

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

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

Docket No. DE 16-241

Opposition of the Office of the Consumer Advocate to Motions for Rehearing and
Reconsideration

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and objects to the Motion for Rehearing and/or Reconsideration filed on November 7, 2016 by intervenor Algonquin Gas Transmission, LLC (Algonquin), the Motion for Reconsideration filed on the same date by petitioner Public Service Company of New Hampshire d/b/a Eversource Energy (PSNH), and the “Response” filed by the Coalition to Lower Energy Costs (CLEC) on November 14, 2016. In support of this opposition the OCA states as follows:

1. On October 6, 2016, the New Hampshire Public Utilities Commission issued Order No. 25,950 in this docket, dismissing the petition of PSNH with prejudice on the ground that the determinations requested by PSNH are inconsistent with New Hampshire law. Pursuant to N.H. Code Admin. Rules 203.05 and 203.07 as well as RSA 541:3, Algonquin and PSNH separately filed timely motions for rehearing (although PSNH styled its motion as one for reconsideration). The submission of such a timely rehearing motion is a prerequisite for any appellate proceedings that may ensue. *See* RSA 541:4 (additionally specifying that any ground not asserted in such a rehearing motion may not be heard on appeal).
2. The essence of the arguments on rehearing as made by both Algonquin and PSNH is that the Commission fundamentally misunderstood the purpose of the Electric Industry

Restructuring Act, RSA 541-F, to be fostering competition in the electric industry rather than achieving reductions in electricity rates. This is a mistaken assertion.

3. Almost 30 years ago, in a *per curiam* opinion, the U.S. Supreme Court made an important observation about statutory interpretation and, in particular, about the quest to discern legislative intent. The justices observed: “Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.”

Rodriguez v. United States, 480 U.S. 522, 526 (1987).

4. The two pending rehearing motions essentially urge the Commission to make precisely that sort of simplistic assumption with respect to the Restructuring Act, something the Commission wisely opted not to do in Order 25,950. The Commission should for that reason deny the two pending rehearing motions. The rest is commentary, as enumerated *infra*.
5. Both Algonquin and PSNH claim that the Commission erred in its conclusion that the “overriding purpose” of the Restructuring Act is “to introduce competition to the generation of electricity.” Algonquin Motion at 4; PSNH Motion at 2; Order No. 25,950 at 8. According to Algonquin and PSNH, the Commission overlooked the true overriding purpose of the Restructuring Act, which was to reduce the cost of electricity to New Hampshire customers. This is a simplistic and therefore flawed claim.
6. The statutory references to unwelcomely high electricity rates cited in both rehearing motions prove nothing beyond the very obvious point that *all* policymakers, be they legislators, governors, regulators and most certainly consumer advocates, want customers

to pay electric bills that are as low as possible and definitely lower than the unreasonably high ones that applied 20 years ago in the aftermath of the Seabrook-induced PSNH bankruptcy. The Legislature could not, and did not, declare by fiat that bills must fall; that would raise the specter of confiscatory rates in violation of the Takings Clause of the U.S. Constitution. Instead, the Legislature in 1996 declared the reduction of costs to be the “most compelling reason” to adopt a particular public policy “goal” – that of “a more efficient industry structure and regulatory framework.” RSA 374-F:1, I. Thus, to the extent the answer here turns on the purpose statement in the Restructuring Act, the principles of plain language that guide statutory interpretation support rather than undermine the Commission’s decision that “competition, furthered by restructuring and unbundling, is the ultimate purpose of the statutory scheme.” Order No. 25,950 at 8.

7. These arguments about overriding purposes notwithstanding, the answer here – i.e., the ruling the Commission actually made in Order No. 25,950 – is not a contest between whether lowering costs is more important than promoting competition but is, rather, a determination that the capacity contract proposed by PSNH is “a component of ‘generation services’ under RSA 374-F:3, III.” *Id.* The Commission’s key legal conclusion is that “[i]ncluding such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principle.” *Id.* This, of course, refers to the third of the 15 Restructuring Policy Principles enumerated in Section 3 of the Restructuring Act. By “functional separation principle” the Commission means the legislative determination in RSA 374-F:3, III that “[g]eneration services should be subject to market competition and minimal economic relation and at least functionally separated from transmission and

transmission and distribution services which should remain regulated for the foreseeable future.” Neither the Algonquin nor the PSNH motion attack this legal conclusion head-on because they cannot. Forcing retail electric customers to pay generation-related costs in distribution rates is the very opposite of the market competition to which these costs must now be subject as a matter of New Hampshire law. The Commission was unassailably correct in saying so.

8. According to Algonquin, the PSNH petition does not transgress the functional separation principle because the firm natural gas capacity PSNH proposes to acquire from an affiliate’s pipeline “will be auctioned by a capacity manager in an arm’s length process consistent with Federal Energy Regulatory Commission (FERC) rules on capacity release.” Algonquin Motion at 10. What Algonquin omits to mention is that on August 31, 2016, the FERC resoundingly rejected its proposal to provide PSNH (and other electric distribution utilities that cut similar deals with the Access Northeast project Algonquin is jointly developing with National Grid and a PSNH affiliate) for a blanket exemption under the Natural Gas Act from bidding requirements that would otherwise apply when releasing pipeline capacity to natural gas generators. *See Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,151 (Aug. 31, 2016) at ¶ 23 (though the FERC authorized the use of asset managers by such utilities). The FERC concluded that the Algonquin proposal does not meet the FERC’s standard for such bidding exemptions: that of “improving the competitive structure of the natural gas industry.” *Id.* at ¶ 34 (noting that the Algonquin proposal “would unnecessarily shield electric generators from the full effect of market forces acting on the natural gas price by excluding non-generators from the bidding process”). The point here is not to embroil the Commission

in questions related to the Natural Gas Act (something the Commission, reasonably, declined to do at pages 14-15 of Order No. 25,950) but rather to point out the congruity as a logical matter between the FERC's concern (possible end-runs around competition in wholesale natural gas markets) and the Commission's implicit determination that what PSNH is proposing here is at fundamental variance with the paradigm of a restructured industry.

9. Algonquin further contends that the Commission erred by ignoring the other 14 Restructuring Policy Principles in RSA 374-F:3. This is the equivalent of attempting to justify a homicide on the ground that nine of the Ten Commandments do not prohibit such conduct.¹

10. Algonquin contends the Commission erred in its interpretation of RSA 374:57, which authorizes electric utilities to seek Commission approval of certain agreements “for the

¹ In the course of claiming that the Commission has inappropriately ignored 14 of the 15 Restructuring Policy Principles, Algonquin contends that “numerous regulators and stakeholders” have recognized that “New England’s increasing reliance on natural gas for electric generation, without a corresponding expansion of natural gas infrastructure, threatens reliability.” Algonquin Motion at 9. Although the PSNH petition and accompanying testimony are riddled with references to reliability, PSNH has presented no direct evidence to the effect that the lights will go out anywhere in New England unless electric distribution companies contract for firm natural gas capacity in the manner contemplated by the petition. In fact, the document at the heart of the petition – the ICF Report entitled “Access Northeast Project – Reliability Benefits and Energy Cost Savings to New England Customers” – notably avoids making such a claim, arguing instead that “[b]y providing secure fuel supplies to [natural gas] generators and LNG facilities, Access Northeast *could* improve electric reliability across the grid.” Attachment EVER-KRP 2 to Testimony of Kevin R. Petak at 9 (emphasis added); *see also id.* at 31 (“By providing secure fuel supplies to these generators, Access Northeast *could* significantly improve electric reliability across the grid”) (emphasis added). Proponents of the Access Northeast project, aided and abetted by the CEO of the regional transmission organization, have consistently sought to conflate the claimed market benefits of the Access Northeast project with reliability benefits. *See, e.g.* “‘Precarious:’ New England’s energy crisis,” New Hampshire Union Leader, Oct. 2, 2016, available at <http://www.unionleader.com/Editorial/Precarious-New-Englands-energy-crisis-10032016> (quoting ISO New England’s CEO and claiming that “[t]he New England electric grid is starting to resemble California’s two decades ago”). This is almost certainly because PSNH and Algonquin know they cannot argue that the region’s electricity grid will be more reliable – i.e., that there will be fewer system failures – if the Access Northeast project goes forward and the attendant financial risk is placed on the backs of electricity customers.

purchase of generating capacity, transmission capacity or energy” at the same time such agreements are filed with the FERC pursuant to the Federal Power Act. Notably, PSNH does not make this argument, which does not even deserve the badge of plausibility the Commission attached to it in the course of rejecting it. *See* Order No. 25,950 at 13 (“While the Supporters’ reading of the statute is plausible, we believe the Opponents have the better argument”). As the Commission correctly concluded, RSA 374:57 is unambiguously a statute that governs *electric* generation and *electric* transmission – hence the reference in the statute to FERC approvals under the Federal Power Act with no corresponding reference to the Natural Gas Act. Notably, this is directly analogous to the recent ruling of the Supreme Judicial Court of Massachusetts that the phrase “the purchase of gas or electricity” in a statute similar to RSA 374-A plainly did not mean an electric utility could purchase natural gas capacity; that authority is reserved under the statute to gas utilities. *See Engie Gas & LNG LLC v. Department of Pub. Utils.*, 475 Mass. 191, 203-205 (2016) (further concluding that to hold otherwise would be “untenable” in light of the Massachusetts restructuring statute).

11. Both Algonquin and PSNH contend that by ruling the petition inconsistent with New Hampshire law the Commission essentially deemed another statute -- RSA 374-A -- repealed by implication. They focus on language in RSA 374-A:2 authorizing electric utilities to “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” (emphasis added). The statute likewise authorizes electric utilities to enter into contracts for such purposes. The Commission concluded that RSA 374-A “no longer applies” to electric distribution companies because

they no longer “participate in the generation side of the electric industry.” Order No. 25,950 at 14.

12. On this point, the OCA agrees with Algonquin – that PSNH’s proposed acquisition of firm natural gas capacity does not amount to “participat[ing] in” electric power facilities as that phrase is used in RSA 374-A:2. *See* Algonquin Motion at 15 (arguing that because “generators will continue to own, operate and retain their interests in the electric power facilities . . . Eversource will not be participating in electric power facilities”). Therefore, RSA 374-A does not provide statutory authorization for what PSNH is proposing here, and thus there is no implied repeal of RSA 374-A by virtue of later enactments that preclude the granting of the PSNH petition.
13. PSNH implies that the Commission should reconsider Order No. 25,950 on the ground that it is contrary to the State Energy Strategy issued by the Office of Energy and Planning in 2014, which acknowledges a need for additional natural gas pipeline capacity. RSA Chapter 4E governs the ongoing development of this document, but PSNH does not contend that the Commission violated this provision in Order No. 25,950. The Order does not reject any of the conclusions in the State Energy Strategy but merely points out that, in light of applicable limitations on what electric distribution companies may do, it falls to natural gas utilities to meet any additional need for pipeline capacity. Moreover, the references to pipeline constraints in the State Energy Strategy must be considered in their context. A fair reading of the relevant provisions is that (1) the ISO New England winter reliability program, which has led to increased use of backup generation fuels like oil and liquefied natural gas, is the right strategy for addressing natural gas supply constraints during extreme winter conditions, and (2) generally,

policies that increase fuel diversity rather than double down on the region’s already too-great reliance on natural gas are in the best interests of New Hampshire consumers. *See* Office of Energy and Planning, New Hampshire 10 Year State Energy Strategy, available at <https://www.nh.gov/oep/energy/programs/documents/energy-strategy.pdf>, at 15 (referring to the need for “cleaner, more diverse and more affordable energy”).

14. Neither Algonquin nor PSNH offer any real challenge to the fundamental determination in Order No. 25,950 that “expenses related to generation supply would be disallowed in distribution rates” based on the “used and useful requirement . . . a basic component of utility ratemaking under New Hampshire law.” Order No. 25,950 at 14. Algonquin objects to this determination in conclusory fashion, *see* Algonquin Motion at 15, and PSNH makes no mention of it. This is telling because, as the OCA has argued previously, the Electric Industry Restructuring Act is lodged squarely within longstanding principles of utility law. Ratepayers of PSNH are captive customers; the Restructuring Act partially released them from that captivity because the Legislature believed that in such freedom would lie cheaper but still reliable electricity. To the extent PSNH customers remain captive, they can only be forced to pay for transmission and distribution service – nothing else. The region may or may not need more natural gas capacity, but unless or until the Legislature says otherwise the financial responsibility for providing such capacity lies with the shareholders of investor-owned firms. That transfer of business risk is the essence of restructuring; the transfer itself left the basic premises of utility regulation intact.
15. On November 14, 2016, the Coalition to Lower Energy Costs (CLEC) – “a nonprofit association of individual consumers, labor unions, larger energy consumers and

institutions concerned about the threat to New England’s families and economy from skyrocketing natural gas and electric prices,”² filed a pleading entitled “Response . . . to Algonquin and Eversource Motion for Reconsideration.” This pleading is time-barred and the Commission should reject it on that basis.

16. RSA 541:3 provides that “[w]ithin 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.” N.H. Code Admin. Rules Puc 203.07(f) provides that *objections* to an RSA 541:3 motion for rehearing may be filed within five days of the date on which the motion for rehearing is filed.”
17. The CLEC pleading is not an objection to a rehearing motion even though it purports to have been filed pursuant to Rule Puc 203.07(f). As the CLEC pleading plainly recites, “CLEC agrees with the arguments presented by AGT and Eversource, and offers the following arguments in support of the motions.” CLEC then goes on to make eight pages of additional argumentation in favor of rehearing, (1) offering as a thesis the notion that the Commission should grant rehearing in light of “market failure” and (2) claiming that because the general corporate law does not withhold from PSNH the authority to contract for firm natural gas capacity and impose the associated costs on its captive customers, the Commission’s interpretation of the Restructuring Act in Order 25,950 is erroneous. On the former point, CLEC appears to claim that, at the very least, the Commission should have taken evidence on the state of wholesale electricity markets so as to “give real life to the legal

² <http://www.energycostcrisis.com/about-us/>.

issues the Commission is asked to consider.” CLEC Pleading at 4. Thus, CLEC is attempting to provide an additional twist to the Eversource and Algonquin arguments about the Restructuring Act and has, by invoking general corporate law, is seeking to introduce an entirely new ground for rehearing.

18. The Commission is precluded by statute from entertaining these arguments because, in effect, CLEC has filed a third rehearing motion – one that was submitted beyond the 30 days provided for in RSA 541:3. Although the Commission is frequently, and laudably, forgiving about deadlines, such flexibility would be both unfair and illegal here. RSA 541:4 provides that any argument not duly made in a rehearing motion pursuant to RSA 541:3 is waived for purposes of subsequent appeal. The untimely nature of the CLEC motion means the Commission and ultimately the New Hampshire Supreme Court lack jurisdiction to consider the grounds CLEC has asserted in its motion. *See, e.g., Radziewicz v. Town of Hudson*, 159 N.H. 313, 315 (2009) (“The superior court has no discretion when dealing with statutory time requirements that confer jurisdiction”) (citation omitted). The Commission should so declare.

19. Finally, the OCA draws the Commission’s attention to the pending motion of PSNH for confidential treatment of the key provisions of the key documents in this case -- and the OCA’s opposition to the motion. Assuming, as is reasonable, that the outcome of the Commission’s decision on rehearing will be further proceedings in the near term, either before the Commission or the New Hampshire Supreme Court, and further assuming that the Legislature may take up questions related to this docket in its upcoming session, the Commission should deem the confidentiality motion to be fully ripe for decision.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Deny the pending motions for rehearing and/or reconsideration as well as for confidential treatment,
- B. Reject the filing of the Coalition to Lower Electricity Costs as time-barred;
- C. Issue a ruling on the pending motion for confidential treatment; and
- D. Grant any other such relief as it deems appropriate.

Sincerely,

/s/ D. Maurice Kreis

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Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

/s/ D. Maurice Kreis

D. Maurice Kreis