THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2017-0007

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

Appeals by Petition Pursuant to RSA 541:6 and RSA 365:21
from New Hampshire Public Utilities Commission, Docket No. DE 16-241

BRIEF OF CONSERVATION LAW FOUNDATION

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Oral Argument Requested: Mr. Irwin will argue on behalf of Conservation Law Foundation

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QUESTIONS PRESENTED

1. Did the Public Utilities Commission (PUC), which since 1996 has been implementing the Electric Utility Restructuring Act, RSA Chapter 374-F ("Restructuring Act" or "Act"), to unbundle and separate electric generation from electric distribution to establish a competitive electric supply market, correctly interpret the Act to determine that Eversource, as an electric utility, cannot lawfully proceed with its proposal to acquire natural gas capacity for release to gas-fired electric generators at the risk of its ratepayers?
2. Did the PUC correctly interpret several energy-related statutes under its purview, including the interplay between the Restructuring Act and several statutes that pre-date it, to conclude that New Hampshire law does not authorize or support Eversource, as an electric utility, proceeding with its proposal to acquire natural gas capacity for release to gas-fired electric generators at the risk of its ratepayers?

CONSTITUTIONAL AND STATUTORY PROVISIONS

New Hampshire Constitution, Part 2, Article 83:

> **[Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc.]** Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: *Provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination. Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

New Hampshire statutes involved in the case:

RSA 374:57, RSA Chapter 374-A, RSA Chapter 374-F, RSA 378:37 and RSA 378:38 are set forth in Appellants' Joint Appendix to Briefs. RSA Chapter 374-G is set forth in the Addendum ("Add.") to this Brief. *See* Add. at 31-33.

STATEMENT OF CASE AND FACTS

Restructuring of New Hampshire's Electric Utility Industry

In 1996, the General Court enacted paradigm-shifting legislation – RSA Chapter 374-F, titled "Electric Utility Restructuring" (hereinafter "Restructuring Act") – to dramatically transform the structure and operations of New Hampshire's electric utility industry. Prior to the Restructuring Act, New Hampshire's electric utility industry was premised on a model that included vertically integrated electric utilities that not only transmitted and distributed electricity to customers but also owned and operated the power plants that generated that electricity. *See Appeal of Campaign for Ratepayer Rights*, 145 N.H. 671, 673 (2001). Such vertically integrated utilities, including PSNH, "provid[ed] all of these services" – electricity generation, transmission, and retail sales – "as part of a 'bundled' package," *id.*, and recovered the costs of all of such services through PUC-regulated rates. Accordingly, costs associated with generating the state's electric supply – *i.e.,* the costs associated with owning and operating power generating facilities, were not subject to competitive market forces but instead covered by ratepayers.

An essential goal of the Restructuring Act was to change that. And to do so, the Restructuring Act "directed the PUC to design a restructuring plan 'in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition.'" *Id.* (*quoting In re N.H. P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. 233, 236 (1998)). Following enactment of the Restructuring Act, the PUC engaged in an intensive process of developing a restructuring plan, which it issued in 1997. *See In re N.H. P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. at 236. ("After a nine-month investigation, which included public comments on a preliminary plan and several public hearings, the PUC issued a final restructuring plan pursuant to RSA 374-F:4.") (*citing*

PUC Order No. 22,514 (Feb. 28, 1997) *In re Restructuring New Hampshire's Electric Utility Industry: Final Plan*, 1997 WL 155394. Since that time, including a period of litigation relative to the plan's effects on a PSNH rate agreement and stranded costs,[1] the PUC has administered the restructuring of New Hampshire's electric utilities.

Completing New Hampshire's Electric Utility Restructuring

While restructuring has led to the unbundling of Eversource's vertically integrated services (generation, transmission and distribution) and has enabled customers to purchase energy services (*i.e.*, electric generation) from competitive suppliers, the full restructuring of New Hampshire's electric utility industry has not yet been completed. Rather, Eversource – the only New Hampshire electric utility that has not fully restructured – continues to own and operate electric generation facilities and to recover from ratepayers the costs of such facilities deemed by the PUC to be prudently incurred, such as approximately $390 million associated with the construction of a flue gas desulfurization system at Eversource's coal-fired power plant in Bow.[2] This situation, however, is on the verge of changing.

In 2015, Eversource entered a settlement agreement with numerous parties, pursuant to which it agreed, subject to PUC approval, to proceed with the process of divesting itself of its electric generating assets and becoming like every other electric utility in New Hampshire – a utility engaged only in transmission and distribution. Indeed, in the context of the PUC's docket

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[1] *See Public Service Co. of N.H. v. Patch*, 962 F.Supp. 222 (D.N.H. 1997); *In re N.H.P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. 233 (1998); *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671 (2001).

[2] The PUC, in the Eversource divestiture docket discussed below (PUC Docket No. DE 11-250, DE 14-238), determined that Eversource prudently incurred approximately $415 million in costs associated with this capital investment. *See* PUC Order No. 25,920 (July 1, 2016), *Pub. Service Co. of N.H. d/b/a Eversource Energy*, 2016 WL 3613349 at *16. That amount, however, was discounted by $25 million as part of a Settlement Agreement related to Eversource's divestiture of its electric generating facilities. *Id.* at *18.

reviewing the above-referenced settlement agreement (PUC Docket No. 14-238), Eversource repeatedly represented its proposed divestiture of electric generating assets as finally completing the process of restructuring in New Hampshire to harness the power of competitive markets. *See, e.g.,* Add. at 35 (*quoting* opening statements of Eversource counsel in PUC Docket No. 14-238: "Today's hearing marks the beginning of the end of a long journey, *transforming the state's electric utilities from vertically integrated entities to adoption of a restructured model, one that relies upon the power of competitive markets to control the cost of electric generation.*") (emphasis added).

By order dated July 1, 2016, the PUC approved the settlement agreement, enabling Eversource to proceed with the divestiture of its electric generating assets. *See* PUC Order No. 25,920 (July 1, 2016), *Public Service Co. of New Hampshire d/b/a Eversource Energy*, 2016 WL 3613349. The process of auctioning those assets is currently underway.

Eversource's Gas Capacity Proposal

On February 28, 2016, at the same time it was seeking approval to complete its restructuring through the divestiture of its electric generating facilities, Eversource filed with the PUC a Petition for Approval of Gas Infrastructure Contract Between Public Service Company of New Hampshire d/b/a Eversource Energy and Algonquin Gas Transmission, LLC ("petition"). *See* Appellants' Joint App. to Briefs at 200. According to the petition, Eversource's proposal would consist of a multi-part gas capacity scheme, pursuant to which Eversource would enter into, with Algonquin, a twenty-year interstate pipeline transportation and storage contract to provide natural gas capacity to electric generation facilities; implement a program for the release of natural gas capacity and the sale of liquefied natural gas to electric generation facilities; and

recover from its ratepayers costs associated with the twenty-year contract. *See* Appellants' Joint App. to Briefs at 202-203.[3]

On March 24, 2016, the PUC issued an Order of Notice bifurcating its review of the petition into two phases: the first to review and determine whether the gas capacity proposal is legal under New Hampshire law, the second, if it were determined legal, to examine the merits of the proposal, including public interest and prudency considerations. *See* Appellants' Joint App. to Briefs at 325, 328.

On October 6, 2016, after extensive briefing from numerous parties, the PUC issued an order dismissing Eversource's petition. *See* PUC Order No. 25,950, Docket No. DE 16-241 ("PUC Order"), Add. at 37. Acknowledging and weighing the Restructuring Act's many policy principles, and taking into account the larger context of restructuring, including recent activities related to Eversource's divestiture of electric generating assets, the PUC determined that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity" and explained:

> The competitive generation market is expected to produce a more efficient industry structure and regulatory framework, by shifting the risks of generation investments away from customers of regulated EDCs toward private investors in the competitive market. The long-term results should be lower prices and a more productive economy. To achieve that purpose, RSA 374-F:3, III directs the restructuring of the industry, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services. A more efficient structure involves placing investment risk on merchant generators who can manage that risk, and allowing customers to choose suppliers, thus enabling customers to pay market prices and avoid long-term over market costs. This purpose is underscored by the

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[3] As described by Eversource, the petition sought approval of:

> (1) the [Access Northeast] Contract, which is a 20-year interstate pipeline transportation and storage contract providing natural gas capacity for use by electric generation facilities in the ISO-NE region; (2) an "Electric Reliability Service Program ("ESRP") to set parameters for the release of capacity and the sale of liquefied natural gas ("LNG") supply available by virtue of the ANE Contract; and (3) a Long-Term Gas Transportation and Storage Contract ("LGTSC") tariff, which allows for recovery of costs associated with the ANE Contract.

See Appellants' Joint App. to Briefs at 202-203.

> Legislature's recent strong encouragement, through the passage of HB 1602 and SB 221, to approve the 2015 Settlement Agreement that will accomplish the functional separation of Eversource's generation activities from its distribution activities.

PUC Order, Add. at 44-45 (*citing* 2014 N.H. Laws Ch. 310; 2015 Laws Ch. 221; PUC Order No. 25,920 (July 1, 2016)). It then concluded that Eversource's proposal "is fundamentally inconsistent with the purposes of restructuring," stating, *inter alia*, that it is "clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies," and that "[i]ncluding such a generation-related cost in the distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal." *Id.* at 45. In addition to interpreting the Restructuring Act to preclude Eversource's proposal, it interpreted certain pre-restructuring statutes, in light of the Restructuring Act, to determine that they could not serve to allow the proposal. *Id.* at 46-50.

On November 7, 2016, Eversource and Algonquin moved for reconsideration of the PUC's decision (Appellants' Appeal Petition Joint App. at 20, 37), which, following responses by several parties (*id.* at 50, 58, 63, 74), the PUC denied by order dated December 7, 2016. *Id.* at 93. Thereafter, Eversource and Algonquin initiated this appeal.

SUMMARY OF ARGUMENT

The Restructuring Act initiated a sweeping transformation of the state's electric utility industry from a vertically-integrated monopoly structure, to one that separates electric generation from electric distribution to establish a competitive market for electricity supply. The PUC has overseen the Act's implementation since 1996, leading to a restructuring of the industry in which, with Eversource's pending divestiture of its electric generating fleet, electric utilities will engage only in the transmission and distribution of electricity.

