

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. \_\_\_\_\_

**LIBERTY UTILITES (ENERGYNORTH NATURAL GAS) CORP.  
D/B/A LIBERTY UTILITIES  
Petition for Approval of a Firm Transportation Agreement  
with Tennessee Gas Pipeline Company, LLC  
NH PUC Docket No. DG 21-008**

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**APPEAL OF CONSERVATION LAW FOUNDATION  
PURSUANT TO RSA 541:6 AND RSA 365:21  
FROM DECISIONS AND ORDERS OF THE PUBLIC UTILITIES  
COMMISSION DATED NOVEMBER 12, 2021 AND  
JANUARY 10, 2022**

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**A. PARTIES AND COUNSEL**

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**B. ADMINISTRATIVE AGENCY’S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED**

This Rule 10 appeal by Conservation Law Foundation (“CLF”) pursuant to RSA 541:6 and RSA 365:21 is from (1) a decision and order of the New Hampshire Public Utilities Commission (“Commission”) dated November 12, 2021 (“Final Order,” Appendix at 1), approving (a) a Settlement Agreement entered into by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty”), the Office of Consumer Advocate (“OCA”), and the Department of Energy (“DOE”), and (b) a Firm Transportation Agreement between Liberty and Tennessee Gas Pipeline; and (2) a decision and order of the Commission, dated January 10, 2022 (“Rehearing Order,” Appendix at 11), denying CLF’s motion for rehearing.

**C. QUESTIONS PRESENTED FOR REVIEW**

1. Did the Commission err as a matter of law in approving the agreement between Liberty and Tennessee Gas Pipeline (“TGP Agreement”) where RSA 378:40 prohibits the Commission from approving any rate change unless a utility has filed a least cost integrated resource plan (“LCIRP”) with the Commission and the Commission’s review of the LCIRP is “proceeding in the ordinary course,” and there has been a lack of any activity by the Commission regarding Liberty’s LCIRP for two years?
2. Did the Commission err as a matter of law in approving the TGP Agreement where RSA 378:37 declares that it is the energy policy of the state to maximize the use of cost-effective energy efficiency and other demand-side resources to meet the energy needs of the state at the lowest reasonable

cost and Liberty failed to adequately analyze demand-side resources as alternatives to the TGP Agreement?

**D. PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS**

The statutes involved in this case, which are included in the Appendix at 16-20, are: RSA 378:37-RSA 378:40.

**E. PROVISIONS OF INSURANCE POLICIES, CONTRACTS, OR OTHER DOCUMENTS**

The following documents are contained in the Appendix filed with this Petition:

NH PUC Docket No. DG 21-008 Liberty Petition for Approval of Firm Transportation Agreement between Liberty and Tennessee Gas Pipeline	Appendix at 21
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NH PUC Docket No. DG 21-008 Firm Transportation Agreement between Liberty and Tennessee Gas Pipeline	Appendix at 27
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NH PUC Docket No. DG 21-008 Commission Order of Notice	Appendix at 38
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NH PUC Docket No. DG 21-008 Settlement Agreement between Liberty, OCA, and DOE	Appendix at 42
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## **F. CONCISE STATEMENT OF THE CASE**

This appeal pertains to the Commission’s November 12, 2021 decision to grant Liberty’s petition for approval of the TGP Agreement, and its associated costs. The appeal raises important issues regarding the integrity and proper application of New Hampshire’s energy laws related to a utility’s planning and investment decisions and the requirement that energy efficiency and demand-side alternatives be considered when a utility makes such decisions. More specifically, it addresses important questions about whether the Commission may approve a change in rates where it has failed to conduct review of a utility’s filed LCIRP, which is the document that is intended to guide a utilities’ planning and investment decisions, and whether the Commission may approve a supply contract where the utility has failed to analyze energy efficiency and other demand-side resources as alternatives to the contract.

### **1. The Statutory Requirement for a Least Cost Integrated Resource Plan and Liberty’s Filing Thereof**

In 2017, Liberty filed an LCIRP, docketed at NH PUC Docket No. DG 17-152. Under RSA 378:38, utilities are *required* to file LCIRPs at least every five years. *Id.* Within the LCIRP, a utility must include, *inter alia*, a demand forecast; an assessment of demand-side energy management programs, such as energy efficiency; an assessment of supply options; an assessment of compliance with environmental laws; and an assessment of the plan’s long- and short-term environmental, economic, energy price, and supply impacts. *Id.* The Commission has explained that a “well-crafted

LCIRP” “allow[s] the Commission the opportunity for input regarding [a utility’s] current planning processes, procedures, criteria, and planned investments” and “provides a regular snapshot of the factors supporting a utility’s investment decisions.” *Public Service Company of New Hampshire d/b/a Eversource Energy*, DE 19-139, Order No. 26,362, at 8 (N.H.P.U.C., June 3, 2020). From the filing of the LCIRP in 2017 until late 2019, significant activity and filings occurred in Liberty’s LCIRP docket. However, since late 2019, no meaningful action has occurred in the Liberty LCIRP docket, and the Commission has failed to conduct substantive review of Liberty’s LCIRP.<sup>1</sup>

## **2. The Tennessee Gas Pipeline Agreement and Liberty’s Petition for Approval Thereof**

On January 20, 2021, Liberty filed a petition with the Commission seeking approval of the TGP Agreement, a firm transportation agreement with Tennessee Gas Pipeline. The TGP Agreement is a 20-year contract for 40,000 dekatherms of fixed natural gas capacity on the Concord Lateral Pipeline, with a receipt point in Dracut, MA and a delivery point in Londonderry, NH. Final Order at 1. In the attachments filed with the petition, Liberty asserted that to optimize the increased capacity from the proposed TGP Agreement, it must complete certain on-system distribution enhancement projects totaling approximately \$45 million. The petition requested approval of the TGP Agreement, including a determination that

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<sup>1</sup> See Virtual File Room for NH PUC Docket No. DG 17-152, available at <https://www.puc.nh.gov/regulatory/Docketbk/2021/21-008.html>.



Liberty's decision to enter into the TGP Agreement was prudent. *Id.* At the March 24, 2021 pre-hearing conference, CLF noted that the Liberty LCIRP docket had laid dormant over the prior year and that Liberty's LCIRP should be reviewed by the Commission and proceed in parallel with the Commission's review of the TGP Agreement. Prehearing Conference Transcript, DE 21-008, at 15 (N.H.P.U.C., Mar. 24, 2021).

Following the conclusion of discovery, Liberty, OCA, and DOE (collectively the "Settling Parties") entered into a Settlement Agreement that was filed with the Commission on September 24, 2021. Under the terms of the Settlement Agreement, the Settling Parties agreed that Liberty's decision to enter into the TGP Agreement was prudent and that the costs to be incurred under the TGP Agreement were reasonable and recommended that the Commission approve the agreement. Settlement Agreement at 2, (Appendix at 43). The Settling Parties also agreed that Liberty would file its *next* LCIRP on or before October 2, 2022. *Id.* at 3 (emphasis added). However, the Settlement Agreement was silent with respect to Liberty's *current, pending* LCIRP, which was filed in 2017, even though the law calls for such LCIRPs to inform considerations of substantial investments like the TGP Agreement. Finally, the Settlement Agreement provided that Liberty would recover the costs associated with the TGP Agreement through its cost-of-gas tariff. *Id.* at 5.

On October 6, 2021, the Commission conducted a hearing on Liberty's petition for approval of the TGP Agreement. At the hearing and in its post-hearing brief, CLF argued that Liberty did not meet its burden to

demonstrate that the TGP Agreement is prudent because it had not performed an analysis related to energy efficiency, demand response, and environmental and health impacts to demonstrate that the TGP Agreement is least cost pursuant to the statutes governing LCIRPs, *i.e.*, RSA 378:37-40. Final Order at 3-6. CLF argued that Liberty’s growth forecasts, which Liberty alleged necessitated approval of the TGP Agreement, did not consider how increased energy efficiency and other demand-side resources, potential electrification, potential greenhouse gas regulation, and customer preference for new technologies including heat pumps might impact Liberty’s demand. *Id.*

### **3. The Final Order and Rehearing Order**

On November 12, 2021, the Commission issued its Final Order approving the TGP Agreement and Settlement Agreement. The Commission concluded that Liberty had “demonstrated a need for additional capacity to serve its customer base in a safe and adequate manner based on its design day forecasting” and that Liberty’s “design day forecasting is adequate to justify its decision to seek out additional capacity resources.” *Id.* at 6. The Commission stated that it did “not agree with CLF that approval of the TGP [Agreement] is prohibited by the LCIRP statute” and noted that “the Settlement Agreement provides for Liberty to file *its next LCIRP in 2022* in accordance with RSA 378:38’s requirement that LCIRP filing occur no later than five years from a company’s previous filing and that [it expected] that filing to fully comply with the statutory requirements.” *Id.* at 7. (emphasis added). The Commission concluded that

the terms of the TGP Agreement were reasonable and that Liberty's decision to enter into the agreement was prudent. *Id.* at 7-8. Accordingly, the Commission approved the TGP Agreement and Settlement Agreement. *Id.* at 8. In reaching its decision, however, the Commission failed to address Liberty's ***current, pending LCIRP***, filed in 2017, which has largely laid dormant since late 2019.

On December 10, 2021, CLF filed a motion for rehearing of the Commission's Final Order. Rehearing Motion, Appendix at 52. In its motion for rehearing, CLF argued that the Commission had violated RSA 378:40 in approving the TGP Agreement because the Commission had failed to conduct the necessary proceedings in the Liberty LCIRP docket, and that the Commission's failure to review Liberty's LCIRP deprived the Commission of a key tool that the LCIRP law designed to precede and inform these types of contract decisions. CLF also argued that the Commission erred in approving the TGP agreement because (1) Liberty failed to properly analyze demand-side alternatives to the TGP Agreement, *i.e.*, alternatives that could be used to reduce demand for gas and, therefore, affect the need for some or all of the capacity/supply purchased by the agreement; (2) Liberty's filings in the docket at issue were inconsistent with its filings in the LCIRP docket; and (3) Liberty's filings failed to comply with all elements of the LCIRP statutes. *Id.* OCA, Liberty, and DOE filed objections to CLF's motion for rehearing. Objections, Appendix at 74, 80, 93. On January 10, 2022, the Commission denied CLF's motion for rehearing, reaffirming its Final Order. Rehearing Order at 4. This appeal follows.

**G. JURISDICTIONAL BASIS FOR APPEAL**

RSA 541:6 and RSA 365:21 provide the jurisdictional basis for this appeal.

**H. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON WHETHER THE COMMISSION VIOLATED RSA 378:40 AND RSA 378:37 IN APPROVING THE TGP AGREEMENT AND SETTLEMENT AGREEMENT. THE ACCEPTANCE OF THIS APPEAL WOULD PROVIDE AN OPPORTUNITY TO CORRECT PLAIN ERRORS OF LAW AND CLARIFY ISSUES OF IMPORTANCE TO NEW HAMPSHIRE’S ENERGY LAWS, THE CITIZENS OF NEW HAMPSHIRE, AND THE ADMINISTRATION OF JUSTICE**

This appeal provides an opportunity for the Court to address important questions about the manner in which the Commission reviews Least Cost Integrated Resource Plans, which are meant to guide utility planning and investment decisions like the contract at issue in this case, and the consequences of a failure to review such plans. It also addresses whether, pursuant to the energy policy of the state, utilities must analyze energy efficiency and other demand-side alternatives to supply contracts when seeking approval of supply contracts.

**1. The Commission Erred as a Matter of Law in Approving the TGP Agreement Because It Failed to Conduct an Ordinary Review of Liberty’s Least Cost Integrated Resource Plan, as Mandated by RSA 378:40**

RSA 378:38 mandates that natural gas utilities file a Least Cost Integrated Resource Plan at least every five years. *Id.* RSA 378:39 mandates that the “*Commission shall review integrated least-cost resource*

*plans* in order to evaluate the consistency of each utility’s plan with [the statutory requirements of RSA 378:39], in an ***adjudicative proceeding.***” *Id.* (emphasis added). Building on the requirements of RSA 378:38 and 378:39, RSA 378:40 requires:

*No rate change shall be approved or ordered with respect to any utility that does not have on file with the commission a plan that has been filed and approved in accordance with the provisions of RSA 378:38 and RSA 378:39. However, nothing contained in this subdivision shall prevent the commission from approving a change, otherwise permitted by statute or agreement, where the utility has made the required plan filing in compliance with RSA 378:38 and the process of review is proceeding in the ordinary course but has not been completed.*

RSA 378:40 (emphasis added). In clarifying the timing requirements for LCIRP filings in *Appeal of PSNH Ratepayers*, No. 2013-0307, 2014 WL 11485765, \*2 (N.H. Nov. 7, 2014), this Court has made clear that under the second sentence of RSA 378:40, the Commission is only allowed “to ***approve a rate change*** while its review of a utility’s plan is ‘***proceeding in the ordinary course but has not been completed.***’” *Id.* (quoting RSA 378:40).

Here, the Commission’s review of Liberty’s LCIRP is not proceeding in the ordinary course, as required by RSA 378:40. Liberty filed its 2017 LCIRP with the Commission more than four years ago, on October

2, 2017.<sup>2</sup> Following a pre-hearing conference, in April 2018, the Commission issued a procedural schedule and set an initial hearing date on the LCIRP.<sup>3</sup> Thereafter, due to a development in the proposed, and since abandoned, Granite Bridge project that Liberty asserted affected its LCIRP, Liberty requested to suspend the LCIRP docket, including the hearing dates, which the Commission granted.<sup>4</sup> Since then, no action by the Commission has occurred on Liberty's LCIRP and the Commission has failed to schedule any hearings on the LCIRP.<sup>5, 6</sup> In fact, in the Commission's Final Order, the Commission noted that Liberty must file its *next LCIRP by October 2022, but was silent with respect to Liberty's 2017 LCIRP*. Final Order at 3.

The Commission's failure to review Liberty's 2017 LCIRP and its statements regarding Liberty's next LCIRP, which demonstrate that the Commission has no intention to ever conduct hearings regarding Liberty's 2017 LCIRP, stand in stark contrast to the Commission's past practices reviewing other utilities' LCIRPs. Since 2010, with the exception of Liberty's 2017 LCIRP docket, virtually every LCIRP plan filed with the

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<sup>2</sup> See Virtual File Room for NH PUC Docket No. DG 17-152, available at <https://www.puc.nh.gov/regulatory/Docketbk/2021/21-008.html>.

<sup>3</sup> Secretary Letter Approving Procedural Schedule, DG 17-152 (N.H.P.U.C., April 5, 2018), available at <https://www.puc.nh.gov/regulatory/Docketbk/2021/21-008.html>. The initial hearing date was later rescheduled to November 21 and 22, 2019.

<sup>4</sup> Secretary Letter, DG 17-152 (N.H.P.U.C., Nov. 13, 2019), available at <https://www.puc.nh.gov/regulatory/Docketbk/2021/21-008.html>.

<sup>5</sup> In response to a request by Liberty for a technical session to provide an update on the Granite Bridge project, the Commission scheduled a parallel technical session for the Liberty LCIRP and Granite Bridge dockets for June 3, 2020; however, this technical session only indirectly addressed Liberty's LCIRP and did not address the substance of Liberty's LCIRP filings. Secretary Letter, DG 17-152 (N.H.P.U.C., May 26, 2020), available at <https://www.puc.nh.gov/regulatory/Docketbk/2021/21-008.html>.

<sup>6</sup> Liberty later publicly announced its withdrawal of the Granite Bridge project on July 31, 2020.

Commission has either been approved following a hearing or approved via settlement agreement.<sup>7</sup> Moreover, for the most recent Least Cost Integrated Resource Plans filed with the Commission, hearings have already taken place or are currently scheduled.<sup>8</sup> Thus, over the last eleven years, the 2017 Liberty LCIRP docket (NH PUC Docket No. DG 17-152) is the only instance in which a Least Cost Integrated Resource Plan has been filed and the docket has laid dormant for such an extended period of time, with no hearings either scheduled or occurring, and no intent on the part of the Commission to ever complete its review thereof.

In construing RSA 378:40, the Commission was required to give full effect to all words in the statute. *See Town of Amherst v. Gilroy*, 950 A.2d 193, 197 (N.H. 2008) (“The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.”). The Commission’s decision in the Final Order to allow Liberty to recover the costs of the TGP Agreement in Liberty’s cost-of-gas tariff, despite the lack of any proceedings or scheduled hearings on Liberty’s LCIRP, ignores the clear statutory language of RSA 378:40, which only allows the Commission to approve rate changes where (1) an LCIRP has been filed and approved or (2) a utility has filed an LCIRP plan and the “*process of review is proceeding in the ordinary course but has not*

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<sup>7</sup> See NH PUC Docket Nos.: DE 19-120; DG 19-126; DE 19-139; DE 16-463; DE 15-248; DE 16-097; DG 15-033; DG 13-313; DE 13-177; DE 13-195; DG 11-290; DE 12-347; DE 10-261; DG 10-041, available at <https://www.puc.nh.gov/regulatory/VirtualFileRoom.html>.

<sup>8</sup> See NH PUC Docket Nos.: DE 20-002; DE 20-161; DE 21-004, available at <https://www.puc.nh.gov/regulatory/VirtualFileRoom.html>.

*been completed.*”<sup>9</sup> *Id.* (emphasis added). The lack of activity on Liberty’s 2017 LCIRP for approximately two years, especially when compared to the Commission’s review of other utilities’ LCIRPs, establishes that the Commission’s review of Liberty’s 2017 LCIRP has not been proceeding in the ordinary course and that the Commission does not intend to complete its review of Liberty’s LCIRP, as required under RSA 378:40 for the Commission to approve a rate change.

If the Commission’s Final Order is allowed to stand, it will condone the Commission’s disregard of statutory responsibilities of review under RSA 378:40. The statutes governing LCIRPs, RSA 378:37-40, are designed to establish a utility’s LCIRP as the utility’s key planning document to guide planning and investment decisions, such as the TGP Agreement. The Commission’s failure to review Liberty’s LCIRP prevented the Commission from relying on this key tool in reviewing the TGP Agreement. Acceptance of this appeal would provide an opportunity for the Supreme Court to correct the Commission’s violation of RSA 378:40 and to clarify an issue of general importance to the citizens of New Hampshire, *i.e.*, that rate changes are not permitted where the Commission has failed to conduct review of a utility’s LCIRP.

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<sup>9</sup> The Commission’s decision to allow Liberty to recover the costs of the TGP Agreement in Liberty’s cost-of-gas filing constitutes a “rate change” under RSA 378:40. Under the Commission’s rules, “Tariff” has the following definition: “‘Tariff’ means the schedule of *rates*, charges and terms and conditions under which a regulated and tariffed service is provided to customers, *filed by a utility and either approved by the commission or effective by operation of law.*” N.H. Code Admin. R. Puc 1602.07 (emphasis added).



## **2. The Commission Erred as a Matter of Law in Approving the TGP Agreement Because Liberty Failed to Analyze Demand-Side Alternatives as Required by RSA 378:37**

As set forth in RSA 378:37, the New Hampshire General Court has unambiguously stated:

it shall be the energy policy of this state *to meet the energy needs* of the citizens and businesses of the state *at the lowest reasonable cost* while providing for the reliability and diversity of energy sources; *to maximize the use of cost effective energy efficiency and other demand-side resources*; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

*Id.* (emphasis added). It is noteworthy that in 2014, the General Court amended a prior version of this statute to specifically establish, for the first time, that it is the state's energy policy to "maximize the use of cost effective energy efficiency and other demand-side resources." PUBLIC UTILITIES—ELECTRICITY—ENERGY CONSERVATION, 2014 New Hampshire Laws Ch. 129 (H.B. 1540). Thus, by amending the statute, the legislature signaled its intention for energy efficiency and other demand-side resources to play as essential a role in accomplishing the state's energy needs as the other policies outlined in RSA 378:37, including the requirement that energy needs be provided at the lowest reasonable cost.

Indeed, in its order of notice initiating the docket, the Commission explicitly recognized that Liberty was required, as part of its petition, to

demonstrate that the agreement was prudent, reasonable, and consistent with the public interest, and to provide an “evaluation of resource alternatives.” Order of Notice, DG 21-008 (N.H.P.U.C., Feb. 16, 2021). Thereafter, in approving the TGP Agreement and Settlement Agreement, the Commission implied that Liberty had assessed other alternatives, concluding that the TGP agreement “represents the most viable, reasonably available alternative for Liberty to meet its current and forecasted customer requirements in an adequate and reliable manner.” Final Order at 8. However, Liberty did not analyze whether energy efficiency and other demand-side resources might be the least cost option, as required under RSA 378:37. Specifically, Liberty failed to evaluate whether cost-effective demand-side alternatives to the TGP Agreement could decrease demand for natural gas and reduce or eliminate the need for the capacity/supply purchased by the TGP Agreement. Because Liberty failed to present an analysis of energy efficiency and other demand-side resources as an alternative to the TGP Agreement, the Commission violated RSA 378:37 in approving the TGP Agreement.

While Liberty sought approval of the TGP agreement based on its assertion that the TGP agreement is the least cost alternative, it ignored essential language in RSA 378:37. In particular, Liberty ignored the requirement in RSA 378:37 that it is the energy policy of the state “to maximize the use of cost-effective energy efficiency and other demand-side resources.” RSA 378:37. At the hearing, Liberty did not attempt to demonstrate whether increased cost-effective energy efficiency and other demand-side resources could obviate the need for the TGP Agreement. In

other words, although Liberty sought approval of the TGP agreement based on its claim that it was the least cost alternative, it failed to demonstrate whether it could meet its customers' energy needs by maximizing cost-effective energy efficiency and other demand-side resources, as mandated by RSA 378:37.<sup>10</sup> In fact, the only alternatives to the TGP Agreement that Liberty analyzed were other supply options, including the now-abandoned Granite Bridge project.

Pursuant to RSA 378:37, energy efficiency in New Hampshire is not only accomplished pursuant to filed and approved triennial energy efficiency plans; rather, the statute unambiguously establishes a policy to both meet energy needs at the lowest reasonable cost and to maximize cost-effective energy efficiency and other demand-side resources. It was an inconsistent application of RSA 378:37 for the Commission to only focus on whether the TGP Agreement was the least cost option without requiring Liberty to also demonstrate that it had explored energy efficiency and other demand-side resources as alternatives to the agreement.

RSA 378:37 establishes a statewide energy policy of meeting the state's energy needs at the lowest reasonable cost, while maximizing cost-effective energy efficiency and other demand-side resources. Because the Commission did not require Liberty to demonstrate that it compared the TGP Agreement to demand-side alternatives, the Commission failed to

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<sup>10</sup> In particular, Liberty did not analyze whether energy efficiency savings above and beyond the approved 2018-2020 New Hampshire Statewide Energy Efficiency Plan ("Triennial Plan")—as well as the proposed, and since rejected, 2021-2023 Triennial Plan—or other demand-side resources could reduce or eliminate Liberty's purported need for the TGP Agreement.

correctly apply RSA 378:37 and, thus, erred in concluding that Liberty met its burden of demonstrating that the TGP Agreement was prudent, reasonable, and consistent with the public interest. Acceptance of this appeal would provide an opportunity for the Supreme Court to correct the Commission's legally erroneous application of RSA 378:37 in approving the TGP Agreement and to clarify the requirements of RSA 378:37 with respect to the review and approval of energy supply contracts.

**I. CERTIFICATION OF ISSUES PRESERVED**

The issues raised herein were presented to the Commission and have been properly preserved for appellate review by a properly filed pleading. Specifically, the issues were raised during hearing and further presented and preserved in CLF's Rehearing Motion. Rehearing Motion, Appendix at 52-73.

**J. CONTENT OF RECORD ON APPEAL**

The Appellant requests that the Court require the PUC to transmit to the Court the entire record for appeal in NH PUC Docket No. DE 20-092.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that consistent with Supreme Court Rule 26 and Supplemental Supreme Court Rule 18, on February 9, 2022, I served the foregoing Notice of Appeal electronically or conventionally to those parties listed above in Section a.2. of this notice.

/s/ Nicholas A. Krakoff,  
Nicholas A. Krakoff