THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2022-0146

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY
PUBLIC UTILITIES COMMISSION DOCKET NO. DG 20-105

APPEAL OF LIBERTY
PURSUANT TO RSA 541:6 AND SUPREME COURT RULE 10
FROM DECISIONS OF THE PUBLIC UTILITIES COMMISSION IN
ORDER NO. 26,536, DATED OCTOBER 29, 2021, AND ORDER ON
REHEARING, ORDER NO. 26,583, DATED FEBRUARY 17, 2022

BRIEF OF APPELLANT LIBERTY

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Appellant requests oral argument before the full court, to be presented by Terri L. Pastori

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QUESTION PRESENTED

Whether the Commission erred as a matter of law in concluding that RSA 378:30-a prohibited recovery of costs related to the investigation, evaluation, and assessment of a potential project because the New Hampshire Public Utilities Commission ("Commission") found those costs to be "associated with construction work if said construction work is not completed" where it is undisputed that construction work had never begun. See Motion of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty ("Liberty") for Rehearing (App. Vol. III, 164).[1]

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

N.H. 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.

[1] In accordance with N.H. Sup. Ct. R. 17(1), the parties to this appeal have collaborated to compile the appendices to this brief for the Court's convenience, using documents from the voluminous Certified Record that the Commission filed with the Court on August 8, 2022, as well as relevant documents from other Commission dockets. These appendices will be referenced as "App. Vol. __, __."

I. STATEMENT OF THE CASE AND FACTS

The Commission misconstrued RSA 378:30-a, New Hampshire's "anti-CWIP" statute, in denying Liberty's request for recovery of certain costs to survey, study, and evaluate the feasibility of a potential least-cost option (a potential pipeline and liquefied natural gas ("LNG") facility referred to as Granite Bridge) to expand Liberty's capacity for natural gas needed to serve its customers in New Hampshire. In its Orders, the Commission ignored the undisputed fact that construction had not begun on Granite Bridge in erroneously concluding that the costs incurred were associated with construction. It is Liberty's position that the only reasonable interpretation of RSA 378:30-a is that it bars costs incurred after the commencement of construction and not costs related to feasibility assessments, which are at issue in this appeal.

A. The History of Liberty's Granite Bridge Due Diligence.

Liberty is a regulated utility that provides natural gas distribution service to over 98,000 customers in 35 cities and towns in New Hampshire. See Form F-16 Annual Report of EnergyNorth Gas Inc. d/b/a Liberty Utilities for Year Ending 2020[2] (revised Aug. 11, 2021) at 2 (App. Vol. III, 95). As a public utility, Liberty is obligated to procure appropriate capacity and supply resources to meet the needs of its customers. See RSA 374:1 (2020) ("Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable"). Since at least 2013, Liberty has identified a capacity

[2] Hyperlinks to documents contained in dockets aside from Docket No. DG 20-105, at issue in this appeal, are provided for the Court's convenience. These documents are also included in Liberty's Appendices.

shortfall, necessitating new resources to meet its obligation to provide reliable service on its design day (*i.e.*, the coldest day in its demand forecast). See id.; RSA 378:38 (2020) ("each electric and natural gas utility … shall file a least cost integrated resource plan with the commission [which] plan shall include … A forecast of future demand [and] An assessment of supply options including owned capacity, market procurements, renewable energy, and distributed energy resources" that will meet the forecasted demand); N.H. Admin. Rules Puc 509.20(c) ("Each utility shall file annually … a report summarizing the upcoming winter period design day forecast [which] report shall include … The demand [forecast, and] The supply of [gas] available to meet design day demand"); see also EnergyNorth Natural Gas, Inc. d/b/a Liberty Utilities, Integrated Resource Plan, Docket No. DG 13-313 (N.H. P.U.C. Nov. 1, 2013) at 65 (App. Vol. I, 69).

As early as 2013, Liberty began analyzing various options to meet the identified shortfall in capacity. See Rebuttal Testimony of Francisco C. DaFonte, William R. Killeen, and Steven E. Mullen (Apr. 29, 2021) at 9 (Confidential Appendix[3] ("C.App."), 65. Liberty's system has long relied on a single transmission pipeline owned by Tennessee Gas Pipeline Company, LLC ("TGP") for the delivery of gas to its service territory in southern and central New Hampshire (the "Concord Lateral"). See Supplemental Testimony of Francisco C. DaFonte, William R. Killeen, and

[3] Pursuant to N.H. Sup. Ct. R. 12(2)(a), Liberty has compiled documents from the Certified Record that the Commission has already determined to be confidential in a separate, confidential appendix. Publicly-available versions of these documents with redactions applied, which are accessible in the Commission's electronic docket, are also included in Liberty's Appendices.

Steven E. Mullen (Nov. 20, 2020) at 5, 12-13 (C.App., 11, 18-19). Liberty's system is not close to any other transmission pipeline, see id. at 13 (C.App., 19), and the existing capacity on the Concord Lateral, which parallels Interstate 93 from Dracut, Massachusetts, to Concord, New Hampshire, had been fully committed for years. See id. at 14 (C.App., 20). Therefore, the options to increase Liberty's capacity were limited to paying TGP to upgrade the Concord Lateral, a substantial and expensive construction project, or finding a new source of capacity that could provide a separate feed into Liberty's system. Id. at 14-15 (C.App., 20-21). Finding a new source of capacity requires feasibility assessments prior to undertaking construction of any new facility.

In 2014, Liberty entered into a contract with TGP to participate in the Northeast Energy Direct ("NED") project to fulfill its incremental capacity needs. See id. at 5, 13-14 (C.App. 11, 19-20). The NED project proposed a new pipeline traveling from Massachusetts through southwestern New Hampshire and ultimately would have connected to Liberty's distribution system in Nashua. See Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, Docket No. DG 14-380, Order No. 25,822 (N.H.P.U.C. Oct. 2, 2015) (App. Vol. I, 83). The Commission approved this contract in 2015. Id. In 2016, however, TGP cancelled the NED project, requiring Liberty to again investigate options to solve its capacity shortfall. See C.App., 20.

Liberty identified two available capacity alternatives: (1) procure a new contract with TGP for TGP to construct new facilities to upgrade the existing TGP Concord Lateral (the "TGP construction contract"); or (2) explore the feasibility of a Liberty-sponsored supply and capacity project,

which ultimately became known as Granite Bridge. Id. at 20-21. Liberty's concept for Granite Bridge involved, first, a natural gas pipeline running along New Hampshire's Route 101 corridor between Manchester and Exeter, which the Legislature had deemed an "Energy Infrastructure Corridor." See RSA 162-R:2, II(d). This pipeline would connect the Concord Lateral in Manchester to another transmission pipeline in Exeter to provide additional capacity and a second feed to Liberty's service territory. The second component of Granite Bridge was an LNG facility in Epping, which would provide the primary source of supply for the pipeline. See Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, Petition to Approve Firm Supply and Transportation Agreements and the Granite Bridge Project, Docket No. DG 17-198 (N.H. P.U.C. Dec. 21, 2017) ("Granite Bridge PUC Proceeding") at ¶¶ 9-10 (App. Vol. I, 117). The TGP construction contract alternative remained the more expensive alternative throughout the time that Liberty evaluated Granite Bridge. See C.App., 20-25.