Eversource's proposal to acquire natural gas capacity to support the expansion of pipeline infrastructure, to *release* that gas capacity to New England gas-fired electric generators, and to recover associated costs from ratepayers – at the very time it seeks to exit the electric generation business – flies in the face of the Restructuring Act and New Hampshire law.

The PUC correctly interpreted the Restructuring Act to conclude that Eversource's proposal would violate the Act's overriding purpose of establishing *competition* in the generation of electricity by separating electric generation from electric distribution and protecting ratepayers from generation-related risks which historically (and recently, in the case of Eversource) they have borne. The PUC's interpretation, which is owed deference, is supported by the unambiguous language of the Act, including its purposes to restructure the industry to reduce costs for consumers "by harnessing the power of competitive markets," RSA 374-F:1, I, and to serve the "essential right of the people" to have "'[f]ree and fair competition'" and be "'protected against all monopolies and conspiracies which tend to hinder or destroy it.'" RSA 374-F:1, II (*quoting* N.H. Const. part II, art. 83). The PUC also correctly interpreted other energy-related statutes within its purview and expertise to conclude that, in a post-restructuring environment, they do not render Eversource's proposal permissible.

ARGUMENT

I. STANDARD OF REVIEW

"A party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, is unjust or unreasonable." *Appeal of Northern New England Tel. Operations, LLC*, 165 N.H. 267, 270 (2013) (*citing* RSA 541:13 (2007); *Appeal of Bretton Woods Tel. Co.,* 164 N.H. 379, 386 (2012)). While the Court reviews an agency's interpretation of a statute *de novo* and is "'the final arbiter of the intent of the legislature as expressed in the words of a statute as a whole,'" it is well established that where, as here, a party contests the interpretation of a statute "by the agency charged its administration," such interpretation "is entitled to deference." *Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501, 506 (2014) (*quoting Appeal of Lake Sunapee Protective Ass'n*, 165 N.H. 119, 125 (2013) and *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012).[4] Although such deference is not absolute, the Court affords policy choices entrusted to the PUC by the legislature "considerable deference." *In Re Pennichuck Water Works, Inc.*, 160 N.H. 18, 26 (2010).

Where, as here, the matter on appeal is premised on threshold legal determinations and not based on evidentiary findings, the Court's "review is limited to questions of law." *In re N.H.*

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[4] As more fully set forth in *In re Town of Seabrook*, 163 N.H. at 644:

> [I]t is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference. *See, e.g., Appeal of Morton,* 158 N.H. 76, 78-79, 960 A.2d 332 (2008) ("[W]e accord deference to the [agency's] interpretation [of the statute it administers]...."); *Appeal of Weaver*, 150 N.H. 254, 256, 837 A.2d 294 (2003) ("[S]tatutory construction by those charged with its administration is entitled to substantial deference. . . . "); *Appeal of Salem Regional Med. Ctr.*, 134 N.H. 207, 219, 590 A.2d 602 (1991) ("[T]he construction of a statute by those charged with its administration is entitled to substantial deference." (quotation omitted)); *N.H. Retirement System v. Sununu*, 126 N.H. 104, 108, 489 A.2d 615 (1985) ("[T]he construction of a statute by those charged with its administration is entitled to substantial deference.").

P.U.C. Statewide Elec. Utility Restructuring Plan, 143 N.H. 233, 237 (1998) (*citing* RSA 365:20; Sup. Ct. R. 9). Accordingly, factual assertions such as Appellants' repeated claims that market conditions warrant their gas capacity proposal are irrelevant to the Court's review. Moreover, such factual claims were not subjected to discovery, cross-examination or countering views in the proceeding before the PUC and are premised in part on materials that are not part of the administrative record.[5] *See* Appellants' Joint App. to Briefs at 508-511.

II. THE PUC CORRECTLY CONCLUDED THAT EVERSOURCE'S GAS CAPACITY PROPOSAL WOULD VIOLATE THE RESTRUCTURING ACT

As the agency charged with administering the Restructuring Act, the PUC was correct in determining that the Act precludes Eversource, as an electric utility in a post-restructuring environment, from entering into and implementing a multi-faceted scheme to bring natural gas to electric generators at the risk of its ratepayers. As set forth below, the proposal would violate the functional separation of electric *generation* from electric *distribution* and thereby directly undermine the establishment of a competitive market that protects ratepayers investment-related risks associated with electric generation.

A. The Core Elements of the Restructuring Act are a *Restructured* Industry that Separates Electric Generation from Electric Distribution and Harnesses the Power of *Competition*

Having administered the Restructuring Act since its enactment in 1996 – including the establishment of New Hampshire's final restructuring plan in 1997 and, more recently, oversight

[5]In addition to being irrelevant for purposes of the Court's review, extra-record materials submitted by the Appellants should be rejected because they were not considered by the PUC. *See* RSA 541:14 (in appeals from the PUC "[n]o new or additional evidence shall be introduced in the supreme court, but the case shall be determined upon the record and evidence transferred."). *See also* N.H. Sup. Ct. Rules. 10(2), 13(1). Should the Court elect to consider these materials, CLF has provided an appendix, accompanied by a motion to supplement the record, providing further context and countering Appellants' claims that Eversource's proposal is warranted.

of the divestiture process for Eversource's electric generation fleet – the PUC correctly interpreted the Act's overriding purpose to be competition, to be achieved through a restructured industry that separates electric generation from electric transmission and distribution. Appellants' arguments that competition and the functional separation of generation from distribution are secondary to rate considerations, and that the PUC erred in interpreting the Act as a directive to separate generation from distribution, are incorrect and fly in the face of the Restructuring Act's purpose as evinced by the unambiguous language of the Act, as characterized by this Court, and as acknowledged by Eversource itself in the PUC's divestiture docket, DE 14-38.

RSA Chapter 374-F's title, "Electric Utility Restructuring," could not express in stronger, clearer terms the legislature's intent: to *restructure* New Hampshire's electric utility industry from its prior model of vertically integrated utilities with bundled generation, transmission and distribution services and a lack of competition. *See Greenland Conservation Comm'n v. N.H. Wetlands Council*, 154 N.H. 529, 534 (2006) (citations omitted) (while "the title of a statute is not conclusive of its interpretation, . . . it is a significant indication of the intent of the legislature in enacting a statute."). Consistent with the statute's title, the plain language of RSA Chapter 374-F further evinces this intent. In describing the purpose of the Restructuring Act, the legislature plainly stated:

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

See RSA 374-F:1, I. Not content to emphasize the "key elements" of competitive markets and customer choice as requiring the functional separation of electric *generation* from electric *transmission and distribution*, *id.*, the legislature went so far as to invoke the constitutional right of New Hampshire citizens to have "[f]ree and fair competition," N.H. CONST. part II, art. 83, stating as one of the Restructuring Act's purposes:

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

See RSA 374-F:1, II.

Of note, the functional separation of electric generation from electric distribution is not absolute, but to the minimal extent it is allowed the legislature has specifically enumerated the scope of the exception it granted: "distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs." RSA 374-F:3, III (Supp. 2016). Significantly, this exception limits the ownership of generation to resources that are small in scale, and that are distributed in nature as a strategy for minimizing costs associated with *transmission* and *distribution*, *i.e.*, the sole functions served by New Hampshire electric utilities post-restructuring.

In light of the foregoing, it is not surprising that this Court has described the Restructuring Act as follows:

> In 1996, the legislature enacted RSA chapter 374-F (the restructuring statute). *See* RSA 374-F:1, I (Supp. 2000). The restructuring statute *directed* the PUC to design a restructuring plan "in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition."

> *In re N.H. P.U.C.*, 143 N.H. at 236, 722 A.2d at 485. *The goal of restructuring* was to "create competitive markets that [would] produce lower prices for all customers than would have been paid under the [then-] current regulatory system." RSA 374-F:3, XI (Supp. 2000).

See Appeal of Campaign for Ratepayer Rights, 145 N.H. at 673 (emphases added; bracketed language in original).[6] Thus, this Court has already determined – contrary to Appellants' arguments – that the PUC has been *directed* by the legislature, through the Restructuring Act, to separate and unbundle generation services from other services, and that the *goal* or purpose of the Act is to create competition that, in turn, produces lower prices. It also is noteworthy that the Act's intent in lowering prices was to do so relative to prices that "would have been paid" under the historic, pre-restructuring model, and in relation to the rest of the New England region. *Id.*; RSA 374-F:3, XI.

Appellants' argument that restructured utilities and competition are somehow secondary considerations of the Restructuring Act is not only grossly inconsistent with the plain meaning of the Act and this Court's characterization thereof, it also is inconsistent with Eversource's own adopted and affirmative descriptions of the Act in the PUC's recent docket addressing the divestiture of Eversource's electric generating facilities. As described in the PUC's recent order in that proceeding, Eversource was party to a Partial Litigation Settlement that stated, in pertinent part:

> The Settling Parties and Staff agree that the prompt divestiture of PSNH's generation assets will eliminate customer risks arising from potential future capital costs and future regulatory and environmental compliance costs, *and will effectuate the Legislature's intent to "harness the power of competitive markets" set forth in the "Electric Utility Restructuring" enactment in 1996 at RSA 374-F:1,I.*

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[6] *See also In re N.H.P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. at 236 ("In [the restructuring] statute, the legislature *directed* the PUC to devise a restructuring plan in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition.") (emphasis added).

See PUC Order No. 25,920 (July 1, 2016), *Public Service Co. of New Hampshire d/b/a Eversource Energy*, 2016 WL 3613349 at *28 (emphasis added). Similarly, during the first day of the PUC's hearing in the divestiture proceeding, counsel for Eversource stated: "Today's hearing marks the beginning of the end of a long journey, transforming the state's electric utilities from vertically integrated entities to adoption of a restructured model, one that relies upon the power of competitive markets to control the cost of electric generation." *See* Add. at 35. Consistent with this statement and the statements of a number of parties to that docket,[7] the PUC ultimately approved a multi-party Settlement Agreement enabling Eversource to proceed with the divestiture of its electric generating assets, concluding that: "By approving the divestiture of Eversource's remaining generation assets, we implement the Legislature's long standing policy goal of restructuring the State's electric industry to one of full and fair competition." *See* PUC Order No. 25,920 (July 1, 2016), *Public Service Co. of New Hampshire d/b/a Eversource Energy*, 2016 WL 3613349 at *57.

