THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0146

Appeal of Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty

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RULE 10 APPEAL PURSUANT TO RSA 541:6
FROM DECISIONS OF THE PUBLIC UTILITIES COMMISSION

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# BRIEF OF THE OFFICE OF THE CONSUMER ADVOCATE

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## QUESTION PRESENTED

Did the Public Utilities Commission properly conclude that RSA 378:30-a, which prohibits a public utility from recovering from customers any costs associated with capital projects not placed into service, precluded a natural gas utility from recovering costs associated with a project that was canceled prior to construction?

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

RSA 378:30-a – Public Utility Rate Base; Exclusions

Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

## STATEMENT OF THE CASE AND FACTS

For more than 40 years, a foundational principle of public utility law in New Hampshire has been that utility capital projects that never end up serving the public cannot ever be included in rates. *See* 1979 N.H. Laws, ch. 101 (codified as RSA 378:30-a). In other words, the business risk associated with such canceled projects rests entirely with utility shareholders and not utility customers.

A classic example of such a canceled project is Granite Bridge – the controversial plan by Liberty Utilities to build a natural gas pipeline along the Route 101 corridor plus a giant tank to store up to 2 billion cubic feet of liquified natural gas (LNG). App. I at 119-120.[1] Had the project gone forward, it would have more than doubled the utility's rate base – i.e., the capital assets on which the utility receives from its captive customers both a return *on* investment (via the allowed Return on Equity included in rates) and a return *of* investment (via depreciation costs that are likewise included in rates). *See* App. I at 240-42 (noting that Granite Bridge would have added $400 million to a preexisting rate base of $362 million).

Liberty has ably, if somewhat self-servingly, described its efforts since 2013 to meet its obligation to serve its customers by

[1] As noted by Liberty, the parties collaborated on the preparation of an extensive, three-volume Appendix. In this brief, the three volumes are cited as App. I, App. II, and App. III, respectively.

securing adequate supplies of natural gas via the interstate pipeline system. When, in 2017, Liberty settled upon the Granite Bridge project as its chosen option for meeting the natural gas supply needs for its customers, approval of the Public Utilities Commission ("PUC" or "Commission") was not required. Rather, as Liberty implicitly acknowledges in its brief, it sought advance PUC approval so as to insulate the Company from after-the-fact cost recovery disallowance via a future rate case. *See* Liberty Brief at 10 ("Liberty did not want to undertake such a significant endeavor and begin construction work on Granite Bridge without knowing whether the Commission would ultimately approve the decision to proceed as prudent").

The project would have required the approval of the Site Evaluation Committee ("SEC") pursuant to RSA 162-H but the Company made no filing with the SEC. Rather, Liberty filed a petition with the PUC on December 22, 2017, seeking the Commission's imprimatur for both the Granite Bridge project and related contracts for natural gas supply and interstate pipeline capacity. The PUC's endorsement of Granite Bridge as a prudent investment would have been germane to the SEC's review of whether the project was in the public interest, a finding required

by RSA 162-H:16, IV(e). Hence the Company's tactical decision to pursue these approvals serially rather than in tandem.[2]

The PUC opened Docket No. DG 17-198 to consider the Granite Bridge project and related contracts according to its contested case procedures. Pursuant to the Commission-approved procedural schedule, on September 13, 2019 the Staff of the PUC and the Office of the Consumer Advocate ("OCA") (in our capacity as the statutory representative of residential customers, pursuant to RSA 363:28, II) separately filed written direct testimony from expert witnesses that both acknowledged a need for Liberty to acquire additional supply (along with the necessary in-state pipeline capacity) and questioned whether Granite Bridge, as proposed, was the optimal solution. This prompted what Liberty has characterized as an "engagement

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[2] The Granite Bridge project was also the centerpiece of the Least Cost Integrated Resource Plan ("LCIRP") filed by Liberty with the Commission on October 2, 2017 in Docket No. DG 17-152 pursuant to RSA 378:37 *et seq*. The LCIRP statute provides a forum for electric and natural gas utilities to gain Commission approval for their capital investment plans and pursuit of resource options generally. The LCIRP statute requires the Commission to review LCIRPs for the extent to which they address certain policy imperatives, laid out in RSA 378:37, in a manner that is least-cost from the perspective of customers. This could have been a useful vehicle for Liberty to obtain the sort of regulatory assurances it desired for the Granite Bridge project, but Liberty canceled the project before the Commission could rule on the LCIRP. It is noteworthy that, although RSA 378:38 requires electric and natural gas utilities to file LCIRPs at least every five years, the Commission never ruled on the LCIRP and recently closed the applicable docket. *See* Order No. 26,702 (Oct. 12, 2022) in Docket No. DG 17-152 (denying OCA rehearing motion). The Court should take note of the fact that the LCIRP included in Volume I of the Appendix, beginning at page 5, is dated November 1, 2013 and contains no reference to the Granite Bridge project.

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process" that resulted in "additional analysis as requested by intervenors." App. I at 151 (erroneously referring to Commission Staff and the OCA as "intervenors"). Liberty reacted by persuading the Commission to extend the deadline for rebuttal testimony and it was during this "engagement" period in the last quarter of 2019 – i.e., after the submission of expert testimony recommending that Liberty pursue alternatives to Granite Bridge – that Liberty discovered a vastly cheaper alternative to the project had "unexpectedly become available." Liberty Brief at 11. This vastly cheaper alternative, ultimately approved by the Commission, was existing capacity on the "Concord Lateral" pipeline (connecting various points along the Interstate 93/Merrimack River corridor in New Hampshire with the interstate gas pipeline system at Dracut, Massachusetts) owned by a third party, the Tennessee Gas Pipeline Company. *See* App. I at 117 (describing Concord Lateral). Liberty therefore contracted for this capacity on the Concord Lateral and gained Commission approval of the transaction. *See* App. I at 155 (referring to this change in plans as a "highly beneficial outcome for [Liberty's] customers").

Meanwhile, as noted by Liberty in its brief, the utility's effort to recover the costs it sunk into Granite Bridge prior to cancellation ultimately came before the Commission via the general distribution service rate case filed by Liberty in 2020.

The Commission rejected the request, *see* App. III at 145-152 and 206-213 (on rehearing), and Liberty's timely appeal followed.

The OCA agrees with the list of six specific cost categories provided by Liberty in its brief that are at issue in this proceeding. Had Granite Bridge been placed into service, all of these costs would have been added to the Company's rate base for purposes of rate recovery. *See* App. III at 13 (referencing June 6, 2021 hearing testimony of PUC Staff witness Steven Frink). In that strictly financial sense, these costs are indistinguishable from those the Company would have incurred had Liberty actually undertaken the construction of the project.

These facts and circumstances are properly evaluated in the context of an ineluctable reality for investor-owned firms, whether or not they are a regulated monopoly like Liberty. Such businesses achieve their objectives by putting capital at risk, which means that some projects do not pan out and their sunk costs must be written off. This was the lesson learned by Public Service Company of New Hampshire in 1988 (when it became the first electric utility since the Great Depression to seek bankruptcy protection, in light of massive delays and cost overruns at the half-canceled Seabrook nuclear power plant)[3] and

[3] In a controversy that took a decade to sort out, the New Hampshire Supreme Court rejected PSNH's constitutional challenge to section 30-a, see *Petition of PSNH*, 130 N.H. 265, 273-282 (1988), and two days later PSNH sought bankruptcy protection. See *In re PSNH*, 114 B.R. 813, 815 (Bankr. D.N.H. 1990). Thus, as a matter of both legislative and general New Hampshire history, the adoption of RSA 378:30-a statute

again by Eversource in 2020 when it wrote off some $200 million invested in the canceled Northern Pass transmission project.[4]

As a matter of public policy, there is a colorable argument to be made in favor of allowing public utilities to recover costs associated with capital projects that have not come to fruition. Indeed, the PUC laid out those reasons in detail when, on May 25, 1978, it authorized Public Service Company of New Hampshire to add $111 million in Seabrook-related costs to that utility's rate base – fully 12 years before the nuclear plant, with one of its two planned units canceled, ever produced a single kilowatt of power. *See Public Service Company of New Hampshire*, 63 NH PUC 127, 149 (1978) ("in a very real sense, a plant under construction, which will go on line in the future, is quite useful to customers" and "[u]tility property does not spring miraculously into existence, when it is needed") (citations omitted). For good or ill, the General Court disagreed and,

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in 1979 was arguably the most consequential moment in the history of utility regulation in the Granite State. Since it was first proposed, the law has colloquially been referred to as the "Anti-CWIP" statute, CWIP being an acronym for "construction work in progress." *See, e.g.*, *Bacher v. Public Service Co. of N.H.*, 119 N.H. 356 (1979) (rejecting individual customer's challenge to including "CWIP" in rates).

[4] Via a Form 8-K filed with the federal Securities and Exchange Commission on July 25, 2019, Eversource announced that Northern Pass was being canceled and, accordingly, the company would record an "impairment charge" on its books of approximately $240 million, with an estimated after-tax value of approximately $200 million. This document is available at www.sec.gov/Archives/edgar/data/72741/000007274119000031/form8-knpt.htm.

indeed, this policy disagreement was of such great import that it actually decided the outcome of the 1978 gubernatorial election. In that election, the victorious candidate pledged to sign an anti-CWIP bill where his opponent (and predecessor) had vetoed it.[5] The new governor made good on his pledge, RSA 378:30-a became law on May 7, 1979, and, once PSNH's constitutional challenge to the statute reached its denouement a decade later, the bankruptcy proceedings ensued.

Thus, in a very real sense, by seeking to recover costs arising out of a major canceled project from its captive customers, Liberty Utilities is endeavoring to thwart the most resolutely ratepayer-favorable policy ever adopted by the General Court. Given that the Office of the Consumer Advocate has both the "power and the duty" to defend the interests of residential utility customers in every forum available, *see* RSA 363:28, II (directing the Consumer Advocate to appear "before any board, commission, agency, court, or regulatory body in which the interests of residential utility customers are involved"), we appear in this appeal to defend the applicable principle as much as the

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[55] For a contemporaneous account of the central role this controversy played in the 1978 gubernatorial election, *see* David S. Broder, "The 10 Percent Utility Uproar" (*Washington Post*, October 31, 1978) available at https://www.washingtonpost.com/archive/politics/1978/10/31/the-10-percent-utility-uproar/8d7a5c23-eca9-41ec-9979-aa018df12462/; see also *Appeal of PSNH*, 125 N.H. at 51 (noting that the concept enshrined in RSA 378:30-a first emerged in the 1977 session of the General Court) and App., Vol. III at 10 (discussion of Broder article in OCA brief filed with PUC on June 25, 2021).

relatively modest amount of money correctly disallowed for rate recovery by the agency below.

## SUMMARY OF THE ARGUMENT

RSA 378:30-a enshrines a simple and clear policy principle in New Hampshire's law of public utilities – that if a utility fails to complete a capital project, costs associated with that project are absolutely banned from recovery from customers. Longstanding and well-established principles of statutory construction, to the effect that decisionmakers must consider statutes in their totality so as to define and then advance their overall purpose, drive the necessary outcome of this appeal.

If, however, the Court deems it necessary to parse the three discrete sentences of the statute, including specific phrases contained therein (e.g., "construction work" and "construction work in progress"), the outcome is the same. The appellant urges the Court to adopt strained and contorted interpretations of specific words and phrases, but the Court must eschew that path.

When the Court last considered RSA 378:30-a, nearly 40 years ago, the dispute concerned a project that had begun but was never completed. This case presents the converse – a project whose actual shovel-in-ground construction never commenced – but the same principle applies. As lthe Court observed in 1978,

the statutory phrase "at no time" means precisely what it appears to mean.

Although the canceled Granite Bridge project would have required a construction permit from the Site Evaluation Committee to move forward, the enabling statute of the Site Evaluation Committee and RSA 378:30-a are not *in pari materia*. The former is a land use regulation statute; the latter enshrines a principle of cost-of-service ratemaking in state law. Therefore, the phrase "commencement of construction" in the Site Evaluation Committee statute sheds no light on the meaning of RSA 378:30-a.

## ARGUMENT

### I. Standard of Review

This case requires the Court to make a *de novo* determination about whether RSA 378:30-a precludes a utility from recovering from customers certain costs associated with a major capital project that was canceled and, therefore, never completed. Although the Court is the "final arbiter" of such questions and is not bound by the Commission's interpretation of the statute, neither does the Court simply ignore the Commission's perspective. *See Appeal of Algonquin Gas Transmission, LLC*, 170 N.H. 763, 770 (2018) (also noting that "the interpretation of a statute by the agency charged with its

administration is entitled to some deference" and that the agency's policy choices are entitled to "considerable deference") (citing *Appeal of Bretton Woods Tel. Co.*, 164 N.H. 379, 364 (2012) and *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012)).

Therefore, the Court should not ignore the observations made by the Commission in the course of ruling that rate recovery was precluded in the circumstances of this case. The Commission noted that it could "identify no other plausible purpose" for Liberty studying the feasibility of the Granite Bridge project other than "in preparation for a construction project" of the sort covered by RSA 378:30-a. This is significant because a central premise of Liberty's argument on appeal is that the costs it seeks to recover are properly regarded as expenditures arising out of the routine efforts that all natural gas utilities conduct to assure the availability of adequate commodity supply. As already noted, *supra*, the General Court intended that sort of work to occur in the context of the least-cost-integrated resource planning required by RSA 378:37 to :40 and there is no history of utilities subject to that process recovering costs associated with such planning other than via their distribution rates as set in the ordinary course of public utility business by rate cases.

Moreover, at least some of the costs at issue here were incurred to gain control of the site needed for part of the Granite

Bridge project. The Company has made no effort, either here or at the agency level, to draw distinctions among the various specific cost categories at issue. Instead, the utility's case rises and falls on its general argument that none of these costs are properly considered a part of an actual construction project. The Commission determined otherwise as a matter of *fact* rather than as a question of law, even going as far as stressing that the agency was unconvinced by the policy arguments marshaled by any of the parties below. App. III at 151.

## II. The "Statute as a Whole"

Beyond that, Liberty's appeal amounts to an invitation for the Court to ignore one of the central tenets of statutory construction that has long applied in New Hampshire and elsewhere. The tribunal must "consider all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result," and thus it is essential to "consider words and phrases, *not in isolation*, *but in the context of the statute as a whole* in order to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Appeal of Vazquez*, 2022 WL 4588132 (N.H. Supreme Ct., 9/30/2022) at *2 (citations omitted, emphasis added); *see also* A. Scalia and B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 167-68 ("Perhaps no interpretive fault is more common than the

failure to follow the whole-text canon" and "the entirety of the document provides the context for each of the parts" in what is properly considered a "holistic endeavor") citations omitted).

The overall purpose of RSA 378:30-a comes into sharp focus when one studies the decision of the Commission that the General Court acted so as to supersede. In *Public Service Company of New Hampshire*, 63 NH PUC 127 (1978), the agency allowed the state's largest electric utility to place more than $111 million dollars – then, an especially gargantuan sum – into rate base for recovery from customers even though those costs were associated with the Seabrook nuclear power plant that was still many years from completion. The Commission concluded that such an approach "will, in the long-run, benefit the ratepayers as well as the company" by generating "increased cash flow for the company thereby decreasing the necessity for externally financed capital." *Id.* at 149. In so determining, the Commission explicitly deemed itself not bound by the traditional "used and useful" concept – the notion that captive ratepayers should pay only for utility assets that are actually involved in providing service to customers. *See In re Campaign for Ratepayers' Rights*, 145 N.H. 671, 676 (2001) (describing "used and useful" principle and noting it is not constitutionally mandated). The Commission rejected this idea, as advanced by the Legislative Utility Consumers' Council (predecessor to the Office of the Consumer Advocate)

because, the regulators reasoned, "utilities are legally required to plan responsibly to meet future growth on their system created by the future service needs of the existing as well as future customers." *In re PSNH,* 63 NH PUC at 149*; see also Legislative Utility Consumers' Council v. PSNH*, 119 N.H. 332, 343-45 (1979) (holding that "'[u]sed and useful' is not a rigid concept; rather it is an elastic one" and any decision to include CWIP in rate base "is a factual one to be made on a case by case basis") (citations omitted).

In other words, the Commission in 1978 embraced the very basis offered here by Liberty for recovering its Granite Bridge costs from customers – and the General Court, one year later, overruled the agency. It did so via a cascade of three sentences that are the entirety of RSA 378:30-a. Liberty's unsuccessful arguments on rehearing, and its contentions on appeal, all rest on a word-by-word, sentence-by-sentence deconstruction of RSA 378:30-a, but the Court should not lose sight of what the Legislature was actually seeking to accomplish in 1979.

Read as a whole, the meaning is unassailably clear: If the project is not actually providing service to customers, it cannot be recovered via rates and charges regardless of what has occurred, or what has not occurred, prior to the in-service date. In other words, "used and useful," as the standard for when the cost of a

project may be placed in rates, is firmly enshrined in New Hampshire law.

## III. Parsing discrete words and phrases does not change the result.

In its brief, Liberty claims that each individual sentence of RSA 378:30-a is inapplicable for reasons specific to each sentence when considered in isolation. Even assuming the propriety of such an approach, these contentions are unpersuasive.

### A. First Sentence

According to Liberty, the first sentence of the statute is inapplicable because it precludes rates and charges based on "construction work in progress" and, as with Granite Bridge, construction work that never commenced cannot be understood to have been "in progress." This argument is both too specific and too broad. It is too specific because, for the reasons already explained, the statute when considered as a whole precludes the relief Liberty seeks here. It is too broad because Liberty ignores the phrase "in any manner." The Legislature could have, but did not, specify simply that "construction work in progress shall not be included in rates or charges." But precluding rates that are "based . . . in any manner" on construction work in progress can and should be reasonably read to preclude artful efforts by utilities and compliant regulators to sneak project-related costs of non-used-and-useful projects into rates. Such a gloss on the first

sentence of RSA 378:30-a keeps faith with the principle that the General Court "is not presumed to waste words or enact redundant provisions." *Doe v. Attorney General*, 2022 WL 2839234 (N.H. Supreme Ct., 7/21/22) at * 2 (citation omitted).

B. Second Sentence

The second sentence of RSA 378:30-a also clearly precludes the sort of rate recovery that Liberty seeks here. This sentence reads: "At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed."

According to Liberty, the reference to construction work that is "not completed" means this provision applies only to construction work that was actually commenced. But the Court cannot read the second sentence in this fashion without violating its longstanding principle: "[W]e do not consider words *and phrases* in isolation but rather within the context of the statute as a whole." *Doe, supra* (citation omitted, emphasis added). The phrase Liberty would have the Court ignore is, of course, "at no time," because it obviously includes the pre-construction phase of a project the utility intends (at the time the costs are incurred) to see to completion.

C. Third Sentence

Finally, Liberty erroneously claims that the third and final sentence of RSA 378:30-a is inapposite to the situation in which

construction of a project never commences. In the third sentence, the General Court provides a non-exclusive list of "costs of construction work in progress – i.e., "any costs associated with constructing, owning, maintaining or financing construction work in progress" – and proclaims all such costs to be out of bounds for rate recovery purposes until "said construction project is actually providing service to consumers." To construe "construction work in progress" narrowly here, as Liberty proposes, would be to abandon the notion of "fair meaning" in favor of a "hyperliteral meaning of each word in the text." Scalia & Garner at 356 (also quoting Judge Learned Hand 's observation that "a sterile literalism . . . loses sight of the forest for the trees") (citation omitted). It is undisputed here that the costs Liberty is seeking to recover involve "owning" and "financing" what was, admittedly, a future example of construction work. But the only plausible interpretation is that "construction work in progress" is used here as a term of art, in which the "progress" encompasses all phases of a capital project including those associated with assessing feasibility, design work, and site control.

## IV. The Court's 1984 Construction of RSA 378:30-a

As Liberty did before the Commission, the utility rests part of its argument here on the Court's construction of RSA 378:30-a in *Appeal of Public Service Company of New Hampshire*, 125

N.H. 46 (1984). Read properly, this decision actually counsels in favor of affirming the agency determination below.

The case stands quite literally for the proposition that Liberty cannot prevail on appeal. The question certified to the Court in *Appeal of PSNH* was whether RSA 378:30-a precluded recovery in rates of costs associated with capital projects that have been "abandoned." The answer was an unequivocal "yes." *Id.* at 48. Granite Bridge is likewise an abandoned project, to which the interpretation of RSA 378:30-a set forth in *Appeal of PSNH* applies with full force.

Nevertheless, Liberty invokes certain observations made by the Court in its 1984 opinion which, when taken out of context, can be deployed in favor of a sophist's gloss on the statute. The Court focused on the second sentence of RSA 378:30-a, noting that "each of the three prohibitory sentences restricts the commission's discretion in some way" but "the second appears on its face to have the broadest scope in both time and in subject matter." *Id.* at 52. Thus, the Court concluded, the phrase "at no time" in the second sentence "means what it appears to mean" and "[c]onstruction work on an abandoned plant is construction work that is 'not completed'" within the meaning of the second sentence. *Id.* at 54. In that very specific context, the Court found it necessary to draw a distinction between "construction work" as the phrase appears in the second sentence of the statute and

"construction work in progress," a phrase from the first sentence. *Id.* at 53-54. The Court concluded that "construction work" in sentence two, should be taken "in its common sense" as "referring to a physical structure" and thus devoid of any suggestion that "it refers to uncompleted construction work only before, but not after, abandonment." *Id.* at 54.

The answer to the problem presented here can and should be squared with the analysis in *Appeal of PSNH*. "Construction work" as used in sentence two does indeed refer to physical construction as the Court noted in 1984, but "costs associated with construction work" is broad enough to include costs that are necessary to construction work but precede its actual commencement. Any other outcome departs from the meta-point made by the Court in *Appeal of PSNH*, which is that the phrase "'at no time' means what it says it means," *id.*, and only completed capital projects may find their way into rates.

## V. RSA 378:30-a and RSA 162:H are not *in pari materia*

In its brief, Liberty devotes considerable attention to RSA 162:H, which is the statute creating the state's Site Evaluation Committee and vesting it with the authority to grant construction permits that are required to build certain energy facilities in New Hampshire. There is no dispute that had Granite Bridge moved forward, it would have needed such a construction permit. However, from this it does not follow that

the phrase "commencement of construction" as it appears in RSA 162-H:2, III, to specify what activities a project developer may undertake prior to receiving a construction permit from the Site Evaluation Committee, somehow informs the meaning of the phrase "construction work" in RSA 378:30-a.

It is well-established that "[s]tatutes *in pari materia* are to be interpreted together, as though they were one law." Scalia & Garner at 252. *In pari materia* – literally, "in a like manner" – refers to "laws dealing with the same subject." *Id.* These two statutes do not qualify.

RSA 162-H is a land-use statute. In effect, the Site Evaluation Committee becomes a substitute for municipal zoning boards and the like, the better to assure that local concerns cannot automatically preclude the development of energy facilities with statewide benefits. RSA 378:30-a is a statute concerned with utility rates – and, as observed in *Appeal of PSNH*, the timing and method for recovering the costs of capital projects. *See Appeal of PSNH,* 125 N.H. at 22 (describing the two commonly used methods for recovering costs associated with project construction and their impact on utility cash flow). Moreover, some projects requiring a construction permit from the Site Evaluation Committee do not involve RSA 378:30-a (e.g., oil refineries or electric generation facilities not owned by a public utility, *see* RSA 162-H:2, VII) while, conversely, some utility

facilities subject to RSA 378:30-a do not fall within the jurisdiction of the Site Evaluation Committee because, to use *Appeal of PSNH* as an example, the projects are not located in New Hampshire.

In other words, although the enabling statute of the Site Evaluation Committee and the statute governing rate recovery for utility construction projects both refer to "construction," the two enactments do not actually cover the same subject. RSA 378:30-a and RSA 162-H are no more *in pari materia* than are RSA 378:30-a and statutes governing safety procedures at energy facility construction sites, wages and hours at such construction sites, or pollution emitted in the course of energy facility construction. *Compare Young v. Bridges*, 86 N.H. 135, 165 A. 272, 275 (1933) (deeming inheritance and adoption statutes to be *in pari materia*) *with In re Thayer*, 145 N.H. 177, 183 (2000) (concluding that the rules of judicial conduct and the rules of professional conduct for lawyers are not *in pari materia* even though both concern lawyers).

Since the two statutes are not *in pari materia*, the meaning of "commencement of construction" as used in RSA 162-H is not dispositive of how "construction work" or "construction work in progress" as used in RSA 378:30-a should be construed. Indeed, the comparison is not instructive in the least.

## CONCLUSION

In summary, this case should be decided with recourse to the longstanding principle that the Court should "construe all parts of a statute together" – here, three complicated and somewhat overlapping sentences including various references to 'construction work' and 'construction work in progress' – to effectuate the "overall purpose" of the enactment and "avoid an absurd or unjust result." *Vasquez, supra*. Liberty would have the court fold, spindle, and mutilate the various words and phrases in RSA 363:30-a in the hope that the Court will transgress its long-established prime directive of statutory interpretation – that one must not "consider words and phrases in isolation" but, instead, interpret those individual words and phrases "within the context of the statute as a whole." *White v. Auger*, 171 N.H. 660, 677 (2021) (citations omitted).

The overriding and incontrovertibly clear purpose of RSA 378:30-a is to enshrine an uncompromising "used and useful" principle in the utility law of New Hampshire such that the only costs associated with capital projects that can be recovered from ratepayers are those associated with capital projects that are actually placed into service. All other costs associated with all other projects are the responsibility of utility shareholders rather

than utility ratepayers. The Public Utilities Commission, as the statutory arbiter of the interests of utility shareholders and utility customers pursuant to RSA 363:17-a, resolved this controversy correctly and its decision should be affirmed on appeal.

Respectfully Submitted,

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By its Attorney,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the Rules of the New Hampshire Supreme Court, this brief contains 6,731 words as calculated by the word processing program used to create the document, which is fewer than the words permitted under the Court's rules.

October 26, 2022 Donald M. Kreis

## CERTIFICATE OF SERVICE

I hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the New Hampshire Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; all counsel of record are so registered.

October 26, 2022 Donald M. Kreis