

THE STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 16-241

Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC

**MOTION FOR RECONSIDERATION**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) and, pursuant to Puc 203.05, Puc 203.07 and RSA chapter 541-A, hereby moves the New Hampshire Public Utilities Commission for reconsideration of Order No. 25,950 issued October 6, 2016 (the “Order”) in the instant proceeding relating to a proposed contract between Eversource and Algonquin Gas Transmission LLC for capacity on the proposed Access Northeast pipeline project (the “ANE Contract”).

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding or by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Id.* at 4-5. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Id.* at 5. Eversource submits that for the reasons set out below, the Commission overlooked or mistakenly conceived important legal and policy matters in the Order and that consideration is therefore appropriate.

In the Order, the Commission concluded as a matter of law,<sup>1</sup> that despite “the increased dependence on natural gas-fueled generation plants within the region and the constraints on gas capacity during peak periods of demand [that] have resulted in electric price volatility” and that although Eversource’s proposal has “the potential to reduce that volatility,” Order at 15, the Commission is powerless to deal with the volatility in electricity prices that has become the distinguishing feature of an electricity marketplace that ISO-New England has referred to as a “precarious” and “unsustainable.”<sup>2</sup> The Commission based its determination nearly entirely upon an unreasonably narrow interpretation of the New Hampshire Electricity Restructuring statute, RSA chapter 374-F (the “Restructuring Law”), by finding that the overriding purpose of the Restructuring Law was to remove regulated utilities from the generation business. That view of the Restructuring Law does not comport with the stated purpose of the law, ignores nearly all of the interdependent policy principles enumerated in it, and appears to undermine the broad authority the Commission has been granted relative to the implementation of the Restructuring Law. RSA 374-F:1, :3, :4. Contrary to the Commission’s determination that “the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity,” Order at 8, the true “overriding purpose” is to reduce electricity rates.

This was not a case where the Commission had been called upon to divine the purpose of the Restructuring Law from vague or ambiguous pronouncements, incomplete language, or through resort to legislative history.<sup>3</sup> In this case, the Legislature has explicitly stated the

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<sup>1</sup> Order at 15 (“We cannot approve such an arrangement under existing laws.”)

<sup>2</sup> See September 28, 2016 Comments of Gordon Van Welie, President and CEO of ISO-New England to New England Council at the New Hampshire Institute of Politics as reported at: <http://www.unionleader.com/energy/New-Englands-energy-situation-precarious-ISO-leader-says-092916>.

<sup>3</sup> See, e.g., *Forester v. Town of Henniker*, 167 N.H. 745, 749-50 (2015) (restating the common standard that when examining the language of a statute, the New Hampshire Supreme Court ascribes plain and ordinary meaning to the words used, and unless the language is ambiguous, the Court will not examine legislative history, and it will neither consider what the legislature might have said nor add words that it did not see fit to include.).

purpose of the law and that purpose is not, as the Commission concluded, “to introduce competition to the generation of electricity.” Accordingly, the Commission should reconsider the Order.

The very first sentence of the restructuring legislation enacted by the General Court in 1996 is a legislative finding that reads, “New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high.” 1996 N.H. Laws, 129:1, I. And, in that first finding, the General Court stated that high electric rates have “a particularly adverse impact on New Hampshire citizens.” Laws 1996, 129:1. The findings of the General Court continue:

The general court finds that:

...

II. New Hampshire's extraordinarily high electric rates disadvantage all classes of customers: industries, small businesses, and captive residential and institutional ratepayers and do not reflect an efficient industry structure. The general court further finds that these high rates are causing businesses to consider relocating or expanding out of state and are a significant impediment to economic growth and new job creation in this state.

III. Restructuring of electric utilities to provide greater competition and more efficient regulation is a nationwide phenomenon and New Hampshire must aggressively pursue restructuring and increased customer choice in order to provide electric service at lower and more competitive rates.

IV. Monopoly utility regulation has historically substituted as a proxy for competition in the supply of electricity but recent changes in economic, market and technological forces and national energy policy have increased competition in the electric generation industry and with the introduction of retail customer choice of electricity suppliers as provided by this chapter, market forces can now play the principal role in organizing electricity supply for all customers instead of monopoly regulation.

....

Laws 1996, 129:1. The concern the General Court intended to address is clear and emphasized repeatedly – the goal was to reduce rates – and competition was only a means to achieve that stated end.<sup>4</sup>

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<sup>4</sup> The New England States Committee on Electricity has recently said essentially the same:

Significantly, nothing in the Restructuring Law forbids the state's electric utilities from owning electric supply related assets. To the contrary, in the Restructuring Law the General Court found that "market forces can now play the *principal* role in organizing electricity supply" – not the "exclusive" role. Laws 1996, 129:1, IV. It is inconceivable that the Legislature removed from the Commission all authority to deal with the continuing issue of high electricity prices – the very issue that was the purpose of the Restructuring Law – when it determined that market forces could play a role in organizing supply.<sup>5</sup>

With reference to the roles of the Commission, utilities, and competitive generators in the new marketplace, the Order found that:

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.

Order at 8-9. As noted in many places, and again recently by the President and CEO of ISO-New England, the competitive generation market has operated as supposed by the Commission, but been incited to build more gas fired generation, while, in the last few years the scarcity of pipeline capacity to serve that generation has led to higher and more volatile electric costs in the

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Take a moment to consider the purpose of restructuring.

It was never to implement markets or to seek to achieve their benefits at the expense of state energy or environmental policies or to diminish environmental quality.

When generators oppose in- or out-of-market mechanisms to recognize state policies in planning and markets, from use of the DG Forecast, to the Renewable Exemption, to Clean Energy RFPs, it suggests a belief that markets are an end in themselves or paramount to state laws. They are not.

NESCOE Annual Report to the New England Governors 2015 at 18, available at: [http://nescoe.com/wp-content/uploads/2016/03/2015AnnualReport\\_23Mar2016.pdf](http://nescoe.com/wp-content/uploads/2016/03/2015AnnualReport_23Mar2016.pdf).

<sup>5</sup> To do so would mean that the Commission is without real authority to improve upon the availability of a commodity that the Commission has described as a "necessity of modern everyday life." *Re Lifeline Rates*, 66 NH PUC 166, 172 (1981).

region and has imperiled reliability.<sup>6</sup> Furthermore, the region requires additional natural gas infrastructure, not just to ensure reliability now, but also to fully realize the region's clean energy goals.<sup>7</sup> The purpose statement in RSA 374-F:1, I provides "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." Rejecting proposals that would support the infrastructure development the region requires will not, in the long term, result in either lower prices or a more productive economy, and imperils the region's ability to ensure reliable electric service. Because the Order runs counter to the stated purpose of the Restructuring Law, and because it will lead to the opposite of the result the General Court has expressly stated is to be promoted by the Restructuring Law, the Order should be reconsidered.

Further, the Legislature, in recognizing the nature of the task, found that it would be in the best interest of the citizens of the state of New Hampshire for the General Court, and the Executive Branch, including the Public Utilities Commission, to work together to implement restructuring over the long term. 1996 N.H. Laws, 129:1,V. To that end, in 2013 the General Court found that "Development of a state energy strategy is necessary to ensure that the state's energy policies and programs support the state's economic, environmental, and public health goals," 2013 N.H. Laws, 276:1, and enacted a law requiring the Executive Branch, through the Office of Energy and Planning, to prepare a 10-year energy strategy for the state which was to

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<sup>6</sup> State of the Grid: 2016 Presentation, Slide 22, available at: [https://www.iso-ne.com/static-assets/documents/2016/01/20160126\\_presentation\\_2016stateofthegrid.pdf](https://www.iso-ne.com/static-assets/documents/2016/01/20160126_presentation_2016stateofthegrid.pdf); and Comments of Gordon Van Welie, President and CEO of ISO-New England, State of the Grid: 2016 Remarks, at 7, available at: [https://www.iso-ne.com/static-assets/documents/2016/01/20160126\\_remarks\\_2016stateofthegrid.pdf](https://www.iso-ne.com/static-assets/documents/2016/01/20160126_remarks_2016stateofthegrid.pdf).

<sup>7</sup> Comments of Gordon Van Welie, President and CEO of ISO-New England, State of the Grid: 2016 Remarks, at 2-3, available at: [https://www.iso-ne.com/static-assets/documents/2016/01/20160126\\_remarks\\_2016stateofthegrid.pdf](https://www.iso-ne.com/static-assets/documents/2016/01/20160126_remarks_2016stateofthegrid.pdf).

include review and consideration of relevant studies and plans from ISO-New England, the Commission, legislative study committees and commissions, and others. RSA 4-E:1, I, III.

Contrary to the Restructuring Law's finding that the Commission should work with others in the Executive Branch and the General Court,<sup>8</sup> the Commission's determination ignores the conclusions in the State's Energy Strategy.<sup>9</sup> Rather than working with the General Court and others in the Executive Branch as required by the Restructuring Law to encourage additional gas pipeline capacity in the region, the Order rejects Eversource's proposal by misconstruing that very law and concluding that although the State Energy Strategy explains and demonstrates the link between constrained natural gas supplies and high and volatile electric prices, the exploration of new pipeline opportunities is to be the sole province of the gas utilities.<sup>10</sup> Order at 12. Even assuming that to be the case, and even further assuming that natural gas companies may, at some future point, seek some new supply that may increase pipeline capacity in the region, that capacity increase would be solely procured to serve the needs of the customers of those companies, and would have only an incidental effect on electric prices or electric reliability. Such pipeline proposals, if they come to pass, will therefore not address the very

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<sup>8</sup> See RSA 374-F:1, III (stating that the "interdependent principles are intended to guide the New Hampshire general court and the department of environmental services and other state agencies in promoting and regulating a restructured electric utility industry.")

<sup>9</sup> As noted at page 9 of Eversource's April 28, 2016 Initial Legal Brief, the State Energy Strategy states that strained gas capacity has resulted in high and volatile electric prices and that while New Hampshire has limited influence over natural gas transmission and pipeline expansion, the State should remain engaged in regional efforts to explore ways to encourage additional pipeline capacity in the region. The State Energy Strategy also encouraged the State to continue those coordination efforts, so as to ensure that New Hampshire's interests were represented in larger decision-making forums, while exploring other opportunities such as reducing usage through efficiency and conservation.

<sup>10</sup> Notably, in reaching this conclusion the Commission also dismissed any electric supply planning obligation under RSA 378:37, *et seq.* as inconsistent with the Restructuring Law. Order at 10-12. This determination appears to run counter to at least some of the planning obligations described in RSA 378:38 and to differ from the opinion of the Governor, as set out in her April 13, 2016 letter to the Commission filed in this docket. Eversource questions whether the Order has, at least by implication, permanently waived those requirements. See RSA 378:38-a. A permanent waiver would appear to be effectively the same as implied repeal, discussed further below.

problem that the Commission, the Legislature, and others in the Executive Branch have all identified.

Further, and as Eversource pointed out in its reply memorandum at pages 9-10, competition among generators has not driven new investments that will alleviate the pipeline capacity constraints that have led to high and volatile prices. This market failure stems from the fact that the generators who might be able to make the needed investments are actually incented to prevent them to both avoid the cost and burden of supporting the necessary infrastructure, and to avoid the impact of a more abundant and reliable gas supply on their operating revenue. Rather than lowering costs for customers, the existing form of competition has served only to protect the generators' financial interests and leave electric customers in a precarious condition. In such a situation, the Commission not only has the opportunity, but arguably the duty, to assist in measures, such as the ANE Contract, that would remedy that failure and thus provide a viable path to more reliable electric generation at significantly lower prices for New Hampshire electric customers – the very goals sought by the Restructuring Law.

In the Order the Commission focused on competition; accordingly, matters pertaining to competition under the Restructuring Law were all that it saw. The conclusion relating to the Restructuring Law, and the conclusions that flowed from it, ignore the true purpose of the Restructuring Law and the interdependent policy principles therein. As that conclusion permeates the analysis and conclusions in the remainder of the Order, the Order should be reconsidered in light of the true purpose of the Restructuring Law, the clear legislative intent, the interdependent policy principles, the State Energy Strategy, and the needs of New Hampshire electric customers.

Furthermore, and as evidence of the impact of the Commission's conclusion on the remainder of the Order, in the Order the Commission noted that while supporters of the ANE Contract argued that RSA chapter 374-A provided support for the contract, it found that RSA 374-A does not apply to entities like Eversource following restructuring. In this case, the Commission's conclusion ignores the plain language of RSA 374-A, and impliedly repeals portions of RSA 374-A, and it should be reconsidered.

While Eversource had not taken the position that RSA chapter 374-A directly supports the proposed contract, other participants in the docket had. For its part, Eversource had contended that the purposes, policies and intentions of RSA chapter 374-A are served through the ANE Contract. Regardless, the Order dismisses all such contentions.

In the Order the Commission quoted the law as follows "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.*'" Order at 13-14 (emphasis added). Yet, the Commission then concluded that regardless of the plain meaning of the words in this definition, "RSA 374-A no longer applies to an EDC like Eversource." *Id.* at 14. RSA 374-A:1, IV, however, pertains to companies that generate and sell electric power, *or that purchase and sell electric power, or that transmit electric power.* Irrespective of what is contained in the Restructuring Law, and even following Eversource's divestiture of its generating facilities, it will continue to be in the business of transmitting and selling electric power. On numerous occasions, this Commission has noted that the language of a statute must be construed according to its plain and ordinary meaning. *See, e.g., New Hampshire Elec. Coop., Inc.*, Order No. 25,426 (October 19, 2012); *Re Investigation of PSNH's Installation of Scrubber Tech. at Merrimack Station*, Order No. 24,898 (September 19, 2008); *Freedom Ring Commc'ns, LLC d/b/a Bayring*



*Comm'ns*, Order No. 24,837 (March 21, 2008). Indeed, in the instant Order itself, at 7, the Commission stated this traditional New Hampshire principle of statutory interpretation.

There is no doubt that Eversource is “an electric utility...primarily engaged in...the purchase and sale of electricity, or the transmission thereof.” RSA 374-A:1, IV. Eversource falls precisely within the definitions of “electric utility” and “domestic electric utility” set forth in RSA 374-A:1, IV and II, respectively. Thus, RSA chapter 374-A still applies to entities such as Eversource, regardless of restructuring.

Additionally, in the Order the Commission stated:

The change in the industry through the Restructuring Statute, first passed in 1996, effectively ended a restructured EDC’s ability to participate in the generation side of the electric industry. Given the centrality of the separation of functions between distribution and generation in the Restructuring Statute, allowing an EDC to “participate in electric power facilities” under RSA 374-A in the manner proposed by Eversource would make little sense in light of RSA 374-F.

Order No. 25,950 at 14. By concluding that an EDC such as Eversource is precluded from undertaking the very activities authorized by RSA chapter 374-A, the Commission has decided that RSA chapter 374-A has been impliedly repealed by the passage of the Restructuring Law. As noted previously, such a result is one the New Hampshire Supreme Court strongly disfavors.<sup>11</sup>

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<sup>11</sup> As noted in Eversource’s initial legal brief at footnote 11 on page 14, in New Hampshire:

Repeal by implication occurs when the natural weight of all competent evidence demonstrates that the purpose of a new statute was to supersede a former statute, but the legislature nonetheless failed to expressly repeal the former statute. Because repeal by implication is disfavored, if any reasonable construction of the two statutes taken together can be found, we will not hold that the former statute has been impliedly repealed.

*In the Matter of Regan & Regan*, 164 N.H. 1, 7 (2012) (internal brackets, quotations and citations omitted). The permissive language of RSA 374-F stating that generation and distribution services “should” be separated and that distribution services “should” remain regulated falls short of demonstrating that the laws cannot be read in harmony or the weight of all evidence shows that RSA chapter 374-A has been repealed by implication. Further, and as noted in this motion, RSA chapter 374-A applies “notwithstanding” any other law. Thus, there is a reasonable construction of the laws that avoids repeal by implication – to the extent there may be any conflict, RSA chapter 374-A continues in force.

The underlying purpose of statutory construction is to determine the intent of the legislature. In this case, the Legislature itself has determined what statute prevails in the event of a potential conflict. RSA 374-A:2 explicitly provides that “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” a domestic electric utility, such as Eversource, “shall have” certain powers and authority.<sup>12</sup> To the extent that RSA chapter 374-A grants certain authority to electric utilities such as Eversource to participate in electric power facilities, that authority exists notwithstanding any other general or special law, including the Restructuring Law.

Additionally, even if the doctrine of implied repeal was properly considered, if “any reasonable construction of the two statutes taken together can be found” then implied repeal is not operative. *Board of Selectmen of Town of Merrimack v. Planning Board of Town of Merrimack*, 118 N.H. 150, 153 (1978). It applies “only if the conflict between the two enactments is irreconcilable.” *Gazzola v. Clements*, 120 N.H. 25, 28 (1980). Eversource submits that the Commission’s determination that the Restructuring Law “trumps” other laws, including RSA chapter 374-A (and, for that matter, the “New Hampshire Energy Policy” statutes at RSA 378:37, *et seq.* as described in footnote 10, *supra*), was incorrect. There is a way to reasonably construe these statutes harmoniously and there is not an unconscionable conflict between these statutes. It is only the Commission’s erroneous interpretation of the Restructuring Law that creates the conflict in the first place.

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<sup>12</sup> “In this jurisdiction, the words of a statute are interpreted according to their plain and ordinary meaning. RSA 21:2. The plain meaning of the word ‘notwithstanding’ is ‘without prevention or obstruction from or by’ or ‘in spite of.’ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1545 (1961).” *King v. Sununu*, 126 N.H. 302, 306 (1985). See also *In re Cote*, 144 N.H. 126, 129 (1999). Similarly, in general, the use of the word “shall” in a statutory provision is a command, requiring mandatory enforcement. *Franklin v. Town of Newport*, 151 N.H. 508, 510 (2004); *Schiavi v. City of Rochester*, 152 N.H. 487, 489–90 (2005).

For example, the Commission has previously indicated in construing a statute it was proper to determine whether a law “expressly prescribes” or “expressly proscribes” a result. *Public Service Company of New Hampshire*, Order No. 25,305 (December 20, 2011) at 28. In that proceeding, the Commission found ways to harmonize the requirements of the Restructuring Law with myriad other statutes, including the Limited Electrical Energy Producers Act at RSA chapter 362-A; the Renewable Portfolio Standard at RSA chapter 362-F; and New Hampshire’s Energy Policy at RSA 378:37, *et seq.* – a law which the Commission now rejects in part as incompatible with the Restructuring Law. Order at 10-12. In this case, nothing in the Restructuring Law “expressly prescribes” or “expressly proscribes” a utility from participating in a project that would lower electric rates for its customers. The Order is in error in its interpretation of the Restructuring Law.

The Order expressly found that RSA chapter 374-A “no longer applies to an EDC like Eversource” because it “would make little sense in light of RSA 374-F.” Order at 14. Whether, as a policy, keeping both statutes “makes little sense” is not a matter within the Commission’s authority, nor is it a relevant factor in determining whether the powers and authority under RSA chapter 374-A remain. Nowhere does the Restructuring Law “expressly prescribe” or “expressly proscribe” a utility from owning gas pipeline capacity that would assist in reducing high and volatile electric rates where the competitive market have failed to provide such a solution. In fact, as noted earlier, the Restructuring Law states that “market forces can now play the *principal* role in organizing electricity supply” – not the “only” role. 1996 N.H. Laws, 129:1, IV.

As noted at page 9 of Eversource’s reply brief, approving Eversource’s proposal would enhance the ability of market forces to provide reliable, economic electricity to Eversource’s customers – it would not in any way supplant the “principal role” that the region’s competitive

generators play in providing the supply of electric energy. Had the General Court intended market forces to play the “only” or “sole” role in providing electricity supply, it could have, and presumably would have, said so.<sup>13</sup> Indeed, the Restructuring Law itself gives the Commission discretion regarding this significant matter: “The commission is authorized to require that distribution and electricity supply services be provided by separate affiliates.” RSA 374-F:4, VIII. Notably, by this provision of the Restructuring Law, the Legislature did not prohibit utilities from providing electric supply, but gave the Commission the authority to determine how electricity supply services from a utility may be provided.

In light of the above, and particularly in light of the clearly expressed purpose of the Restructuring Law to reduce the state’s high cost of electricity, the Commission should reconsider Order No. 25,950. The Commission’s conclusions in the underlying Order leading to its determination that it is barred from considering Eversource’s project as a matter of law run counter to the purposes of the Restructuring Law and will only help to perpetuate the high and volatile electric prices in New Hampshire and New England and will continue the situation that currently imperils the reliability of the regional grid – both of which are results that the Restructuring Law was enacted to avoid.

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<sup>13</sup> *Re New Hampshire Yankee Elec. Corp.*, 70 NH PUC 563 (June 27, 1985) (If the Legislature had intended to limit applicants to buyers, it would have so specified.); *Pub. Serv. Co. of New Hampshire*, Order No. 25,506, Docket No. DE 11-250 (2013) (if the Legislature had intended this result, it would have been easy to say so); *Northern Pass Transmission LLC /Pub. Serv. Co. of New Hampshire d/b/a Eversource Energy*, Order No. 25,910, Docket Nos. DE 15-460, -461, -462, -463 (2016) (if the legislature had intended to exclude such merchant or elective projects from licensing crossings over public lands and waters, it could have done so).

**WHEREFORE**, Eversource respectfully requests that the Commission:

- A. Grant this Motion to Reconsider; and
- B. Order such further relief as may be just and reasonable.

Respectfully submitted this 7<sup>th</sup> day of November, 2016.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY**


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**CERTIFICATE OF SERVICE**

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

November 7, 2016  
Date

  
Matthew J. Fossum