Finally, Algonquin's reliance on legislative history (*see* Algonquin Br. at 10, 13) is without merit. In the first instance, as discussed herein, the plain language of the Restructuring

[7] *See* PUC Order No. 25,920 (July 1, 2016), *Public Service Co. of New Hampshire d/b/a Eversource Energy*, 2016 WL 3613349 at *33 (stating position of Governor's Office of Energy and Planning that Settlement Agreement "achieves the Legislative mandates of RSA 374-F to restructure the electric industry to a fully-competitive market"); *35 ("[Conservation Law Foundation], a settling party, supported the divestiture of Eversource's generating assets to facilitate moving New Hampshire's electric generating sector to a fully competitive market. . . . CLF stated that one of the essential benefits of divestiture will be relieving ratepayers of the risk of high capital expenditures and environmental compliance costs associated with Eversource's aging fleet of fossil-fuel electric generating facilities.") (citations omitted); *35 (stating that the Retail Energy Supply Association ("RESA") and New England Power Generators Association ("NEPGA") "strongly supported divestiture of Eversource generation assets in order to end the bifurcated market, to shift risk away from consumers, and to provide transparency and competition."); *38 (describing the position of PUC Staff Advocate Thomas Frantz as follows: "Mr. Frantz agreed that looking forward to a new competitive world where Eversource is fully divested, will result in lower rates. He stated that, more importantly, divestiture shifts the risk and prudence determinations where they were intended in electric restructuring: away from customers and toward generators and suppliers in the wholesale market.").

Act is clear and unambiguous. Accordingly, the Act's legislative history is irrelevant and need not be considered. *See Appeal of Old Dutch Mustard*, 166 N.H. at 507 (*citing Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 677 (2011) ("When interpreting a statute, we first look to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous.")). Moreover, even if the Court were to consider the Act's legislative history, such history does not support the argument that restructuring the electric utility industry and creating *competition* were intended to be secondary to rate relief. *See, e.g.,* Appellants' Joint App. to Briefs at 120-121 (testimony of Senator John Barnes: "Almost without exception, the restructuring of our utility industry to allow for competition is a goal sought by NH's political leaders, business leaders and residential consumers.").[8]

In light of the foregoing, and despite Appellants' best efforts to read out of existence key language in RSA 374-F:1, I and this Court's description of RSA 374-F:1, I,[9] the Act clearly and unambiguously establishes the core, foundational elements of a restructured industry that unbundles and functionally separates generation from distribution, and in which competition and customer choice are key elements. Accordingly, the PUC, interpreting the Restructuring Act as a

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[8] *See also, e.g.,* Appellants' Joint App. to Briefs at 81-83 (testimony of Senator Burton Cohen: "The utility has been a monopoly with no incentive to be responsive to ratepayers. . . . Part of the problem that the ratepayers have faced is footing expensive, unnecessary utility investments. The ratepayers thus far have been eating poor decisions and it's time to leave it up to the free market. Let the utility bear responsibility for their own actions. It's not up to the ratepayers to bail out bad decisions. . . . A monopoly only benefits investors. We need competition now.") 83 (testimony of PUC Commissioner Douglas Patch that competition "seems to be the clearly stated objective of this legislature to date and, assuming the passage of this particular bill, will be even more so.").

[9] *See* Eversource Br. at 12 (omitting the phrase "by harnessing the power of competitive markets" from its quotation of RSA 374-F:1, I); *id.* at 14 (quoting the Court's description of the purpose section of the Restructuring Act in *In re N.H.P.U.C.*, 143 N.H. at 241, yet omitting from such quotation the term "by harnessing the power of competitive markets"); *id.* at 16, n. 9 (*again* omitting the phrase "by harnessing the power of competitive markets" from its apparent quotation of RSA 374-F:1, I); *id.*at 29 (quoting language from RSA 374-F:1, I – "to reduce costs for all consumers of electricity" – as the "the true purpose" of the Restructuring Act, and yet again omitting the statute's language "to harness the power of competitive markets.").

whole and with the benefit of its expertise with the statute and the overall context of restructuring in New Hampshire, correctly concluded that the overriding purpose of the Act is to establish a competitive market – one that protects ratepayers and that will lead to lower prices – and that the functional separation of generation from distribution is an essential element of the Act.

B. Eversource's Gas Capacity Proposal Would Violate the Core Elements of the Restructuring Act – *Restructured* Utilities and *Competition*

Appellants contend that Eversource's proposal to acquire natural gas capacity to be released to gas-fired electric generators does not adequately relate to electric *generation* for purposes of the Restructuring Act and that therefore the PUC erred in concluding that it would violate the Act. *See* Eversource Br. at 23-25; Algonquin Br. at 18-20. Contrary to Appellants' arguments, Eversource's proposed scheme – as specifically described by Eversource in its petition – is clearly related to electric generation, and the proposal would, as the PUC correctly concluded, violate the Restructuring Act.

In its petition to the PUC, Eversource specifically describes the proposed Access Northeast contract, which it would enter with Algonquin, as "a 20-year interstate pipeline transportation and storage contract providing natural gas capacity *for use by electric generation facilities* in the ISO-NE region." *See* Appellants' Joint App. to Briefs at 202 (emphasis added). It states that "[i]f approved by the Commission, Eversource would release natural gas capacity *to the electric market* in accordance with an Algonquin Electric Reliability Service ("ERS") tariff carrying out the terms of the state-approved [Electric Reliability Service Program]." *Id.* at 203 (emphasis added). Eversource further describes the proposed contract as satisfying certain factors, including "the ability to directly serve electric generation facilities having a material impact on electricity prices," *id* at 209, and, more specifically, as "provid[ing] an opportunity to deliver up to a maximum of 66,600 MMBtu/day of gas to New England generators." *Id.* at 162.

Testimony submitted by Eversource as part of its petition includes similar representations.[10] There simply can be no doubt that Eversource's gas capacity proposal is directly related to, and intended to influence, the generation of electricity and the competitive electric supply market.[11]

By involving Eversource in electric generation, the proposed gas infrastructure contract would violate the two core elements of the Restructuring Act discussed *supra*: (1) utilities that are *restructured* to separate electric generation from electric distribution, and (2) the establishment of a competitive market and customer choice. With regard to the first of the core elements, the Restructuring Act recognizes only one exception to the overarching requirement that generation and transmission/distribution be separated from one another. Specifically, RSA 374-F:3,III, which the Court has relied upon to describe the Restructuring Act's essential "unbundling" requirement,[12] states in pertinent part:

> REGULATION AND UNBUNDLING OF SERVICES AND RATES. When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any

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[10] *See* Appellants' Joint App. to Briefs at 218 ("Eversource will release this capacity *to the electric market* in accordance with an Electric Reliability Service ("ERS") tariff that will be approved by [the Federal Energy Regulatory Commission].") (emphasis added); 224-225 ("Eversource has contracted for 66,600 MMBtu/day of pipeline transportation delivery capacity, which includes 29,600 MMBtu/day of deliverability from a new regional domestic liquefied natural gas ("LNG") storage facility *in order to serve Eversource's share of the New England electric market*.") (emphasis added); 232 ("This will result in the ability to deliver up to a maximum of 66,600 MMBtu/day of natural gas *to New England gas-fired generators*.") (emphasis added); 266 (explaining that Eversource selected the ANE pipeline project in part because "the project reaches the largest number of power plants"); 274-275 ("Eversource has collaborated with the Eversource Massachusetts [Electric Distribution Companies] to develop an "Electric Reliability Service Program" ("ERSP"), which will utilize a Capacity Manager to *administer the release of contracted gas capacity to the electric generation market*. . . . Conceptually, an agreement between participating EDCs and the Capacity Manager would facilitate the transfer or procured capacity *to electric generators on a priority basis* to ensure reliability and promote liquidity.") (emphases added).

[11] In *ENGIE Gas & LNG LLC v. Dep't of Pub. Utilities*, 56 N.E.3d 740 (Mass. 2016), the court acknowledged the significant role of fuel-related costs in gas-fired electric generation, noting that "by some estimations, fuel-related costs constitute seventy-five per cent of a natural gas-fired plant's generation costs." *ENGIE Gas,* 56 N.E.3d at 754 (*citing* 3 World Scientific Handbook of Energy 72 (G.M. Crawley ed., 2013)).

[12] *See In re N.H. P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. at 236 ("In [the restructuring] statute, the legislature directed the PUC to devise a restructuring plan in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition.") (*citing* RSA 374-F:3,III (Supp.1998)).

> other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future. *However, distribution service companies should not be absolutely precluded from owning small scaled distributed generation resources as part of a strategy for minimizing transmission and distribution costs.*

(Emphasis added).

As the statute makes clear, there is one – and only one – exception to the separation of generation from transmission/distribution, namely small scaled distributed generation serving as part of a strategy to minimize "transmission and distribution costs." *Id.* This explicit and limited exception is significant in two regards. First, it leaves the door open for electric utilities to own limited types of generation assets not as a means to reduce costs associated with electric generation, but rather – in keeping with their post-restructuring role – as a means to reduce costs associated with *transmission and distribution.* There can be no dispute that Eversource's proposal to acquire pipeline capacity does not qualify within the above exception.

Second, pursuant to the statutory rule of construction *expressio unis est exclusion alterius*, which provides that "the expression of one thing in a statute implies the exclusion of another," Appellants cannot credibly claim that, despite the explicit exception contained in RSA 374-F:3, III, the acquisition of gas pipeline capacity may nonetheless be exempted on some other grounds from the functional separation between generation and transmission/distribution. *See In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (*quoting St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12 (1996)). The General Court clearly and explicitly established a specific exception, to the exclusion of others.

Looking beyond the Restructuring Act, it is noteworthy that in 2008, more than ten years after enactment of the Restructuring Act, the General Court enacted RSA Chapter 374-G specifically addressing, and encouraging, the investment by public utilities in distributed energy

resources, including renewable and clean distributed energy resources. RSA 374-G:1 *et seq.* That the General Court has *not* explicitly authorized public utilities to engage in the activities here proposed by Eversource is significant, and is further evidence that approving Eversource's proposal would fly in the face of existing New Hampshire law.

