STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Energy North Natural Gas Corp. d/b/a Liberty Utilities

Request for Change in Rates

Docket No. DG 20-105

Post-Hearing Brief of the Office of the Consumer Advocate Concerning Expenses Related to Granite Bridge Project

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and, pursuant to the schedule for post-hearing briefs adopted by the Commission at hearing on June 8, 2021, provides the following written argument with respect to the issues addressed at hearing on June 7-8, 2021:

I. Introduction

As the Commission is aware, this is a natural gas distribution service rate case initially filed by Energy North Natural Gas Corp. d/b/a Liberty Utilities ("Energy North") on July 21, 2020 (Tab 4). Following discovery, the submission of prefiled direct testimony by OCA (Tab 34) and Commission Staff (Tab 35), and the submission of rebuttal testimony by Energy North (Tab 40), the parties reached an agreement that, pending Commission approval, resolved all outstanding issues except one:[1] Energy North's request to recover $7.5 million in costs associated with

[1] The agreement, reached in principle prior to the June 7-8 hearing, has not yet been filed.

the Company's abandoned Granite Bridge Project.[2] Rather than include these costs in distribution rates, Energy North seeks to recover the $7.5 million via a temporary surcharge to be included in the Company's LDAC (Local Distribution Adjustment Charge) for five years. On June 7 and 8, 2021, the Commission heard testimony and received written evidence on Energy North's request, followed by oral argument. At the conclusion of these proceedings, the Commission requested written briefs to be filed on June 25, 2021, with replies due on June 29, 2021. For the reasons that follow, the Commission must deny Energy North's request to recover costs associated with the Granite Bridge Project.

II. Recovery is absolutely precluded by RSA 378:33-a, the "Anti-CWIP" Statute

A. Plain Meaning

Energy North may not recover the $7.5 million because recovery would contravene one of the most clear and unambiguous statutes in New Hampshire's history— RSA 378:30-a, the Anti-CWIP statute. As the Commission is well-aware,

[2] The Granite Bridge Project would have involved the construction of a 16-inch distribution pipeline along the Route 101 corridor between Manchester and the Seacoast, along with a 2 billion cubic-foot liquefied natural gas storage tank in Epping. EnergyNorth sought approval of the project, and certain supply contracts associated with it, by petition filed in Docket No. DG 17-152 on December 22, 2017. Although the proceedings in DG 17-152 were extensive, the matter never reached the hearing stage and, on October 6, 2020, the Commission effectively brought the matter to an end by issuing Order No. 26,409, denying a motion of EnergyNorth to amend its petition by substituting for the Granite Bridge Project a proposed 20-year capacity supply contract with Tennessee Gas Pipeline ("TGP"), owner of the pipeline known as the Concord Lateral, which connects Energy North's distribution network with the interstate natural gas pipeline network via the regional supply hub located just south of the New Hampshire border in Dracut, Massachusetts. The proposed TGP contract is currently pending before the Commission in Docket No. DG 21-008.

CWIP is an acronym that stands for "Construction Work in Progress," referring to utility capital projects that have not yet been placed into service.

Statutory interpretation requires that the tribunal "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *In re M.M.*, 2021 WL 2213069 at *4 (N.H. Supreme Ct. June 2, 2021) (citation omitted). The plain and ordinary meaning of the Anti-CWIP statute could not be more apparent and incontrovertible. 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.

In essence, the General Court made the same point in three successive sentences: Investments that are not in use, providing service to customers, may not be included in rates. To interpret a statute correctly, the tribunal must "construe all parts of a statute together, to effectuate its overall purpose and avoid an absurd or unjust result." *In re M.M., supra* at *4 (citation omitted). These three sentences, construed together, clearly preclude the sort of rate recovery that Energy North seeks here.

Applying the plain meaning of section 30-a to the facts of this case is particularly straightforward in light of the phraseology of the second and third sentences of the statute. The second sentence unambiguously bars recovery from ratepayers of "*any* costs *associated with* construction work" (emphasis added). The third sentence requires the same treatment – non-recovery -- of "*all* costs" including "*any* costs *associated with …* construction work" (emphasis added). It is uncontroverted on this record that design and engineering are fundamental parts of construction work regardless of whether a shovel has yet touched the ground. Design and engineering costs constitute virtually all the costs Energy North is seeking to recover and would have capitalized as part of a completed project. By definition, these expenditures must be considered "costs associated with costs constructing, owning, maintaining or financing" construction work that Energy North planned to undertake.[3]

Applying the plain meaning of the Anti-CWIP statute to the facts on the ground in this case is as far as the Commission need go here. Should the Commission deem it necessary to go further, there are additional reasons to determine that the costs of the canceled Granite Bridge project cannot be imposed upon this utility's captive ratepayers.

