

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT  
No. \_\_\_\_\_**

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

**Notice of Intent to File Rate Schedules**

**PUC Docket No. DE 19-057**

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**APPEAL OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY  
PURSUANT TO RSA 541:6 AND RSA 365:21  
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)**

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## Contents

a.	PARTIES AND COUNSEL .....	1
1.	Name and Counsel of Parties Seeking Review .....	1
2.	Names and Addresses of Parties and Counsel .....	2
b.	ADMINISTRATIVE AGENCY’S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED.....	4
c.	QUESTIONS PRESENTED FOR REVIEW .....	5
d.	PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS.....	5
e.	PROVISIONS OF INSURANCE POLICIES, CONTRACTS OR OTHER DOCUMENTS	6
f.	STATEMENT OF THE CASE.....	7
g.	JURISDICTIONAL BASIS FOR APPEAL.....	17
h.	A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE CORRECT INTERPRETATION OF STATUTES AND NEW HAMPSHIRE SUPREME COURT PRECEDENT. ACCEPTING THE APPEAL PROVIDES AN OPPORTUNITY TO CORRECT PLAIN ERRORS OF LAW, CORRECTLY INTERPRET A LAW OF IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE. ....	17
1.	General Concerns.....	17
2.	Specific Bases of Error .....	19
i.	PRESERVATION OF ISSUES FOR APPELLATE REVIEW .....	23

Pursuant to RSA 541:6, RSA 365:21 and Supreme Court Rule 10, Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or the “Company”) appeals to this Court from Order No. 26,504 (the “Order”) of the New Hampshire Public Utilities Commission (the “Commission”) dated July 30, 2021 and the Commission’s Order on Reconsideration, Order No. 26,528 dated September 27, 2021. In support of this Petition, Eversource states as follows:

**a. PARTIES AND COUNSEL**

**1. Name and Counsel of Parties Seeking Review**

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## **2. Names and Addresses of Parties and Counsel**

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**b. ADMINISTRATIVE AGENCY’S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED**

Copies of the Order and the Order on Reconsideration and the following documents are contained in the Appendix filed with this Petition:

Settlement Agreement on Permanent Rates October 9, 2020	Appendix, page 1
Commission Order on Settlement Order No. 26,433 December 15, 2020	Appendix, page 220
Commission Order on First Step Adjustment Order No. 26,439 December 23, 2020	Appendix, page 247

Transcript of Second Step Adjustment Hearing July 19, 2021	Appendix, page 257
Commission Order on Second Step Adjustment Order No. 26,504 (the “Order”) July 30, 2021	Appendix, page 417
Eversource Energy Motion for Reconsideration August 27, 2021	Appendix, page 427
NH Department of Energy Response September 2, 2021	Appendix, page 445
Commission Order Denying Reconsideration Order No. 26,528 September 27, 2021	Appendix, page 454

**c. QUESTIONS PRESENTED FOR REVIEW**

1. Did the Public Utilities Commission act unlawfully when it denied recovery of \$911,000 in costs pertaining to the Pemigewasset Substation as being imprudent without identifying any evidence of imprudence by Eversource?
2. Did the Public Utilities Commission act unlawfully when it denied recovery of \$911,000 in costs pertaining to the Pemigewasset Substation as being imprudent without identifying the proper legal standard for prudence and by failing to apply any legal standard in its ruling?

**d. PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS**

The constitutional provisions, statutes and rules involved in this case are:

Puc 203.25

Appendix, page 463

Puc 1604.05	Appendix, page 463
RSA 363:17-b	Appendix, page 464
RSA 363:28	Appendix, page 465
RSA 378:6	Appendix, page 466
RSA 378:27	Appendix, page 467
RSA 541-A:1	Appendix, page 468

**e. PROVISIONS OF INSURANCE POLICIES, CONTRACTS OR OTHER DOCUMENTS**

The following documents are contained in the Appendix filed with this Petition:

Order No. 20,503 (June 5, 1992)	Appendix, page 470
Order No. 25,565 (August 27, 2013)	Appendix, page 480

## **f. STATEMENT OF THE CASE**

### **1. Background**

On March 22, 2019, Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or the “Company”) filed with the New Hampshire Public Utilities Commission (“Commission”) a Notice of Intent to File Rate Schedules pursuant to N.H. Code Admin. Rule Puc 1604.05 pertaining to a request for temporary rates. Pursuant to RSA 378:27, temporary rates are set by the Commission during the time a utility’s rate case filing is under review – generally a year – to allow an appropriate opportunity for a utility to earn a reasonable return during the review period and until permanent rates are set. On April 26, 2019, the Company filed with the Commission proposed tariffs and rate schedules, testimony, attachments and other information supporting that temporary rate request. In that submission Eversource sought an increase in temporary rates of approximately \$33 million effective July 1, 2019, pending the Commission’s determinations on the Company’s permanent rate request. Also on April 26, 2019, the Company filed with the Commission a Notice of Intent to File Rate Schedules pertaining to its request for permanent rates.

On March 25, 2019, the Office of Consumer Advocate (“OCA”) filed a letter of participation in the docket pursuant to RSA 363:28. The Commission also granted intervention on various dates to AARP New Hampshire, Acadia Center, ChargePoint, Inc., Clean Energy New Hampshire, the New Hampshire Department of Environmental Services, The Way Home, and Walmart, Inc.<sup>1</sup>

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<sup>1</sup> Prior to July 1, 2021, the Staff of the Commission was a participant in this proceeding, as it was in essentially all Commission proceedings. Following the enactment of HB 2 in June 2021, as of July 1, 2021 the majority of the staff and responsibilities of the Commission were transferred to the newly-created New Hampshire Department of

On May 8, 2019, the Commission issued Order No. 26,250 suspending Eversource's proposed tariff for a temporary rate increase pending further investigation. On May 28, 2019, the Company submitted its permanent rate filing seeking an increase in rates of approximately \$70 million, inclusive of the temporary rate request. The permanent rate request was supported by proposed tariffs and rate schedules, testimony and attachments from 14 witnesses, and other information. That information pertained to a representative "test year" of 2018, as adjusted to account for certain specific changes, and to the rates, charges, and services Eversource intended to implement subject to the Commission's approval. Pursuant to RSA 378:6, on June 7, 2019 the Commission issued Order No. 26,256 suspending Eversource's proposed tariff for a permanent rate increase pending further investigation.

Following initial discovery, on June 13, 2019, Eversource filed a settlement agreement on temporary rates with the Commission. On June 27, 2019, and following a hearing, the Commission issued Order No. 26,265 approving that settlement agreement and allowing a temporary increase of \$28.3 million in the Company's annual distribution revenues effective for service rendered on and after August 1, 2019. Consistent with past cases, the temporary rates were approved subject to reconciliation based on the outcome of the permanent rate case.

On June 28, 2019, the Commission approved an initial procedural schedule for adjudication of the Company's permanent rate request that included multiple rounds of discovery, technical sessions, settlement conferences, Staff and intervenor testimony and Company rebuttal testimony, merits hearings, and an anticipated Commission order by May 20,

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Energy ("DOE"). For purposes of this case, the shift of the staff members and their responsibilities makes no material difference. For clarity, though, references to "Staff" in this document will be inclusive of the staff members of the Commission and/or the Department of Energy, regardless of the agency by which they were employed at the relevant time.

2020. Staff, OCA, and other intervenors filed testimony on December 20, 2019 and the Company filed its rebuttal testimony on March 3, 2020.

On March 24, 2020, the Staff filed a letter in the docket describing the status of the matter and the agreement of the Company to a three-month extension of the procedural schedule to account for the state of emergency declared by Governor Sununu on March 13, 2020, regarding the COVID-19 pandemic. Eversource confirmed its agreement to the three-month extension in a letter filed on March 26, 2020. Superseding that agreement, on April 24, 2020, Governor Sununu issued Exhibit D to Executive Order #29, pursuant to Executive Order 2020-04, extending the Commission's authority to suspend rate schedules by six months, from 12 to 18 months.

On April 16, 2020, AARP filed a pleading seeking an order directing Eversource to file supplemental testimony to reflect the impacts of the pandemic. AARP also requested that the Commission stay the effectiveness of the previously approved temporary rates. Eversource objected to those requests on April 27, 2020. On June 16, 2020, the Commission issued Order No. 26,363, which denied AARP's request as to the temporary rates but also directed Eversource to file supplemental testimony. Under the authority granted by the Governor in his emergency directives of April 24, 2020, that order also suspended Eversource's permanent rate proposal for an additional six months. The Commission also directed Staff to work with the parties to develop and propose a revised procedural and hearing schedule to resolve the matter. On June 19, 2020, Staff submitted a proposed procedural schedule for hearings on the merits. On July 7, 2020, the Commission issued a secretarial letter approving the Staff's proposed procedural schedule including 20 days of hearings beginning on August 19, 2020 and ending October 30, 2020.

In the weeks prior to and following the Commission’s order extending the suspension period, the Company, Staff and OCA engaged in settlement discussions, which were subsequently expanded to include additional intervenors. Based upon these discussions, the parties agreed to the terms of a Settlement Agreement which was filed with the Commission on October 9, 2020 (the “Settlement”). App. at 1. The Commission held hearings on the Settlement across three days at the end of October 2020. On December 15, 2020, the Commission issued Order No. 26,433 approving the Settlement. App. at 220.

The Settlement is a comprehensive resolution of numerous issues presented in the case. Beyond the basic purpose of establishing the rates and charges Eversource would implement, the Settlement included provisions regarding: the study of advanced metering; a review of the physical condition of Eversource’s distribution system; a business process audit reviewing Eversource’s capital planning processes; the creation of a new arrearage forgiveness program; and numerous other topics. Among those topics, Section 10 of the Settlement permitted Eversource to request three step increases to its rates to account for capital investments placed into service in calendar years 2019, 2020, and 2021. App. at 19.

Step adjustments to rates are designed to account for “regulatory lag” by allowing defined adjustments to utility revenues to permit the utility an opportunity to recover the costs of certain investments between rate cases. As Eversource’s test year was 2018, without these step adjustments to account for capital projects that Eversource had completed after 2018, Eversource would have had no means of collecting the revenue requirement associated with those completed capital projects unless it filed a new rate case. Because the rate case was not completed until the end of 2020, without the step adjustments Eversource would have immediately experienced a lag of nearly two full years. The Commission has for many years permitted utilities to make use of

step adjustments to balance the interests of the utility in timely recovering its capital costs, with the interests of consumers and others in avoiding the time and significant expense of unnecessarily repetitive rate case filings.

Appendix 5 to the Settlement identifies the particular capital projects Eversource anticipated placing in service in calendar years 2019 and 2020 as part of the first and second step adjustments. App. at 51. The first step adjustment covering projects completed in calendar year 2019 was filed on the same day as the underlying Settlement, October 9, 2020, and was addressed at a hearing in December 2020. On December 23, 2020, the Commission issued Order No. 26,439 approving that proposed step adjustment as filed. App. at 247. The rate changes necessary to account for the Settlement as well as the first step adjustment occurred simultaneously on January 1, 2021.

On May 3, 2021, Eversource submitted its documentation in support of the second step adjustment consistent with the Settlement. Under the terms of the Settlement, the Company was to provide certain information with the second step submission, including: extensive information on the amount of the investments to be included in the step adjustment; detailed project descriptions including the initial budget; the final cost and date on which each project was booked to plant in service; and certain supporting documentation identified in the Settlement. App. at 21. The documentation followed the template for documentation agreed to with the Staff for the initial step. App. at 21. Under the Settlement Agreement, if the actual costs for the relevant projects were less than the agreed-upon cap of \$18 million, the actual amounts were to be used to calculate the step adjustment. App. at 19-20. In this case, the actual costs came in below the cap and Eversource proposed to recover the actual costs through the step adjustment.

The second step adjustment proposed that amended rates take effect on August 1, 2021, as contemplated in the Settlement. On June 29, 2021, the Commission issued a supplemental order of notice pertaining to the second step setting a hearing for July 19, 2021. Following that hearing, on July 30, 2021, the Commission issued Order No. 26,504 (the “Order”). App. at 417.

## **2. The Order**

In the July 30, 2021 Order, the Commission approved the majority of the completed capital projects and project costs for recovery as proposed in Eversource’s step adjustment filing, with significant exceptions pertaining to specific projects. In particular, the Commission disallowed recovery of certain capital investments the Company made for its Pemigewasset Substation project.<sup>2</sup> Despite concluding that the Pemigewasset Substation project was prudent, used and useful, and in-service delivering electric service to customers, the Commission disallowed \$911,000 of the total costs incurred for the development of this project. App. at 421-22.

That project related to extensive, necessary work within the Pemigewasset Substation including replacement of an existing, overloaded transformer with a new transformer, as well as the replacement of other aged equipment and expanding the control house at the station to accommodate the required new control equipment. App. at 431. For that project, as part of its standard policies and consistent with its general contracting and retention practices Eversource retained an outside engineering firm to conduct detailed engineering work on the substation pertaining to this necessary work. App. at 324. The engineering work was examined through Eversource’s normal project review and budgeting processes consistent with its capital authorization practice. App. at 325-330. Eversource’s capital authorization practice requires

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<sup>2</sup> In this context, an electric substation converts electrical energy from a higher voltage to a lower voltage for the purpose of distributing that electricity to consumers.

that an initial funding request be submitted and approved within the Company to authorize initial work on a proposed project. App. at 294. To the extent additional funding is later required, a supplemental funding request will be submitted that outlines the additional costs and the justification for those costs. App. at 291.

In mid-2020, while part way through construction on the Pemigewasset Substation project, Eversource determined that due to necessary changes in the scope of the project, additional funding was required and a supplemental funding request was submitted consistent with its internal policies. App. at 330. That supplemental request, however, was never approved because an issue discovered during testing halted the approval process. App. at 331-32.

Eversource utilizes sophisticated quality-control testing protocols to assure that any new equipment being installed on the system is functioning as designed and will integrate with the existing components of the electric distribution system safely and reliably. App. at 431-32. The quality-control testing is designed to be a checkpoint to reveal any anomalies that could cause system faults or cascading failures when the component is energized and placed into service. *Id.* This is especially important for large, expensive equipment such as substation transformers where a fault could result in damage to sensitive equipment that will take substantial time and money to repair or replace. *Id.* At the stage that Eversource was testing the newly installed equipment prior to commissioning, Eversource discovered incorrect voltage on the synch scope, requiring a change to the design. App. at 330-31. Because the synch scope error was attributable to the work of the third-party engineering firm, the firm was required to conduct additional work to correct the identified problems at the firm's cost. App. at 334. The additional engineering, however, required other additional steps to be taken by the Company, including further construction and testing, all with the purpose of assuring that the newly installed

equipment would function properly when integrated into the surrounding, inter-dependent components and not be prone to some kind of failure. App. at 335-36. The expense associated with that additional work by Eversource was eventually included in a supplemental funding request that covered all of the costs associated with the project, including the costs from the scope change as well as the costs associated with the issue discovered in testing. App. at 389. That final funding request, unlike the prior request, was ultimately approved by the relevant levels of Eversource management. App. at 389.

Thereafter, at a hearing before the Commission, Eversource's witnesses testified to the management of the work on this substation project, both before and after discovery of the testing issue, and how the work was completed efficiently and prudently to assure that this necessary project could be placed into service as expected. App. at 278. No other witnesses testified, and no evidence other than evidence testified to by Eversource was provided.

In the Order, the Commission reviewed the incremental costs it saw as occurring between the funding request that was halted part way through the substation project in 2020 and the final funding request, without differentiating between the costs attributable to the scope change and those related to the testing issue. App. at 422. In its review, the Commission determined that the incremental costs between the two funding requests were imprudently incurred and therefore not eligible for recovery. App. at 422. The entirety of the Commission's analysis on the matter is as follows:

Eversource acknowledged that it incurred additional costs as a direct result of a third party contractor's error, but that those costs were not covered by its contract. Exh 64 at 55. At hearing, Eversouce [*sic*] went on to state that its contracts limit contractor liability, that it did not seek any "insurance" claim through the contractor for "consequential" damages, and that its own internal reviews did not catch the issue. Hearing Transcript of July 19, 2021 (Tr.) at 78- 79. The costs attributable to the third party engineering contractor's error include: additional internal engineering efforts, construction, testing and commissioning, and other

costs resulting from the contractor's error but not covered under its contract are disallowed as imprudently incurred. *See* Exh. 64 at 55-56. ***Based on the testimony***, we do not find that Eversource has met its burden to show that these ***consequential costs*** were prudently incurred, and disallow \$911,000 in investment costs associated this project.

App. at 422 (emphasis added). Accordingly, the Commission's basis for the disallowance is "the testimony" at the hearing relating to "consequential costs" of \$911,000. App. at 422.

In its motion for reconsideration filed on August 27, 2021, Eversource described numerous bases for overturning the Commission's disallowance of recovery of the \$911,000 including: (1) the Commission stated that its ruling was "based on the testimony", yet the only testimony in the proceeding came from Eversource's witnesses who stated that the project and its costs were prudent; (2) the Commission failed to identify the relevant standard for judging prudence; (3) without any statement of the prudence standard in the decision, and without any analysis matching up the evidentiary facts with the standard, the Commission's summary conclusion stating that the Company had not met its burden did not support any disallowance; and (4) there was no evidence that the Company could have, or should have, done anything different in relation to this contractor's liability or Eversource's contracts generally. App. at 431-436.

The DOE filed a response to Eversource's motion and, after contending that Eversource was raising a "straw man" argument, it addressed the claim regarding the Commission's reliance on the testimony. App. at 448. The DOE contended that "[w]hat the Motion [on reconsideration] fails to acknowledge is that the Commission's reference to the testimony ***more likely*** related to the prudence of the Company's contracting practice, a practice that in this case directly led to Eversource' inability to recover [consequential damage] costs from a contractor, costs that were directly attributable to an error of that contractor." App. at 448 (emphasis and

brackets added). This passage reflects that the DOE is likewise unclear on the actual basis for the Commission's determination, but speculated it was "more likely" to have been related to Eversource's "contracting practice." Not until DOE's response to the Eversource motion for rehearing were Eversource's "contracting practices" raised or discussed as an issue – and such practices had only been mentioned, at most, in a single passing reference at hearing. The DOE also offered the argument that "industry standard practice is by no means a prudence review safe harbor, and has no bearing on whether limiting the liability of their contractor is the prudent choice for Eversource to make on behalf of its ratepayers." App. at 449. In making this argument, the DOE's filing did not explain, or cite to any record evidence on, what industry standard practice is, nor how that practice does or does not align with the prudence standard, nor why Eversource acting in line with industry standard practice is not indicative of prudence. Rather, the DOE rested on the unsupported contention that complying with industry standard practices is unrelated to prudence.

On September 27, 2021, the Commission issued Order No. 26,528 denying reconsideration. App. at 454. In that order, the Commission concluded that it had identified facts supporting a finding of imprudence and that any failure to identify the appropriate standard was "harmless" because Eversource cited the standard in its motion. App. at 457. Additionally, the Commission stated, "As is evident from the Commission's Order, the Commission does not fault Eversource for its contractor's errors. However, Eversource's imprudent contracting practices left it insufficiently insulated against its contractor's errors, incurring nearly \$1 million in additional costs." App. at 457. This was the first mention by the Commission that Eversource's "contracting practices" were inappropriate in any regard.

As a final comment, the Commission's Order also ordered an additional disallowance of recovery of costs incurred by the Company for another capital project and ordered a change in the accounting treatment for other materials. Eversource objected to both of those conclusions in its motion for reconsideration. In the interest of narrowing the matters in this appeal, however, Eversource states that it continues to disagree with the Commission's conclusions on both of these other matters, but has determined not to address those two other matters in this appeal. As a result, this appeal is limited to the single issue of the Commission's disallowance of recovery of \$911,000 in costs the Company incurred for the Pemigewasset Substation project.

**g. JURISDICTIONAL BASIS FOR APPEAL**

RSA 541:6 and RSA 365:21 supply the jurisdictional basis for this appeal.

**h. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE CORRECT INTERPRETATION OF STATUTES AND NEW HAMPSHIRE SUPREME COURT PRECEDENT. ACCEPTING THE APPEAL PROVIDES AN OPPORTUNITY TO CORRECT PLAIN ERRORS OF LAW, CORRECTLY INTERPRET A LAW OF IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.**

**1. General Concerns**

This case presents an important opportunity for the Court to interpret – and clarify – the proper and appropriate standards for determining the prudence of utility investments that serve customers, as well as an opportunity to clarify the proper and appropriate process for the Commission to follow in rendering its decisions. The Order and order denying rehearing in this matter lack the detailed findings required by law and are misaligned with the principles of due process in New Hampshire. Eversource, like other regulated utilities in New Hampshire,

presents proposals and requests to the Commission on a regular and recurring basis. Having the Court clarify the appropriate requirements for a properly supported Commission order has direct due process implications, as it is critical for the continued work of Eversource and other New Hampshire utilities if they are to understand the standards used to judge their conduct and thus their ability to recover their prudently-incurred costs.

