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

REPLY BRIEF OF APPELLANT LIBERTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Administrative Rulings

Other Authorities

I. ARGUMENT

Appellant Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty ("Liberty") supplements the argument contained in its opening brief (cited as "AB") with the following reply to certain arguments made in the opposing briefs of the New Hampshire Department of Energy ("DOE") and the New Hampshire Office of the Consumer Advocate ("OCA") (cited as "EB" and "OB," respectively). Abbreviations and defined terms continue from Liberty's opening brief.

A. DOE and OCA Urge an Interpretation of RSA 378:30-a That is Contrary to the Statute's Plain Language.

1. The plain language of the statute and the Commission's own reasoning support the recovery of the attenuated costs at issue.

Liberty did not embark on any "construction work" within any meaningful sense of that statutory phrase. C.App., 23-25, 58-59. This Court must decide whether the second sentence of RSA 378:30-a is so broad as to bar what the Commission classified as "costs incurred to investigate, evaluate, and assess a potential project" (see Add., 32) under consideration as a possible least cost option, which never materialized into physical construction or anything close to it. DOE asserts that those costs "are necessary costs for any construction project and are, therefore, properly considered 'construction work' under the statute." EB, 8, 19. DOE would have this Court conclude that any and all costs incurred related to a utility's duty to evaluate potential least cost options would be precluded from recovery. The practical consequence of such a position would place a utility in a perverse catch-22: either incur costs to evaluate other options to satisfy its duty to the public without any chance of cost

recovery, or avoid evaluating other potential projects that may be least cost for customers altogether in order to avoid incurring non-recoverable costs. DOE and OCA urge this Court to ignore the limitations of the statute's terms, plummeting down a slippery slope linking attenuated costs incurred with the evaluation of a least cost option to an actual physical construction project. That sweeping interpretation goes beyond the plain language of the second sentence of RSA 378:30-a.

RSA 378:30-a's second 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." See RSA 378:30-a (2020). As this Court previously concluded, the common sense meaning of "construction work" entails a physical structure.[1] Appeal of Public Serv.

[1] When a term is not defined in a statute, this Court looks "to its common usage, using the dictionary for guidance." See K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180, 185 (2014). PSNH's definition of "construction work" is consistent with the dictionary definition of "construction," which, in relevant part, is defined as "the process, art, or manner of constructing something" or "a thing constructed." Construction, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/construction (last visited Nov. 28, 2022). The relevant definitions of "work" are "a specific task, duty, function, or assignment often being a part or phase of some larger activity" and "sustained physical or mental effort to overcome obstacles and achieve an objective or result." Work (noun), Merriam-Webster.com, https://www.merriam-webster.com/dictionary/work#dictionary-entry-2 (last visited Nov. 28, 2022). Taken together with PSNH, "construction work" in the second sentence of RSA 378:30-a must mean "the act of building a physical structure."

Certain federal regulations define construction work consistent with this definition. With respect to government contracts and subcontracts, "construction work" is defined as "the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction." See 41 C.F.R. § 60-1.3; see also 29 C.F.R. § 1926.32(g) (defining "construction work" for the purposes of OSHA regulations as "work for construction, alteration, and/or repair, including painting and decorating.").

Co., 125 N.H. 46, 54 (1984) ("PSNH"). As such, this Court concluded that the existence of an uncompleted physical structure when construction work has ceased because of abandonment (*i.e*. prior to reaching its "desired objective") triggers the second sentence of RSA 378:30-a. Id. The statutory bar for recovery is inherently tethered to the existence of "construction work," whether in progress or abandoned, which is more limited in scope than mere "construction." The Legislature's use of the word "work" demonstrates the need for the commencement of construction of a physical structure. Recovery of the attenuated costs a utility may incur to assess the viability of potential projects and resources needed to meet its obligations to serve customers at the lowest reasonable cost is not precluded.

The OCA and DOE misapply the phrase "[a]t no time" in the second sentence, arguing that it modifies the references to "costs associated with construction work" and "said construction work," and as a result, includes all manner of pre-construction work expenses. See OB, 19; see EB, 19-21. "'At no time' means just what it appears to mean" – a utility can never recover its investment in construction work in a physical structure that *had* begun and was abandoned prior to completion, which this Court correctly decided in the PSNH case. PSNH, 125 N.H. at 54 ("Construction work on an abandoned plant is construction work that is 'not completed.'").

Considering the structure of the statute, the "[a]t no time" limitation builds off of the pronouncement in the first sentence that rates shall not be based upon "construction work in progress," and goes further to address the issue of construction work that commenced but had been abandoned. See Appeal of Algonquin Gas Transmission, LLC, 170 N.H. 763, 770 (2018)

(words and phrases should be construed within the context of the statute as a whole); see also PSNH, 125 N.H. at 52 (Court must consider "the language and the structure of the statute"). In other words, at no time – either while construction work is in progress (the first sentence) or after it has moved beyond work in progress because it was abandoned (the second sentence) – can the Commission establish rates or charges on any costs associated with "*said* construction work." See RSA 378:30-a (2020). Implicit in the construction of the second sentence in the statute is the requirement that construction work on a physical project must have begun.

This interpretation of RSA 378:30-a is consistent with established principles of utility regulation: a construction project that has begun but is never completed does not benefit utility customers in any way; costs incurred to evaluate potential least cost options prior to commencing any construction *do* benefit customers by determining the least cost, and thus most prudent, option for service. There is simply no logical way to read the second sentence of RSA 378:30-a as applying to costs that were incurred in the absence of impending – let alone actual – construction work. Regardless of when this Court finds "construction work" begins for the purposes of RSA 378:30-a, Liberty had not initiated anything resembling "construction work."

Importantly, this interpretation of RSA 378:30-a is also consistent with the Commission's prior allowance of recovery for fees to cover development costs associated with termination of a construction contract for a 2 billion cubic foot LNG storage tank. See In Re N. Utilities, Inc., Docket No. DG 99-050, Order No. 23,362 (Dec. 7, 1999) ("Northern") at 1, 5-6. There, the utility sought to terminate the precedent agreement for

construction and operation of the project "due to changed circumstances, and more advantageous contracts for peaking supply." Id. at 2. Here, the Commission attempted to distinguish the outcome in Northern from the rejection of Liberty's feasibility and investigation costs by reasoning that "the construction work in question was not Northern Utilities' own," and RSA 378:30-a "must apply—and apply only—to projects that the utility undertakes or contracts to construct its *own* plant, facilities, or other infrastructure." Add., 38-39.

The Commission also reasoned that if RSA 378:30-a prohibited recovery of "attenuated costs" such as an exit fee, "the result would be unworkable." Id. While the Commission erroneously elevated form over substance in adding a gloss to the statute that the construction work must be the utility's own construction, the Commission correctly concluded that costs barred by RSA 378:30-a cannot be so attenuated from construction work. As in OCA's words, the least cost option under evaluation here was "a future example of construction work," see OB, 20, and far removed from construction work barred by RSA 378:30-a. To interpret RSA 378:30-a as DOE and OCA promote, barring from recovery any cost that could ever conceivably be linked with future construction before anything resembling construction work has come close to commencing, leads to the exact type of absurd result so disfavored by this Court.

2. To the extent this Court determines that the second sentence is ambiguous, it may consider the legislative history as a guide.

If this Court determines that the second sentence is ambiguous, it may look to legislative history to aid in the interpretation. Greenhalge v.

Dunbarton, 122 N.H. 1038, 1040 (1982). The legislative history of RSA 378:30-a is detailed in PSNH. PSNH, 125 N.H. at 55-56. The first bill on the treatment of CWIP, 1977's H.B. 986, "would have enacted a provision of one sentence with much of the language of the presented sentences one and three but precluding only treatment of CWIP in the rate base." Id. at 56.[2] That original bill was amended to reflect the same three sentence structure of today's RSA 378:30-a. Id. (citing N.H.H.R. Jour. 627 (1977)).

The second sentence appears to have been inserted into the bill to address the abandoned plant concern prevalent at the time. See, e.g., People's Org. for Wash. Energy Res. v. Utils. & Transp. Comm'n, 711 P.2d 319, 322 (Wash. 1985) (noting that between 1972 and 1982, 91 nuclear power plants had been canceled and cancellation of "another 19 nuclear power reactors in various phases of construction" was anticipated). The original H.B. 986 was nearly identical to Missouri's anti-CWIP statute, Section 393.135, enacted in 1976, which provides, "Any charge made or demanded by an electric corporation for service, or in connection therewith, is based on the cost of construction in progress upon any existing or new facility of the electric corporation, or any other costs associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited." In 1985, the Supreme Court of Missouri confirmed that its statute does not bar recovery once construction was abandoned,

[2] H.B. 986, as introduced, read "No electric utility shall include, as part of its rate base, the costs of construction work in progress on any existing or new facility nor any costs associated with owning, maintaining or financing property of such electric utility before said property or facility is operational for the purpose of generating or transmitting electricity to the consumer."

distinguishing it from RSA 378:30-a due to the latter's second sentence. State ex rel. Union Elec. Co. v. Public Serv. Comm'n, 687 S.W.2d 162, 167 (1985).

B. Liberty's Internal Treatment of the Granite Bridge Costs for Accounting Purposes Is Irrelevant.

This Court is tasked with determining whether RSA 378:30-a's bar of recovering "costs associated with construction work if said construction work is not completed" applies in a situation in which it is undisputed that construction work not only never began, but could not have begun for years. In an apparent attempt to confound this narrow issue, DOE repeatedly makes two arguments related to the way in which Liberty internally treated the Granite Bridge costs: (1) that the costs must be "costs associated with construction work" because Liberty "intended to capitalize" the Granite Bridge costs if Granite Bridge were ever completed; and (2) that Liberty cannot argue that it incurred the Granite Bridge costs in good faith compliance with its Least-Cost Integrated Resource Planning ("LCIRP") obligations pursuant to RSA 378:38 because "the costs were *not* charged as LCIRP costs in the LCIRP docket." EB, 8 (emphasis original). Those arguments can be swiftly dismissed.

This Court has held that RSA 378:30-a should not be construed in the "technical accounting sense." PSNH, 125 N.H. at 52-53. Technical accounting treatment of how expenses are booked is irrelevant to the application of RSA 378:30-a. Liberty was several years and procedural hurdles away from ever being able to seek capitalization of the Granite Bridge costs in its rates. Liberty would have only been able to seek

capitalization of the full cost of constructing Granite Bridge into its rates *if* each of the following had occurred: (1) the Commission had endorsed Liberty's continued pursuit of Granite Bridge in the Granite Bridge docket; (2) Liberty received reasonable quotes for the cost of construction that still made Granite Bridge the least cost option compared to the TGP option; (3) Liberty received a siting permit from the SEC; (4) Liberty again confirmed that Granite Bridge remained the least cost option; (5) Liberty began *and* completed construction of Granite Bridge; and (6) Granite Bridge was placed into service.

Instead, in fulfillment of its obligation to consider the least cost option for its customers, Liberty prudently discontinued any further investigation of Granite Bridge as an option once TGP alerted it to newly-available capacity. It is undisputed that Liberty's pursuit ended before even procedural step (1) was complete. As such, what Liberty "intended" to do only if Granite Bridge were ever completed (see EB, 8) is irrelevant to Liberty's recovery of costs associated with the investigation of what was at the time the least cost option for securing future capacity, *not* costs associated with construction work.

Similarly, DOE argues that Liberty "admitted" that the costs at issue were "charged to the Granite Bridge Project and were not charged to Liberty's Least Cost Integrated Resource Plan." EB, 13 (internal quotations omitted). Again, how costs are treated in a "technical accounting sense" is wholly irrelevant to any proper analysis of RSA 378:30-a. PSNH, 125 N.H. at 52-53. It is also worth noting that the Commission does not have the authority to set rates within an LCRIP docket, so the suggestion that the costs incurred to evaluate Granite Bridge

as a potential least cost option should have been recovered in the LCRIP docket misses the mark. See RSA 378:38 (2020).

C. This Court May Properly Consider the Definition of "Commencement of Construction" Contained in RSA 162-H.

Contrary to arguments made by DOE and OCA, the relevant statutory provisions in RSA chapter 162-H do not need to involve the same exact subject matter as RSA chapter 378 in order for this Court to properly consider RSA 162-H:2's definition of "commencement of construction," as well as the fact that Liberty was prohibited from commencing construction without approval from the SEC by RSA 162-H:5. See RSA 162-H:2, III (2020); RSA 162-H:5, I (2020). This Court does not "construe statutes in isolation; instead, [the Court] attempt[s] to construe them in harmony with the overall statutory scheme." Paine v. Ride-Away, 174 N.H. 757, 760 (2022) (citing Anderson v. Robitaille, 172 N.H. 20, 22-23 (2019)). This Court's recent holding in Paine demonstrates that statutes need not deal with identical subject matter in order to be construed in harmony, as it held that the trial court erred when it refused to take into account the legality of therapeutic cannabis pursuant to RSA chapter 126-X (which governs the therapeutic use of marijuana by prescription) when determining whether an employee was entitled to a reasonable accommodation in accordance with the provisions of RSA chapter 354-A (which sets forth New Hampshire's Law Against Discrimination). Id. at 761.

The SEC process is a long and expensive one, which Liberty prudently did not attempt without having received the Commission's endorsement of what would have been (but ultimately was not) a significant

financial undertaking.[3] Applying for a siting permit would have been premature because the Commission had yet to render a decision concerning whether Granite Bridge was the best option for Liberty to meet its capacity needs. AB, 25-26. The undisputed fact that, due to the relevant provisions of RSA 162-H, Liberty would not be able to begin anything resembling "construction work" for *years* at the point in which it discontinued its investigation into the feasibility of Granite Bridge underscores how attenuated the Granite Bridge costs are from any rational interpretation of clearing the bar of being "associated with construction work."

II. CONCLUSION

This Court must interpret RSA 378:30-a with common sense in the overall context of the statutory scheme. Doing so leads to just one logical, reasonable result: costs incurred years prior to the commencement of construction of any utility plant are too attenuated to the concept of "construction work" to reasonably be barred from recovery. This Court is not tasked with determining whether Liberty should, as a matter of law or fact, be entitled to recover the Granite Bridge costs. Rather, Liberty simply requests that this Honorable Court vacate the Commission's Orders and remand the issues for further proceedings consistent with this Court's Order, including a determination of the prudence of the costs incurred.

[3] The estimates for the total cost of Granite Bridge made during the 30% design phase were in the ballpark of $500 million; Liberty seeks recovery of $7.5 million. See C.App., 231:14-233:16; see App.I, 172:7-174:15.

Respectfully submitted,

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.

By its attorneys,

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Dated: November 30, 2022 By: */s/ Terri L. Pastori*

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that, pursuant to N.H. Sup. Ct. R. 16(11), this brief contains 2,854 words, excluding the cover page, Tables of Contents and Authorities, and this signature page, which is fewer than the number of words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Ashley D. Taylor
Ashley D. Taylor

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2022, the foregoing reply 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