In addition to violating the functional separation of generation from transmission and distribution, Eversource's proposal would violate the Restructuring Act's core element of establishing a fully *competitive* market – *i.e.*, a market in which ratepayers do not subsidize, or otherwise assume economic risks associated with, the generation of electricity.[13] Here, Eversource seeks permission to acquire pipeline capacity and to pass along associated costs to ratepayers. Indeed, the entire basis for its proposed scheme is that whereas gas-fired electric generating companies are unwilling to accept the uncertainty of long-term gas capacity contracts, Eversource is willing to do so, but only if it can shift one hundred percent of that risk – all costs and all future uncertainty – onto all of its ratepayers. As Eversource explained in testimony filed with its petition:

> Because gas-fired generators are unwilling to contract for pipeline capacity due to the uncertainty of cost recovery, the [Electric Distribution Companies ("EDCs")] are the only entities with a long-term vested interest in the reliability and cost of electric service for retail customers connected to the distribution system, and with the financial and ratemaking capability to pay for and recover the costs of capacity procured to protect the interests of those customers.

[13] It is worth noting that within the larger Eversource Energy corporate structure, an affiliate of Appellant Public Service Company of New Hampshire d/b/a Eversource Energy is one of the Access Northeast developers, meaning that Appellant PSNH's proposed scheme would place risk on electric utility ratepayers for the benefit of the Eversource affiliate's project development goals. The Restructuring Act's purpose of achieving *competition* would certainly be eroded if schemes enabling an electric utility (*e.g.*, PSNH d/b/a Eversource) to put their ratepayers at risk, all to the benefit of parent or affiliate companies engaged in generation activities. *See* RSA 374-F:4, VIII (a) (authorizing PUC to require distribution and electric supply services be provided by separate affiliates).

See Appellants' Joint App. to Briefs at 224. *See also id.* at 228 ("[B]ecause gas-fired generators do not have the capability to sign the long-term pipeline contracts, the most logical parties to sign long-term pipeline contracts to reduce the wholesale cost of electricity are the EDCs. The EDCs have the long-term financial capability and institutional willingness to support the pipeline contracts on behalf of their customers *as long as they have the ability to recover the associated costs.*") (emphasis added).

Finally, it is important to note that Eversource's proposed gas infrastructure contract is part of a larger, regional effort to involve electric utilities as participants in the Access Northeast pipeline project.[14] Accordingly, like the PUC, the Massachusetts Department of Public Utilities ("DPU") reviewed the question whether electric utilities in Massachusetts could acquire natural gas capacity. Significantly, after the Massachusetts DPU issued an order concluding that electric utilities may do so, the Massachusetts Supreme Judicial Court reviewed and unanimously vacated the decision. In doing so, it concluded that the purchase of gas capacity by electric utilities "would undermine the main objectives of [Massachusetts' restructuring] act and re-expose ratepayers to the types of financial risks from which the Legislature sought to protect

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[14] Testimony accompanying Eversource's petition states:

> **Q. Will the Commission's approval of the proposed ANE Contract be contingent on approvals in other states?**
>
> A. Yes, effectively. The solution proposed by Access Northeast is sized as a regional solution and will require other New England states to take responsibility for a proportional share of the costs of the project, which are necessary to achieve the benefits of lower electricity rates and increased reliability across the New England region. . . .
>
> . . . .
>
> **Q. What will happen if Access Northeast precedent agreements are not approved in each of the six New England states?**
>
> A. . . . .
>
> If other approvals do not follow in one or more New England states, Access Northeast will need to make a determination whether to proceed with few precedent agreements; to reconfigure the project and renegotiate the existing precedent agreements; or terminate the project. . . .

See Appellants' Joint App. to Briefs at 248 - 249.

them." *See ENGIE Gas & LNG LLC v. Dep't of Public Utilities*, 56 N.E.3d 740, 742 (Mass. 2016). With respect to the restructured utility model brought about by Massachusetts' restructuring law, the court determined "that the [DPU's] approval of ratepayer-backed, long-term contracts by electric distribution companies for gas capacity contradicts the fundamental policy embodied in the restructuring act, namely the Legislature's decision to remove electric distribution companies from the business of electric generation." *Id.* at 752. With respect to ratepayer risk, it stated, *inter alia*:

> [T]he [DPU's] order would reexpose ratepayers to the very types of risks that the Legislature sought to protect them from when it enacted the restructuring act. Both the [Department of Energy Resources] and the [DPU] noted that gas-fired generating businesses are unwilling to assume the risks associated with long-term gas pipeline capacity contracts because 'there is no means by which they can' assure recovery of those contract costs. Shifting that risk onto the electric ratepayers of the Commonwealth, however, is entirely contrary to the risk-allocation design of the restructuring act.

Id. at 754

The same is true here. As the PUC correctly concluded, Eversource's gas capacity proposal would violate core elements of New Hampshire's Restructuring Act – the separation of generation from transmission and distribution, and a fully competitive market that places generation-related risks on private investors as opposed to ratepayers.

III. THE PUC CORRECTLY CONCLUDED THAT EVERSOURCE'S GAS CAPACITY PROPOSAL IS NOT AUTHORIZED BY OTHER STATUTES

The PUC, as the agency charged with administering not only the Restructuring Act but also other utility-related statutes, correctly determined that Eversource, as an electric utility in a post-restructuring environment, cannot lawfully rely on other statutes to proceed with its proposed acquisition of natural gas capacity for release to gas-fired electric generators at ratepayer risk.

The Court is no stranger to interpreting the interplay between a utility-related statute and the Restructuring Act. In *In re N.H. P.U.C. Statewide Electric Utility Restructuring Plan*, 143 N.H. at 240, the Court interpreted two statutes – RSA Chapter 362-C and the Restructuring Act – to determine the effect of the latter on the former (more particularly, whether PSNH's recovery of stranded costs pursuant to RSA 362-C:6 was affected by RSA Chapter 374-F). In doing so, the Court explained:

> "When interpreting two statutes which deal with a similar subject matter, we 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." *State v. Farrow*, 140 N.H. 473, 475, 667 A.2d 1029, 1031 (1995) (quotation omitted). We construe the statutes as consistent with each other "[w]here reasonably possible." *State v. Philbrick*, 127 N.H. 353, 356, 499 A.2d 1341, 1343 (1985).

See In re N.H. P.U.C. Statewide Elec. Util. Restructuring Plan, 143 N.H. at 240. Viewing the issue through the lens of the Restructuring Act, the Court concluded that PSNH could recover stranded costs, but that "under the terms of the restructuring statute, the PUC can award PSNH only those stranded costs . . . that comport with the standard mandated by the legislature in RSA 374-F:4, V and VI." *Id.* Stating that "when conflict exists between two statutes, [the] later statute prevails," it explained: "to the extent that PSNH might be entitled to recover deferred assets under the rate agreement and RSA 362-C:6 that are not recoverable under the standard set forth in RSA 374-F:4, V and VI, RSA chapter 374-F controls." *Id.* at 240-241 (*citing Petition of Public Serv. Co. of N.H.*, 130 N.H. at 283 ("when conflict exists between two statutes, later statute prevails"); *State v. Perra*, 127 N.H. 533, 537 (1985) ("when natural weight of competent evidence shows that latter statute's purpose was to supersede former, latter controls even absent explicit repealing language")).[15]

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[15]*See also Appeal of Old Dutch Mustard*, 166 N.H. at 509 (*quoting Grant v. Town of Barrington*, 156 N.H. 807, 812 (2008) (Court "'construe[s] statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other.'").

A. The PUC Correctly Determined That RSA 374-A Cannot Be Used to Authorize Eversource's Gas Capacity Proposal

The PUC correctly concluded that Eversource cannot rely on RSA 374-A:2 as a basis to proceed with its proposed gas capacity scheme. Enacted in 1975, more than twenty years before the Restructuring Act, that statute states:

> **Powers of Domestic Utilities.** 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, or securities issued in connection with the financing of electric power facilities or portions thereof, including, without limitation, contracts and agreements for the payment of obligations imposed without regard to the operational status of a facility or facilities and 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 generation unit or units. . . .

RSA 374-A:2. The PUC properly concluded that RSA 374-A no longer applies to electric utilities in a post-restructured environment. *See* PUC Order, Add. at 50. Appellants take exception to the PUC's determination, focusing on the precise wording of the statute's definition of "Electric utility," which includes entities engaged in the "purchase and sale of electricity or the transmission thereof." RSA 374-A:1, IV. Their argument misses the mark.

Contrary to Appellants' argument, the PUC did not erroneously interpret the wording of the statute's definition of "Electric utility." Rather, viewing the statute through the lens of the

Restructuring Act and its implementation over the years, including Eversource's recent activity to finally exit the business of electricity generation, it correctly reasoned:

> 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.

See PUC Order, Add. at 50. Stated in other terms, Appellants' interpretation would enable Eversource, post-restructuring, to purchase, own, and operate electric power facilities at the very moment it is engaged in the divestiture of its electric generating assets to finally *complete* the restructuring of New Hampshire's electric utility industry. The legislature, in enacting the Restructuring Act, as well as more recent legislation enabling Eversource to proceed with divestiture, could not have reasonably contemplated such an absurd result. *In re N.H. P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. at 240 ("When interpreting two statutes which deal with a similar subject matter, we 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.") (citation omitted).

In addition to the above, even if, despite the absurd results it would bring about, Appellants could somehow prevail on their argument that the PUC erred in concluding that the statute no longer applies to Eversource, RSA 374-A:2 nonetheless could not be used to authorize Eversource's proposal because the facility at issue in Eversource's proposal, the Access Northeast pipeline, is not an "electric power facility" for purposes of RSA 374-A:2. Rather, RSA 374-A:1, III defines "Electric power facilities" as "generating units rated 25 megawatts or above and transmission facilities rated 69 kilovolts or above planned to be placed in service in

New England after June 24, 1975." Simply put, there is no theory by which RSA Chapter 374 can authorize Eversource's proposed gas infrastructure contract.

