THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0146

Appeal of Liberty Utilities (EnergyNorth 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

BRIEF FOR THE NEW HAMPSHIRE DEPARTMENT OF ENERGY

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENERGY

By Its Attorneys,

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(Oral argument waived)

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STATEMENT OF THE CASE

This case arises from orders of the Public Utilities Commission (the "Commission") issued in Docket No. DG 20-105 (hereinafter "DG 20-105"), a rate case initiated by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty"). On November 20, 2020, during the pendency of DG 20-105, Liberty filed a motion to amend its Petition for Permanent and Temporary Rates to add a request to recover in Liberty's rates $7.5 million in costs associated with a natural gas pipeline and storage facility project known as the Granite Bridge Project. App. I at 139.[1]

The Commission held a hearing on June 22 and 23, 2021, regarding Liberty's request for recovery of costs associated with the Granite Bridge Project. Commission Order No. 26,536 (October 29, 2021) at 2 (App. III at 146).[2] The Department of Energy (the "Department") and the Office of Consumer Advocate ("OCA") opposed Liberty's request. App. III at 5, 45. On October 29, 2021, the Commission issued Order No. 26,536 denying Liberty's request and finding that the costs Liberty sought to recover through rates were "unambiguously costs 'associated with construction,'" which "construction work … was never 'completed' within the meaning of [RSA 378:30-a]." Order at 5–6 (App. III at 149–50). Accordingly, the Commission held that "[b]ecause the costs associated with the Granite Bridge project were associated with construction work, and because that

[1] Citations to the Appendix filed with Liberty's Rule 10 Notice of Appeal are designated herein as "App. I" with the roman numeral indicating the referenced volume of the Appendix.

[2] The Commission's Order No. 26,536 is referred to in this brief as the "Order," and also appears in the Addendum to Appellant's Brief at 32.

construction work was never completed, Liberty's recovery of those costs is barred by RSA 378:30-a." Order at 6 (App. III at 150).

Liberty filed a motion for rehearing dated November 24, 2021, App. III at 165, to which the Department and the OCA objected. App. III at 195 (Department), 184 (OCA). On January 18, 2022, Liberty filed a letter raising new arguments regarding RSA 162-H:2, III, App. III at 202–03, to which the OCA responded requesting that the Commission disregard Liberty's untimely attempt to supplement its motion for rehearing. App. III at 204–05.

On February 17, 2022, the Commission issued Order No. 26,583 (the "Rehearing Order"), denying Liberty's motion for rehearing. App. III at 206.[3] The Commission expressly declined to consider Liberty's January 18, 2022, letter as untimely pursuant to RSA 541:3. App. III at 210. On March 18, 2022, Liberty filed a Rule 10 Notice of Appeal with this Court appealing the Order and Rehearing Order. The Department and the OCA filed a joint motion for summary affirmance on April 7, 2022, which the Court denied on May 23, 2022.

[3] The Rehearing Order also appears in the Addendum to Appellant's Brief at 41.

STATEMENT OF FACTS

In late 2017, after "extensive quantitative and qualitative analysis," Liberty "announced plans to develop the Granite Bridge Project." App. I at 150. The Granite Bridge Project was comprised of the Granite Bridge Pipeline, a proposed new "natural gas pipeline running along New Hampshire's Route 101 corridor between Manchester and Exeter," Appellant's Brief at 10,[4] and the Granite Bridge LNG Facility, a 2 billion cubic foot liquified natural gas storage facility proposed in the Town of Epping adjacent to Route 101. App. I at 120.

Liberty incurred approximately $9.1 million in development costs for the Granite Bridge Project, with "the vast majority of these costs … incurred during 2018 and 2019." App. I at 171. Liberty excluded certain costs "related to public outreach, legal costs associated with the Company's planned filing with the New Hampshire SEC, AFUDC, and other miscellaneous costs" from its request for rate recovery. App. I at 172. Accordingly, Liberty sought recovery in rates of $7.5 million, comprised of engineering costs, environmental assessment costs, general consulting costs, Commission-related costs, internal labor costs, and land costs. App. I at 173–74. Liberty characterized these as "core development costs" for the Granite Bridge Project. App. I at 148.

More than half of Liberty's requested $7.5 million is made up of engineering and environmental costs. App. I at 174. Liberty's "detailed engineering and other development work" achieved "a 70% design level for

[4] Citations herein to the Appellant's Brief are denoted "AB" followed by the relevant page number.

the Granite Bridge Pipeline," and "a Front End Engineering and Design ('FEED') study that would bring the design engineering for the Granite Bridge LNG Facility to a minimum of 30% design." App. I at 162. 97% of the requested $7.5 million "core development costs" were incurred after Liberty announced its plans to develop the Granite Bridge Project in late 2017. App. I at 175–76.

Liberty abandoned the Granite Bridge Project in July 2020, after it signed a contract for additional capacity on an existing natural gas pipeline. App. 169–70. During discovery in DG 20-105, Liberty admitted that none of the Granite Bridge costs requested were charged to Liberty's Least Cost Integrated Resource Plan costs in Docket No. DG 17-152. App. II at 81. Instead, Liberty admitted that "[a]ll" of the $7.5 million in costs requested by Liberty "would have been capitalized if the Granite Bridge Project was placed in service." App. II at 3. Liberty never completed construction work on the Granite Bridge Project. Order at 6 (App. III at 150); AB at 21.

SUMMARY OF THE ARGUMENT

Liberty seeks to recover $7.5 million from its ratepayers for work associated with the abandoned Granite Bridge Project, despite the clear prohibition in RSA 378:30-a on recovery of "costs associated with construction work" that is "not completed." RSA 378:30-a. To avoid the statutory bar on recovery, Liberty argues the second sentence of RSA 378:30-a does not apply because Liberty never started physical construction work. Liberty's arguments fail to satisfy its burden on appeal to demonstrate that the Commission's application of RSA 378:30-a was unlawful, unjust, or unreasonable.

First, Liberty's attempt to imply that the $7.5 million in question were mere Least-Cost Integrated Resource Planning ("LCIRP") costs that may not fall under RSA 378:30-a must be rejected. The costs were not general LCIRP planning costs, but "core development costs" for a specific construction project. Moreover, during discovery at the Commission Liberty admitted the costs were *not* charged as LCIRP costs in the LCIRP docket and that Liberty intended to capitalize the costs if the Granite Bridge Project was completed. Liberty's admissions make it clear these are costs associated with construction work for the Granite Bridge Project.

Second, Liberty's argument that it never started physical construction misses the mark. The engineering design, environmental assessment, property rights acquisitions, and other "core development costs" at issue are necessary costs for any construction project and are, therefore, properly considered "construction work" under the statute. Nothing in RSA 378:30-a suggests a legislative intent to limit "construction

work" to physical construction as opposed to including other necessary design and site work. Indeed, the third sentence of RSA 378:30-a includes non-physical construction costs in the category of "costs of construction work in progress," which is a subset of the broader category of costs of "construction work" and, therefore, relevant to the Commission's interpretation of the second sentence of the statute.

Moreover, Liberty overlooks the statute's plain language, which extends not just to the costs of "construction work," but to "any costs *associated with* construction work." RSA 378:30-a (emphasis added). Design, site assessment, and property rights acquisition are clearly costs associated with the construction of any project. Nothing in the second sentence of RSA 378:30-a supports Liberty's suggestion that the statutory bar applies only after some arbitrary, undefined point in time (*i.e.*, breaking ground). Rather, the plain language "[a]t no time" demonstrates the legislative intent that costs, whenever incurred, may not be recovered through rates if the "construction work is not completed." RSA 378:30-a. Liberty's addition of an arbitrary temporal limitation would lead to absurd results at odds with the clear intent of the statute.

Finally, Liberty's argument that RSA 162-H:2, III has some bearing on the interpretation of RSA 378:30-a was waived and is unavailing. The two statutes deal with different subject matters for different state bodies and cannot reasonably be read in conjunction with each other. By its plain language, and consistent with the legislative intent that ratepayers pay only for capital improvements that are used and useful, the second sentence of RSA 378:30-a bars recovery of the $7.5 million in costs associated with the never completed Granite Bridge Project.

ARGUMENT

I. STANDARD OF REVIEW

On appeal of a decision of the Commission, this Court's scope of review is narrow—to determine "whether the party seeking to set aside the decision of the commission has demonstrated by a clear preponderance of the evidence that such order is contrary to law, unjust, or unreasonable." *Appeal of Conservation L. Found. of New England, Inc.*, 127 N.H. 606, 616 (1986) (quoting *LUCC v. Public Serv. Co. of N.H.,* 119 N.H. 332, 340 (1979)). When an appeal centers on the Commission's interpretation of a statute, this Court is "the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole," and its review is *de novo*. *Petition of Carrier*, 165 N.H. 719, 721 (2013) (citations omitted).

When interpreting a statute, the Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Id.* The Court "interpret[s] 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." *Id.* The Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result," and considers "words and phrases … within 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." *Id.*

II. THE COMMISSION CORRECTLY BARRED RECOVERY PURSUANT TO THE SECOND SENTENCE OF RSA 378:30-A

This appeal centers on the proper interpretation of the so-called "anti-CWIP" statute, RSA 378:30-a. "CWIP" is an acronym common in utility regulation, meaning "construction work in progress." In its entirety, the statute reads:

> 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.

RSA 378:30-a.

In the Order, the Commission found the Granite Bridge costs constituted "costs associated with construction work" under the second sentence of RSA 378:30-a. App. III at 150. Because the Granite Bridge Project was never completed, the Commission ruled that the costs were barred from recovery under RSA 378:30-a. *Id.* Liberty challenges the Commission's interpretation of the statute, arguing the engineering, environmental assessment, surveying, land options, and similar costs incurred in the development of the Granite Bridge Project are mere feasibility assessment and planning costs that do not constitute "construction work." AB at 21.

Liberty misconstrues the plain language of the statute, overlooking the phrase "associated with" and ignoring the context of the third sentence of the statute. The clear intent of the statute, as expressed by its plain language, is to bar recovery of "any" costs "associated with construction work" regardless of when incurred, unless or until the construction work has reached completion. The Commission properly determined that the Granite Bridge costs were barred from recovery by the second sentence of RSA 378:30-a.

A. The Costs at Issue Are "Associated with Construction Work"

Central to Liberty's argument is the notion that "construction work" must be interpreted narrowly as beginning with "breaking ground" and encompassing only the physical work of building the facilities in question. As Liberty states, "Liberty never began construction" because "Liberty was years away from breaking ground on the project." AB at 21. Fatal to Liberty's argument, however, is the utter absence of any such restrictive language in RSA 378:30-a. To the contrary, the second sentence of RSA 378:30-a expressly includes not just direct construction costs, but "any" costs "associated with" construction work. As such, Liberty's attempt to narrow the scope of the second sentence falters against the plain language of the statute.

1. The Costs at Issue are Not Planning Costs

As an initial matter, it is necessary to dispel a misleading and incorrect inference raised by Liberty. Throughout its brief, Liberty implies that the costs at issue were "feasibility study" costs incurred in relation to Liberty's least cost integrated resource planning ("LCIRP") obligations

under RSA 378:37–42. *See*, *e.g.*, AB at 7 (identifying costs as incurred "to survey, study, and evaluate the feasibility of a potential least-cost option"); AB at 8 (citing RSA 378:38); AB at 12 (identifying costs as "necessary to fulfill Liberty's RSA 378:37 obligation to survey, study, and investigate the feasibility of Granite Bridge to determine if it was, in fact, the least-cost alternative available at the time"); AB at 15–16, 19–20, 25–27 (characterizing costs as "feasibility" costs of a "potential project"). The facts do not support this inference.

Contrary to Liberty's current suggestion that the costs at issue here were incurred for LCIRP obligations, Liberty admitted below that the costs at issue in this case were not LCIRP costs under RSA 378:38. *See* App. II at 81 (admitting that all $7.5 million in costs at issue were "charged to the Granite Bridge Project" and were not charged to Liberty's Least Cost Integrated Resource Plan). Even more telling is Liberty's admission that if the Granite Bridge Project had been completed, Liberty would have capitalized all of these costs, App. II at 3, meaning that Liberty would have included the costs as part of the capital expenditure for the Project for which it would seek recovery from customers in rates.

Liberty cannot have it both ways; either the costs were incurred as part of the development of the Granite Bridge Project and can be capitalized, or they were LCIRP planning costs.[5] Liberty's admission that

[5] RSA 378:38 contemplates the development of a least cost integrated resource *plan* as part of the LCIRP process, not the detailed engineering and environmental work necessary for a specific project, the costs of which would not be considered LCIRP costs.

these costs were charged to the Granite Bridge Project and planned to be capitalized forecloses any new inference that they are mere feasibility and planning costs exempt from the prohibition on recovery set out in the second sentence of RSA 378:30-a. Indeed, while Liberty has an ongoing obligation to seek the least-cost option to supply its customers, development costs for a specific capital project are not LCIRP costs incurred pursuant to RSA 378:37–38.

2. Engineering Design, Environmental Assessment, and Other "Core Development Costs" Are Costs "Associated with" Construction Work

In DG 20-105, Liberty sought recovery of $7.5 million in costs associated with the Granite Bridge Project comprised of engineering, environmental, consulting, internal labor, land, and commission-related activities. App. I at 173–74. Liberty does not dispute that all these costs were incurred in direct pursuit of development of the Granite Bridge Project.[6] In its direct testimony filed with the Commission, Liberty correctly characterized the costs as "core development costs" associated with the Granite Bridge Project. App. I at 148.[7] Indeed, the costs include "detailed engineering and other development work to achieve a 70% design level for the Granite Bridge Pipeline." App. I at 162.

[6] As set out above, Liberty admitted it planned to capitalize these costs as part of the Granite Bridge project. App. II at 3.

[7] Similarly, Liberty refers to the costs at issue as "reasonable and prudent development costs" incurred to "investigate, analyze, and pursue the development of the Granite Bridge Project." App. I at 149.

It is beyond dispute that construction work on a project such as the Granite Bridge Project cannot be completed without first developing detailed engineering designs, performing environmental assessments of the proposed facility siting, and procuring real property interests in the land where the facility will be located. Such "core development costs" are integral to any construction project. Nevertheless, Liberty suggests that these "core development costs" incurred in pursuit of a specific construction project are not "costs associated with construction work" because "Liberty never began 'construction work' on Granite Bridge." AB at 17.

Liberty's argument suffers from two fatal flaws. First, it attempts to limit "construction work" to only those components of the construction project that occur after some arbitrary point in time Liberty designates as either "breaking ground on the project" or "commencement of construction," AB at 21, 22, neither of which terms are defined or appear in RSA 378:30-a or even RSA chapter 378. Second, Liberty fails to account for the actual language of the statute, which prohibits recovery of "any costs *associated with* construction work if said construction work is not completed." RSA 378:30-a (emphasis added).

With regard to the term "construction work," there simply is no definition of this term in the statute. While there must be a point in time at which "construction work" on a project begins, Liberty attempts to insert qualifiers such as "breaking ground" and "commencement of construction" that do not appear in RSA 378:30-a. In fact, they do not even appear anywhere in RSA chapter 378. As explained below, *infra*, Section II.B, the plain language of the second sentence of RSA 378:30-a contains no

temporal limitation on when "construction work" begins, and Liberty cannot avoid the clear intent of the second sentence by inserting words the legislature did not include in the statute. *Petition of Carrier*, 165 N.H. at 721.

In any case, Liberty further overlooks the plain language of the second sentence of RSA 378:30-a, which bars recovery of all costs "*associated with* construction work." RSA 378:30-a (emphasis added). As a matter of simple interpretation, "costs associated with construction work" must mean something more than costs of "construction work." It is well established that "the legislature does not waste words," and that all words of a statute must be given meaning. *Appeal of Public Service Co. of New Hampshire*, 125 N.H. 46, 54 (1984) (hereinafter "*Appeal of PSNH*"). If the legislature intended that only direct construction costs be barred, the legislature would have said so and delineated which specific costs fell under the statutory prohibition on cost recovery and which did not. Instead, the legislature included the broader "associated with" language indicating more than direct construction costs are included under the bar on recovery. *See, id.* (noting that "the second sentence [of RSA 378:30-a] appears on its face to have the broadest scope both in time and in subject matter").

Liberty fails to explain how engineering, environmental assessment, and real property costs that are necessary components of any construction project are not "associated with construction work." Indeed, these "core development costs" are as much "associated with" the construction work as PSNH's investment costs in the Pilgrim 2 nuclear plant at issue in *Appeal of PSNH*. In that case, the Court found PSNH's investment in the plant constituted costs associated with construction work. *Appeal of PSNH* at

54–55. The costs of designing the engineering plans that will guide the physical construction of the project, and the environmental assessment and land rights necessary to site the project, like investment costs, are plainly "associated with" the construction work—they are specific to the project and the project could not be constructed without them. Moreover, whether the utility abandons the project either before or after the start of physical construction, these costs remain "associated with" the construction work in question.[8] As such, recovery of those costs through rates or charges is barred by the second sentence of RSA 378:30-a.

3. The Commission Properly Referenced the Third Sentence

Liberty argues that at the time of Liberty's rate case "there was no 'construction work *in progress'* on Granite Bridge" and, therefore, the first and third sentences of RSA 378:30-a are not applicable to the costs at issue. AB at 23 (emphasis in original). While that argument is debatable, Liberty goes on to make the clearly incorrect assertion that "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." *Id.* Liberty overlooks the interrelation between "construction work" and "construction work in progress" that makes the examples of "costs of construction work in progress" in the third sentence relevant in this case.

While it is true, as the Commission noted, that "the phrase 'associated with construction work' in the second sentence of RSA 378:30-

[8] This is reflected in Liberty's stated intention to capitalize these costs as "core development costs" of the Granite Bridge Project. App. II at 3.

a must mean something other than 'construction work in progress' in order to read the statute consistently with the presumption against redundancy," Order at 6, it is incorrect that the two phrases are not related. Both involve "construction work," with the third sentence further limited in scope to only that subset of "construction work" that is "in progress." As a subset of the broader category of "construction work," all CWIP must logically also qualify as "construction work."

Any examples of costs of CWIP listed in the third sentence must, therefore by definition, also be examples of costs of "construction work" covered by the second sentence. In other words, the costs of "construction work *in progress*" are always costs of "construction work." Accordingly, the Commission correctly looked to the list of "costs of construction work in progress" set forth in the third sentence of the statute, to inform the Commission's application of the broader second sentence. Rehearing Order at 7 (App. III at 212) (noting that the third sentence "specifically includes costs of ownership and financing, which [are broader than] Liberty's arguments pertaining to physical construction").

Reading the second sentence of RSA 378:30-a in context, the Commission properly determined the phrase "costs associated with construction work" covers costs beyond the physical construction of the facility, including costs such as "financing" and land rights acquisition ("owning") that are incurred *before* physical construction commences. If such costs qualify as "costs of construction work in progress," they must also fall within the broader category of "costs associated with construction work."

B. There Is No Temporal Limitation in the Second Sentence

Underlying all of Liberty's arguments is the erroneous interpretation of the second sentence of RSA 378:30-a as applying only "after" physical construction of a facility has commenced. AB at 16. However, the second sentence of the statute contains no such temporal restriction and cannot reasonably be read in the limited sense urged by Liberty. Rather, the second sentence of the statute bars recovery of "any costs" regardless of when incurred when the "construction work is not completed." RSA 378:30-a.

Liberty attempts to avoid the statutory bar on recovery by arguing that it never began "any 'construction work' [on the Granite Bridge Project] that was later 'not completed.'" AB at 20. As set forth above, *supra*, Sections II.A.2 and II.A.3, the millions of dollars Liberty spent on engineering design, environmental assessment, and acquisition of real estate rights qualify as costs of "construction work" under the statute, meaning "construction work" necessarily began on the Granite Bridge Project. But even if it did not, the second sentence applies to the even broader category of costs "associated with construction work," and Liberty offers no reasonable basis to infer a temporal limitation to the second sentence of RSA 378:30-a.

As the Court in *Appeal of PSNH* previously determined, "the second sentence [of RSA 378:30-a] … is not restricted by any temporal limitation CWIP may carry." *Appeal of PSNH*, 125 N.H. at 53. In other words, while the words "in progress" in the first and third sentences of the statute necessarily impose a temporal limitation that construction work is ongoing, these words are absent from the second sentence, meaning the second

sentence "appears on its face to have the broadest scope both in time and in subject matter." *Id.* at 52.

Far from limiting the effect of the second sentence to costs incurred "after" breaking ground, as urged by Liberty, the plain language of the second sentence actually expands the temporal scope of the restriction on recovery. The second sentence reads "[a]t *no time* shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed." RSA 378:30-a (emphasis added). As the Court stated in *Appeal of PSNH*, "'[a]t no time' means just what is appears to mean"—whether costs are incurred before, during, or after any arbitrary point in time (e.g., breaking ground), such costs are not recoverable through rates if the construction work is not completed. *Appeal of PSNH* at 54–55.

Ignoring the statute's plain "at no time" language, Liberty instead focuses on the "not completed" phrase arguing that "'not completed' necessarily requires the work to have begun." AB at 21. However, the phrase "not completed" carries no such temporal restriction. Whether construction work commences or not, it is "not completed" if it does not reach the desired end point. To accomplish Liberty's interpretation of the statute, additional words would be needed; words the legislature did not include in the second sentence of RSA 378:30-a. Moreover, as set forth above, the second sentence relates not just to direct costs of construction work, but to "costs *associated with* construction work." Costs "associated with" construction work, such as engineering, environmental assessment and land rights acquisitions, are routinely incurred prior to breaking ground

on a construction project, and are clearly covered by the second sentence of RSA 378:30-a.

C. Liberty's Interpretation of "Construction Work" Leads to Absurd Results

In addition to conflicting with the plain language of the statute, Liberty's interpretation of the statute would lead to absurd results. Under Liberty's interpretation, the effect of the second sentence would hinge on whether a utility "break[s] ground" on a construction project or otherwise "commence[s] construction." AB at 22. As such, Liberty would charge customers millions of dollars for a construction project that was never completed. In fact, under Liberty's interpretation Liberty could repeatedly propose construction projects, incur millions of dollars in "core development costs," and then abandon projects before "breaking ground" while still recovering the costs from ratepayers. Such an outcome flies in the face of the unambiguous intent of the statute to prohibit recovery through rates of costs associated with capital projects that are not completed and are, therefore, not used and useful. *See* RSA 378:27 and 378:28 (requiring the Commission to find utility plants "used and useful" before setting utility rates). *See also*, *Appeal of PSNH* at 49–51 (describing utility rate making and the "used and useful" concept as it relates to RSA 378:30-a).

Similarly, according to Liberty's theory the legislature intended that ratepayers would be liable for millions of dollars in failed project costs if a project were abandoned before "breaking ground," but intended to protect ratepayers from paying those same capital costs if the project were

abandoned after only a single shovel of dirt was dug. Such an arbitrary demarcation is absurd and should not be inferred in RSA 378:30-a. *Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71, 75 (2015) ("[I]t is not to be presumed that the legislature would pass an act leading to an absurd result.") (quoting *State v. Costella,* 166 N.H. 705, 711 (2014)). Because concepts such as "breaking ground" and "commencement of construction" do not appear in RSA 378:30-a, let alone in RSA chapter 378, there is no basis in the language of the statute to support Liberty's argument.

III. LIBERTY'S RELIANCE ON RSA 162-H IS MISPLACED AND THE ARGUMENT HAS BEEN WAIVED

Finally, Liberty directs the Court to a separate statute for a different state body as guidance for interpreting the second sentence of RSA 378:30-a. However, Liberty failed to preserve this argument below and RSA 162-H has no relation to the Commission's ratemaking authority under RSA chapter 378.

First, Liberty failed to preserve its new argument that the definition of "commencement of construction" in RSA 162-H:2, III, somehow controls the interpretation of RSA 378:30-a. Liberty first raised this argument in a letter dated January 18, 2022, more than 30 days after the Commission issued the October 29, 2021, Order and almost two months after Liberty filed its motion for rehearing. Rehearing Order at 1-2 (App. III at 206–07). Pursuant to RSA 541:4, "no ground not set forth [in a timely motion for rehearing] shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds." RSA 541:4. Because Liberty did

not raise its RSA 162-H:2, III argument in its motion for rehearing, this argument was not preserved and this Court need not consider it on appeal.

Second, even if the Court considers Liberty's argument, RSA 162-H has no relation to or bearing on RSA 378:30-a and provides no insight into its proper interpretation. RSA chapter 378 governs utility rates and charges under the jurisdiction of the Public Utilities Commission, while RSA chapter 162-H governs the siting of energy facilities under the jurisdiction of the Site Evaluation Committee ("SEC").[9] Facility siting and utility rate making are two entirely separate and distinct areas under the jurisdiction of separate and distinct state entities.

With regard to a facility siting permit, as Liberty correctly points out, there necessarily must be a discrete demarcation of "what work cannot be done before obtaining a permit." AB 24. Otherwise, a project proponent could not perform the "core development" work necessary to present the project to the SEC for evaluation. No such distinction exists in the ratemaking arena as the Commission does not issue permits for facility construction. Rather, in utility ratemaking proceedings the Commission assesses whether a project is "used and useful" and, therefore, whether the utility can begin to recover the capitalized costs of the facility. RSA 378:27–28. As discussed above, *supra*, Section II.C, such arbitrary distinctions in ratemaking lead to absurd results.

[9] The Department notes that RSA 378:30-a was enacted in 1979, while RSA 162-H:2 was enacted in 1991. There is no basis to infer that the legislature intended for the later-enacted RSA 162-H to modify the existing RSA 378:30-a when no express modification or cross-reference was made by the legislature.

Liberty's only support for considering RSA 162-H:2, III's definition of "commencement of construction" when interpreting the second sentence of RSA 378:30-a is that "it is reasonably possible to construe statutes consistently with each other." AB at 26. However, this interpretive canon applies only where the statutes "deal with similar subject matters" and have the potential to contradict each other. *Appeal of Union Tel. Co.*, 160 N.H. 309, 318–19 (2010) (comparing two statutory provisions in the same chapter that related to hearing requirements for telecom service areas). As stated above, facility siting and utility ratemaking are not similar subject matters, relate to separate governmental agencies, are in separate chapters of the RSA, and do not create a conflict. Indeed, whether Liberty can later capitalize and recover the costs of the Granite Bridge Project through rates is not affected by whether Liberty obtains a certificate of site and facility authorizing the "commencement of construction." The determinative factor under the second sentence of RSA 378:30-a is not when (or whether) construction commences, but whether the construction work is complete. Because the construction work was undisputedly never completed, Liberty is prohibited from recovering "any costs associated with construction work." RSA 378:30-a. RSA 162-H:2, III sheds no light on when the construction work was completed and, therefore, has no relevance to the proper interpretation of RSA 378:30-a.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Honorable Court affirm the Commission's order below.

The State waives oral argument. However, to the extent the Court feels oral argument will assist it in rendering a decision, the Department requests fifteen-minutes to present its oral argument.

Respectfully Submitted,

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October 26, 2022

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CERTIFICATE OF COMPLIANCE

I, Christopher G. Aslin, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5399 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 26, 2022 *<u>/s/ Christopher G. Aslin</u>*
Christopher G. Aslin

CERTIFICATE OF SERVICE

I, Christopher G. Aslin, 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 Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them.

October 26, 2022 *<u>/s/ Christopher G. Aslin</u>*
Christopher G. Aslin