

DG 20-105

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty

Request for Change in Rates

STAFF LEGAL BRIEF ON LIBERTY REQUEST TO RECOVER GRANITE BRIDGE COSTS

Introduction

Staff of the New Hampshire Public Utilities Commission (Staff), through its counsel, and pursuant to the request of the Public Utilities Commission (Commission), respectfully submits this legal brief addressing the request of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (Liberty, or the Company) to recover in Docket DG 20-105 the costs incurred in support of its Granite Bridge proposal. That proposal was filed in Docket DG 17-198, wherein Liberty sought Commission approval of the proposed construction of a 27-mile natural gas pipeline and a 2 billion cubic foot liquefied natural gas (LNG) storage tank facility to be located in New Hampshire (together, the Granite Bridge Project).

After close to three years of litigation in Docket DG 17-198, Liberty ultimately filed a motion to amend its petition in that docket to inform the Commission that it had abandoned its Granite Bridge Project proposal, and to request that the Commission authorize, among other things, the Company's proposed recovery of approximately \$7.5 million of costs incurred to develop the proposed Granite Bridge Project. The Commission denied Liberty's request to recover costs related to the Granite Bridge Project in Docket 17-198, but allowed the Company an opportunity to seek recovery of the Granite Bridge Project costs in a future rate case. Liberty subsequently filed its request for Granite Bridge cost recovery in the current proceeding, Docket DG 20-105, Liberty's Request for Change in Rates.

Liberty, in this rate case, requests Commission approval to charge its customers, through its Local Distribution Adjustment Clause, over a period of five years, approximately \$7.5 million of costs expended in developing its Granite Bridge Project proposal. According to Liberty, these costs include engineering studies and plans, land leases and easement procurements, and regulatory siting studies and permits from the NH Division of Historical Resources, the NH Department of Transportation, the NH Department of Environmental Services, and the towns in which the Project would have been sited. *See Hearing Transcript (Tr)*. (6-7-21) at 57-62.

Legal Issue

Staff argues that ALL of the Granite Bridge costs that Liberty seeks to recover through rates fall under the statutory prohibition of recovery of “construction work in progress,” or CWIP, costs, as discussed further, below. No Commission approval was ever granted for the Granite Bridge Project in Docket DG 17-198 or in any other docket. Further, the testimony filed by non-petitioner parties to the DG 17-198 proceeding uniformly - with the single exception of the United Steelworkers of America Local 12012 - recommended rejection of the Granite Bridge Project as proposed.

Liberty argues that because no actual construction was initiated, the statutory prohibition against charging customer for CWIP costs does not apply and that cost recovery is reasonable because of benefits that Liberty perceives arose from pursuing Granite Bridge – specifically, negotiating leverage in securing alternate pipeline transportation service to meet forecasted load. Supplemental Testimony of DaFonte-Killeen-Mullen (11-20-2020) at 49.

Applicable Law

The principal applicable statute is as follows:

RSA 378:30-a Public Utility Rate Base; Exclusions. Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility’s rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

More generally, the Commission’s review in this case is governed primarily by the legal framework established by RSAs 374:2, 378:5, RSA 378:28, and 378:30-a. RSA 374:2 requires all rates to be “just and reasonable” and not more than is allowed by law; it further establishes that “every charge that is unjust - or unreasonable - or in excess of that allowed by law or by order of the PUC is prohibited.” RSA 378:5 provides that the Commission may investigate the reasonableness of proposed rates. RSA 378:28 provides that “The Commission shall not include in permanent rates any return on any plant, equipment, or capital improvement which has not first been found by the commission to be prudent, used, and useful.” And, as stated, RSA 378:30-a (“the anti-CWIP statute”) excludes from recovery – “in any manner” – “the cost of construction work in progress” (CWIP) or “any costs associated with construction work if said construction work is not completed” – “including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress” – “until, and not before, said construction project is actually providing service to customers.”

New Hampshire gas utilities, including Liberty/EnergyNorth, must follow federal accounting requirements under the Federal Energy Regulatory Commission (FERC) Chart of Accounts. *See* Puc Rule 507.08. FERC Account 107 concerns construction work in progress, and provides as follows (italics and bolding added):

A. This account shall include the total of the balances of work orders for gas plant in process of construction.

*B. Work orders shall be cleared from this account as soon as practicable after completion of the job. Further, if a project, such as a gas production plant, a compressor station, or a transmission line, is designed to consist of two or more units which may be placed in service at different dates, any expenditures which are common to and which will be used in the operation of the project as a whole shall be included in gas plant in service upon the completion and the readiness for service of the first unit. **Any expenditures which are identified exclusively with units of property not yet in service shall be included in this account.***

***Expenditures on research, development, and demonstration projects for construction of utility facilities are to be included in a separate subdivision in this account.** Records must be maintained to show separately each project along with complete detail of the nature and purpose of the research, development, and demonstration project together with the related costs.*

Notes omitted.

Legal Arguments

1. The Costs in Question Are Specific to the Development of Granite Bridge, a Cancelled Project, and Recovery is Barred by the Anti-CWIP Statute.

After approximately three years of litigation and overwhelming opposition to the Granite Bridge project, Liberty cancelled its campaign to pursue the Granite Bridge project and withdrew its petition for approval at the Commission. The Company now seeks approval to recover from its ratepayers the costs incurred for a cancelled project that was never approved – a result that not only is precluded by statute, but would set an unfortunate precedent for future public utility tactics in proposing and sustaining through years of litigation projects that are not well designed, well managed, adequately supported, or justifiable under applicable law and policy. It would be inappropriate and contrary to law to permit the recovery from ratepayers the costs expended on a project that has not been and will not be approved or found prudent, let alone constructed and placed in service. Granite Bridge will never be used and useful.

The costs in question (approximately \$7.5 million of the \$9.1 million incurred) are core engineering, environmental, and related costs (e.g., permitting, consulting, legal, etc.) associated

with the proposed Granite Bridge Project. *See, e.g.*, Tr. (6-7-2021) at 58-67; and Exh. 9 - Staff Audit Report. *See, also*, DG 20-105 Supplemental Testimony of DaFonte, Killeen, Mullen (Nov. 20, 2020) at 7, lines 8-12. (“The purpose of our Supplemental Direct Testimony is to seek Commission approval for recovery of the costs incurred to investigate, evaluate, and assess the future development of the Granite Bridge Project as part of EnergyNorth’s current rate case proceeding.”) Liberty testified that the \$7.5M includes engineering and environmental expenses specific to the proposed pipeline and LNG tank, including \$1.3M in internal labor charged directly by time card for work specific to the project. These were not general planning costs. Importantly, Liberty also testified that, had this project progressed to the point of Commission approval in DG 17-198, these same costs would have been charged to Construction Work in Progress. Tr. (6-8-2021 PM) at 165.

Such costs fall within the anti-CWIP prohibition of RSA 378:30-a, and the statute is clear on the prohibition of recovery through ratepayers of any such costs associated with the construction of a project that is not actually in service. The seminal New Hampshire court decision on the issue of recovery of costs associated with CWIP pertains to a project that was approved by the commission but subsequently abandoned by the utility and never put into service. *See Appeal of Public Service Co. of New Hampshire* (125 NH 46 (1984)). In contrast, the Granite Bridge proposed project was never approved – in fact, it was withdrawn by the Company before it reached the Commission for consideration.

The costs that Liberty seeks to recover in the current docket were costs incurred to plan, site, and engineer an approximately half billion dollar project that would have included a 27-mile gas pipeline and a 2 billion cubic foot LNG tank to be paid for through rate base inclusion over several decades, by the fewer than 100,000 customers of a small New Hampshire gas utility. The Company

has provided no plausible support or argument to address the clear statutory language that prohibits the recovery through customer rates of costs accrued for a project proposal that has never been approved, much less constructed or put into service. There are simply no grounds to justify recovery from ratepayers of any of the costs of the Granite Bridge Project proposed in Docket 17-198, and no number amount of unsupported references to “prudent” and “reasonable” costs throughout the testimony supporting the Company’s request can substitute for actual support and demonstration that costs incurred to engineer, develop, or obtain applicable permits for a project that was never approved, never built, and never put into service may be justifiably recovered from ratepayers under New Hampshire law; specifically RSA 378:30-a.

Liberty’s attempt to distinguish these costs from statutorily barred construction costs by claiming that no construction had actually begun on the Granite Bridge Project falls flat because Liberty has stated from the outset that these cost would have been capitalized (*i.e.*, booked to plant), had the project been completed. Exh. 13; Tr. (6-7-21) at 68, lines 6-22 (Mullen). If the costs had been booked as plant, then recovery should be barred by the anti-CWIP statute. Arguably, planning costs (*i.e.*, pre-plant) are not barred from recovery because they are more akin to on-going administrative expenses than construction costs, but that is not what we are dealing with here. As is abundantly clear from reviewing the Audit Division Report (Exh. 12) and from Mr. DaFonte’s and Mr. Mullen’s descriptions of these costs (*See, e.g.*, Tr. (6-7-21) at 41, lines 20-24; 42, lines 1-9; 57, lines 8-13, 21-24; 58, lines 1-8; 59, lines 14-24; 60, lines 1-22; 62, lines 1-8; 65, lines 16-23; 66, lines 1-14, 17-24; and 67, lines 1-14), the costs at issue here relate specifically to the construction and siting of the Granite Bridge Project and would have been capitalized had the plant been completed.

At hearing, neither Liberty nor Staff could point to a situation where such costs had been incurred by a local gas distribution company and then passed on to the customers of that company. The two examples suggested - the Wells LNG project in Maine and degradation fees for work undertaken to replace cast iron and bare steel pipes - were shown not to be comparable to the Granite Bridge situation. Tr. (6-8-2021 PM) at 22, lines 18-24, through 28, line 6.

Again, denial of the recovery of the cited costs is required by the anti-CWIP statute. Nothing submitted in the Company's filings to date justifies recovery from its ratepayers the estimated \$7.5 million in costs that Liberty spent on site-work assessment, permitting, and construction planning to support its petition. And any such recovery would violate the statutory prohibition of the recovery of costs associated with construction work in progress.

2. Even if Not Barred under the Anti-CWIP Statute, Cost Recovery is Not Supported by Any Sound Regulatory Policy Considerations.

The Company further suggested in its filed testimony that any denial of recovery through ratepayers of that 7.5 million dollars would, in effect "...result in a *disincentive* for the Company to pursue [a least cost] strategy in the future, potentially leading to higher costs for its customers." Supplemental Direct Testimony of Francisco C. DaFonte, William R. Killeen, and Steven E. Mullen (Nov. 20, 2020) at BP 50. The Company further testified that "allowing recovery of the Granite Bridge Project Costs would 'incentivize' EnergyNorth and other utilities to continue seeking the least-cost option for customers regardless of whether that option is sponsored by the Company or a third-party." See Supplemental Direct Testimony of Francisco C. DaFonte, William R. Killeen, and Steven E. Mullen (Nov. 20, 2020) at 39, line 1-3. However, no such incentive is needed because that result - least cost integrated resource planning - is required by statute of all public utilities under RSAs 378:38 and: 39.

3. **Liberty’s Analogy to Northern Utilities Exit Fee Recovery in the 1990s is Flawed.**

The Company’s analogy to Northern Utilities’ recovery of costs incurred in connection with service from the Wells LNG facility in the 1990s is inapposite. *See* Supplemental Direct Testimony of DaFonte and Killeen (Nov. 20, 2020) at 48 (referring to a settlement agreement concerning a request by Northern Utilities, Inc. (Northern) to be released from its contractual obligation with an interstate gas pipeline, Granite State Gas Transmission (GSGT)). The circumstances are significantly and materially different in the present case. In 1996, the Commission had approved Northern’s Precedent Agreement with GSGT for LNG storage and vaporization services associated with an LNG facility project in Wells, Maine. The precedent agreement between Northern and GSGT contained the following provision, “If Northern decides to terminate the unexecuted contract prior to the end of the primary terms, Northern shall be assessed an exit fee for the stranded costs associated with the facility.”¹

In 1999, the Commission opened an investigation into Northern’s request to be released from its contractual obligation with GSGT (Docket DG 99-050) and approved the referenced settlement agreement. The settlement agreement in that docket did not provide for recovery of costs prohibited by State law under RSA 378:30-a. Rather, GSGT petitioned the Federal Energy Regulatory Commission (FERC) for recovery of that fee from Northern through an exit clause after the contract was terminated.²

That is not the case here – there is no approved precedent agreement between Liberty and an interstate pipeline company for recovery of development costs if the proposed Granite Bridge project

¹ *See, e.g.*, Granite State Gas Transmission, Inc., FERC Docket No. CP99-238-000, NHPUC Staff Notice of Intervention, Protest, Request for Stay, and Request for Hearing at 9.

² *See* Granite State Gas Transmission, Inc., FERC Docket No. CP99-238-000.

is not placed into service. Thus, there is no contractual contingency at play for the payment or recovery of costs related to the abandoned Granite Bridge project. Further, the construction costs in the Wells LNG case were incurred by a FERC regulated interstate pipeline company for a project in Maine, not New Hampshire. Tr. (6-8-2021 PM) at 26, lines 15-24.) Liberty’s attempt to establish a link of similarity between the Granite Bridge Project and a different gas company’s decision (which the Commission ruled to be prudent) to enter into a precedent agreement with an exit clause in the event of project cancellation, should be rejected.

Conclusion

Staff recommends that the Commission deny the Company’s request to recover the approximately \$7.5M of costs incurred in support of the Granite Bridge Project proposal, as identified this docket. To entertain the Company’s request would be contrary to RSA 378:30-a, because the Project not only has not been built and put into service, it will not be built at all and has never been found by this Commission to be a prudent project.

Wherefore, Staff respectfully requests the Commission to provide the following relief:

- A. Deny the Company’s request for recovery in Docket DG 20-105 of any of the costs incurred in support of the Granite Bridge Project ; and
- B. Grant such other relief as deemed just and equitable.

Respectfully submitted,

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