B. The PUC Correctly Determined That RSA 374:57 Cannot Be Used to Authorize Eversource's Gas Capacity Proposal

The PUC correctly interpreted RSA 374:57 to determine that it cannot be used to authorize Eversource, in a post-restructuring environment, to proceed with its proposal to acquire natural gas capacity for release to electric generators. Enacted in 1989, seven years before the Restructuring Act, RSA 374:57 states:

> **Purchase of Capacity.** Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the commission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter the transaction was unreasonable and not in the public interest.

As the agency charged with interpreting RSA 374:57, the PUC interpreted the statute as addressing the types of agreements "commonly associated with electric supply." *See* PUC Order, Add. at 49. It appropriately noted as significant the statute's reference to the Federal Power Act and its conspicuous omission of any reference to the Natural Gas Act. *Id.* Based on these observations, as well as the historical context of the statute and its intended function, the PUC reasonably and correctly concluded that RSA 374:57 pertains to *electric* generating capacity and *electric* transmission capacity and that it does not authorize electric utilities to purchase *gas* capacity under long-term contracts. Indeed, it is difficult to imagine the legislature contemplated *electric* utilities purchasing *gas infrastructure capacity*.

Even if Appellants' interpretation of RSA 374:57 were somehow reasonable (which it is not), applying the statute in a manner that authorizes the purchase of natural gas capacity by

electric utilities in a post-restructuring environment would conflict with the legislature's more recent enactment of RSA Chapter 374-F and the legislature's intent to separate generation from distribution and establish a competitive market for electricity generation and consumer choice. *In re N.H. P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. at 240 ("When interpreting two statutes which deal with a similar subject matter, we 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.") (citation omitted).

Finally, even if Appellants could prevail on their statutory interpretation argument, it would be to no avail, as RSA 374:57 does not contain language *authorizing* the purchase of capacity by electric utilities. Rather, the statute is procedural in nature, presupposing the existence of an agreement for the long-term purchase of capacity and requiring, for PUC oversight purposes, the electric utility to *provide* such agreement. RSA 374:57. It does not *authorize* electric utilities to enter such agreements. Indeed, if Eversource were truly confident in its reliance on RSA 374:57, it would not have petitioned for PUC approval of its proposed gas infrastructure contract. It simply would have proceeded with the agreement and "furnish[ed] a copy . . . to the commission. . . ." *Id.*

C. The PUC Correctly Determined That RSA 378:37 and :38 Cannot Be Used to Justify or Allow the Gas Capacity Proposal

The PUC correctly interpreted RSA 378:37 and :38, in light of the Restructuring Act, to conclude that, in a post-restructuring environment, the planning obligation they establish "is not broad enough to justify approval of a proposal like Eversource's." *See* PUC Order, Add. at 48. RSA 378:37 establishes a policy to meet the state's energy needs at the lowest reasonable cost while taking into account factors such as reliability, demand side management and protection of public health and the environment. *See* RSA 378:37 (Supp. 2016). RSA 378:38 requires utilities (both electric utilities and gas utilities), pursuant to the policy in RSA 378:37, to prepare and

periodically file with the PUC least cost integrated resource plans. *See* RSA 378:38 (Supp. 2016).

The PUC has extensive experience not only administering the Restructuring Act, but also – pursuant to its frequent receipt and review of least cost integrated resource plans from electric and gas utilities – the state's least-cost planning statutes. Properly interpreting those statutes in light of the Restructuring Act, the PUC correctly rejected Eversource's reliance on these statutes in light of the role of electric utilities in a post-restructuring environment:

> Reading the planning statutes together with RSA Ch. 374-F, . . . we do not find that the statutes permit the re-joining of distribution and generation functions in the manner provided by the Capacity Contract. The planning statutes must be read in concert with RSA 374-F and in light of the industries to which they apply. RSA 378:38 applies to both electric and natural gas utilities, and those industries now differ in a fundamental way. While natural gas utilities continue to arrange natural gas supplies for their residential and small commercial customers, following electric restructuring, electric utilities do not arrange electric supply for their customers. Instead, pursuant to RSA 374-F:3, V(c), electric utilities provide electric supply through default service, which is offered only to those customers who have not opted to purchase their electricity from a competitive supplier. . . . As a result of the Restructuring Statute, electric distribution utilities are no longer required to conduct long-term planning for electric supply. Accordingly, we find that in a restructured electric industry, the planning requirements for EDCs are limited to procurements of electric supply for the EDC's default service customers.

See PUC Order, Add. at 47-48. Not surprisingly, the PUC's interpretation of the planning statutes, in light of restructuring, is consistent with its view twenty years ago, in its Final Electric Utility Restructuring Plan, that restructuring changed the responsibilities of electric utilities under the planning statutes.[16] The PUC's interpretation of RSA 378:37 and :38 in a manner

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[16] *See* PUC Order No. 22,514 (Feb. 28, 1997) *In re Restructuring New Hampshire's Electric Utility Industry: Final Plan*, 1997 WL 155394 at *73, in which the PUC explained in its Final Electric Utility Restructuring Plan:

> Integrated Resource Planning (IRP) requires utilities to evaluate all supply and demand side resource options to meet customer needs. The majority of parties in this proceeding stated that IRP is unnecessary in a restructured industry. Some proponents asserted that the market will

consistent with the Restructuring Act – an interpretation which is owed deference – is correct. *See supra* at 9, n. 4; *In re N.H.P.U.C. Statewide Elec. Util. Restructuring Plan*, 143 N.H. at 240-241 (discussed *supra* at page 22).

CONCLUSION

For the reasons discussed above, Appellants have not satisfied their burden of establishing that the PUC erred as a matter of law in its interpretation of the Restructuring Act and other statutes under its purview. To the contrary, the PUC – the agency that has implemented the Restructuring Act since its enactment in 1996 – correctly interpreted New Hampshire law in a post-restructuring environment to preclude Eversource's gas capacity proposal, a proposal that would re-inject Eversource into the area of electric generation, at the risk of its ratepayers, in direct contravention of the legislature's intent to establish a competitive market in which electric generation is separated from electric distribution.

In light of the foregoing, the Court should affirm the decision of the PUC.

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respond efficiently to any need for generation. Some parties indicated a continuing need for the transmission and distribution companies to perform least cost planning. *[con't on next page]*
[con't from prior page]
While IRP may no longer be an effective process once the generation function is separated from transmission and distribution, we find it appropriate that distribution companies continue to conduct overall system planning. We direct the distribution companies to include proposals in their compliance filings describing how they will address system planning in the restructured industry.

As the goals underlying IRP are likely to be better served through market forces, RSA 378:38 which requires least cost plans, seems unnecessary.

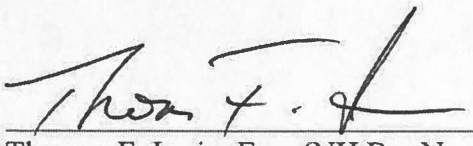
REQUEST FOR ORAL ARGUMENT

Oral argument requested. Mr. Irwin will argue on behalf of Conservation Law Foundation.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By Its Attorney,



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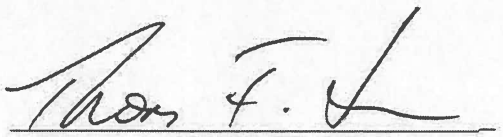
CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2017 two copies of this brief have been sent via first-class, U.S. Mail, to counsel for all parties of record.



Thomas F. Irwin, Esq.

ADDENDUM

RSA Chapter 374-G.....31

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PUC Order No. 25,950 (Oct. 6, 2016).....37

RSA 374-G
Electric Utility Investment in Distributed Energy Resources

RSA 374-G:1 Purpose. Distributed energy resources can increase overall energy efficiency and provide energy security and diversity by eliminating, displacing, or better managing traditional fossil fuel energy deliveries from the centralized bulk power grid, in keeping with the objectives of RSA 362-F:1. It is therefore in the public interest to stimulate investment in distributed energy resources in New Hampshire in diverse ways, including by encouraging New Hampshire electric public utilities to invest in renewable and clean distributed energy resources at the lowest reasonable cost to taxpayers benefiting the transmission and distribution system under state regulatory oversight.

RSA 374-G:2 Definitions; Exclusions.
I. The following definitions shall apply in this chapter except as otherwise provided:
(a) "Commission" means the public utilities commission.
(b) "Distributed energy resources" means electric generation equipment, including clean and renewable generation, energy storage, energy efficiency, demand response, load reduction or control programs, and technologies or devices located on or interconnected to the local electric distribution system for purposes including but not limited to reducing line losses, supporting voltage regulation, or peak load shaving, as part of a strategy for minimizing transmission and distribution costs as provided in RSA 374-F:3, III.
II. "Distributed energy resources" in this chapter shall exclude electric generation equipment interconnected with the local electric distribution system at a single point or through a customer's own electrical wiring that is in excess of 5 megawatts.

374-G:3 Electric Generation Equipment Funded by Public Utility; Requirements.
Any electric generation equipment funded in part by a public utility under this chapter is subject to the following requirements:
I. The energy produced by electric generation equipment owned by the public utility shall be used as an offset to distribution system losses or the public utility company's own use;
II. The energy produced by electric generation equipment utilizing a non-renewable fuel source that is owned by a customer, or sited on a customer's property shall be used to displace the customer's own use;
III. The energy produced by electric generation equipment utilizing a renewable fuel source that is owned by a customer, or sited on the consumer's premises shall be used to displace the customers own use; however, if energy is occasionally generated in excess of the customer's energy requirements, it may be credited to the customer's account in a subsequent period.
IV. Any biomass-fueled generation shall meet the emission requirements to qualify as eligible biomass technology under RSA 362-F:2, VIII.
V. Any fossil-fuel fueled generation shall produce combined heat and power with a minimum energy efficiency of 60 percent, measured as usable thermal and electrical output in BTUs divided by fuel input in BTUs, shall be installed as an integrated combined heat and power application, and shall meet the following emission standards (in lbs/MW-H): NOx--0.07; CO--

0.10; VOCs--0.02. A credit to meet the emission standard may be applied at the rate of one MW-H for each 3.4 million BTUs of heat recovered.
VI. These requirements apply in addition to and do not preempt or replace any emission standards or permitting requirements applicable to a given generation facility under any other applicable state or federal law.

374-G:4 Investments in Distributed Energy Resources.
I. Notwithstanding any other provision of law to the contrary, as provided in RSA 374-G:5, a New Hampshire electric public utility may invest in or own distributed energy resources, located on or inter-connected to the local electric distribution system.
II. Distributed electric generation owned by or receiving investments from an electric utility under this section shall be limited to a cumulative maximum in megawatts of 6 percent of the utility's total distribution peak load in megawatts.
III. In addition, once the cumulative generation authorized under this chapter for a given public utility reaches 3 percent of the utility's total distribution peak load in megawatts, then that utility shall not be allowed to add any additional non-renewable generation under this chapter, until the cumulative renewable generation installed pursuant to this chapter, as a percentage of total generation installed pursuant to this chapter, shall equal or exceed twice the sum of the then-applicable percentage requirements for class I and class II under RSA 362-F:3.

374-G:5 Rate Filing; Authorization.
I. A New Hampshire electric public utility may seek rate recovery for its portion of investments in distributed energy resources from the commission by making an appropriate rate filing. At a minimum, such filing shall include the following:
(a) A detailed description and economic and environmental evaluation of the proposed investment.
(b) A discussion of the costs, benefits, and risks of the proposal with specific reference to the factors listed in paragraph II, including an analysis of the costs, benefits, and rate implications to the participating customers, to the company's default service customers, and to the utility's distribution customers.
(c) A description of any equipment or installation specifications, solicitations, and procurements it has or intends to implement.
(d) A showing that the utility has used a competitive bidding process to reasonably minimize the costs of the project to its customers.
(e) A showing that it has made reasonable efforts to involve local businesses in its program.
(f) Evidence of compliance with any applicable emission limitations.
(g) A copy of any customer contracts or agreements to be executed as part of the program.
II. Prior to authorizing a utility's recovery of investments made in distributed energy resources, the commission shall determine that the utility's investment and its recovery in rates, as proposed, are in the public interest. Determination of the public interest under this section shall include giving a balanced consideration and proportional weight to each of the following factors:
(a) The effect on the reliability, safety, and efficiency of electric service.
(b) The efficient and cost-effective realization of the purposes of the renewable portfolio standards of RSA 362-F and the restructuring policy principles of RSA 374-F:3.
(c) The energy security benefits of the investment to the state of New Hampshire.
(d) The environmental benefits of the investment to the state of New Hampshire.

(e) The economic development benefits and liabilities of the investment to the state of New Hampshire.
(f) The effect on competition within the region's electricity markets and the state's energy services market.
(g) The costs and benefits to the utility's customers, including but not limited to a demonstration that the company has exercised competitive processes to reasonably minimize costs of the project to ratepayers and to maximize private investment in the project.
(h) Whether the expected value of the economic benefits of the investment to the utility's ratepayers over the life of the investment outweigh the economic costs to the utility's ratepayers.
(i) The costs and benefits to any participating customer or customers.
III. Authorized and prudently incurred investments shall be recovered under this section in a utility's base distribution rates as a component of rate base, and cost recovery shall include the recovery of depreciation, a return on investment, taxes, and other operating and maintenance expenses directly associated with the investment, net of any offsetting revenues received by the utility directly attributable to the investment. The utility may recover all reasonable costs associated with the filing, whether or not the application is approved by the commission.
IV. The commission may add an incentive to the return on equity component as it deems appropriate to encourage investments in distributed energy resources.
V. The commission shall approve, disapprove, or approve with conditions a utility rate filing under this section within 90 days of its filing. The commission may extend this deadline to 6 months at its discretion for any filing involving an investment in excess of $1,000,000. The commission may also extend the deadline at its discretion for failure of the applicant to respond to data requests on an expedited timeline.

374-G:6 Exemption; Rural Electric Cooperatives.
The requirements for commission authorization for recovery of investments under RSA 374-G:5 shall not apply to rural electric cooperatives for which a certificate of deregulation is on file with the commission.

374-G:7 Exclusion.
Any renewable generating equipment funded in part by a distribution utility under this chapter shall not be included in the calculation of the total rated generating capacity under RSA 362-A:9, I for purposes of limiting net energy metering.

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Eversource Energy Petition for approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC	)	DE 16-241

PRINCIPAL BRIEF OF
NEXTERA ENERGY RESOURCES, LLC

Pursuant to New Hampshire Public Utilities Commission ("Commission") Code Admin. Puc Rule 203.32 and the March 24, 2016 Order of Notice, NextEra Energy Resources, LLC ("NEER") hereby submits its principal brief in this matter.

Twenty years ago the New Hampshire Legislature passed RSA 374-F (the "Act" or "Restructuring Act") for the purpose of fundamentally changing the New Hampshire electricity market from one predominated by vertical utilities to one requiring free competition for energy supply. Electric utilities would continue to have responsibility for the transmission and distribution function within their service territories, but their ratepayers would no longer bear the costs associated with the utilities' obligation to develop sufficient generation assets to meet long-term resource planning (and potential stranded costs associated with new generation assets). In February 2016, the Commission in Docket No. DE 14-238 heard several days of testimony in support of a settlement agreement for the divestiture of all of the generation assets of Public Service Company of New Hampshire ("PSNH") d/b/a Eversource Energy ("Eversource") and thus accomplishing the Legislature's 1996 directive, transitioning Eversource entirely to a transmission and distribution-only entity and finalizing the amount of stranded costs to be borne by its electric ratepayers.

stranded costs that would be included in the rates paid by Eversource electricity ratepayers; and (3) "establish a competitive energy market" in compliance with the Restructuring Act. (*See* June 10, 2015 Settlement Agreement, Docket No. 14-238, p.16.) On January 26, 2016, the settling parties entered into a Partial Litigation Settlement, which among other things demonstrates their agreement that divesting all of Eversource's generation assets promptly is in the public interest, would enhance the New Hampshire economy, and remove from EDC ratepayers the risk of owning generating assets:

> Near-Term Divestiture of PSNH's Generation Assets Is in the Public Interest and Advances the Economy in PSNH's Service Territory as well as the Ability to Attract and Retain Employment Across Industries . . .
>
> The Settling Parties and Staff agree that the prompt divestiture of PSNH's generation assets will eliminate customer risks arising from potential future capital costs and future regulatory and environmental compliance costs, and will effectuate the Legislature's intent to "harness the power of competitive markets" set forth in the "Electric Utility Restructuring" enactment in 1996 at RSA 374-F:1, I.

(Partial Litigation Settlement, Docket No. 14-238, p. 1 & paragraph 12.)

During the hearing held by the Commission to consider the Settlement Agreement, Eversource itself argued that, with approval of the Settlement Agreement, Eversource would exit the generation business and free its ratepayers from further risk from funding generation resources, including potential future stranded costs:

> [COUNSEL FOR EVERSOURCE; OPENING REMARKS]: . . . Today's hearing marks the beginning of the end of a long journey, transforming the state's electric utilities from vertically integrated entities to adoption of a restructured model, one that relies upon the power of competitive markets to control the cost of electric generation.
>
> . . .
>
> [COUNSEL FOR EVERSOURCE; CLOSING REMARKS]: The Company believes that this settlement agreement meets all the relevant standards, and, if approved, PSNH would move as quickly as it's reasonably able to sell its generating assets. As parties have testified at length in this process, having PSNH exit the generating business, including through an appropriate disposition of its

two existing PPAs and its status as a hybrid utility, and make more clear its status in the marketplace.

. . .

It will avoid having a shrinking pool of default service customers, predominantly residential customers, who continue to bear the cost of PSNH's generation assets. It removes from PSNH and its customers the risk of potential future liabilities relating to the facilities.

(Tr. Day 1 AM session, p.19; Day 3 PM session, pp. 58-59) (Emphasis added).

It is clear from the testimony that the parties to the divestiture proceeding relied upon these fundamental assertions about the transition to a competitive electricity market in New Hampshire and removing generating asset risk from electricity ratepayers:

[STAFF:]
Q. Do you think that, looking forward, this new competitive world where PSNH is fully divested will result in lower rates?
A. [STAFF] Yes.
. . .
More importantly, I think it shifts the risk where we intended it in electric restructuring away from customers and prudence cases and to the wholesale market and to the generators and suppliers in that market.

(Day 2, PM session, p.73) (Emphasis added).

[COUNSEL FOR CONSERVATION LAW FOUNDATION]: . . . We fully support completing this process of restructuring and moving New Hampshire's electric generating sector to a fully competitive market. It is our hope that this docket will result in a decision enabling PSNH to proceed to divestiture of its generating assets.

(Day 1 – AM session, pp. 23-24) (Emphasis added).

[NEPGA:] Our testimony briefly summarized . . . NEPGA and RESA's strong support for divestiture to end the bifurcated market in rate-base generation, and . . . strong support for the Settlement focused on goals of shifting risks away from consumers and market participants, as well as providing further transparency and competition to serve default customers in a restructured market.

(Day 2 – AM session, pp.50-51) (Emphasis added).

[SENATOR JEB BRADLEY:] [W]e move forward, get the divestiture behind us, the end of the half-in-one-world/half-in-another-world of deregulation partly. With this Settlement, we do that. We implement fully competition, and we

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 16-241

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

Order Dismissing Petition

ORDER NO. 25,950

October 6, 2016

In this Order, the Commission dismisses Eversource's petition requesting approval of a contract to purchase capacity on the proposed Access Northeast gas pipeline, and associated program details and distribution rate tariff. The Commission has determined that Eversource's proposed program is inconsistent with New Hampshire law. The legal authorities relied upon by Eversource and other supporters of the petition do not overcome the policies preventing such activity found within the Electric Utility Restructuring statute, RSA Chapter 374-F.

I. EVERSOURCE'S PROPOSAL

On February 18, 2016, Public Service Company of New Hampshire d/b/a Eversource (Eversource) filed a petition for approval of a proposed 20-year contract with Algonquin Gas Transmission, LLC (Algonquin), for natural gas capacity on Algonquin's Access Northeast Pipeline Project (Access Northeast pipeline), and for recovery of associated costs through a new distribution rate tariff, to be assessed on all of Eversource's customers. In its petition, Eversource sought approval of: (1) a 20-year interstate pipeline transportation and storage contract providing natural gas capacity for use by electric generation facilities in the New England region (the Capacity Contract); (2) an Electric Reliability Service Program to set

parameters for the release of capacity and the sale of LNG supply made available to electric generators through the Capacity Contract; and (3) a Long-Term Gas Transportation and Storage Contract tariff for Eversource's rates (Tariffed Rate) to be applied through a uniform cents-per-kWh rate element on all retail electric customers served by Eversource, to provide for recovery of costs associated with the Capacity Contract.

Eversource is a public utility headquartered in Manchester, operating under the laws of the State of New Hampshire as an electric distribution company (EDC). Algonquin is an owner-operator of an interstate gas pipeline located in New England. Algonquin is owned by a parent company, Spectra Energy Corp (Spectra), a publicly-traded corporation headquartered in Houston, Texas. Algonquin has partnered with Eversource's corporate parent, Eversource Energy, headquartered in Boston, Massachusetts, and Hartford, Connecticut, and with National Grid, the parent company of EDC subsidiaries in Rhode Island and Massachusetts, to develop the Access Northeast pipeline. In general terms, Eversource Energy's EDC subsidiaries in Connecticut, Massachusetts, and New Hampshire and National Grid's EDC subsidiaries in Rhode Island and Massachusetts, are each individually seeking regulatory approval of gas capacity on the Access Northeast pipeline.[1]

The Access Northeast pipeline is intended to provide 500,000 million British thermal units (MMBtu)/day of incremental gas transportation capacity and 400,000 MMBtu/day of incremental liquefied natural gas (LNG) storage deliverability. Under its petition, Eversource would hold contractual entitlements for firm gas transportation and storage deliverability up to a

[1] The Massachusetts Supreme Judicial Court issued an order prohibiting the Massachusetts Department of Public Utilities from approving the companion petition from the Massachusetts affiliates of Eversource Energy and National Grid. The Massachusetts Court concluded such a Capacity Contract would contradict the policy embodied in the Massachusetts restructuring act, which removed electric companies from the business of electric generation. 475 Mass. 191 (2016).

Maximum Daily Transportation Quantity of 66,000 MMBtu/day, which would represent 7.4 percent of the total capacity of the Access Northeast pipeline. Eversource asserts that energy cost savings resulting from the increased supply of gas capacity to New England electric generators would exceed contract-related costs by a 3:1 ratio, excluding any additional capacity-release revenues that would be credited to Eversource's customers, thereby offering Eversource's customers significant benefits and justifying the recovery of the contract costs through rates.

II. PROCEDURAL HISTORY

With its petition in February, Eversource filed supporting testimony and related exhibits along with a motion for confidential treatment of certain information. Algonquin filed a similar motion for confidential treatment on March 10, 2016. The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-241.html.

There was significant interest in this docket from its inception. On February 22, 2016, the Office of Consumer Advocate (OCA) filed notice of its participation on behalf of residential ratepayers pursuant to RSA 363:28. Numerous other entities and groups sought intervenor status. They included Algonquin, NextEra Energy Resources LLC (NextEra), Richard Husband, TransCanada Pipelines (TransCanada), Portland Natural Gas Transmission System (PNGTS), Exelon Generation Company, LLC (Exelon), Coalition to Lower Energy Costs (CLEC), Tennessee Gas Pipeline Company (Tennessee), the New Hampshire Municipal Pipeline Coalition (NHMPC), SunRun Inc., Pipe Line Awareness Network of the Northeast (PLAN), Repsol Energy North America Corporation (Repsol), the Office of Energy and Planning, the Conservation Law Foundation (CLF), and ENGIE Gas &LNG, LLC (ENGIE). On April 22,

2016, the Commission issued Order No. 25,886, addressing intervention requests and certain procedural issues.

In its March 24, 2016, Order of Notice, the Commission indicated that before assessing the merits of Eversource's proposal, it would determine as a threshold matter whether the proposed Capacity Contract and the associated request for rate recovery, are consistent with New Hampshire law. The Commission set deadlines for initial submissions and responses on the legal issues of April 28 and May 12, respectively.

On May 10, 2016, the OCA filed a motion pursuant to RSA 363:32, for designation as Staff Advocates, Electric Division Assistant Director, George McCluskey and Staff Attorney, Alexander Speidel. The OCA alleged that, due to past involvement in the IR 15-124 investigation regarding gas supply constraints into the New England region, past pleadings at FERC, involvement in regional wholesale market meetings regarding related topics, and alleged statements made by Staff at a technical session in the instant docket, Messrs. McCluskey and Speidel should be designated Staff Advocates. This motion received the concurrence of CLF, Richard Husband, NextEra, and NHMPC.

III. POSITIONS OF THE PARTIES

A. Supporters of the Capacity Contract

Eversource, Algonquin, and CLEC[2] (collectively the Supporters) argue generally that Eversource's plans are authorized by a number of statutes, either standing alone or in combination. The Supporters' basic argument is that RSA Chapter 374-F, the electric utility restructuring statute, was intended to lower energy prices and that an EDC's purchase of gas capacity to be used by generators could further that intent. The Supporters argue as well that

[2] Although CLEC supported the legality of an EDC entering into a long-term gas capacity contract, it objected to the lack of a competitive procurement process for the Capacity Contract entered into by Eversource. CLEC Brief at 26-29.

Eversource's proposal could be considered to be part of its obligation to provide reliable service at reasonable rates under RSA 374:1 and :2; or the type of "least cost" resource planning required by RSA 378:37 and :38. They also point to the specific language in RSA 374:57, which sets forth an EDC's obligations when it "enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy"; and to RSA Chapter 374-A, which discusses EDCs' participation in electric power facilities. The Supporters dispute the opposition arguments that Eversource's plan would violate the Federal Power Act and the Natural Gas Act. They maintain that the proposal is consistent with Federal law and thus not preempted.

B. Opponents of the Capacity Contract

ENGIE, NextEra, CLF, OCA, Exelon, NHMPC, and PLAN, (collectively the Opponents), all disagree. They argue that the most significant intention of the restructuring statute, RSA Ch. 374-F, was to do what its title promised and restructure the industry to get the EDCs out of the generation business completely. To the Opponents, lower rates were and continue to be expected as a result of that restructuring, as competition for generation services replaces the vertically integrated generation, transmission, and distribution structure that existed for decades before. The Opponents view competitive markets and retail choice for consumers as the key components of restructuring; rate effects are secondary to competition. They also claim that in the restructured market, the risks associated with investments in generation would be borne by the owners of that generation, not by the ratepayers of the regulated distribution utilities. As for the other statutes that are part of the Supporters' arguments, the Opponents' general position is that the restructuring statute controls. They argue that those other statutes do

not support Eversource's proposal, either because they never meant what the Supporters argue, or because they have been superseded by the more recent enactment of RSA Chapter 374-F.

The Opponents make two additional points to support their position. First, they argue that the notion of an EDC charging customers for the costs of a gas capacity contract is fundamentally inconsistent with the requirement that assets included in rate base must be "used and useful." They also assert that the proposed Capacity Contract and the release of gas capacity to wholesale power generators is pre-empted by the Federal Power Act and the Natural Gas Act.[3] They cite to decisions by the Federal Energy Regulatory Commission ("FERC"), and recent decisions by the United States Supreme Court to argue that state laws permitting proposals like Eversource's improperly interfere with FERC's regulation of both the wholesale natural gas market and the wholesale electric market.

IV. COMMISSION ANALYSIS

A. New Hampshire Electric Utility Restructuring Statute, RSA Chapter 374-F

The threshold question regarding any potential proposal for gas capacity acquisition by a New Hampshire EDC is whether the Electric Utility Restructuring Statute, RSA Ch. 374-F, (Restructuring Statute) prohibits such activity. All parties to this proceeding make arguments based on the Restructuring Statute passed in 1996 and implemented over the course of many years, including most recently through Order 25,920 (July 1, 2016) approving the divestiture of Eversource's remaining hydro and fossil electric generation facilities. We must determine: (1) whether the functional separation of transmission/distribution activities on the one hand, and generation activities on the other, called for by RSA 374-F:3, III, would be violated by the terms of Eversource's proposal, and (2) if yes, whether this directive of the Restructuring Statute

[3] *See* Natural Gas Act 15 U.S.C. § 717c(b) (prohibiting preferential pricing for natural gas capacity releases) and Federal Power Act 16 U.S.C.§824(b)(1)(giving FERC core responsibility for regulating electric transmission and wholesale pricing).

overrides, or supersedes, all other restructuring principles and therefore prohibits the Capacity Contract and associated Tariffed Rate contemplated by Eversource.

In examining these questions, we apply traditional New Hampshire principles of statutory interpretation. The New Hampshire Supreme Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. The Court interprets statutes in the context of the overall regulatory scheme and not in isolation. The goal is to determine the Legislature's intent. Further, the Court construes statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other. When interpreting a statute, the Court gives effect to all words in the statute and presumes that the legislature did not enact superfluous or redundant words. *See Appeal of Old Dutch Mustard Co., Inc.,* 166 N.H. 501 (2014); *State v. Collyns*, 166 N.H. 514 (2014). When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with the subject in a specific way and the earlier enactment treats that subject in a general fashion. *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152 (1978); *see also Appeal of Pennichuck Water Works,* 160 N.H. 18, 34 (2010) (quoting *Appeal of Plantier*, 126 N.H. 500 (1985)).

Because the Restructuring Statute contains numerous policy directives, we begin our analysis of the statute with reference to its stated purposes.

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

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

RSA 374-F:1, I and II.

In addition to the overall statutory purposes, RSA 374-F:3 outlines the restructuring policy principles that must govern the Commission's approach to restructuring the New Hampshire electric market. RSA 374-F:3, III states, in part:

> When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future. However, distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs.

The disagreement in this matter is based on the multiple objectives in the sections quoted above. Supporters point to the purpose of reducing costs to customers, and argue that having EDCs purchase gas capacity for use by electric generators will further that goal. Opponents argue that competition, furthered by restructuring and unbundling, is the ultimate purpose of the statutory scheme.