Pursuant to RSA 363:17-b, III, orders of the Commission are to contain a “decision on each issue *including the reasoning behind the decision.*” (emphasis added). In the Order, the Commission recited portions of the testimony before issuing conclusory statements about Eversource failing to meet its burden to show the costs were prudently incurred. The Order and the order on reconsideration do not, as required by law, explain the Commission’s reasoning or justification for the results it reached.

Further, the Commission did not, at any point, indicate the proper standard for finding investments by a utility company to be prudent and relied instead upon Eversource to identify the relevant legal standards. Eversource should not be required to guess at the standard the Commission is intending to apply, nor assume that the Commission is working from the proper legal framework, in the hope that the Commission is abiding by the requirements of New Hampshire law.

Additionally, the Commission attempted to reinforce its decision not to reconsider by arguing that Eversource did not state that the Commission applied the incorrect standard. An argument about the correct standard is, however, irrelevant to whether reconsideration, and now appeal, is warranted. The Commission did more than fail to define the correct standard, it failed to apply one – the Order fails to demonstrate how Eversource’s actions or inactions did not align with the relevant legal standards and requirements. The orders at issue clearly and self-evidently

failed to provide an appropriate justification for the conclusions made and resulting consequences and should not be permitted to stand.

Also, the Commission failed to provide proper and appropriate notice of the issues upon which it would be ruling contrary to the requirements of due process. On some matters, there was no notice of the issues in dispute and on others, the only notice of the issues came after the Commission's orders were issued. Within these general concerns, more specific questions exist as follows.

## **2. Specific Bases of Error**

As noted above, the Commission concluded that Eversource should not recover nearly \$1 million in costs relating to the substation project “based on the testimony.” As also described above, the only testimony in the case was from Eversource witnesses who described the work done at the station and how it aligned with appropriate processes and policies and was prudently done. Eversource acknowledges that the Commission is permitted to rely upon the evidence presented, as well as also upon its own expertise and that of its staff to arrive at a conclusion. *In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 26 (2010). Further, the Court has stated that the Commission is not compelled to accept the opinion evidence of any one witness or group of witnesses and accepting the testimony of any particular witnesses is a matter left to its judgment. *Id.* However, in this case, the Commission specifically and unambiguously stated that its conclusions were “based upon the testimony” at the hearing. In this case “the testimony,” the only testimony, was directly contrary to the Commission's ultimate conclusion. In the Order, the Commission makes no effort to explain how it relied exclusively upon the testimony of Eversource's witnesses to reach conclusions contrary to their testimony. Despite the language in the Order, the Commission's conclusion in this respect is wholly unsupported by the record.

Moreover, on reconsideration, the Commission's justification for the disallowance shifted such that it now claimed that it was Eversource's "contracting practices" justifying the disallowance of nearly \$1 million. Eversource's contracting practices could not, however, justify any conclusion by the Commission because there was no evidence about them in the record at all.

Eversource's witness testified that this contract for the substation project did not permit Eversource to seek consequential damages from the third-party engineering firm. App. at 334-35. Other than this single reference by Eversource's witness to the terms of a particular contract, there is no evidence anywhere in the record pertaining to Eversource's "contracting practices." In fact, the first mention of Eversource's contracting practices occurs in the DOE's unsupported speculation about what the Commission "more likely" meant when it referred to "the testimony" supporting its decision. The DOE's speculative grasp for what it believes the Commission may have intended is not a sufficient basis for the Commission to disallow nearly \$1 million in prudently-incurred costs, nor is an after-the-fact statement in a response to a motion to reconsider the Order sufficient grounds to support the Order's original and unsupported conclusion.

Furthermore, as this Court has recently found, contract damages can be direct or consequential, though the line dividing what may be considered direct versus consequential damages is not capable of exact determination. *Mentis Sciences, Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 589 (2020). There, the Court stated "[d]irect damages are based on the value of the performance itself, whereas consequential damages are based on the value of some consequence that performance may produce." *Id.* (quotation and citations omitted). "Thus, consequential damages are not based on the capital or present value of the promised performance but upon benefits it can produce or losses that may be caused by its absence." *Id.* (quotation and

citations omitted). Here, the Commission undertook no analysis of any potential difference between the kinds of damages that might be appropriate in a contract action to determine whether it was reasonable for Eversource to conclude that it was limited by its contract. In fact, the Commission undertook no analysis at all, applying no legal standard to the conclusory statement related to “consequential costs”. The Commission concluded that the “consequential costs” must be disallowed because of Eversource’s “contracting practices” when there was no evidence on either point.

Further, the Commission has never articulated any standard or requirement for utilities that would require all contracts with outside vendors to assure that those vendors assume liability for all consequential damages; nor has the Commission provided any means for determining whether or how electric ratepayers should bear the resulting increase in the cost of vendor services that would result from increasing the scope of liability of vendors. Accordingly, the lack of a provision (or a limitation to it) on consequential damages in utility contracts with vendors cannot be *per se* imprudent. Instead, a conclusion by the agency on the prudence of Eversource’s contracting practices requires additional evidence in the record as to what the standard of prudent utility contracting practice is, and additional evidence that Eversource fell below any such recognized standard of reasonableness in negotiating its vendor contracts. As noted in Eversource’s reconsideration motion, in New Hampshire:

The prudence standard is one of the specific standards that has been developed by the Court to govern the inclusion or exclusion of costs for ratemaking purposes. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 637 (1986).

Prudence is “essentially an analogue of the common law negligence standard”. *Id.* “While the scope of the prudence principle is by no means clear, it at least requires the exclusion from rate base of costs that should have been foreseen as wasteful.” *Id.* “[P]rudence judges an investment or expenditure in the light of what due care required at the time an investment or expenditure was planned and made.” *Id.* at 638.

The test of due care asks what a reasonable person would do under the circumstances existing at the time of a decision. *Fitzpatrick v. Public Service Co. of N.H.*, 101 N.H. 35 (1957). Stated differently, a lack of due care is the failure to use that degree of care that the ordinary reasonably careful and prudent person would use under like circumstances.

*Public Service Company of New Hampshire*, Order No. 20,503, 77 NH PUC 268, 270 (1992), App. at 472-73; see also *Public Service Company of New Hampshire*, Order No. 25,565 (August 27, 2013) at 20 (“When reviewing whether a utility has been prudent in its decision making, [the Commission] ‘may reject management decisions when inefficiency, improvidence, economic waste, abuse of discretion or action inimical to the public interest are shown.’”) (quoting *Appeal of Easton*, 125 N.H. 205, 215 (1984)), App. at 499.

Had the Commission reviewed this standard and had the Commission sought to apply it to the relevant facts, it would have been required to review whether Eversource’s contract was created with “due care” such that it was reasonable under the circumstances. To support a disallowance, the Commission would have needed to identify or point to some evidence somewhere in the record that this contract was not reasonable in light of what Eversource knew at the time it made the contract. Rather than do so, however, the Commission created a new requirement, without notice and after all process had been completed in the matter, that contracts must include provisions for the recovery of consequential damages or any costs incurred, but not covered by such a contract, will be deemed *per se* imprudent as the product of inadequate “contracting practices.” Not only is the Commission not permitted to simply articulate new standards and requirements of general applicability outside of established processes<sup>3</sup>, in this case

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<sup>3</sup> See RSA 541-A:1, XV, defining “rule” in relevant part as “each regulation, standard, form as defined in paragraph VII-a, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies.”

it did so without any of the analysis required by the law and without the notice required to comport with due process. This the Commission cannot do, and the Court should not allow.

In conclusion, the Commission erred by failing to identify any evidence supporting its conclusions, by failing to identify the appropriate legal standards, by failing to apply the legal standard to the facts, and by failing to adequately articulate and support the reasons for its conclusions as required by law. As a result of these shortcomings, the Commission has inappropriately denied Eversource the ability to recover the costs of prudent capital projects. This Court should accept this appeal to correct these unlawful and unreasonable conclusions, and to clarify the issues of law and process presented in this matter.

**i. PRESERVATION OF ISSUES FOR APPELLATE REVIEW**

Each issue raised in this appeal has been presented to the Commission by Eversource in its Motion for Reconsideration dated August 27, 2021 and has been properly preserved for appellate review.

Respectfully submitted,

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

By its Attorney,

Dated: October 27, 2021

By:

  
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**CERTIFICATE OF SERVICE**

I hereby certify that consistent with Supreme Court Rule 26 and Supplemental Supreme Court Rule 18, on October 27, 2021, I served the foregoing Notice of Appeal electronically and by conventional service to those parties listed above in Section a.2. of this notice.



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Matthew J. Fossum