Because sponsoring Granite Bridge was a substantial undertaking, Liberty took the prudent step, in 2017, of requesting the Commission's pre-approval of the decision to select the Granite Bridge alternative as its least cost option by initiating the Granite Bridge PUC Proceeding. See App. Vol. I, 117. Put simply, as with Liberty's request for approval of the NED contract, 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. See, e.g., RSA 374:2 (2020) (public utilities to provide reasonably safe and adequate service); RSA 374:7 (2020) (Commission's authority to

"investigate … the methods employed by public utilities in manufacturing, transmitting or supplying gas" and "to order all reasonable and just improvements and extensions in service or methods" to supply gas); RSA 378:7 (2020) (rates collected by a public utility for services rendered or to be rendered must be just and reasonable); RSA 378:28 (2020) (all utility plant to be included in permanent rates must be found by the Commission to be prudent, used, and useful).

In 2019, additional capacity on the Concord Lateral had unexpectedly become available, and TGP offered that capacity to Liberty at pricing that was significantly less than the proposed costs of the TGP construction contract and also significantly less than the Granite Bridge cost estimates, making it the superior option for Liberty's customers. See C.App., 24-25. As a result, Liberty never reached the ultimate issue of feasibility, received approval from the Commission that Granite Bridge was the prudent choice, or submitted an application for a siting permit from the New Hampshire Site Evaluation Committee ("SEC") pursuant to RSA 162-H:5, because Liberty immediately suspended the evaluation of Granite Bridge's feasibility when it received the new, lower cost offer from TGP for additional capacity in 2019. Id. at 13, 43-44. When Liberty ultimately signed a contract with TGP for the right to transport 40,000 dekatherms of natural gas per day through the Concord Lateral, Liberty discontinued its evaluation of the Granite Bridge project entirely. See id. at 30-31. The Commission approved the new TGP contract on November 12, 2021. See Liberty Utilities (EnergyNorth Gas) Corp. d/b/a Liberty, Docket No. DG 21-008, Order No. 26,551 (N.H.P.U.C., Nov. 12, 2021) (App. Vol. III,

154); see also Order Declining Appeal (N.H. Sup. Ct. Case No. 2022-0077, Mar. 23, 2022).

B. Liberty's Request for Cost Recovery for Granite Bridge Feasibility Costs.

After Liberty discontinued its evaluation of Granite Bridge, it filed a motion to add a request to recover the costs to explore the feasibility of the Granite Bridge project in a then-pending rate case in Commission Docket No. DG 20-105. See Liberty's Motion to Amend Petition (Nov. 20, 2020) (App. Vol. I, 139); see also Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, Docket No. DG 17-198, Order No. 26,409 (N.H.P.U.C., Oct. 6, 2020) (App. Vol. I, 122). The Commission allowed Liberty's request to recover the Granite Bridge costs to become part of that general rate case. See Supplemental Order of Notice (Dec. 18, 2020) (App. Vol. I, 192).

The costs for which Liberty sought recovery were limited to costs necessary to fulfill Liberty's RSA 378:37 obligation to survey, study, and investigate the feasibility of Granite Bridge to determine whether it was, in fact, the least-cost alternative available at the time. See C.App., 14, 34-35. Granite Bridge never progressed beyond a conceptual stage. Id. at 23-25. (noting that, at the time that Liberty became aware of the lower TGP pricing, the Granite Bridge design was only 70% complete). Liberty never started construction activities such as excavating and installing pipe or leveling and preparing the LNG site for the necessary foundations because designs were not complete and, importantly, because Liberty had not obtained the necessary legal authority from the SEC to do so under RSA 162-H:5. See id. at 58-59. Thus, for the entire time that Liberty incurred

the Granite Bridge costs, no final decision had been reached as to whether Liberty would proceed with Granite Bridge or with the TGP construction contract. Id. at 20-31. The analysis remained incomplete, making any further steps inherently premature. See id. at 23-25.

The specific types of Granite Bridge costs for which Liberty sought recovery in Docket No. DG 20-105 included: (1) engineering to develop preliminary designs used to determine construction feasibility and to prepare and refine capital cost estimates; (2) environmental assessments and analyses to determine construction feasibility and define compliance obligations; (3) general consulting expenses for services associated with certain viability tasks and regulatory activities in the Granite Bridge PUC Proceeding; (4) expenses incurred by the Commission Staff's consultant and for the court reporter in the Granite Bridge PUC Proceeding; (5) internal labor for assessing the viability and feasibility of the potential project, management of external resources, and review of detailed costs analyses conducted by Liberty personnel; and (6) expenses to secure an option to purchase land in Epping for the proposed LNG facility and options to acquire easements to locate the metering stations at either end of the proposed pipeline, the precise locations of which were needed to assess feasibility. Id. at 34-35.

C. The Commission's Order and Order Denying Rehearing.

On October 29, 2021, the Commission issued an Order denying Liberty's request for cost recovery on the sole basis that RSA 378:30-a barred recovery, erroneously concluding that the Granite Bridge feasibility costs were costs "associated with construction." See Order No. 26,536

("Order") at 1-9 (Addendum ("Add.") at 32-40). Specifically, the Commission found that "[t]he feasibility studies that Liberty undertook for the Granite Bridge project are unambiguously costs 'associated with construction,'" reasoning that it "can identify no other plausible purpose for undertaking these studies and the other actions it took that resulted in the costs at issue except in preparation for a construction project." See id. at 5 (Add. at 36). The Commission did not engage in any analysis related to when "construction work" commences within the meaning of RSA 378:30-a, nor did it make any findings concerning the reasonableness or prudency of the costs.

On November 24, 2021, Liberty filed a motion for rehearing, arguing, *inter alia*, that the costs for which Liberty sought recovery were associated with its feasibility evaluation, not "construction work," a fact that the Commission overlooked in the Order. See App. Vol. III, 164. Liberty further noted that, not only had there been no physical plant construction, but Liberty had not even begun the complicated and involved process of seeking a siting permit from the SEC, a statutorily required prerequisite to the commencement of constructing the Granite Bridge pipeline and the Granite Bridge LNG facility, each of which would have been classified as an "energy facility" as defined in RSA 162-H:2, VII (2020), thus falling within the SEC's jurisdiction. See id.; see also RSA 162-H:5, I (2020); RSA 162-H:2, III (2020) (defining "commencement of construction").

The Office of the Consumer Advocate and the New Hampshire Department of Energy objected to Liberty's motion. See App. Vol. III, 184, 193. On December 22, 2021, the Commission suspended the Order,

pending its consideration of the issues that Liberty raised in its motion for rehearing. See Order No. 26,558 (Dec. 22, 2021) (App. Vol. III, 200).

On February 17, 2022, the Commission denied Liberty's motion for rehearing, rejecting Liberty's argument that it had misconstrued RSA 378:30-a. See, e.g., Order No. 26,583 ("Rehearing Order") (Add. at 41). Affirming its conclusion that the feasibility costs were barred, the Commission reasoned that "the definition of cost associated with construction work, construction project, or construction work in progress is broader than costs of actual physical construction pursuant to the text of the third sentence of RSA 378:30-a," which the Commission noted references costs of ownership and financing. See id. at 7 (Add. at 47).[4] For the reasons outlined below, the Commission erred as a matter of law in denying Liberty's motion for rehearing and should have found that the feasibility costs related to the Granite Bridge project are recoverable.

II. SUMMARY OF LIBERTY'S ARGUMENT

The Commission misconstrued RSA 378:30-a, New Hampshire's "anti-CWIP" statute, in denying Liberty's request for recovery of costs to survey, study, and evaluate the potential least-cost option to expand its capacity for natural gas needed to serve its customers in New Hampshire. Liberty's appeal implicates an important issue of first impression: whether RSA 378:30-a prohibits recovery of costs to investigate, evaluate, and

[4] The Commission also found that Liberty's booking of the costs to Account 183, "Other preliminary survey and investigation charges" is irrelevant, and that the Commission heard and considered the policy arguments and other arguments relating to allowing exit fees in another docket and, therefore, Liberty did not present good reason for rehearing. See Rehearing Order at 7-8 (Add. at 47-48).

assess a possible project when it is undisputed both that construction had not commenced and that Liberty was not legally authorized to commence such construction (because the SEC had not issued a siting permit), and where Liberty ceased investigation into the feasibility of the project in favor of a supply agreement that resulted in reduced rates for customers.

RSA 378:30-a provides in its entirety:

> 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.

See RSA 378:30-a (2020).

The only reasonable construction of RSA 378:30-a is that it bars costs incurred *after* the commencement of construction and does not bar costs associated with assessing the feasibility of a potential project, which are the types of costs at issue in this appeal.

In the Order, the Commission relied on the second sentence of the statute in denying Liberty cost recovery, which provides: "At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed." The Commission

erroneously reasoned that Liberty's costs were in "preparation for a construction project" and therefore were "costs associated with construction." See Order at 5 (Add. at 36). As discussed in more detail in the Argument Section, the Commission's analysis and conclusion contradict the plain meaning of the second sentence of RSA 378:30-a, which bars recovery where construction "work" has necessarily begun but is not currently in progress because it ended prior to completion of the construction work. Liberty never began "construction work" on Granite Bridge. See C.App., 23-25.

In the Rehearing Order, the Commission attempted to buttress its conclusion that RSA 378:30-a bars recovery of Liberty's feasibility costs by relying on the third sentence, noting that it prohibits costs that are "broader than costs of actual physical construction." See Rehearing Order at 7 (Add. at 47). As argued below, this conclusion fails to withstand scrutiny because the third sentence does not have any application beyond the first sentence of RSA 378:30-a (*i.e.*, construction work in progress), which even the Commission acknowledged is not applicable here. See Order at 5-6 (Add. at 36-37).

The Commission's Orders denying Liberty cost recovery based upon an erroneous interpretation of RSA 378:30-a were unjust and unreasonable where it is undisputed that Liberty did not begin "construction work" on the Granite Bridge project. Liberty is entitled to have the Commission's Orders vacated and this matter remanded to the Commission for further proceedings consistent with this Court's Order.

III. ARGUMENT

A. Standard of Review.

An appellant "seeking to set aside an order of the [Commission] has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable." Appeal of Lakes Region Water Co., 171 N.H. 515, 517 (2018); see also RSA 541:13. Although this Court gives the Commission's policy choices "considerable deference" in reviewing its decisions rendered on the merits, it does not defer to its statutory interpretation. See Appeal of Pennichuck Water Works, 160 N.H. 18, 26 (2010). Where, as here, the issue presented is purely a question of law, this Court must review the Commission's statutory interpretation *de novo*. See id.; see also Appeal of Town of Seabrook, 163 N.H. 635, 644 (2012) (explaining that while an interpretation of a statute by the agency charged with its administration is entitled to some deference, the New Hampshire Supreme Court is still the final arbiter of the legislature's intent and are not bound by an agency's interpretation of a statute); Appeal of Bretton Woods Tel. Co., 164 N.H. 379, 386 (2012).

In matters of statutory interpretation, this Court is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." See Roy v. Quality Pro Auto, 168 N.H. 517, 519 (2016) (internal quotations omitted). When the Court interprets a statute, it must "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Id. (quotation omitted). The Court must "interpret legislative intent from the

statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." See Appeal of Algonquin Gas Transmission, LLC, 170 N.H. 763, 770 (2018) (citing LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 736 (2010)).

> We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us 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.

See id. (internal citations omitted).

Additionally, this Court's "ordinary rules" of statutory construction provide that this Court "will consider legislative history *only* if the statutory language is ambiguous." See Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005) (emphasis added).

B. The Commission Misconstrued RSA 378:30-a When It Concluded That RSA 378:30-a Bars Liberty's Feasibility Costs for Granite Bridge on which Construction Work Never Commenced.

RSA 378:30-a bars recovery of construction expenses in three different scenarios, all requiring the threshold finding that "construction work" had commenced. As this Court has determined, "although the three sentences of RSA 378:30-a speak to roughly similar ideas, each must have independent effect and not be redundant to each other." See Appeal of Public Serv. Co., 125 N.H. 46, 54 (1984) ("PSNH").

1. The first sentence of RSA 378:30-a is inapplicable to the feasibility costs at issue.

The first sentence of the statute bars costs associated with "construction work *in progress*," which the Commission correctly determined is not applicable here. See Order at 6 (Add. at 37). It is undisputed that Liberty was not engaged in any construction work "in progress" at the time Liberty filed its petition for cost recovery. See App. Vol. III, 12; C.App., 58-59, 333-34 (Tr. 112:11-113:13). Thus, the first sentence of RSA 378:30-a does not apply.

2. RSA 378:30-a's second sentence does not operate to bar recovery of the costs at issue and is also inapplicable.

The second sentence of RSA 378:30-a, on which the Commission relied to deny Liberty cost recovery, provides: "At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed." See RSA 378:30-a. This provision does not contain the phrase "in progress" after "construction work" as in the first sentence of the statute. The second sentence bars recovery of costs associated with construction work that had begun but is no longer in progress because the work ended prior to "reaching its desired objective." See PSNH, 125 N.H. at 54. The Commission erred in concluding that this sentence applies to Liberty's costs where Liberty had not begun any "construction work" that was later "not completed."

To reach that erroneous result, the Commission began by misconstruing the meaning of the second sentence in the statute as *not* requiring the commencement of actual construction work. Whereas the first and third sentences of RSA 378:30-a both address "construction work

in progress," contemplating actual construction had begun and was still "in progress," and the second sentence addresses work that is no longer "in progress" because the work terminated prior to reaching its desired objective, the second sentence still shares the common denominator of all three sentences – that the construction work began. Stated another way, the second sentence's reference to work that was "not completed" necessarily requires the work to have begun.

Liberty never began construction. See App. Vol. III, 12; C.App., 58-59, 333-34 (Tr. 112:11-113:13). As described below, Liberty was years away from breaking ground on the project, assuming the Commission deemed it feasible and least cost in the first place and the SEC authorized construction per RSA 162-H. Liberty's costs associated with engineering work and other assessments to determine whether Granite Bridge was feasible and would be the least cost option, which are the costs at issue here, do not constitute "construction work" under the statute.

Perhaps recognizing that the plain statutory language did not support its conclusion, the Commission expanded the reach of RSA 378:30-a by ignoring the word "work" in the second sentence and concluding that costs "associated with construction" are barred. By ignoring the limitation created by the use of the word "work," which modifies the preceding word "construction" in the phrase "associated with construction work," the Commission determined that the statute bars all costs associated with "preparation of a construction project." See Order at 5 (Add. at 36).

The Commission's expansive interpretation contravenes the plain meaning and plain language of the statute. In construing RSA 378:30-a as it did, the Commission violated a basic rule of statutory interpretation,

requiring it to give full effect to all words in the statute. See Garand v. Town of Exeter, 159 N.H. 136, 141 (2009) (quoting Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008)) ("[t]he legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect"). Likewise, statutes should not be construed in such a way that would lead to an absurd result. See State v. N. of the Border Tobacco, LLC, 162 N.H. 206, 212 (2011); see also Weare Land Use Ass'n v. Town of Weare, 153 N.H. 510, 511 (2006) (statutes should be interpreted to lead to a reasonable result).

Here, giving all words in the second sentence their full effect and not inserting words into the statute that the legislature did not see fit to include underscores the Commission's error. RSA 378:30-a does not reference costs associated with "preparation of a construction project," the Commission's phrase, but rather "costs associated with *construction work*." See RSA 378:30-a (emphasis added). The universe of costs associated with "construction" alone, the Commission's selective quotation, is an expansive one which could encompass mere conceptual and attenuated efforts that may, or may not, eventually lead to breaking ground and the commencement of construction. In contrast, the phrase "costs associated with construction *work,*" which is the unambiguous statutory language, can only mean construction activities that have actually begun implementing the previously conceptual-only efforts. The Commission's analysis and conclusion contradict the plain meaning of the second sentence of RSA 378:30-a, which bars recovery where construction "work" has necessarily begun but is not currently in progress because it ended prior to completion of the construction work. Liberty never commenced any "construction

work" and thus the second sentence of RSA 378:30-a, the sentence the Commission relied on in the Order, does not apply.

3. The third sentence of RSA 378:30-a is inapplicable to the costs at issue.

The third and final sentence in RSA 378:30-a provides:

> 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.

See RSA 378:30-a.

As an initial matter, the third sentence of RSA 378:30-a provides detail of some of the costs associated with "construction work in progress," the recovery of which the first sentence in RSA 378:30-a prohibits. As there was no "construction work *in progress*" on Granite Bridge, the Commission correctly declined to apply the first sentence of RSA 378:30-a in assessing Liberty's request for cost recovery. See Order at 6 (Add. at 37) (noting "the phrase 'associated with construction work' in the second sentence of RSA 378:30-a must mean something other than 'construction work in progress' in order to read the statute consistently with the presumption against redundancy," and concluding the second sentence alone barred recovery). As such, the examples of costs associated with "construction work in progress" in the third sentence of RSA 378:30-a are inapposite to the proper interpretation of the second sentence.

Furthermore, the Commission made a sweeping and erroneous pronouncement that the examples in the third sentence apply to "construction work," "construction project[s]," and "construction work in progress." See Rehearing Order at 7 (Add. at 47). Such a determination is not supported by a plain reading of RSA 378:30-a and is erroneous as a matter of law where the third sentence of RSA 378:30-a exclusively applies to "construction work in progress."

C. This Court Should Look to RSA 162-H:2, III as a Benchmark for Which Activities are Considered "Construction Work" for Purposes of Construing the Second Sentence of RSA 378:30-a.

While RSA 378:30-a does not address when "construction work" commences, another relevant statute does. Pursuant to RSA 162-H:5, I, the construction of large energy projects in New Hampshire cannot commence unless and until a siting permit from the SEC is secured. See RSA 162-H:5, I (2020) ("No person shall commence to construct any energy facility within this state unless it has obtained a certificate pursuant to this chapter."). Had they proceeded, the Granite Bridge pipeline and the Granite Bridge LNG facility would each have been an "energy facility" within the SEC's jurisdiction. See RSA 162-H:2, VII(a) (2020).

RSA 162-H:2, III defines "commencement of construction" for the purpose of determining what work cannot be done before obtaining the necessary siting permit. RSA 162-H:2, III provides in its entirety:

> "Commencement of construction" means any clearing of the land, excavation or other substantial action that would adversely affect the natural environment of the site of the proposed facility, but does not include land surveying, optioning or acquiring land or rights

> in land, changes desirable for temporary use of the land for public recreational uses, or necessary borings to determine foundation conditions, or other preconstruction monitoring to establish background information related to the suitability of the site or to the protection of environmental use and values.

See RSA 162-H:2, III (2020).[5] Liberty performed none of the activities identified in this statute as construction work, not only because Liberty did not have a permit from the SEC to do so, but also due to the fact that Liberty was still assessing feasibility of the potential project. It is undisputed that Liberty never applied for a siting permit from the SEC. See C.App., 146 (Tr. 71:9-13), 333-34 (Tr. 112:11-113:13). In fact, applying for a siting permit – even immediately prior to when Liberty formally discontinued its evaluation of Granite Bridge – would have been premature because the Commission had yet to hold a hearing and render a decision as

[5] In its motion for rehearing, Liberty argued that construction of the Granite Bridge project would have required a siting permit from the SEC, noting that Liberty did not make an application for a siting permit, nor were any pre-construction or construction activities commenced, citing RSA 162-H:5, I. See Motion for Rehearing at ¶ 7 & n. 5 (App. Vol. III, 169). Liberty later called the Commission's attention to RSA 162-H:2, III in a letter to Commission Chairman Goldner dated January 18, 2022, noting that Liberty had previously referenced RSA 162-H:5 and raised the issue of no construction having commenced in its motion for rehearing. See App. Vol. III, 202-03. In the Rehearing Order, the Commission incorrectly depicted the January 18, 2022 letter as raising "new arguments." See Rehearing Order at 5 (Add. at 45). This Court has previously held that while parties must raise all *arguments* before the trial court or agency, the Court "will not restrict a party only to those authorities cited to the trial court." See Riverwood Com. Props. v. Cole, 134 N.H. 487, 490 (1991); see also State v. Schachter, 133 N.H. 439, 440 (1990) (holding that a party need only raise its "general theory" of its case in the lower court and would not "lose its right to appeal on that theory simply because it cited for the first time on appeal a statute that it believed to be favorable to its position."). As such, Liberty is properly raising the definition of "commencement of construction" in this appeal.

to whether Granite Bridge was the least cost option to serve Liberty's needs. As such, Liberty was far removed from any commencement of construction related to Granite Bridge.

When, as here, it is reasonably possible to construe statutes consistently with each other, this Court must do so. See Appeal of Union Tel. Co., 160 N.H. 309, 319 (2010) (citing Appeal of Derry Educ. Assoc., 138 N.H. 69, 71 (1993)). In situations where two statutes deal with similar subject matter, they must be construed "so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." See id. (citing Appeal of Campaign for Ratepayer Rights, 142 N.H. 629, 631 (1998)).

Reading RSA 378:30-a and RSA 162-H:2, III together, there can be no question that Liberty's feasibility expenses are not associated with "construction work" within the meaning of RSA 378:30-a, as none of the work in question approached triggering commencement of construction, as defined with specificity by RSA 162-H:2, III.[6] Liberty did not clear land, excavate, or take any other substantial action that would adversely affect the natural environment of the site of the proposed facilities. Indeed, RSA 162-H:5, I precluded Liberty from doing so because Liberty did not have the required SEC permit. If anything, Liberty's efforts were more in line

[6] "Optioning or acquiring land or rights in land" is excluded from RSA 162-H:2, III's definition of "commencement of construction." This means that the optioning or acquiring land rights alone does not trigger commencement of construction for the purposes of not only RSA 162-H:5, I, but also RSA 378:30-a. RSA 162-H:2, III and RSA 378:30-a can be construed harmoniously because the third sentence of RSA 378:30-a is only applicable to the unavailability of rate recovery once construction has begun and is in progress, and RSA 162-H:2, III applies to evaluate whether construction has begun for the purposes of necessitating a siting permit.

with the type of work specifically excluded from "commencement of construction" for the purposes of obtaining a siting permit, which RSA 162-H:2, III indicates includes land surveying, test borings, and other preconstruction monitoring to establish background information related to the suitability of the sites.

The costs Liberty seeks to recover are not barred as associated with "construction work" as construction work was undisputedly never commenced. The costs for which Liberty seeks recovery are limited to costs to assess the feasibility of the potential project. As outlined above, these costs were related to preliminary engineering, environmental assessment, general consulting, Commission-related costs, internal labor related to feasibility, and costs associated with the acquisition of options for the potential purchase of land and easements. None of the activities for which costs were incurred are associated with the "commencement of construction" as defined by RSA 162-H:2, III.

D. This Court's Decision in PSNH Supports Liberty's Interpretation of RSA 378:30-a as Not Barring Costs Associated with Feasibility Studies Prior to the Commencement of Any Actual Construction.

In construing the meaning of "construction work" in the second sentence of RSA 378:30-a, this Court in PSNH opined that, "taking 'construction work' in its common sense referring to a physical structure, it carries no suggestion that it refers to uncompleted construction work only before, but not after, abandonment." See PSNH, 125 N.H. at 54. However, the central dispute in the PSNH case focused on whether construction work *was completed*; there was no dispute that PSNH had commenced construction on the project that it later abandoned. In PSNH, this Court

was presented with the issue of whether RSA 378:30-a precluded recovery of PSNH's investment in a physical plant on which construction had commenced but was abandoned prior to completion of construction. See id. at 51. The Court observed that the interlocutory transfer for the matter on appeal did not specifically describe how the value of the investment was computed, but "we assume it includes both the cost of *actual* construction and the cost of money used to pay for it." Id. (emphasis added).

The Court concluded that PSNH's expenses associated with the construction of its uncompleted and abandoned plant were barred by the second sentence of the statute because they are costs "associated" with the uncompleted construction work, which had commenced but was no longer "in progress," having been abandoned prior to completion. See id. at 54. The Court found that the second sentence of RSA 378:30-a was not ambiguous and that "completed" means that the work "concluded upon reaching its desired objective." See id. The Court notably declined to read "costs associated with construction work" in the statute's second sentence as "costs associated with construction work in progress." Id. at 53-54. Likewise, it declined to interpret "construction work in progress" in the technical accounting sense. See id. at 53.

Although PSNH does not address the central question of this appeal – whether costs are "associated with construction work" for purposes of the second sentence in RSA 378:30-a – the opinion establishes two points. First, in order to construe the statute consistently with the presumption against redundancy, the references to "owning" and "financing" "construction work in progress" from the third sentence of RSA 378:30-a cannot be read into the statute's second sentence. The Court specifically

warned in PSNH that "construction work in progress" is not synonymous with "construction work." See id. at 54. Second, the Court's interpretation of the statute suggests that actual construction is a *sine qua non* of the bar contained in the second sentence. Id.

The Commission's decision to summarily use RSA 378:30-a as a justification to bar recovery of Liberty's reasonable and prudent costs was erroneous as a matter of law, unreasonable, and unjust.

IV. CONCLUSION

This Court should vacate the Orders and remand the issues to the Commission for further proceedings consistent with this Court's Order, including a determination of the prudence of the costs incurred.

REQUEST FOR ORAL ARGUMENT

Liberty requests 15 minutes for oral argument to be presented by Terri L. Pastori, Esquire.

APPELLANT'S CERTIFICATION

Pursuant to N.H. Sup. Ct. R. 16(3)(i), Liberty certifies that copies of the appealed Commission orders are appended to this brief.

Respectfully submitted,

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.

By its attorneys,

PASTORI | KRANS, PLLC

Dated: September 8, 2022 By: */s/ Terri L. Pastori*

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with N.H. Sup. Ct. R. 16(11), and contains 6,203 words, excluding the cover page, Table of Contents, Table of Authorities, Statutes, Rules, Addendum, and Appendix.

/s/ Ashley D. Taylor
Ashley D. Taylor

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2022, the foregoing brief has been served via the New Hampshire Supreme Court's electronic filing system on all parties who have registered through the system.

/s/ Ashley D. Taylor
Ashley D. Taylor

ADDENDUM

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DG 20-105

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
D/B/A LIBERTY UTILITIES

Request for Change in Rates

Order Denying Request to Recover Costs Related to the Granite Bridge Project

O R D E R N O. 26,536

October 29, 2021

In this order the Commission finds that RSA 378:30-a bars recovery of the costs related to the Granite Bridge project and denies Liberty Utilities' request to recover those costs.

I. PROCEDURAL HISTORY

On July 31, 2020, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty") filed a Petition for Permanent and Temporary Rates pursuant to RSA 378:27 and RSA 378:28. The Office of the Consumer Advocate ("OCA") notified the Commission of its intent to participate in the docket by letter dated July 8, 2020. No other parties intervened.

On November 20, Liberty filed a Motion to Amend its petition to include a request for recovery of approximately $7.5 million in costs incurred to investigate, evaluate, and assess a potential project ("Granite Bridge"), which was to include a liquefied natural gas tank and related gas pipeline. Liberty sought to recover these costs through its Local Distribution Adjustment Clause ("LDAC") over a period of five years.

On May 24, 2021, former staff of the Commission appearing in the docket[1] filed a letter on behalf of the parties informing the Commission that the parties had reached a settlement in principle resolving all issues in the proceeding except for the recovery of costs associated with the Granite Bridge project, which the parties intended to litigate.

On June 30, Liberty filed a proposed settlement agreement, which the Commission approved by order dated July 30.[2] On a parallel track, the Commission held duly noticed hearings on June 22 and 23 limited to the recovery of costs associated with Granite Bridge. The OCA, Liberty, and Department of Energy ("Energy") filed post-hearing briefs on June 25. The OCA and Liberty then filed replies on June 29.

Liberty's petitions and related filings, other than any information for which confidential treatment has been requested of or granted by the Commission, are posted on the Commission's website at https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-105.html.

II. POSITIONS OF THE PARTIES

A. Liberty

Liberty argues that recovery of the costs associated with investigation, evaluation, and assessment of the Granite Bridge project is not barred by RSA 378:30-a, the anti-construction-work-in-progress ("anti-CWIP") statute. Brief of Liberty Utilities (Jun. 25, 2021) at 13. Specifically, Liberty asserts that these costs were part of a feasibility study of the Granite Bridge project that occurred before any actual

[1] These positions were transferred to the newly created New Hampshire Department of Energy by legislation effective July 1, 2021.
[2] On August 24, Liberty sought rehearing, in part, of the July 30 order, which the Commission denied by order dated September 22.

construction work occurred and could not, therefore, qualify as "construction work in progress" under RSA 378:30-a. *Id.*

Liberty further argues that the recovery it seeks here is analogous to the recovery of contract exit fees, which the Commission previously approved in another docket. *Id.* at 16 (citing *In Re N. Utilities, Inc.*, Docket No. DG 99-050, Order No. 23,362 (Dec. 7, 1999) ("*Northern Utilities*").

Liberty next argues that the Commission should permit recovery of these costs because the costs were incurred reasonably as part of Liberty's pursuit of the least-cost option for its ratepayers. *Id.* at 17. According to Liberty, its existing gas supplier, Tennessee Gas Pipeline Company ("TGP"), is the only interstate pipeline that reaches New Hampshire, and TGP has taken advantage of its position as Liberty's sole supplier to extract higher prices. *Id.* Liberty pursued the Granite Bridge project to access a new supplier and use market competition to bring down rates for its ratepayers. *Id.* at 18. Liberty notes that, even though it never completed the Granite Bridge project, it was able to leverage the prospect of the project to bargain with TGP for a new contract at significantly reduced cost (so reduced, in fact, that the newly negotiated contract with TGP ultimately became the least-cost option). *Id.*

B. OCA

The OCA argues that recovery of the Granite Bridge project costs is categorically barred by RSA 378:30-a. Brief of the OCA (Jun. 25, 2021) at 2. It urges the Commission to draw no distinction between costs associated with construction projects that begin but are abandoned and costs associated with investigating and evaluating construction projects upon which no actual construction work has

commenced.[3] *Id.* at 7–8. The OCA asserts that the plain language of the statute and its legislative history both support this interpretation. *Id.* at 2–6.

Next, the OCA argues that, even if recovery is not precluded by RSA 378:30-a, the Commission should, nevertheless, deny recovery of those costs because the costs were not prudently incurred. *Id.* at 10–18.

C. Energy[4]

Energy similarly asks that the Commission deny Liberty's request to recover the costs associated with the Granite Bridge project. Brief of Energy (Jun. 25, 2021) at 5. Energy principally argues that recovery is barred under RSA 378:30-a. *Id.* Even if not barred, however, Energy argues that recovery of these costs is not supported by sound regulatory policy. *Id.* at 7. Finally, Energy distinguishes Liberty's Granite Bridge project costs from the contract exit fees approved by the Commission in Docket No. DG 99-050. *Id.* at 8.

III. COMMISSION ANALYSIS

A. Legal Standard

The anti-CWIP statute states as follows:

> 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.

[3] The parties all agree that under *Appeal of Pub. Serv. Co. of N.H.*, 125 N.H. 46 (1984), costs associated with construction projects that begin but are abandoned prior to completion may not be recovered under RSA 378:30-a.

[4] As noted above, Staff Advocates for the Commission filed their brief in this docket prior to their transfer to the newly created Department of Energy on July 1, 2021. This order will refer to them as "Energy," notwithstanding their earlier affiliation to the Commission.

RSA 378:30-a. In interpreting this statute, the New Hampshire Supreme Court has followed its "familiar principles." *Appeal of Pub. Serv. Co. of N.H.*, 125 N.H. 46, 52 (1984) ("*PSNH*"). Among them are that, "[i]n seeking the intent of the legislature, [the Court] will consider the language and the structure of the statute." *Id.* (citing *State v. Flynn*, 123 N.H. 457, 462 (1983)). Additionally, the Court must "follow common and approved usage except where it is apparent that a technical term is used in a technical sense." *Id.* (citing RSA 21:2). Legislative history need be "a guide to meaning only if ambiguity requires choice." *Id.* (citing *Greenhalge v. Dunbarton*, 122 N.H. 1038, 1040 (1982)). Finally, although the three sentences of RSA 378:30-a speak to roughly similar ideas, the Court concluded that they must each have independent effect and not be redundant to each other. *Id.* at 54.

The court in *PSNH* provided a few additional guideposts in its reading of RSA 378:30-a. First, the Court noted that "[t]he statute does not use the term 'construction work in progress' in a technical accounting sense." *Id.* Next, the court focused its attention on the second sentence of RSA 378:30-a ("At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed."), noting specifically that it does not use the term "construction work in progress" at all. *Id.* Finally, the Court rejected the idea that construction work can be considered "completed" when it is abandoned. *Id.* at 54–55.

B. Analysis

The feasibility studies that Liberty undertook for the Granite Bridge project are unambiguously costs "associated with construction." The Commission can identify no other plausible purpose for undertaking these studies and the other actions it took that resulted in the costs at issue except in preparation for a construction project. Specifically, and as acknowledged by Liberty in its own brief, the feasibility studies

and other costs at issue were incurred as part of a plan for construction of a pipeline and liquefied natural gas facility. Brief of Liberty at 7 n.3.

It is also beyond dispute that the construction work in question was never "completed" within the meaning of the statute. The Supreme Court has already rejected the interpretation that "completed," within the meaning of the second sentence of RSA 378:30-a, means something other than "concluded upon reaching its desired objective." *PSNH* at 54. The objective of the Granite Bridge project was to provide Liberty with an alternative source of gas to its existing contract with TGP. Brief of Liberty at 7–8. No Granite Bridge project facilities were ever built or put into use. This construction work was, therefore, not completed within the meaning of RSA 378:30-a.

Because the costs associated with the Granite Bridge project were associated with construction work, and because that construction work was never completed, Liberty's recovery of those costs is barred by RSA 378:30-a.

Numerous of the parties' arguments do nothing to disturb this conclusion. The parties, for example, ascribe significance to the term "construction work in progress." As explained by the Supreme Court, this term is nowhere to be found in the second sentence of RSA 378:30-a. *PSNH* at 53. Because the phrase "associated with construction work" in the second sentence of RSA 378:30-a must mean something other than "construction work in progress" in order to read the statute consistently with the presumption against redundancy, *id.* at 54, the parties focus on the term "construction work in progress" is misplaced.[5]

[5] In this sense, the term "anti-CWIP," (a term which also appears nowhere in the text of RSA 378:30-a) is also something of a misnomer.

Next, the Commission finds no benefit to inquiring into the technical accounting definition of the term "construction work in progress." In addition to that term's absence from the relevant sentence of the statute, the Supreme Court has already definitively ruled that this term is not used in the technical accounting sense. *Id.*

Nor are the parties' policy arguments on either side persuasive. Regardless of whether the so-called "anti-CWIP" statute encourages or discourages utilities from pursuing novel least-cost alternatives, or whether the public is well served by that incentive structure, the text of the law is clear: costs "associated with construction work" that is "not completed" may not be the basis for a utility's rates. RSA 378:30-a. Even assuming *arguendo* that Commission found a party's policy arguments persuasive, it would not empower the Commission to flout the requirements of RSA 378:30-a.

Finally, the Commission's earlier decision in *Northern Utilities* does not compel a contrary conclusion. RSA 378:30-a is a statute with specific application to costs associated with a utility's construction projects. The contract in that docket was an agreement between Northern Utilities and its affiliate utility, Granite State Gas Transmission. *Northern Utilities* at *1. Under the agreement, it was Granite State—not Northern Utilities—that planned to construct a liquefied natural gas facility. *Id.* Although Liberty dismisses this distinction, it is important that the construction work in question was not Northern Utilities' own. Utilities contract with a multitude of entities for a wide variety of purposes unrelated to construction. It is well within the realm of possibility that Liberty has paid, for example, some amount of money to TGP to purchase gas, which TGP used to fund an as-yet incomplete construction project. If RSA 378:30-a also prohibited recovery such attenuated costs as the uncompleted

construction work by a utility's contracting partner utility, the result would be unworkable. If RSA 378:30-a is to be applied rationally and practically, it must apply—and apply only—to projects that the utility undertakes or contracts to construct its *own* plant, facilities, and other infrastructure. The *Northern Utilities* docket is, therefore, entirely distinguishable from the present docket.

Having concluded that RSA 378:30-a bars recovery of the Granite Bridge project costs, the Commission need not address the parties' arguments regarding the public interest or the project's prudency.

Based upon the foregoing, it is hereby

ORDERED, that Liberty shall not recover through its LDAC the costs it incurred associated with the construction of the Granite Bridge project.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of October, 2021.

Dianne Martin
Chairwoman

Daniel Goldner
Commissioner

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Docket# : 20-105

Printed: 10/29/2021

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DG 20-105

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY

Petition for Permanent Rates

Order Denying Motion for Rehearing of Order No. 26,536

O R D E R N O. 26,583

February 17, 2022

In this order, the Commission denies Liberty Utilities' motion for rehearing of Order No. 26,536 pertaining to its request to recover approximately $7.5 million in costs related to the Granite Bridge project.

I. BACKGROUND AND PROCEDURAL HISTORY

In Order No. 26,536 (October 29, 2021), the Commission found that RSA 378:30-a barred recovery of approximately $7.5 million in costs Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (Liberty) incurred related to Granite Bridge, a proposed gas supply project which was to include a new natural gas pipeline and liquified natural gas (LNG) storage, and denied Liberty's request to recover those project costs.

On November 24, 2021, Liberty filed a Motion for Rehearing of Order No. 26,536.

On December 3, 2021, both the Office of the Consumer Advocate (OCA) and the New Hampshire Department of Energy filed objections to Liberty's Motion for Rehearing of Order No. 26,536.

On December 22, 2021, the Commission issued Order No. 26,558, in which it suspended Order No. 26,536 while it considered the merits of Liberty's Motion for Rehearing and the objections.

On January 18, 2022, Liberty filed a letter regarding the Motion for Rehearing.

On January 19, 2022, the OCA filed a letter in response to Liberty's January 18, 2022 letter.

Order No. 26,536, Liberty's Motion for Rehearing of Order No. 26,536, the objections, and related docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at: https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-105.html.

II. POSITIONS OF THE PARTIES

a. Liberty

According to Liberty, good reason exists to rehear Order No. 26,536 because it unlawfully denied cost recovery. In support of its position, Liberty argued that Order No. 26,536 is unlawful because it misconstrues RSA 378:30-a and disregards the underlying evidentiary record.

In support of its argument that the Commission misconstrued RSA 378:30-a, Liberty argued that the Commission mistakenly interpreted the second sentence of RSA 378:30-a in isolation and ignored the plain meaning of the statute and the precedent in *Appeal of Pub. Serv. Co. of N.H.*, 125 N.H. 46 (1984) (*PSNH).* According to Liberty, the Commission did not establish that the identified costs were in preparation for a construction project as opposed to costs incurred to evaluate and assess the costs and viability of one or more project alternatives. To this point, Liberty construed the holding in *PSNH* as limiting the statutory prohibition against recovery of

construction work to only the physical aspects of construction, as opposed to pre-physical construction project activities, such as feasibility studies.

In support of its argument that the Commission disregarded record evidence, Liberty stated that the Commission did not address that the majority of disallowed costs were booked in Account 183, titled Preliminary Survey and Investigation Charges.

Finally, Liberty argued that the Commission's distinction between the instant matter and exit fees approved for recovery in Docket No. DG 99-050 was speculative and not fact-based, arguing that factually the matters are similar but for the classification of the costs as survey and feasibility as opposed to exit fees.

b. Office of Consumer Advocate

The OCA objected to Liberty's Motion for Rehearing of Order No. 26,536. In support of its objection, the OCA argued that the Commission properly construed RSA 378:30-a, arguing that undue weight was not given to the second sentence, while also noting that the third sentence is dispositive of any argument limiting application of the statute to physical construction activities due to its inclusion of pre-construction categories of expense such as "owning" and "financing." The OCA recommended that the Commission clarify that the third sentence of the RSA 378:30-a also supports the Commission's determination.

The OCA reiterated its prior arguments relating to the legislative intent and language of RSA 378:30-a and the holding in *PSNH.* With respect to Liberty's policy-based arguments, the OCA refuted those arguments, stating that it is not within the Commission's discretion to overrule a legislative determination on recoverability based on policy. The OCA also pointed out that Liberty is not precluded from recovering

costs associated with routine planning and preliminary project investigations though the Least Cost Integrated Resource Planning framework in RSA 378:37 *et seq*.

According to the OCA, the determination in Order No. 26,536 was a fact specific determination that the costs sought for recovery were incurred to prepare for a particular construction project. Finally, in response to Liberty's argument relating to Docket DG 99-050, the OCA posited that several specific factual differences exist, including that the exit fees in Docket DG 00-050 were associated with a Commission-approved precedent agreement, whereas the Commission never approved any aspect of the Granite Bridge project.

c. New Hampshire Department of Energy

Energy objected to Liberty's Motion for Rehearing of Order No. 26,536. In support of its objection, Energy argued that Liberty did not state good cause for rehearing because Order No. 26,536 was based on sound reasoning, was neither unreasonable nor unlawful, and that the Commission did not overlook or mistakenly conceive any matters. With respect to the evidentiary support for the Commission's determination, Energy argued that contrary evidence exists in the record, including testimony that established the costs were incurred in preparation for a construction project, that evidence in the record supported that the costs were engineering costs, permitting costs, route design, or otherwise project-specific costs as opposed to general planning costs. Energy also argued that Order No. 26,536 does not deny recovery of planning costs, but only costs that were incurred for a specific project that was never placed into service. In support of this argument, Energy cited to portions of the record where Liberty acknowledged that Least Cost Integrated Resource Planning costs pursuant to RSA 378:37 *et seq.* were not included in the request for recovery and

routine planning costs would be expensed, where the identified costs would be capitalized if the project had been placed in service.

d. Liberty Letter

Liberty's January 18, 2022 letter supplemented the legal argument in its Motion for Rehearing, positing that a definition contained in RSA Ch. 162-H was relevant to the Commission's analysis of its Motion.

e. Office of Consumer Advocate Reply Letter

On January 19, 2022, the OCA requested in the first instance that the Commission strike Liberty's January 18th letter as untimely pursuant to RSA 541:3. The OCA went on to argue that the definition cited to in the letter is not material, and only distantly related, if at all, to the arguments in Liberty's Motion.

III. COMMISSION ANALYSIS

As a preliminary matter, we address Liberty's Letter of January 18, 2022. RSA 541:3 is dispositive of the issue of whether Liberty can raise new arguments after the 30-day deadline to file for rehearing of a Commission order. The party seeking rehearing must specify "all grounds for rehearing" within the 30-day statutory deadline. As Liberty's January 18, 2022 letter contained new arguments and was filed more than 30 days after the issuance of Order No. 26,536, the Commission has not and will not consider either Liberty's new arguments raised on January 18, 2022 or the OCA's January 19, 2022 substantive reply to those arguments because they were untimely filed. The Commission declines to strike the filings from the general record or docket book, while noting that exhibits become part of the evidentiary record of a proceeding only if and when admitted into evidence at a hearing.

The Commission may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3; RSA 541:4;

Rural Telephone Companies, Order No. 25,291 (November 21, 2011); *see also Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 25,970 at 4-5 (December 7, 2016). A successful motion must establish "good reason" by showing that there are matters that the Commission "overlooked or mistakenly conceived in the original decision," *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision," *Hollis Telephone Inc.*, Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Public Service Co. of N.H.*, Order No. 25,970, at 4-5 (citing *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015)).

In Order No. 26,536, the Commission considered each party's legal arguments relating to RSA 378:30-a, restated the full text of RSA 378:30-a[1], and analyzed the New Hampshire Supreme Court's interpretation of RSA 378:30-a in *PSNH*, including the Court's conclusion that although the three sentences of RSA 378:30-a speak to roughly similar ideas, that they must each have independent effect and not be redundant to each other. The Commission determined that the underlying Granite Bridge project costs were costs "associated with construction." Order No. 26,536 at 5.

We therefore, do not agree that Liberty stated good cause to grant rehearing. Liberty did not present new evidence, nor did it establish that the Commission misconstrued RSA 378:30-a relating to the denial of cost recovery associated with the

[1] The full text of RSA 378:30-a bears repeating: "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."

Granite Bridge project. Liberty's argument that the Commission mistakenly interpreted the second sentence of RSA 378:30-a in isolation and ignored the plain meaning of the statute RSA 378:30-a is not persuasive. As pointed out by the OCA, the definition of cost associated with construction work, construction project, or construction work in progress is broader than costs of actual physical construction pursuant to the text of third sentence of RSA 378:30-a. That sentence is an illustrative list that specifically includes costs of ownership and financing, which do not fit within Liberty's arguments pertaining to physical construction. As pointed out by the OCA and Energy, these costs were not routine planning to determine the least-cost course of action, but were costs incurred in furtherance of a specific course of action, i.e., a specific project, Granite Bridge.

Furthermore, we do not agree that record evidence was ignored. As Energy points out, it is clear that evidence in the record demonstrates that the disputed costs were distinct from least-cost planning costs. Regardless, as noted in Order No. 26,536 at 5, *PSNH* holds that 378:30-a does not use the term "Construction Work in Progress" in the technical accounting sense. Liberty's argument that because costs were booked to Account 183 as "Other preliminary survey and investigation charges" is unpersuasive in challenging the Commission's denial of cost recovery with regards to the Granite Bridge project. The operative question is whether the costs were "associated with construction," not how Liberty chose to document those costs for accounting purposes. Here, these costs were plainly associated with the construction of the Granite Bridge project.

It is also apparent that the Commission heard and considered the policy arguments (*see* Order No. 26,536 at 5) and other arguments relating to Docket No. 99-

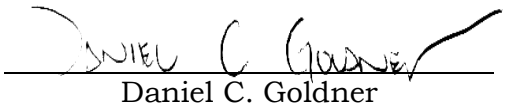
050. *Id.* Therefore, we agree with the OCA that Liberty's Motion does not present good reason for rehearing on these bases.

As such, the Commission finds that Liberty has not stated good cause to rehear the Commission's in Order No. 26,536.

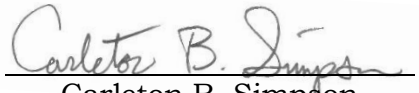
Based upon the foregoing, it is hereby

ORDERED, the Liberty's Motion for Rehearing of Order No. 26,536 (October 29, 2021) is DENIED.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of February, 2022.



Daniel C. Goldner
Chairman



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket# : 20-105

Printed: 2/17/2022

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