B. Legislative History

The Commission could consider the legislative history of RSA 378:30-a because it is highly instructive. Recourse to legislative history is appropriate when

[3] This is especially true given that by the time it filed its petition in DG 17-198, Liberty had already identified and acquired the rights to the site of the proposed liquefied natural gas tank in Epping.

the language of a statute is "ambiguous or subject to more than one reasonable interpretation." *Krainewood Shares Ass'n, Inc. v. Town of Moultonborough*, 2021 WL 787081 at *2 (N.H. Supreme Ct. March 2, 2021) (citation omitted). When examining legislative history, "it is proper to consider the previous state of the law, the circumstances which led to [the statute's] enactment, and especially the evil or mischief which it was designed to correct or remedy." *Appeal of Coastal Materials Corp.*, 130 N.H. 98, 103 (1987) (citation omitted).

In the case of RSA 378:30-a, the "evil or mischief" the Legislature sought to "correct or remedy" in light of "the previous state of the law" is captured in a 1978 decision of the PUC and its subsequent affirmance by the New Hampshire Supreme Court. In Order No. 13,162, 63 NH PUC 127 (1978), entered in Docket No. DR 77-49, the Commission allowed Public Service Company of New Hampshire to include in its rate base the amount then invested in the Seabrook nuclear power plant – what was then the astronomically large sum of $111 million -- explicitly rejecting the argument propounded by the Legislative Utility Consumers' Council (predecessor to the OCA) that such treatment would run counter to the longstanding principle that rate recovery is limited to property "'used and useful' in the public service." Order No. 13,162, 63 NH PUC at 146-147. The Commission concluded that whether to rate-base CWIP is a matter consigned to the agency's discretion, *id.* at 147, a conclusion subsequently affirmed on appeal. *See Legislative Utility Consumers' Council v. PSNH*, 119 N.H. 332, 343-45 (1979) (holding that

"'[u]sed and useful' is not a rigid concept; rather it is an elastic one" and any decision to include CWIP in rate base "is a factional one to be made on a case by case basis") (citations omitted).

The late and legendary Washington Post political columnist David Broder recounted ensuing events in his column of October 31, 1978, headlined "The 10 Percent Utility Uproar."[4] The General Court adopted an anti-CWIP bill in June of 1978, only to see it vetoed by three-term Governor Meldrim Thompson, who was gearing up to seek a fourth term as the state's chief executive. This, mused columnist Broder, had the effect of "handing [challenger Hugh Gallen] his issue . . . a live one, [since] CWIP itself adds almost 10 percent to [PSNH] utility bills."

As it turned out, the issue was not simply live – it was dispositive. Gallen won an upset victory, unseated an entrenched incumbent, and eventually made good on his campaign pledge to sign an anti-CWIP bill into law. This he did on May 7, 1979 and, by its terms, Chapter 101 of the 1979 Laws of New Hampshire, codified as RSA 378:30-a, became effective immediately. Although it took a decade to sort out, the New Hampshire Supreme Court rejected PSNH's constitutional challenge to section 30-a, *see Petition of PSNH*, 130 N.H. 265, 273-282 (January 26, 1988), and *two days later* PSNH became the first electric utility in the U.S. to seek bankruptcy protection since the Great Depression. *See In re PSNH*, 114 B.R. 813,

[4] Mr. Broder's column can be found at https://www.washingtonpost.com/archive/politics/1978/10/31/the-10-percent-utility-uproar/8d7a5c23-eca9-41ec-9979-aa018df12462/.

815 (Bankr. D.N.H. 1990). Thus, as a matter of both legislative and general New Hampshire history, the adoption of the Anti-CWIP statute in 1979 was arguably the most consequential moment in the history of utility regulation in the Granite State. In effect, Energy North now asks the Commission to ignore this history and its implications, in derogation of the plain meaning of section 30-a, by allowing a utility to recover costs associated with a canceled capital project. The Commission must reject such a legally improper request.