In weighing the restructuring policy principles of RSA 374-F, we agree with the Opponents and find that the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity. The competitive generation market is expected to produce a more efficient industry structure and regulatory framework, by shifting the risks of

generation investments away from customers of regulated EDCs toward private investors in the competitive market. The long-term results should be lower prices and a more productive economy. To achieve that purpose, RSA 374-F:3, III directs the restructuring of the industry, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services. A more efficient structure involves placing investment risk on merchant generators who can manage that risk, and allowing customers to choose suppliers, thus enabling customers to pay market prices and avoid long-term over market costs. This purpose is underscored by the Legislature's recent strong encouragement, through the passage of HB 1602 and SB 221, to approve the 2015 Settlement Agreement that will accomplish the functional separation of Eversource's generation activities from its distribution activities. *See* 2014 N.H. Laws Ch. 310 (H.B. 1602); 2015 N.H. Laws Ch. 221 (S.B. 221); and Order No. 25,920 (July 1, 2016).

Based on that finding, we conclude that the proposal brought forward by Eversource is fundamentally inconsistent with the purposes of restructuring. Specifically, we conclude that the Capacity Contract is a component of "generation services" under RSA 374-F:3, III, which requires unbundled, clear price information for the cost components of generation, transmission, and distribution. The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies. Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal.

Having concluded that the basic premise of Eversource's proposal – having an EDC purchase long-term gas capacity to be used by electric generators – runs afoul of the Restructuring Statute's functional separation requirement, we turn to the question of whether any

of the other purported justifications would allow us to go forward in this proceeding to consider the merits of the proposal. To analyze the effect of other statutes applicable to EDCs on the Restructuring Statute, we must consider two issues. First, we must identify whether any of those statutes standing alone would support the Eversource proposal, and, if so, how those statutes are affected by the subsequent enactment of the Restructuring Statute.

B. Commission's General Oversight and Other Utility Statutes

Supporters note that RSA 374:1 and RSA 374:2 require that EDCs provide safe and reliable service at just and reasonable rates. They claim that by entering into the Capacity Contract and then selling capacity to gas-fired electric generators, Eversource would both increase reliability of electric supply and mitigate price spikes in the wholesale and retail markets in New England. That would, in turn, help Eversource meet its obligations under RSA 374:1 (safe and reliable service) and RSA 374:2 (just and reasonable rates). While we agree that those two sections of our supervisory statutes govern our regulation of Eversource's provision of distribution services, we do not agree that an EDC is responsible for either the reliability of the generation supply, or the price of such supply. That function has been shifted to the competitive marketplace for retail electric generation service in New Hampshire. For regional wholesale electric markets, the responsibility for regulating reliability and pricing remains with ISO-NE and FERC. *See* Federal Power Act, 16 U.S.C. § 824 (federal jurisdiction over electric transmission and wholesale electric sales).

Supporters also claim that the least cost planning statutes, RSA 378:37 and 378:38, create an affirmative obligation for Eversource to plan for adequate energy supply resources. The Legislature has set the goals for planning as follows:

> The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

RSA 378:37. In fulfilling its planning obligations a regulated utility is required to do a number of assessments, including:

> III. An assessment of supply options including owned capacity, market procurements, renewable energy, and distributed energy resources....
>
> VI. An assessment of the plan's long- and short-term environmental, economic, and energy price and supply impact on the state.
>
> VII. An assessment of plan integration and consistency with the state energy strategy under RSA 4-E:1.

RSA 378:38, III-VII. The Supporters reason that if the required assessments of generating capacity, price, and supply show that more gas is needed, and if the gas-fired generators are unwilling to purchase the necessary capacity, then it is the responsibility of the EDCs to do what has to be done and commit to those purchases.

Reading the planning statutes together with RSA Ch. 374-F, however, we do not find that the statutes permit the re-joining of distribution and generation functions in the manner provided by the Capacity Contract. The planning statutes must be read in concert with RSA Ch. 374-F and in light of the industries to which they apply. RSA 378:38 applies to both electric and natural gas utilities, and those industries now differ in a fundamental way. While natural gas utilities continue to arrange natural gas supplies for their residential and small commercial customers, following electric restructuring, electric utilities do not arrange electric supply for their customers. Instead, pursuant to RSA 374-F:3, V(c), electric utilities provide electric supply through default service, which is offered only to those customers who have not opted to purchase

their electricity from a competitive supplier. Default service is designed to be a safety net for customers who do not choose an independent competitive supplier. Further, default service must be competitively procured. *Id.* As a result of the Restructuring Statute, electric distribution utilities are no longer required to conduct long-term planning for electric supply. Accordingly, we find that in a restructured electric industry, the planning requirements for an EDC are limited to procurements of electric supply for the EDC's default service customers. That obligation is not broad enough to justify approval of a proposal like Eversource's.

Supporters also point out that the 10-Year New Hampshire State Energy Strategy, referenced in RSA 378:38, VII, encourages exploration of ways to increase gas pipeline capacity in New England. They claim that the Strategy thus requires EDCs to explore ways to increase gas pipeline capacity. We disagree. As discussed above, RSA 378:38 applies to both electric and gas utilities. Both are required to plan to have an adequate supply to meet their customers' demand. In our view, gas supply under the State Energy Strategy is the responsibility of the gas utilities. While Eversource, an EDC, cannot enter into the Capacity Contract and have it paid for through its distribution rates, natural gas utilities might be appropriate proponents of increased gas pipeline supply under RSA 378:38, VII. *See Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 25,822 (October 2, 2015) (approving firm transportation agreement for natural gas supply).

Supporters cite RSA 374:57, "Purchase of Capacity," as support for Eversource's proposal.

> Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the [C]ommission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The [C]ommission may disallow, in whole or part, any

> amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest.

RSA 374:57. The Opponents, however, maintain that the statute does not mean what the Supporters think it means. The Opponents argue that RSA 374:57 was enacted following PSNH's bankruptcy to tighten the commission's authority over contracting decisions for electric supply; a service EDCs no longer provide. According to the Opponents, a statute intended to give the commission authority to disallow unreasonable provisions in contracts with terms longer than one year cannot mean an electric utility can enter into a long-term contract for gas transmission.

While the Supporters' reading of the statute is plausible, we believe the Opponents have the better argument. The meaning of "capacity" in that legislation is limited to electric generating capacity and electric transmission capacity. First, the types of agreements listed are commonly associated with electric supply. Second, if gas capacity was to be included, the statute would have included references to the Natural Gas Act in addition to the Federal Power Act. Thus we find that RSA 374:57 concerns long-term contracts for electric supply and does not authorize EDCs to purchase gas capacity under long-term contracts.

Supporters claim that RSA Chapter 374-A's provisions granting EDCs authority to "enter into and perform contracts" related to "participation in electric power facilities" provide support for Eversource's petition. Supporters observe that those provisions were not repealed by subsequent enactments such as RSA 374-F. NextEra argues RSA 374-A applied to vertically integrated "electric utilities" as defined in 1975 by 374-A:1, IV and therefore that the provisions in RSA 374-A:2, I and II are inapplicable in a restructured market where electric utility has been redefined. RSA 374-A:1, IV defines electric utilities as "primarily engaged in the generation and

sale or the purchase and sale of electricity or the transmission thereof." We believe NextEra is correct and that RSA 374-A no longer applies to an EDC like Eversource.

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.

Opponents also argue, based upon RSA 378:28, that the Capacity Contract violates the used and useful requirement which is a basic component of utility ratemaking under New Hampshire law. Supporters counter that RSA 378:28 applies to rate base and because the Capacity Contract does not add to Eversource's rate base, and is instead an ongoing expense, the used and useful standard does not apply. The requirement that utility rate base be used and useful for a utility to include a return on that rate base in rates has a corollary principle governing expenses. That is, expenses must be prudent and necessary for providing the service offered by the utility. In this case, we have found that after enactment of the Restructuring Statute, EDCs should unbundle rates for distribution from rates for energy supply. Capacity Contract expenses are not needed to supply distribution services to Eversource distribution customers. The Capacity Contract is designed to support electric generation supply, and therefore expenses related to generation supply would be disallowed in distribution rates.

C. Federal law

As noted above, the Opponents also argued that the Capacity Contract would violate a number of federal laws, including the Natural Gas Act, the Federal Power Act, and the terms of

FERC procedures and precedent. Having determined that we cannot approve the Capacity Contract and related capacity releases under New Hampshire law, we need not reach a decision concerning federal pre-emption.

V. CONCLUSION

The proposal before us would have Eversource purchase long-term gas pipeline capacity to be used by gas-fired electric generators, and include the net costs of its purchases and sales in its electric distribution rates. That proposal, however, goes against the overriding principle of restructuring, which is to harness the power of competitive markets to reduce costs to consumers by separating unregulated generation from fully regulated distribution. It would allow Eversource to reenter the generation market for an extended period, placing the risk of that decision on its customers. We cannot approve such an arrangement under existing laws. Accordingly, we dismiss Eversource's petition.

We acknowledge that the increased dependence on natural gas-fueled generation plants within the region and the constraints on gas capacity during peak periods of demand have resulted in electric price volatility. Eversource's proposal is an interesting one, with the potential to reduce that volatility; but it is an approach that, in practice, would violate New Hampshire law following the restructuring of the electric industry. If the General Court believes EDCs should be allowed to make long-term commitments to purchase gas capacity and include the costs in distribution rates, the statutes can be amended to permit such activities.

Because that concludes this proceeding, we deny the motion to designate Staff Advocates as moot. We will address the joint motion for confidential treatment in a separate order.

Based upon the foregoing, it is hereby

ORDERED, that Eversource's instant petition is hereby DISMISSED; and it is

FURTHER ORDERED, that the information subject to Eversource's joint motion for confidential treatment should be kept confidentially, pending an order by the Commission regarding the disposition of same under RSA Chapter 91-A; and it is

FURTHER ORDERED, that the motions to designate Staff Advocates are hereby DISMISSED, having been rendered moot by the decision delineated in this Order.

By order of the Public Utilities Commission of New Hampshire this sixth day of October, 2016.

Martin P. Honigberg	Michael J. Iacopino	Kathryn M. Bailey
Chairman	Special Commissioner	Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary