THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0007

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

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

BRIEF OF APPELLANT ALGONQUIN GAS TRANSMISSION, LLC

Oral Argument Requested: Ms. Miranda will argue for Algonquin Gas Transmission, LLC.

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I. QUESTIONS PRESENTED

The questions presented for review are:

1. Whether the New Hampshire Public Utilities Commission ("Commission") erred when it concluded that the fundamental purpose of RSA Chapter 374-F (the "Restructuring Statute") is to encourage competition.

   Issue preserved by Algonquin Gas Transmission, LLC ("Algonquin") in its Motion for Rehearing and/or Reconsideration in Docket No. DE 16-241 (Nov. 7, 2016) ("Algonquin Mot. Reh'g"), App.[1] at 413-15.

2. Whether the Commission erred in ignoring the fourteen other policy priorities articulated in RSA 374-F:3.

   Issue preserved by Algonquin Mot. Reh'g, App. at 415-418.

3. Whether the Commission erred in concluding that the contract between Public Service Co. of New Hampshire d/b/a Eversource Energy ("Eversource") and Algonquin for natural gas capacity on Algonquin's Access Northeast Project (the "Access Northeast Contract"); an Electric Reliability Service Program ("ERSP") to set parameters for the release of capacity and liquefied natural gas ("LNG") to electric generators; and/or a Long-Term Gas Transportation and Storage Contract tariff ("LGTSC") to provide for recovery of costs associated with the Access Northeast Contract (collectively, the "Access Northeast Program") violate the Restructuring Statute.

   Issue preserved by Algonquin Mot. Reh'g, App. at 418-20.

[1] "App." and "Appendix" refer to the separately-bound *Joint Appendix To Briefs Of Algonquin Gas Transmission, LLC And Public Service Company Of New Hampshire d/b/a Eversource Energy* filed with the brief of Eversource Energy.

4. Whether the Commission erred in interpreting RSA 374:57, which provides for Commission approval of certain electric distribution company ("EDC") contracts for the purchase of "generating capacity, transmission capacity or energy" as applicable only to contracts for *electric* transmission capacity but not natural gas transmission capacity.

   Issue preserved by Algonquin Mot. Reh'g, App. at 420-21.

5. Whether the Commission erred in interpreting RSA Chapter 374-A as "no longer apply[ing] to an EDC like Eversource" and, thus, improperly concluded that RSA Chapter 374-A was repealed by implication.

   Issue preserved by Algonquin Mot. Reh'g, App. at 421-24.

6. Whether the Commission erred in determining that any costs incurred by Eversource related to the Access Northeast Program would not be recoverable in rates.

   Issue preserved by Algonquin Mot. Reh'g, App. at 424.

II. RELEVANT AUTHORITIES

The text of the following relevant authorities is set forth in the Appendix: RSA 362:4-d (App. at 3); RSA 365:21 (App. at 27); RSA 374:57 (App. at 30); RSA Chapter 374-A (App. at 31); RSA Chapter 374-F (App. at 36); RSA 378:37 (App. at 48); RSA 378:38 (App. at 49); RSA 541:6 (App. at 50).

III. STATEMENT OF THE CASE AND THE FACTS

A. Background

This case arises out of efforts to ensure that New England's natural gas pipeline infrastructure is sufficient to support the large, and growing, percentage of New England's electricity supplied by natural gas in order to reduce the price of electricity to consumers and to

enhance the reliability of the electric system. In 2015, the Commission found that "the average retail price of electricity in New England is the highest in the continental United States, posing a threat to our region's economic competitiveness." App. at 441. Specifically, the Commission noted that:

> During recent winters, significant constraints on natural gas resources have emerged in New England, despite abundant natural gas commodity production in the Mid-Atlantic States and elsewhere. These constraints have led to extreme price volatility in gas markets in the winter months in our region, which, in turn have resulted in sharply higher wholesale electricity prices.

Id. In recognition of its "fundamental duty to ensure that the rates and charges assessed by EDCs are just and reasonable," the Commission expressed a view that "the potential development of additional natural gas resources for the benefit of the electricity supply in our region should be carefully considered." *Id.* Based on this, the Commission directed its Staff to undertake an investigation to "examine the gas-resource constraint problem" and identify potential solutions to such problem. App. at 442. The Commission also directed Staff to examine whether New Hampshire EDCs have the authority to enter into contractual arrangements with sponsors of regional projects to acquire pipeline and/or LNG related products and services to benefit their customers and, if so, whether the associated costs can be recovered from EDC customers through Commission-approved rates. App. at 442; App. at 456.

B. Price And Reliability Are Major Concerns

New England's regional electric power grid is managed by an independent system operator, ISO New England ("ISO-NE"). As ISO-NE recently highlighted, "New England's natural gas infrastructure was not designed to serve demand for natural gas for both heating and power generation, so on cold winter days, New England's network of pipelines is near or at capacity for commercial and residential heating." App. at 510.

Historically, New England's natural gas infrastructure has been geared toward satisfying the heating and industrial needs served by natural gas local distribution companies ("LDCs"), and not toward the needs of electric power generators. App. at 225-26. Natural gas pipelines are only economically feasible when backed by long-term contracts that ensure that investment in the pipeline is justified. App. at 227. By contrast, natural gas-fired electric generators typically operate on a fairly short planning horizon, attuned to the three-year timeline of the Forward Capacity Auction.[2] *See* App. at 223; App. at 226. As a result, if an electric power generator invests in a long-term supply of natural gas, there is no guarantee that it will continue to be dispatched in the long term or be able to recover the cost associated with its investment. App. at 223. This mismatch has prevented natural gas-fired electric generators from supporting a build-out of natural gas pipeline infrastructure to support the needs of the electric generation sector. *See* App. at 227.