C. The 1984 interpretation of RSA 378:30-a

In arguing to the contrary, Energy North relied at hearing on *Appeal of Public Service Company of New Hampshire*, 125 N.H. 46 (1984). This decision supports rather than undermines a conclusion that the Anti-CWIP statute precludes recovery of costs related to a capital project that was canceled before construction was commenced. At issue in the 1984 *Appeal of PSNH* was an electric utility's investment in a nuclear plant (Pilgrim 2 in Massachusetts) that was, like Granite Bridge, canceled prior to completion. In an opinion written by future U.S. Supreme Court Justice David Souter, the New Hampshire Supreme Court rejected the utility's argument that RSA 378:33-a "regulates only the timing of recovery of investment," leaving the commission free to allow recovery when the "process of construction . . . is over." *Id.* at 52-53. The Court placed special reliance on the second sentence of the statute, providing that "[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."

"'At no time' means just what it appears to mean," wrote Justice Souter. "Construction work on an abandoned plant is construction work that is 'not completed. The investment in such an uncompleted and abandoned plant is a cost 'associated' with its uncompleted construction work," rate recovery of which "the statute simply forbids." *Id.* at 54-55. Granite Bridge was not, and will never be, completed – and, therefore, Energy North's investment in Granite Bridge is likewise a "cost 'associated'" with "uncompleted construction work" that is forever barred from inclusion in rates.

Energy North apparently believes Justice Souter's emphatic disquisition on the meaning of the Anti-CWIP statute justifies rate recovery here because of the Court's emphasis on the phrase "construction work." Obviously, since physical construction of Granite Bridge never commenced, a slavishly literalist gloss on Justice Souter's words could lead to the result that Energy North desires. But this would be an incorrect application of the 1984 *Appeal of PSNH* for two reasons.

First, it is axiomatic that one must "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result," avoiding any temptation to "consider words and phrases in isolation" as opposed to "within the context of the statute as a whole." *In re M.M.*, supra at *4. How absurd it would be to construe section 30-a as to preclude recovery of costs related to some abandoned projects but not others; the Legislature could not have been more emphatic in its declaration that only completed projects may work their way into rates – "the policy

or purpose sought to be advanced by the statutory scheme." *Id.*

Second, it is important to keep in mind that the 1984 *Appeal of PSNH* represents the New Hampshire Supreme Court's response to this specific question, as transferred to the Court by the Commission: "Does RSA 378:30-a, as a matter of law, prohibit the Public Utilities Commission from allowing public utilities to recover, through rates, amounts such utilities have invested in plant construction projects that have been abandoned?" *Appeal of PSNH*, 125 N.H. at 48. The answer provided by the Court was an emphatic "NO!" Attempting to spin the answer to a "yes" in the present circumstances amounts to pure sophistry, inasmuch as one would have to conclude that Granite Bridge was not a "plant construction project" within the meaning of the question answered by the Court in 1984. This is consistent with Energy North's overall theory of recovery in light of RSA 378:30-a; the utility is asking the Commission to turn long-established public policy in New Hampshire on its head through an absurdly literalist gloss on the phrase "construction work in progress." Energy North had every intention of doubling its rate base by undertaking the construction work known as the Granite Bridge project. The work barely began and the project will never be used and useful in the provision of public service. The costs at issue here would have been capitalized had the project been built. *See* tr. 6/8/21, afternoon, at 14, lines 4-10 (testimony of Staff witness Steven Frink). In these circumstances, such costs cannot be lawfully imposed on captive utility customers in New Hampshire.

III. The $7.5 million cannot be included in rates as a prudently incurred cost.

Even if the Commission were to conclude that recovery of Granite Bridge costs is not precluded by RSA 378:30-a, these costs must still be disallowed The burden of establishing the basis for cost recovery rests with the utility. N.H. Code Admin. Rules Puc 203.05. The utility's asserted bases for cost recovery did not withstand the scrutiny to which they were subject at hearing.

According to Energy North's witnesses, messrs. DaFonte, Killeen, and Mullen, there are five reasons for allowing the recovery of the $7.5 million. First, the witnesses claimed that the costs "were necessary to evaluate and demonstrate the feasibility of an alternative to the Company's sole delivery pipeline," i.e., the Concord Lateral owned by TGP. Exh. 14 at bates 13, lines 14-15. Second, the witnesses testified that "the work that gave rise to the Granite Bridge Project Costs strongly positioned the Company in its negotiations with TGP and other market participants" by demonstrating "EnergyNorth's ability and willingness to solve the Company's resource constraints through a means other than contracting with TGP." *Id.* at bates 13, lines 18-21 to bates 14, line 1. Third, the Energy North witnesses stated that customers "will receive the benefit associated with the Company's pursuit of the Company-sponsored development option" because "the customers are the direct and sole beneficiaries of the significant cost savings associated with the TGP Contract." *Id.* at bates 14, lines 6-9. Fourth, the witnesses claimed that the request for cost recovery pending here is "consistent with the payment of a

termination of exit fee associated with a third-party precedent agreement for pipeline capacity, which have [sic] been allowed for recovery. *Id.* at lines 10-13. Finally, according to the Energy North witnesses, cost recovery as requested here would "incentivize EnergyNorth and other utilities to continue seeking the least-cost option for customers regardless of whether the option is sponsored by the Company or a third party." *Id.* at lines 13-16.

In reality, these witnesses are asking the Commission to provide the shareholders of their employer with what Justice Souter memorably described (again, during his tenure as a member of the New Hampshire Supreme Court) as "plenary indemnification." *See Appeal of PSNH*, 130 N.H. 748, 755 (1988) (noting that New Hampshire utility law precludes "shifting of the entire risk from the investors to the ratepayers"). Every investor-owned firm, whether regulated or not, confronts the possibility that some investments (e.g., a nuclear power plant, a high-voltage transmission line cutting through the White Mountains, or a gas pipeline) will not pan out. This is the reason regulators routinely grant utility shareholders returns on equity in excess of the rate applicable to the ten-year U.S. Treasury Note (or some other benchmark for a risk-free return on investment).

Thus, that Liberty devoted resources to investigating the feasibility of a gas pipeline along Route 101 and a big tank to store liquefied natural gas does not in itself provide a basis for cost recovery.[5] Meticulous evaluation of available capital

[5] *See also* the rebuttal testimony of messrs. DaFonte, Killeen, and Mullen, Exh. 17, at bates 9-11, rebutting Staff witness Steven Frink on this point. Assuming, arguendo, that the Company did a good job of vetting available supply alternatives, it is still incontrovertible that bad things sometimes happen to good companies.

deployment options are routine operating costs for electric and natural gas utilities inasmuch as this is precisely the sort of work these companies must undertake as part of the least-cost integrated resource planning process mandated by RSA 378:37-40. *See, e.g.*, RSA 378:38, III (requiring "assessment of supply options including owned capacity" as well as "market procurements"). It is no coincidence that the original Granite Bridge proceeding, Docket No. DG 17-198, was a companion to Docket No. DG 17-152, in which Energy North sought approval of a least-cost integrated resource plan (LCIRP) that claimed Granite Bridge and additional capacity on the Concord Lateral were the only available options to meet foreseeable customer demand. As Mr. DaFonte conceded at hearing, *see* tr. 6/7/21 at 86, lines 20-24, the Commission has never approved an LCIRP endorsing the Granite Bridge project.

As to the Energy North witnesses' claim that cost recovery is appropriate because the Granite Bridge expenditures "strongly positioned the Company in its negotiations with TGP and other market participants," the facts adduced at hearing simply do not support this kind of speculation. Instead, particularly in light of Energy North's burden of proof, the record actually supports *these* inferences, as to what occurred after Energy North learned that its Commission-approved precedent agreement with the Northeast Energy Delivery ("NED") pipeline would not yield any usable capacity because project developer Kinder Morgan (the same firm that is

the ultimate owner of the the Concord Lateral) canceled the NED project:

1. In order to justify plans to develop Granite Bridge, Energy North undertook cursory efforts[6] to obtain a price quote from Kinder Morgan (owner of TGP and its Concord Lateral), which Energy North duly plugged into its written testimony in support of Granite Bridge,
2. Energy North investigated no additional alternatives, even though other possibilities (i.e., demand-side efforts, capacity commitments of different durations) were theoretically available,[7]
3. Energy North sought optional Commission approval of Granite Bridge by filing its petition in Docket DG 17-198, hoping that the imprimatur of the Public Utilities Commission would bolster efforts to gain the required approval of the Site Evaluation Committee as required by RSA 162-H,
4. During the ensuing discovery process in DG 17-198, Energy North studied additional supply possibilities, largely via its resource optimization software, at the request of the OCA and Commission Staff -- not, as the Energy North

[6] *See, e.g.*, the testimony of Staff witness Steven Frink, describing previous findings of Staff consultants that Energy North did not give TGP "a basis for believing that it faced a serious counterparty" when these discussions took place. Tr. 6/8/21, afternoon, at 77, lines 16-24. *See also id.* at 79, lines 6-9 ("they didn't make an effort, they didn't sharpen their pencil, they didn't look at ways they could make this work. They simply gave [Energy North] a number") and 87, lines 19-24 through 88, lines 1-4 ("The way I read this is, they went to Tennessee and said 'We're building Granite Bridge. We'd like to know what, you know, what your number would look like.") and id. at 88, lines 14-16 ("if somebody came to me under those circumstances, and I didn't think I had a shot at it, I wouldn't put a lot of effort in it").

[7] *See, e.g.*, tr. 6/8/21, afternoon, at 92 lines 14-23 (Staff witness Frink testifying that "they could have gone out and gotten and pursued some other temporary fixes" such as demand-side options, interruptible contracts, etc.).

Witnesses have claimed, because the Company itself was conducting ongoing "due diligence,"

5. Granite Bridge met with considerable skepticism in DG 17-198, as reflected in the written testimony filed on behalf of the OCA, Commission Staff, and intervenors,
6. In the immediate aftermath of this skeptical testimony, filed on September 13, 2019, Energy North again initiated discussions with TGP, which was in the process of confronting a decision by the only other user of capacity on the Concord Lateral – the Granite Ridge electric generation facility in Londonderry, owned by Calpine – not to renew its contractual commitment to some or all of its firm capacity on the Concord Lateral.
7. As the result of business decisions made by Calpine (assessing its vulnerability to pay-for-performance penalties imposed by the regional grid operator ISO New England in light of Granite Ridge's well-compensated capacity supply obligations, vs. the cost of firm pipeline capacity obtained from TGP and/or Energy North), and *not* as the result of any clever negotiation tactics from Energy North, from late October of 2019 through May of 2020 the price of additional capacity on the Concord Lateral offered by TGP to Energy North dropped so drastically that Energy North was compelled to abandon Granite Bridge in favor of a new deal with TGP (now pending in Docket DG 21-008).

Exhibit 21 – Energy North's response to Staff's request for "all written correspondence, including emails, between Liberty and TGP related to contracting for the expiring capacity" held by Calpine on the Concord Lateral – combined with Mr. DaFonte's testimony at hearing about this exhibit – is illustrative of why Energy North has failed to demonstrate that leverage related to Granite Bridge accounts for savings produced for customers via the pending deal for capacity on the Concord Lateral. *See* tr. 6/7/21 at 102, line 17 through 123, line 2. In framing its response to what was originally a Staff discovery request, Energy North could have – but did not – provide a coherent, annotated, chronologically organized set of e-mail messages, supported by a clarifying and explanatory narrative, so that the parties and ultimately the Commission could understand precisely how the discussions progressed between Liberty and TGP about the capacity on the Concord Lateral that Calpine had forgone or was in the process of foregoing. Instead we have a confusing and convoluted set of e-mail threads with gaps and inconsistencies that Mr. DaFonte could not adequately explain. *See e.g.*, tr. 6/7/21 at 118, line 17 through 120, line 3.[8]

[8] In the cited portion of the June 7, 2021 transcript, Mr. Dafonte was asked to explain what Alison Stringer of TGP meant by "your 11/5/19 email request and follow up responses on 11/11/19," to which she was responding with "additional scenarios and estimates for incremental service to Liberty Utilities' city gates." Exh. 21 at 12. Despite Ms. Stringer's reference to "follow-up responses on 11/11/19," there is no message from Energy North to TGP dated November 11, 2019 in Exhibit 21. At hearing, Mr. DaFonte testified: "I think that was based on the questions that we had asked, and we had a discussion on that." Tr. 6/7/21 at 118, line 23 through 119, line 1. In other words, Mr. DaFonte's testimony is that the "follow-up responses on 11/11/19" were communicated in a meeting rather than in writing. But elsewhere in Exhibit 21, there is no reference to a November 11 meeting. Although it is not necessary for the Commission to make precise findings about who said what to whom in the fall of 2019 as Energy North negotiated with TGP, the Commission can and should conclude that Exhibit 21 and Mr. DaFonte's discussion of it at hearing is so obfuscatory as to undermine Liberty's characterizations of these negotiations. A reasonable inference to be drawn from Exhibit 21 is that TGP was negotiating simultaneously with Calpine and Energy North,

Moreover, Mr. DaFonte's theory about negotiating leverage did not hold up under questioning from Commissioner Bailey. At hearing on June 8, she asked Mr. DaFonte to assume, hypothetically, that Energy North had never developed plans for Granite Bridge but that TGP suddenly found itself with additional capacity available on the Concord Lateral to sell to Energy North. She asked whether, in these circumstances, TGP would have offered a higher price to Energy North than it actually offered. *See* tr. 6/8/21, morning, at 10 lines 12-023. Mr. DaFonte's answer was notably evasive: "Well," said he, "I think the issue really is that we didn't have the luxury to wait to find out if any capacity would become available." *Id.* at 10, lines 23 through 12, line 5 (referring to various supply options explored by Energy North from 2013 to 2019). Mr. DaFonte could not truthfully testify that Energy North extracted a better price from TGP because of Granite Bridge because, as he conceded, "we're not privy to the business decisions that are made" by a supply counterparty like TGP. *Id.* at 12, lines 9-11. Neither is the Commission, which should not give Energy North the benefit of an inference that even Mr. DaFonte was unwilling to draw.

Energy North's third asserted basis for Granite Bridge-related cost recovery – that customers "will receive the benefit associated with the Company's pursuit of the Company-sponsored development option" because "the customers are the direct

playing these two users of the Concord Lateral against each other. In other words, it was the behavior of Calpine, rather than negotiating leverage exerted by Energy North because of a Granite Bridge project that was then under siege, that accounts for the dramatic improvements to the terms being offered by TGP in late 2019 and early 2020.

and sole beneficiaries of the significant cost savings associated with the TGP Contract" – is not an independent basis for cost recovery. It is simply a tautology, based on an assumption of consumer benefits that are fairly attributable to the Granite Bridge project. For the reasons already discussed, the record does not support such an attribution.

The fourth claimed basis for cost recovery draws an analogy to exit/termination fees payable by local distribution companies upon their cancellation of precedent agreements with suppliers of new pipeline capacity. This is a specious and unpersuasive analogy. As Mr. DaFonte acknowledged at hearing, a precedent agreement is a contract typically entered into by a pipeline developer with one or more local distribution companies (or other pipeline users) so as to justify the issuance by the Federal Energy Regulatory Commission of a certificate of public convenience and necessity as required for such interstate facilities under the Natural Gas Act. See tr. 6/7/21 at 96, lines 11-24. Thus, to cite the example referenced by messrs. DaFonte, Killeen, and Mullen at bates page 47 of Exhibit 14, a precedent agreement between local distribution company Northern Utilities and Granite State Transmission Company, involving a liquefied natural gas storage facility to be constructed in Maine, earned the approval of the Commission in 1996. *See* Order No. 22,288 in Docket No. DE 95-345, 81 NH PUC 648 (1996). This presumably formed at least part of the basis for approval of the storage facility by federal regulators. The Commission's determination that the terms of the

precedent agreement were "consistent with the public interest," *id.* at 649, presumably included any exit fees to which Northern Utilities had agreed in the event it opted not to use the storage facility. In the case of Granite Bridge, the Commission has never blessed, approved, endorsed, or even commented favorably on any aspect of the project, including any element that might be analogous to an exit fee.

Finally, the Commission should reject out of hand the contention that cost recovery is appropriate here to "incentivize" utilities to "continue seeking the least-cost option for customers regardless of whether the option is sponsored by the Company or a third party." The fact that natural gas (and electric distribution) utilities are *required by statute* to seek least-cost options, regardless of their provenance, *see* RSA 378:38 and :39, is incentive enough. Adopting this "incentive" theory would put utilities on notice that they are free to ignore their least-cost planning obligations unless ratepayers provide a Commission-approved lagniappe. That would fly in the face of New Hampshire law.

IV. Conclusion

The Granite Bridge Project was a failed investment and recovery is barred under the anti-CWIP statute and New Hampshire Supreme Court precedent. Even if this were not so, the record supports only one inference: the claimed costs were not prudently incurred in the course of providing service to customers. For the

foregoing reasons, this Commission should deny recovery of the $7.5 million sought by Energy North.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Conclude as a matter of law that recovery from ratepayers of costs associated with the Granite Bridge project is impermissible, or, in the alternative

B. Find that such costs were not prudently incurred and thus should not be included in rates, and

C. Grant any other such relief as it deems appropriate.

Sincerely,

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June 25, 2021

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis