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.

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[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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