOGY OF THE GRANITE STATE TEST

To understand the GST, one must first look at the costs, benefits, and impacts that are included in the test. *See* Appendix I attached to Order No. 26,322; *see also* Synapse Energy Economics, Inc., *New Hampshire Cost-Effectiveness Test Review* (“*Review*”), Table 1 at 7 (Oct. 14, 2019). For the reasons stated above, the Commission is legally precluded in this docket from changing the costs, benefits and impacts that are included in the GST. For example, the GST accounts for certain non-energy impacts (“NEIs”), including non-utility system impacts of income eligible participants and environmental fossil fuel impacts. Therefore, hypothetically, if the Commission were to order that the utilities can no longer account for these two NEIs in the primary test then the Commission’s order would violate RSA 374-F:3, VI-a(d)(4), because it would no longer be using the GST as the primary test to review cost-effectiveness. Accordingly, the Commission is legally obligated to apply the costs, benefits, and impacts in the GST as described in the *New Hampshire Cost-Effectiveness Test Review* and approved in Order No. 26,322, as the joint utilities have done in the 2024-2026 Plan before the Commission in this proceeding.

While the framework of the GST cannot change, the statute recognizes that the *values* of the costs, benefits, and impacts could change over time. The statute states that “the commission’s review of the cost effectiveness shall be based upon the latest completed and available Avoided Energy Supply Cost Study [“AESC”] for New England [and] the results of any Evaluation,

Measurement, and Valuation studies.” RSA 374-F:3, VI-a(d)(4). This is consistent with past practice approved by the Commission and with Synapse’s description of the GST in the *New Hampshire Cost-Effectiveness Test Review*. For example, in the past, the utilities used a percentage adder to capture the value of the low-income participant NEIs in the benefit cost test. After further study¹, the utilities now use a monetary value to account for these impacts. Similarly, the Joint Intervenors understand that the utilities will propose changes to the *values* of other costs, benefits, and impacts when the latest AESC study is completed and available in the future. However, any such changes are not before the Commission in its review of the current 2024-2026 Plan.

The words “inputs,” “assumptions” and “variables,” as used by the Commission in its September 7, 2023 Order requesting briefing, do not appear in the statute. *See* RSA 374-F:3, VI-a. Likewise, the PUC did not use these terms in Order No. 26,322 when discussing and adopting the GST or the secondary tests. While Synapse did use the words “inputs” and “assumptions” in the *New Hampshire Cost-Effectiveness Test Review*, the authors never used the word “variable.” To the extent the Commission’s reference to “variables” means the values assigned to the costs, benefits, and impacts in the GST, the statute recognizes that the values could change in a future proceeding, as discussed above.

In general, Synapse uses the words “inputs” and “assumptions” in the *New Hampshire Cost-Effectiveness Test Review* to refer to the components of the GST and to describe how the GST is applied in practice. For example, Synapse often uses the word “input” when referencing the specific costs, benefits, and impacts that are included in a cost-effectiveness test, such as the

¹ Opinion Dynamics. Home Energy Assistance Program Evaluation Report 2016-2017, Final, July 29, 2020, available at <https://puc.nh.gov/Electric/Monitoring%20and%20Evaluation%20Reports/20200729-NHSaves-HEA-Evaluation-ReportFINAL.pdf> (last accessed Sept. 21, 2023).

utility system avoided costs, utility system benefits and NEIs. Synapse explains that the B/C Working Group provided feedback on “cost and benefit impacts and other test *inputs*” (emphasis added) to identify which costs and benefits should be included in a test. *Review* at 15. Similarly, Synapse states that “utility system avoided costs are one of the most important *inputs* to any cost-effectiveness analysis.” *Review* at 22 (emphasis added). As explained above, the Commission is legally precluded from changing any “inputs” of the GST because the legislature enshrined the GST in statute.

For example, one such input of the GST that cannot be changed is the discount rate. The choice of a discount rate is a key element of any primary cost-effectiveness test. *See National Standard Practice Manual for Assessing Cost-Effectiveness of Energy Efficiency Resources*, 73 (May 18, 2017) available at https://www.nationalenergyscreeningproject.org/wp-content/uploads/2017/05/NSPM_May-2017_final.pdf (last accessed Sept. 22, 2023). The *New Hampshire Cost-Effectiveness Test Review* determined the appropriate discount rate for the GST. *Review* at 43-44. This particular discount rate was consistent with decades of prior Commission and utility practice. *Id.* In Order No. 26,322, the Commission approved the GST discount rate recommended in the *New Hampshire Cost-Effectiveness Test Review*. Because the particular discount rate approved by the Commission in Order No. 26,332 is one of the key “inputs” or elements of the GST, the Commission is precluded from changing it under the plain language of RSA 374-F:3, VI(d)(4). Although the values used to calculate the real discount rate (*e.g.* the inflation rate) are updated annually, the method for determining the real discount rate is a fundamental part of the GST that cannot change.

When the legislature codified the GST in statute, it removed the possibility of considering future changes to the GST. However, the legislature did make one change to the cost-

effectiveness review that was a departure from prior practice. The legislature stated that the PUC “may” consider savings impacts associated with free-ridership. *See* RSA 374-F:3, VI-a(d) (“incorporate savings impacts associated with free-ridership for those programs and measures where such free-ridership may have a material impact on savings figures.”). Free-ridership is not a component of the GST, and the legislature did not require that free-ridership be incorporated permanently into the GST. Rather, free-ridership “may” be considered in the cost-effectiveness review under limited circumstances. However, there is no evidence that those circumstances are present in this case, and the Commission is legally precluded from raising free-ridership *sua sponte*.

IV. QUESTION 2: THE COMMISSION IS LEGALLY PRECLUDED FROM CHANGING THE ROLE, COMPOSITION, OR FUNCTION OF A WORKING GROUP IN THIS PROCEEDING

The Joint Intervenors agree with the utilities and the Consumer Advocate that changing the role, composition or function of a working group in the context of 2024-2026 Plan is outside the scope of this proceeding because RSA 374-F:3, VI-a(d)(5) limits the scope of the Commission’s review to “program offerings” for the next three-year term. Furthermore, the Commission would need to give proper notice if it were to change a working group so that interested parties could respond. Presently, the only active energy efficiency working group is the EM&V Working Group. The Joint Intervenors agree that it is an effective and functioning body that is crucial to operating the energy efficiency programs in New Hampshire. It would be difficult to comply with the mandates in RSA 374-F:3, VI-a(d)(4) if the EM&V Working Group were significantly changed. Lastly, former energy efficiency working groups were created based on proposals put forth by the parties. No party has put forth a proposal in the current proceeding to create or modify a working group.

V. QUESTIONS 5-6: ALTHOUGH RSA 378:37 CREATES A MORE COMPREHENSIVE STATE ENERGY EFFICIENCY POLICY THAN THE FUNDING LIMITS ESTABLISHED BY RSA 374-F:3, VI-A(D), THE TWO STATUTES ARE COMPLEMENTARY, RATHER THAN CONFLICTING

It is well-established that when “interpreting two statutes which deal with a similar subject matter, [a court] will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.” *Pennelli v. Town of Pelham*, 148 N.H. 365, 366 (2002). Further, “construction of a later statute as impliedly repealing an earlier one is disfavored,” unless “it is clear that the later act conflicts with the earlier act” or “the later act is clearly intended to occupy the entire field covered by the prior enactment.” *Professional Fire Fighters of Wolfeboro, IAFF Local 3708 v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012).

Here, RSA 374-F:3 and 378:37 are not contradictory. Under RSA 378:37, the New Hampshire General Court has declared that it is the energy policy of the state to, *inter alia*, “maximize the use of cost-effective energy efficiency and other demand resources.” Regarding RSA 374-F:3, VI-a(d), it states that the utilities should “prepare triennial energy efficiency with programming and incentive payments at levels optimized to deliver ratepayer savings,” consistent with the funding levels described in RSA 374-F:3, VI-a(d)(2), as well as the cost-effectiveness methodology outlined in RSA 374-F:3, VI-a(d)(4), *i.e.*, the Granite State Test. Thus, although RSA 374-F:3, VI-a(d) sets strict limits on the amount of SBC and LDAC funds that can be collected from ratepayers for energy efficiency programs, RSA 378:37 adopts a broader and more far-reaching state policy of maximizing cost-effective energy efficiency beyond the current funding confines of RSA 374-F:3, VI-a(d).

For example, other funding obtained by the Department of Energy pursuant to the Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818, could accomplish the

policy of maximizing energy efficiency under RSA 378:37 without conflicting with the SBC and LDAC funding parameters described in RSA 374-F:3, VI-a(d). There also may be other ratepayer-funded sources for energy efficiency programs, beyond the SBC and LDAC funding limits, that could enable the state to maximize energy efficiency. Specifically, in instances where utility investments in energy efficiency would obviate the need for new capital investments in traditional wires or pipeline solutions, it may be permissible for utilities to fund energy efficiency or demand reduction measures through their general distribution rates. *See Gas and Electric Utilities*, Order No. 25,932, at 48 (Aug. 2, 2016) (explaining that “nothing prohibits electric utilities from funding energy efficiency programs through their distribution rates as approved by the Commission under its general rate making authority”); RSA 374-F:4, VIII(e) (providing that “[t]argeted conservation, energy efficiency, and load management programs and incentives that are part of a strategy to minimize distribution costs may be included in the distribution charge”). Further, unlike SBC and LDAC rates, RSA 374-F:3, VI-a(d) does not place similar limitations on Regional Greenhouse Gas Initiative funds and revenues available from wholesale energy and ancillary services markets operated by ISO-NE that are available to fund energy efficiency programs, and these funding sources can achieve the policy goal of maximizing energy efficiency.

The distinction between RSA 378:37 and RSA 374-F:3, VI-a(d) is reflected in the different meanings and context of the terms “maximize” and “optimize.” The definition of “maximize” is “increase to the greatest possible amount or degree.” *Maximize*, Random House Webster’s College Dictionary (2d ed. 1997). Therefore, under RSA 378:37, it is state policy to increase energy efficiency programs to the greatest possible amount, regardless of the particular funding mechanism employed. Conversely, “optimize” means to “make as effective, perfect, or

useful as possible.” *Optimize*, Random House Webster’s College Dictionary (2d ed. 1997). Thus, the requirement in RSA 374-F:3, VI-a(d) for the utilities to prepare triennial energy efficiency plans with “programming and incentive payments at levels optimized to deliver ratepayer savings as made possible by the funding” described in RSA 374-F:3, VI-a(d)(1)-(4), means that the utilities are required to make as effective as possible NH Saves programs pursuant to the funding, cost-effectiveness, and other criteria described in RSA 374-F:3, VI-a(d)(1)-(4).

In sum, RSA 378:37 reflects a broader state policy on energy, which prioritizes energy efficiency beyond RSA 374-F:3, VI-a(d). Because the language in the two statutes does not conflict and HB 549 does not contain any language indicating it was intended to occupy the entire field of energy efficiency, the Commission may not conclude that HB 549 impliedly repealed the requirements in RSA 378:37 to maximize energy efficiency. *Professional Fire Fighters of Wolfeboro, IAFF Local 3708*, 164 N.H. at 22. Nevertheless, for the purposes of the Commission’s review of the 2024-2026 Plan, the Commission does not need to determine the precise interaction between RSA 378:37 and RSA 374-F:3, VI-a(d) in this proceeding. Instead, RSA 374-F:3, VI-a(d) provides the legal test that the Commission must employ for its decision.

VI. QUESTION 7: THE SECTION TITLE “LEAST COST ENERGY PLANNING” DOES NOT HAVE INTERPRETIVE VALUE WITH RESPECT TO THE POLICY STATEMENT IN RSA 378:37 OR THE COMMISSION’S REVIEW OF THE 2024-2026 PLAN

On August 8, 2023, Governor Sununu signed into law HB 281, which repeals utility least cost integrated resource plan requirements, RSA 378:38-40. Although HB 281 repealed these sections, it did not repeal RSA 378:37, which declares that it is state policy to, *inter alia*, prioritize energy efficiency. The retention of the overarching title “Least Cost Energy Planning” for the Chapter containing RSA 378:37 is not relevant here. The Commission should look to the

specific title for RSA 378:37, *i.e.*, “New Hampshire Energy Policy,” when interpreting that statute.

Additionally, the retention of the “Least Cost Energy Planning” title does not create any separate standard for the Commission’s review of the 2024-2026 Plan than what is contained in RSA 374-F:3, VI-a(d). In other words, when reviewing the 2024-2026 Plan, the Commission must only determine whether the plan complies with the funding, cost effectiveness, and other requirements of RSA 374-F:3, VI-a(d).

VII. QUESTION 8: THE PRINCIPLES AND RULES ESTABLISHED IN APPEAL OF ALGONQUIN GAS TRANSMISSION ARE MOSTLY IRRELEVANT TO THE COMMISSION’S REVIEW OF THE 2024-2026 PLAN IN THIS PROCEEDING

In general, *Appeal of Algonquin Gas Transmission, LLC*, 170 N.H. 763 (2018) has limited applicability to the instant case. In *Appeal of Algonquin Gas*, the Supreme Court held that the Commission erred in concluding that Eversource’s proposal to purchase natural gas capacity for use by electric generation facilities violated the Restructuring Act, RSA chapter 374-F. *Id.* at 768, 775. The Supreme Court reached its holding by concluding that the primary intent of the legislature in enacting the Restructuring Act was to “reduce electricity costs to consumers,” and not to “introduce competition to the generation of electricity,” and, therefore, that Eversource’s proposed contract was not precluded by the Restructuring Act. *Id.* at 774-75 (citing RSA 374-F:1, I).

First and foremost, because the 2024-2026 Plan does not involve electric utilities purchasing natural gas pipeline capacity, the holding from *Appeal of Algonquin Gas* is irrelevant to the Commission’s review of the 2024-2026 Plan. Just as importantly, the main principle discerned by the Supreme Court in *Appeal of Algonquin Gas vis-à-vis* the primary intent of the Restructuring Act is inapplicable to the Commission’s review of the 2024-2026 Plan.

Second, if the primary intent of the Restructuring Act is to reduce costs to ratepayers, cost-effective energy efficiency programs by definition “reduce electricity costs to consumers.”

Id. The Commission has previously concluded that “cost-effective energy efficiency is a lower cost resource than other energy supply” and that energy efficiency programs not only benefit participating customers who spend less on energy usage, but all customers in the long run who spend less on energy supply through reduced grid and power procurement costs. *Gas and Electric Utilities*, Order 25,932, at 50, 54, 57, 64 (Aug. 2, 2016). The 2022 Update to the New Hampshire 10-Year State Energy Strategy also recognizes that “energy efficiency is often the cheapest and cleanest energy resource,” and that “[i]nvesting in efficiency boosts the state’s economy by reducing energy costs for consumers and businesses.” New Hampshire State Energy Strategy, N.H. Department of Energy, at 20 (July 2022). The State Energy Strategy further explains that efficiency “benefits more than just those customers who participate in efficiency programs,” because “reducing our electricity use, especially during expensive peak times such as the hottest and coldest days of the year, saves money for *everyone on our energy systems.*” *Id.* (emphasis added).² Because the programs included in the proposed 2024-2026 Plan are all cost-effective pursuant to the statutorily mandated GST, the plan is consistent with the primary intent of the Restructuring Act, as determined by the New Hampshire Supreme Court, to “reduce electricity costs to consumers.” *Appeal of Algonquin Gas*, 170 N.H. at 774.³

² See also Direct Testimony of Tim Woolf and Danielle Goldberg On Behalf of The Office of the Consumer Advocate, at 28 (Docket No. DE 23-068, Sept. 12, 2023) (“Cost-effective energy efficiency programs will lower system-wide electricity and natural gas costs, leading to reductions in customers’ energy bills. Energy efficiency can avoid investments in transmission and distribution (T&D) infrastructure by creating reductions in peak demand. These demand savings reduce stress on local T&D systems, potentially deferring expensive upgrades or mitigating local transmission congestion problems. These avoided costs are enjoyed by all customers, regardless of whether they participate in energy efficiency programs.”); Direct Testimony of Christopher Skoglund On Behalf of Clean Energy New Hampshire, at 6 (Docket No. DE 23-068, Sept. 12, 2023) (“Energy efficiency investments lower energy costs for all consumers” by reducing overall energy consumption, as well as peak energy demand.).

³ The goal of Restructuring Act, as expressed in RSA 374-F:1, I, to reduce costs for all consumers of electricity, is consistent with the recently enacted provisions of the Restructuring Act relating to energy efficiency, *i.e.*, RSA 374-

Finally, although the holding and general principle established by *Appeal of Algonquin Gas* are inapplicable to the Commission’s review of the 2024-2026 Plan, the case does establish a rule of statutory construction that is instructive for the Commission’s review of the plan. In *Appeal of Algonquin Gas*, the Supreme Court concluded that the “use of the word ‘should’ allows the [Commission] to exercise its discretion and judgment[, but] in contrast, the word “shall” establishes a mandatory duty.” *Appeal of Algonquin Gas*, 170 N.H. at 774. Here, RSA 374-F:3, VI-a(d) states that the “budget for joint energy efficiency planning *shall* be funded through the” SBC and LDAC; that SBC and LDAC levels *shall* be set at the levels established in RSA 374-F:3, VI-a(d)(2); that the Commission’s “review of the cost-effectiveness [of plans] *shall* be based upon the latest completed and available Avoided Energy Supply Cost Study for New England . . . and use the Granite State Test as the primary test”; and that the Commission “*shall* issue its order approving or denying” the 2024-2026 Plan by no later than November 30, 2023. RSA 374-F:3, VI-a(d) (emphasis added). Pursuant to *Appeal of Algonquin Gas*, the legislature’s use of the word “shall” in multiple instances in RSA 374-F:3, VI-a(d) indicates that the legislature intended to remove the Commission’s exercise of discretion and judgment and,

F:3, VI-a(d). As a result, the two laws are not in conflict. However, even if they were, it is a well-established rule of statutory construction that “in the case of conflicting statutory provisions, the specific statute controls over the general statute.” *In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 34 (2010); *Appeal of Plantier*, 126 N.H. 500, 510 (1985); *see also State v. Moussa*, 164 N.H. 108, 128-129 (2012) (explaining that “where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the latter will be regarded as an exception to the general enactment where the two conflict”). It is also well-settled that when “a conflict exists between two statutes, the later [enacted] statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion.” *In re Dufton*, 158 N.H. 784, 789 (2009); *Petition of Public Service Co. of New Hampshire*, 130 N.H. 265, 283 (1988). Because RSA 374-F:3, VI-a, as amended by HB 549 and SB 113, contains the specific and prescriptive criteria that the Commission must employ for reviewing triennial energy efficiency plans and is the later enacted statute, if—despite the evidence to the contrary—the Commission perceived a conflict between RSA 374-F:3, VI-a and the general Restructuring Act general purpose stated in RSA 374-F:1, I, then the rules of statutory construction mandate that RSA 374-F:3, VI-a control.

instead, impose a mandatory duty for most aspects of the Commission’s review of the 2024-2026 Plan.

VIII. CONCLUSION

The legislature amended RSA 374-F:3, VI-a in 2022 and 2023 to overrule Commission orders that sought to undermine the NH Saves program. In amending RSA 374-F:3, VI-a, the legislature established strict parameters for the Commission to follow in reviewing the 2024-2026 Plan, including for cost-effectiveness testing, SBC and LDAC funding levels, and the timing of plan approval. By enshrining the GST in statute, the legislature specifically precluded the Commission from modifying any inputs and assumptions of the GST in this proceeding. Finally, RSA 374-F:3, VI-a provides the only relevant statutory standards for the Commission to follow in its review of the 2024-2026 Plan.

Respectfully submitted,

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September 22, 2023

Certification of Service

I hereby certify that on this date a copy of this brief was filed electronically with the Commission, and a copy was sent electronically to the service list in Docket No. DE 23-068 consistent with the Commencement of Adjudicative Proceeding and Notice of a Prehearing Conference and the secretarial letter of March 17, 2020.

CONSERVATION LAW FOUNDATION

9/22/2023
Date

/s/Nicholas A. Krakoff
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