Approximately half of New England's electricity comes from natural gas-fired generation, compared to only approximately fifteen percent in 2000 (App. at 251); yet, only a small fraction of these units obtain their natural gas through "firm" contracts that can be relied upon even in times of very high demand (e.g., during cold weather when there is high demand for natural gas for heating). App. at 223-24. The overwhelming majority of these natural gas-fired units rely on interruptible or secondary services that are not available during peak demand periods to deliver the natural gas required for these plants to generate electricity. *Id.* The inadequate supply of natural gas to New England's natural gas-fired electric generators causes

[2] The Forward Capacity Auction is a wholesale market for electric generation capacity managed by ISO-NE. The auctions that assign capacity supply obligations to electric power generators occur approximately three years before the capacity supply obligation begins.

electric consumers in New Hampshire (and the rest of New England) to face high and volatile electric prices and concerns about electric reliability, particularly in the winter. App. at 291.

As ISO-NE noted, "approximately 3,450 MW of natural-gas-fired generating capacity may be at risk this winter because of pipeline constraints." App. at 510. "Beyond this winter, the situation will grow even more uncertain because non-gas power plants are retiring and being replaced primarily with new, gas-fired generation" and ISO-NE is "currently evaluating how [it] will maintain reliability in the future under these conditions." *Id.* The Commission has acknowledged 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." Order at 15. Moreover, reliable electric supply is critical for those living and working in New Hampshire, and anything less than reliable electric supply would cause substantial and irreparable harm. While many natural gas-fired electric generators are also able to generate using ultra low sulfur diesel ("ULSD"), it is an imperfect solution because it results in higher air emissions (including greenhouse gas emissions), may be in conflict with New Hampshire Title X, and leaves electric consumers at the mercy of potentially volatile world-wide oil prices. App. at 273. Furthermore, alternatives like renewable energy and energy efficiency, while valuable, will not fully address inadequate natural gas supply because they are often intermittent (i.e., available only when the sun shines or wind blows, which does not necessarily align with periods of high electric demand) and "cannot be procured or reasonably implemented on the scale necessary to fill the gap." App. at 273-74. In fact, in order to seamlessly integrate intermittent renewable generation into New England's electric grid, a consistent backstop of base load generation is required—i.e., natural gas-fired generation plants supported by firm access to a cleaner fuel. App. at 293.

C. The Access Northeast Project Provides A Solution

Algonquin owns and operates the existing Algonquin Pipeline, which delivers Marcellus-region natural gas to New England via Connecticut, Rhode Island and Massachusetts. The affiliated Maritimes & Northeast Pipeline ("Maritimes & Northeast") is interconnected with Algonquin, and serves electric generators and other natural gas customers in northeastern Massachusetts, New Hampshire and Maine. App. at 468. The majority of New England's natural gas generation is served by the existing Algonquin and Maritimes & Northeast pipelines. App. at 252.

Algonquin is the developer of the Access Northeast Project ("Access Northeast"), a suite of targeted upgrades to the existing Algonquin Pipeline designed to provide cost-effective resources to increase the reliability of electric service and reduce electric costs for the benefit of electric customers. Because of the mismatch of the planning horizons faced by electric power generators (facing a short planning horizon) and natural gas pipelines (facing a long planning horizon) natural gas-fired generators have not participated in recent pipeline capacity expansions requiring long-term contracts, and, consequently, Algonquin and pipelines in general are not designed to serve electric power generators. *See* App. at 510. Those projects currently planned and moving forward are designed to serve traditional LDC demand, not electric power generation. App. at 223. Eversource, as an EDC, operates on a long-range planning horizon and is already required to ensure resource adequacy in future years. RSA 378:37, *et seq*. As such, it has the power to bridge this mismatch. In fact, Eversource has stated: "EDC contracts for gas infrastructure has emerged as the only feasible alternative to achieve the development of the necessary infrastructure as no other market participant possesses both the creditworthiness and

customer connection to enter into the infrastructure contracts and to establish a mechanism for associated costs and revenues." App. at 282.

Through the Access Northeast Program, Eversource would acquire natural gas pipeline transmission capacity, which it would then release through a competitive, arms-length auction process administered by a capacity manager consistent with FERC rules. App. at 274-76. The service provided by the Access Northeast Program has been designed to meet the unique needs of electric power generators, providing them the opportunity to access transportation capacity (and thus access fuel) on a much quicker and more flexible basis than traditional transportation arrangements. App. at 236; App. at 239. In particular, the Access Northeast Program was designed to offer "priority" release of capacity to electric power generators because this is the most efficient means of lowering electric prices and ensuring reliability. *See* App. at 280. Even if there was not a priority capacity release to generators, the increased availability of such capacity in the market generally would still cause a reduction in the wholesale price of electricity and enhance reliability. *See Id.*

This auction process would drive competition among the broad class of New England's natural gas-fired electric generators, ensuring that the natural gas transmission capacity made available would be allocated to the most economically efficient generators. The natural gas-fired generators would thereby have an opportunity to access the natural gas pipeline capacity necessary to operate even in times of high natural gas demand without necessitating the economic commitment of entering into long-term firm contracts for which generators have no cost recovery guarantee in the competitive wholesale electric market. *See* App. at 210. In turn, the availability of more natural gas-fired electric power plants would make more generation available to participate in the market generally; thereby, increasing competition in the New

England wholesale market consistent with the Restructuring Statute. Moreover, unlike some other methods of shoring up New England's electric grid, the Access Northeast Program would not favor any particular geographic cluster of electric power generators.

In addition, this firm access to natural gas would help natural gas-fired generators avoid the volatile natural gas spot market and obviate the need to use USLD; thereby insulating against high and volatile prices and reducing air emissions. App. at 273. Natural gas-fired generation, when supported by adequate access to natural gas, would also provide the reliable, base-load generation critical to back up the increasing amounts of intermittent renewable generation in New England's electric grid. App. at 293.

D. Eversource Petition And Related Proceeding

On February 18, 2016, Eversource submitted a petition seeking approval of the Access Northeast Program. App. at 200 *et seq*. The Commission opened Docket No. DE 16-241 to consider the Petition. Several parties, including Algonquin, intervened and were granted party intervenor status by the Commission.[3]

On March 24, 2016, the Commission issued the Order of Notice setting forth a two-phase proceeding. In the first phase ("Phase I"), the Commission would consider whether the Access Northeast Program is allowed under New Hampshire law. App. at 328. In the event of an affirmative decision on this issue, the Commission would then open a second phase ("Phase II") "to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by Eversource's proposal." *Id.*

[3] Order No. 25,950 discusses the two rough groupings of parties and, for convenience, this Brief maintains those groupings. The "Supporters" include Eversource, Algonquin and the Coalition for Lower Energy Costs ("CLEC"). The "Opponents" include Conservation Law Foundation ("CLF"); Exelon Generation Company, LLC ("ExGen"); ENGIE Gas & LNG LLC ("ENGIE"); Office of Consumer Advocate ("OCA"); New Hampshire Municipal Pipeline Coalition ("Municipal Coalition"); NextEra Energy Resources, LLC ("NEER"); and Pipe Line Action Network for the Northeast ("PLAN"). Order at 4-5.

On October 6, 2016, the Commission issued Order No. 25,950 on Phase I issues (the "Order"). The Commission dismissed the Petition and concluded that the Access Northeast Program was not permitted under New Hampshire law based primarily on incorrect statutory interpretations including, *inter alia*, that that the "overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity" (Order at 8) by ensuring that electric generation be "at least functionally separated from transmission and distribution services" (the "Functional Separation Principle") (Order at 15), that RSA 374:57 should be read to apply to electric transmission rather than gas transmission (Order at 15), and that RSA Chapter 374-A was implicitly repealed by the enactment of RSA Chapter 374-F (Order at 15).[4]

Algonquin and Eversource timely filed motions for rehearing and/or reconsideration pursuant to RSA 541:3, RSA 365:21 and N.H. Admin Rule Puc 203.33 (App. at 410 *et seq.;* App. at 427 *et seq.*) and various Opponents filed oppositions.[5] On December 7, 2016, the Commission issued Order No. 25,970, Order on Reconsideration (the "Order on

[4] Opponents have made much of the decision of the Massachusetts Supreme Judicial Court in *ENGIE Gas & LNG LLC v. Dep't of Pub. Utils.*, 475 Mass. 191 (2016) and various proceedings before the Federal Energy Regulatory Commission ("FERC"). *See* Joint Supplemental Briefing of Conservation Law Foundation, NextEra Energy Resources, LLC, and Office of the Consumer Advocate Regarding Legality of Petitioner's Proposal (Aug. 22, 2016); Letter from D. Kreis, Office of the Consumer Advocate, to D. Howland, New Hampshire Public Utilities Commission (Sept. 1, 2016)). However, the status of these other regulatory proceedings is irrelevant to the central question of New Hampshire statutory interpretation at issue in this appeal. This matter raises issues of significant public interest. This is the first time that the Court has been asked to interpret the statutes relating to an EDC's authority to enter into contracts for the purchase of natural gas resources for the benefit of electric ratepayers. More broadly, this appeal presents an opportunity to clarify an issue of general importance by providing needed guidance to the Commission, EDCs, ratepayers and other stakeholders in the New Hampshire electric market regarding the scope of the Restructuring Statute generally and the activities in which the EDCs are permitted to engage after the passage of that statute more specifically. In fact, the Commission has already cited the Order as precedent in other proceedings. *See* Order No. 26,008 (Apr. 20, 2017) (("[i]n light of our precedent (admittedly under appeal by Eversource before the New Hampshire Supreme Court) established by Order No. 25,950, we have concluded that RSA Chapter 374-F prohibits Eversource from entering into the proposed [power purchase agreement] and we affirm our conclusions that the proposal 'goes against the overriding principle of restructuring, which is to harness the power of competitive markets to reduce costs to consumers by separating the functions of generation, transmission, and distribution.").

[5] CLEC also filed a response in support of the motions for rehearing and/or reconsideration.

Reconsideration"), denying the motions for rehearing and/or reconsideration and re-stating the conclusions it articulated in the Order. This appeal followed.

IV. SUMMARY OF ARGUMENT

In the Order, the Commission erroneously found that the fundamental purpose of the Restructuring Statute was to encourage competition through the separation of generation from the transmission and distribution functions. It then based all of its conclusions upon this erroneous finding. In particular, the Commission's conclusions concerning the overall goals and relationship between the principles of the Restructuring Statute (RSA Chapter 374-F) and interpretation of other statutes in light of its reading of the Restructuring Statute, are erroneous, unlawful and unreasonable.

The Commission acknowledged in its Order "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." Order at 15. The Commission further acknowledged that the Access Northeast Program has "the potential to reduce that volatility." *Id.* Despite these acknowledgments and record evidence that the Access Northeast Program would lower costs, the Commission ignored the plain language and legislative history of the Restructuring Statute, which had as its ***primary*** purpose:

- "to reduce costs for all consumers of electricity" (RSA 374-F:1, I);
- "to provide electric service at lower and more competitive rates" (App. at 52-53);
- "to achieve lower rates for all customer classes" (App. at 60); and
- to free "residents and businesses from exorbitantly high electric rates (App. at 81); *see also* App. at 138 (Sen. Cohen making similar remarks))."

The Commission instead focused on only a single one of fifteen stated Restructuring Policy Principles in finding that the Access Northeast Program is inconsistent with New Hampshire law.

Moreover, even if, despite the plain language and legislative history of the Restructuring Statute to the contrary, the "overriding purpose" of the Restructuring Statute was the functional separation of generation activities from transmission and distribution activities, the Access Northeast Program would not abrogate that separation as it would simply provide a mechanism by which natural gas capacity would be made available to the generators. Further, if all of the Restructuring Policy Principles are considered, there is no inconsistency between the Restructuring Statute and other New Hampshire energy statutes. As a consequence, there was no basis to artificially limit an EDC's authority to acquire "transmission capacity" under RSA 374:57 to electric transmission capacity only despite the absence of any such limitation in the language of the statute itself. Similarly, since, when all of the Restructuring Policy Principles are considered, RSA Chapter 374-A is consistent with the Restructuring Statute, there was no basis for the Commission to implicitly repeal RSA Chapter 374-A's grant of authority for EDCs to "participate" in electric power generation facilities. Finally, based on a flawed understanding of the Restructuring Statute and the Access Northeast Program, the Commission erroneously concluded that costs related to the Access Northeast Program would not be recoverable in Eversource's rates.

V. ARGUMENT

A. Legal Standard

This Court reviews "an agency's interpretation of a statute *de novo*." *Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501, 506 (2014). It is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Id.*

When interpreting statutes, courts must "first look to the language of the statute . . . itself, and, if possible, construe that language according to its plain and ordinary meaning." *Id.* When

the statute "is clear on its face, its meaning is not subject to modification." *Id.* Courts "will neither consider what the legislature . . . might have said nor add words that they did not see fit to include." *Id.*

Moreover, statutes must be interpreted "in the context of the overall statutory . . . scheme and not in isolation." *Id.* Ultimately, the "goal is to apply statutes . . . in light of the legislature's . . . intent in enacting them, and in light of the policy sought to be advanced by the entire statutory . . . scheme." *Id.*

B. The Commission Erred When It Concluded That The Fundamental Purpose Of The Restructuring Statute Is To Encourage Competition

In the Order, the Commission found that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity." Order at 8. The Commission did not modify its position on reconsideration. Order at 21. However, this finding directly contravenes the plain language of the Restructuring Statute, is inconsistent with its legislative history, and confuses the goals of the Restructuring Statute with the methods by which to achieve those goals.

As the Order recognizes, the plain language of the Restructuring Statute explicitly provides that "[t]he ***most compelling reason*** to restructure the New Hampshire electric utility industry ***is to reduce costs for all consumers*** of electricity . . . ." Order at 7-8 (emphasis added); *see also* RSA 374-F:1, I. It is difficult to imagine a clearer statement of the law's fundamental purpose than the legislature's own acknowledgement of cost reduction as the "most compelling reason" for restructuring. *See* Order at 7-8. Moreover, as the Restructuring Statute was amended over the years, the goal of rate relief has continued as the main priority. *See* App. at 198-199 (Laws 2002, 212:7, amending RSA 374-F:4 to allow a delay of retail choice on a finding by the Commission that it would be "inconsistent with the goal of near-term rate relief or would

otherwise not be in the public interest."). The Commission's finding that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity" (Order at 8) directly contravenes the plain language of that statute and is, therefore, unreasonable and unlawful.

Because the plain and ordinary language of the Restructuring Statute itself identifies its primary purpose, there is no need for this Court to "turn to the legislative history to aid in . . . interpretation of the meaning of the statutory language." *Old Dutch Mustard,* 166 N.H. at 507. Nevertheless, if it were to do so, it would find that the legislative history of the Restructuring Statute confirms that cost reduction was the law's fundamental purpose. The legislative findings of the Restructuring Statute (which were not codified in the Statute, but appeared as the first section of the relevant bill) specifically state that "New Hampshire must aggressively pursue restructuring and increased customer choice in order to provide electric service at ***lower and more competitive rates***." App. at 52-53 (emphasis added).

Testimony by legislative leaders further confirms electric cost reduction as the fundamental purpose of the Restructuring Statute. For instance, Rep. Jeb Bradley, sponsor of HB 1392 (which became the Restructuring Statute), stated: "[The bill's] goals are simple but profound. ***Most importantly***, it hopes to achieve ***lower rates*** for all customer classes, all residents in the state of New Hampshire. Number two: It will allow customers to choose who their supplier of electricity is." App. at 60 (emphasis added). Further, Sen. Burton J. Cohen, expressing his support for the bill, said that "[t]he issue of ***freeing*** New Hampshire residents and businesses ***from exorbitantly high electric rates*** is the ***most important*** to our constituents from a long range." App. at 81 (emphasis added); *see also* App. at 138 (Sen. Cohen stating that "Freeing NH residents and businesses from exorbitantly high electric rates is the most important

issue to our constituents."). Thus, the Commission's finding that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity" (Order at 8) also conflicts with the legislative history of the Restructuring Act and is, therefore, unreasonable and unlawful.

The Commission's analysis appears to conflate the ***purpose*** of the Restructuring Statute with the ***methods*** employed by the Restructuring Statute. In the Order, the Commission found:

> The long-term results [of the Restructuring Statute] should be lower [electric] 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.

Order at 9-10. The Commission itself thus appears to recognize that the purpose of the Restructuring Statute is to achieve "lower [electric] prices and a more productive economy." Restructuring of the electric market is simply a means by which to "achieve that purpose." Similarly, this Court has recognized that the legislature's intent was to "to provide electric rate relief to New Hampshire citizens ***through*** the deregulation of generation services." *In re N.H. PUC*, 143 N.H. 233, 241 (1998) (emphasis added). However, the Commission inexplicably abandoned the distinction between the purpose of the Restructuring Statute and the means of achieving that purpose and leapt to the unsupported conclusion that the goal of the Restructuring Statute is competition for its own sake. Order at 8-9. Based on this unsupported finding, the Commission then erroneously concluded that the Access Northeast Program is not authorized under New Hampshire Law, a conclusion that is unlawful and unreasonable in light of the plain and ordinary meaning of the Restructuring Statute and its legislative history.

C. The Commission Erred In Ignoring The Fourteen Other Policy Principles Articulated In The Restructuring Statute

According to the Order, the Commission "weigh[ed] the restructuring policy principles of RSA 374-F" (the "Restructuring Policy Principles") and concluded that "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity." Order at 8-9. The Commission arrived at its conclusion through a flawed two-step process:

> 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 [i.e., the Functional Separation Principle], would be violated by the terms of Eversource's proposal, and (2) if yes, whether this directive of the Restructuring Statute overrides, or supersedes, all other restructuring principles and therefore prohibits [the Access Northeast Program].

Order at 6-7. Because the "goal is to apply statutes . . . in light of the legislature's . . . intent in enacting them, and in light of the policy sought to be advanced by the ***entire*** statutory . . . scheme" (*Old Dutch Mustard*, 166 N.H. at 506 (emphasis added)), the Commission's decision to evaluate the Access Northeast Program's consistency with the Functional Separation Principle first, rather than evaluating its consistency with the Restructuring Statute as a whole, was erroneous, unlawful and unreasonable.

Although the Restructuring Statute provides for the functional separation of the generation function from the transmission and distribution function (i.e., the Functional Separation Principle), this principle is just one of ***fifteen (15)*** Restructuring Policy Principles articulated by the legislature. The Commission inexplicably ignored the other fourteen principles, the application of many of which would support an alternate conclusion than the one

the Commission reached in its Order. The Order does not even cite or discuss any of the other Restructuring Policy Principles.[6]

Furthermore, while these Restructuring Principles are "intended to guide" the Commission in its implementation of electric market restructuring (RSA 374-F:1, III), the Restructuring Statute does not prioritize the Functional Separation Principle of the Restructuring Policy Principles over any of the others. Had the General Court intended, as the Commission concludes, that the Functional Separation Principle take primacy, it would have said so. *Accord Old Dutch Mustard,* 166 N.H. at 506 (Courts "will neither consider what the legislature . . . might have said nor add words that they did not see fit to include."). Moreover, the Commission is not permitted to read one Restructuring Policy Principle in isolation and ignore fourteen others. *Id.* (statutes must be interpreted "in the context of the overall statutory . . . scheme and not in isolation"); *see also Sprague Energy Corp. v. Town of Newington*, 142 N.H. 804, 806 (1998) (holding that "words of a statute should not be read in isolation; rather, all sections of a statute must be construed together."). In doing so, the Commission acted erroneously, unlawfully and unreasonably.

In fact, by erroneously focusing on the Functional Separation Principle, the Commission failed to recognize that many, if not all, of the other fourteen Restructuring Policy Principles would be advanced by the Access Northeast Program. Most critically, the Restructuring Policy

[6] The Restructuring Policy Principles are: maintaining system reliability (RSA 374-F:3, I); customer choice among various service options (RSA 374-F:3, II); unbundling of services and rates (i.e., the Functional Separation Principle) (RSA 374-F:3, III); open access to transmission and distribution facilities (RSA 374-F:3, IV); universal service and availability of default service (RSA 374-F:3, V); benefits for all customer classes (RSA 374-F:3, VI); full and fair competition with a range of viable suppliers (RSA 374-F:3, VII); environmental protection and sustainability (RSA 374-F:3, VIII); development of renewable energy (RSA 374-F:3, IX); incentives for energy efficiency (RSA 374-F:3, X); near term rate relief (RSA 374-F:3, XI); recovery of stranded costs (RSA 374-F:3, XII); cooperation with other New England states (RSA 374-F:3, XIII); efficient adaptation of administrative processes (RSA 374-F:3, XIV); and implementation of customer choice in an expeditious manner (RSA 374-F:3, XV).

Principles provide that "[r]eliable electricity service ***must*** be maintained while ensuring public health, safety, and quality of life." RSA 374-F:3, I (emphasis added).[7] Thus, to the extent that any of the Restructuring Policy Principles should take primacy, given the mandatory language used,[8] it should be this requirement. As numerous stakeholders have recognized, New England's increasing reliance on natural gas for electric generation, without a corresponding expansion of natural gas infrastructure, threatens reliability. App. at 510-11. The Access Northeast Program would enhance reliability by providing a critical upgrade to natural gas infrastructure. App. at 241-43.

In addition, the Restructuring Policy Principles state that "[c]ontinued environmental protection and long term environmental sustainability should be encouraged" (RSA 374-F:3, VIII) and call for increased use of "cost-effective renewable energy technologies" (RSA 374-F:3, IX). The Access Northeast Program would further both of these goals. Since the Access Northeast Program involves the upgrade of existing facilities, and not the construction of an entirely new set of facilities, it would create relatively less environmental impacts than other alternatives that involve new construction. App. at 241. Additionally, while many natural-gas fired electric generators are also able to run on ULSD, ULSD generates higher emissions of greenhouse gas emissions and other pollutants. App. at 273-74. Finally, by providing a

[7] This mandate to maintain reliable electric service is one of only three Restructuring Policy Principles that uses the word "must" or "shall" (the others provide that an EDC "must" connect to all customers in its service territory and that the Commission "shall" balance the interests of utilities and ratepayers in allowing stranded cost recovery). RSA 374-F:3, III; RSA 374-F:3, V; RSA 374-F:3, XII.

[8] "The general rule of statutory construction is that the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006) (internal citations and quotations omitted). "Where the legislature fails to include in a statute a provision for mandatory enforcement that it has incorporated in other, similar contexts, we presume that it did not intend the law to have that effect and will not judicially engraft such a term." *In re Bazemore*, 153 N.H. 351, 354 (2006).

backstop for intermittent renewable generation, the Access Northeast Program assists in integrating intermittent renewable generation into New England's electric grid. App. at 293.

The Access Northeast Program would also further other Restructuring Policy Principles as well. Ensuring an adequate supply of natural gas, and thereby ensuring an adequate supply of electricity, would support the availability of universal electric service. *See* RSA 374-F:3, V. Because it would make more firm natural gas available to natural gas fired generators, the Access Northeast Program will enhance the opportunities for more generators to compete in the wholesale electric market; thereby, increasing available supply and decreasing prices. As a consequence, the Access Northeast Program would address New Hampshire's higher than average electric prices. *See* RSA 374-F:3, XI. The Access Northeast Program, as an upgrade to New England's natural gas infrastructure, is also consistent with the goal of regionalism. *See* RSA 374-F:3, XIII. The Commission's failure to consider the many ways that the Access Northeast Program would further the Restructuring Policy Principles, including the critical requirement that EDCs maintain reliability, was erroneous, unlawful and unreasonable.

D. The Commission Erred In Concluding That The Access Northeast Program Violates The Restructuring Statute

RSA 374-F:3, III provides, in pertinent part that "[g]eneration services should be subject to market competition and minimal economic regulation . . . ." In the Order, the Commission found that the Access Northeast Program is inconsistent with the purpose of the Restructuring Statute because it "is a component of 'generation services' under RSA 374-F:3, III . . . ." Order at 9.

Even if "the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity" (Order at 8-9) (which Algonquin strongly contests), the Access Northeast Program would not abrogate that purpose. The Access Northeast Program would

simply provide a mechanism by which firm natural gas transmission capacity would be made available to generators. While Eversource would make additional primary firm pipeline capacity available in New England, that capacity would be auctioned by a capacity manager in an arms-length process consistent with FERC rules on capacity release. App. at 274-76. Generators, acting in their own economic interests in a fully competitive market, will either utilize it or not as they see appropriate. Thus, the decision of whether to procure and/or use the natural gas capacity made available by Eversource would rest firmly with generators. Eversource's sole and critical role would be making primary firm natural gas capacity available—Eversource would not be providing or engaged in the generation of electricity. Furthermore, Eversource would not be selecting electric power generators or geographic clusters of electric power generators. The slate of electric power generators using natural gas transmission capacity provided through the Access Northeast Program would be fully determined by competitive forces, consistent with the Restructuring Statute.

As Rep. Bradley noted in 1996, the legislature sought to encourage "full and fair competition" by which it meant "a viable range of suppliers." App. at 61. Consistent with the Restructuring Policy Principle calling for "full and fair competition" (RSA 374-F:3, XII), the Access Northeast Program would maintain "a viable range of suppliers" and would not pick winners and losers between suppliers. In fact, the Access Northeast Program would actually enhance the "viable range of suppliers" by making natural gas generators that were previously unavailable to operate when dispatched available, even on the coldest winter days (*see* App. at 242), and by providing a backstop to support additional intermittent renewable generation resources (*see* App. at 273-74).

Additionally, all of the many layers of competition in the electric generation supply chain would remain: generators would still competitively secure the natural gas commodity and pipeline capacity; generators would still compete in the wholesale electric marketplace; and retail electric suppliers would still competitively procure energy and compete for end-user market share. In fact, the Access Northeast Program would make more electric power generators available to participate in the wholesale market: thereby, increasing the amount of competition in that market, consistent with the Restructuring Statute. Moreover, in contrast to projects premised on sourcing power from particular generators or regions, the Access Northeast Program would not lock electric supply to any particular generator or region as every generator attached to the pipelines can compete for capacity. Thus, the Commission's conclusion that the Access Northeast Program is inconsistent with the purpose of the Restructuring Statute was erroneous, unlawful and unreasonable.

E. The Commission Erred In Interpreting RSA 374:57 as Applicable Only To Electric Transmission

RSA 374:57 authorizes EDCs like Eversource to acquire "generating capacity, transmission capacity or energy." Contrary to the canons of statutory construction, however, the Commission concluded that "[t]he meaning of 'capacity' in that legislation is limited to electric generating capacity and electric transmission capacity…." [Order at 13]. However, had the legislature intended to add the word "electric" before the phrase "transmission capacity," it would have done so.

In fact, the legislature has used the words "transmission capacity" in other contexts to refer to ***either*** natural gas or electric transmission capacity, not just electric transmission capacity. For example, RSA 378:38, IV (emphasis added) requires every EDC and LDC to include "an assessment of distribution ***and transmission*** requirements" in its least cost integrated

resource plan. Furthermore, the fact that the legislature included the general term "energy" within the types of contracts that EDCs are authorized to enter (with Commission approval) evidences its intent not to limit the types of contracts permissible under 374:57 to just electricity. As a matter of fact, the word energy is used so broadly in New Hampshire statutes that it can even refer to district hot water systems. *See* RSA 362:4-d. By contrast, where the General Court has intended to limit a statute to the electric sector it has explicitly done so. For instance, the Restructuring Statute, which restructured electric utilities in particular, generally uses the words "electricity" and "electric" instead of "energy" unless using specific phrases that typically include the word "energy" such as "energy efficiency," "renewable energy" and the like. In this case, the legislature did not limit transmission capacity to electric transmission.

In an attempt to bolster its conclusion, the Commission also found that "transmission" must mean "electric transmission" because the statute mentions the Federal Power Act ("FPA") but not the Natural Gas Act. While the statute does specifically reference the FPA, it also recognizes that the EDCs may enter into agreements that may not be subject to the FPA. *See* RSA 374:57 (requiring an EDC to "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." (emphasis added)). Thus, the Commission's addition of words that the legislature "did not see fit to include" in a way that implied a limitation on the EDCs' authority that was not expressly created by the legislature was erroneous, unlawful and unreasonable. *See Old Dutch Mustard*, 166 N.H. at 506 (Courts "will neither consider what the legislature . . . might have said nor add words that they did not see fit to include."); *see also Appeal of Pennichuck Water Works*,

160 N.H. 1834 (2010) ("We will not imply a limitation when the legislature has not expressly created one.").

F. The Commission Erred In Repealing RSA Chapter 374-A By Implication

The Commission concluded that "[t]he change in the industry through the Restructuring Statute, first passed in 1996, effectively ended a restructured EDC's ability to participate in the generation side of the electric industry." Order at 14. In the Order on Reconsideration, the Commission stated that it "stand[s] by [its] conclusions that 'RSA 374-A no longer applies to an EDC like Eversource…'" Order on Reconsideration at 5. In doing so, the Commission implicitly repealed RSA 374-A's grant of authority for EDCs to "participate" in electric generation facilities in contravention of New Hampshire precedent. *See, e.g., Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152-53 (1978).

As the Commission itself recognized in the Order, "the Court construes statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other." Order at 7 (*citing Old Dutch Mustard*, 166 N.H. at 509 (reading two statutes that address watercourse protection harmoniously so that one did not prohibit conduct the other permitted)). Moreover, this Court has specifically held that:

> implied repeal of former statutes is a disfavored doctrine in this State. The party arguing a repeal by implication must demonstrate it by evidence of convincing force. If ***any reasonable construction*** of the two statutes taken together can be found, this [C]ourt will not find that there has been an implied repeal.

Board of Selectmen, 118 N.H. at 152-53 (emphasis added). The Supreme Court of the United States has likewise held that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (holding that the

Equal Employment Opportunity Act had not implicitly repealed the statute authorizing the Bureau of Indian Affairs to afford a preference to certain Native American job applicants). Even where it is possible to read two statutes in harmony, this Court has found a repeal by implication "when the later act clearly is intended to occupy the entire field covered by the prior enactment." *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012).

In this case, the Restructuring Statute was ***not*** "intended to occupy the entire field covered by" RSA 374-A:2. In fact, RSA 374-A:2 explicitly provides that "***[n]otwithstanding 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," domestic electric utilities have the power:

> 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…
>
> 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***… including, without limitation, contracts and agreements for the payment of obligations imposed without regard to the operational status of a facility or facilities….

RSA 374-A:2 (emphasis added).

When the General Court passed the Restructuring Statute, it knew of the existence of RSA 374-A:2. *Wolfeboro*, 164 N.H. at 22 ("We generally assume that when the legislature enacts a provision, it has in mind previously enacted statutes relating to the same subject matter."). Thus, if it had intended the Restructuring Statute "to occupy the entire field covered by" RSA 374-A:2, the legislature could have and would have removed the phrase "[n]otwithstanding any contrary provision of any general or special law relating to the powers and authorities of domestic electric utilities" from RSA 374-A:2. Thus, Eversource's authority

to enter into contracts related to electric power facilities was not repealed by and still exists "notwithstanding" the Restructuring Statute (RSA 374-F).

In fact, as noted in Section V(E) above, all of the many layers of competition in the electric generation supply chain would remain: generators would still competitively secure the natural gas commodity and pipeline capacity; generators would still compete in the wholesale electric marketplace; and retail electric suppliers would still competitively procure energy and compete for end-user market share. Thus, if the Restructuring Statute is read holistically, including all of the Restructuring Policy Principles, it is possible to read it in harmony with RSA 374-A:2. Because the Restructuring Statute does not "occupy the entire field covered by" RSA 374-A:2 and a "reasonable construction of the two statutes taken together can be found," the Commission's repeal of RSA 374-A:2 by implication was erroneous, unreasonable and unlawful. *See Board of Selectmen*, 118 N.H. at 153.

Moreover, even if RSA-374-A could not be reconciled with the Restructuring Statute (which Algonquin disputes), the specific grant of authority to participate in electric power facilities should control over the more general precepts of the Restructuring Statute. New Hampshire precedent is clear that "to the extent two statutes conflict, the more specific statute…controls over the general statute." *Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 294 (2012) (holding that a specific statute about a municipality's responsibilities with respect to state roads controls over general statutes about the authority of political subdivisions); s*ee also In re Heinrich & Curotto*, 160 N.H. 650, 654-55 (2010) (in a family law context, holding that a specific statute regarding relocation controlled over a more general statute calling for decisions to be in the child's best interest); *Pennichuck Water Works*, 160 N.H. at 34 (2010) (holding that a specific statute concerning Commission authority over acquisition of a utility by a municipality

controlled over the more general statute concerning Commission authority over municipal utilities); *Appeal of Plantier*, 126 N.H. 500, 511 (1985) (holding that a specific statute regarding physician disciplinary hearings controlled over the more general open meeting law). The Supreme Court of the United States has likewise held that while it is generally true that when a conflict exists between two statutes, the later statute will control, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, ***regardless of the priority of enactment***." *Morton,* 417 U.S. at 550-51 (emphasis added). Although RSA 374-A was passed prior to the Restructuring Statute, RSA 374-A provides EDCs with the authority to undertake specific actions while the Restructuring Act is more general. Thus, RSA 374-A controls.

Moreover, in this case, the legislature itself has specifically determined what statute prevails in the event of a conflict. RSA 374-A:2 explicitly provides that "[n]otwithstanding 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," EDCs have the power to undertake numerous actions, including, without limitation, to participate in electric power facilities or portions thereof and to enter into and perform contracts and agreements for such participation in electric power facilities. Further, Eversource still fits the definition of "electric utility" under RSA 374-A:2, because it is "primarily engaged in the…transmission" of electricity. RSA 374-A:1, IV. As a consequence, the Commission's determination that enactment of the Restructuring Statute implicitly repealed the EDCs' authority to "participate" in electric generation facilities and its finding that RSA 374-A:2 is no longer applicable in a restructured market, was erroneous, unreasonable and unlawful. *See Morton*, 417 U.S. at 550.

G. The Commission Erred In Determining That Any Costs Incurred By Eversource Related To The Access Northeast Program Would Not Be Recoverable In Rates

The Commission's erroneous conclusions regarding the Restructuring Statute and Access Northeast Program led to its further conclusion that the Access Northeast Program "is designed to support electric generation supply, and therefore expenses related to generation supply would be disallowed in distribution rates." Order at 14. For all of the reasons discussed above, the Commission erred in its interpretation of the Restructuring Statute, RSA 374:57 and RSA 374-A:2. Because the Commission's analysis of the recoverability of these costs was inextricably linked to its conclusions regarding the purpose of the Restructuring Statute and whether the Access Northeast Program was consistent with that statute, the Commission's conclusions related to cost recovery were also erroneous, unreasonable and unlawful.

VI. CONCLUSION

For all of the forgoing reasons, Algonquin requests that this Court vacate the Order and Order on Reconsideration and remand to the Commission for further proceedings on the Petition.

VII. STATEMENT CONCERNING ORAL ARGUMENT

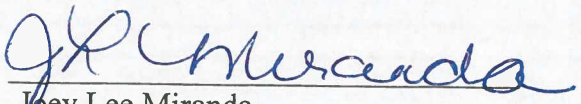
Algonquin requests oral argument, and requests to share oral argument with Eversource. Ms. Miranda will argue for Algonquin.

VIII. CERTIFICATION CONCERNING ORDER TO BE APPEALED

The Order and Order on Reconsideration are attached hereto.

Dated: May 30, 2017

Respectfully submitted,
ALGONQUIN GAS TRANSMISSION, LLC

By: 

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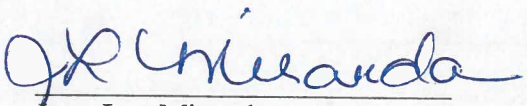
CERTIFICATE OF SERVICE

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



Joey Lee Miranda

Dated: May 30, 2017