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

Reply 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 in response to the brief filed by Energy North Natural Gas Corp. d/b/a Liberty Utilities ("Energy North") on June 25, 2021:

I. Plain Meaning of RSA 378:30-a, the "Anti- CWIP" Statute

For the reasons already explained by the OCA in its initial brief, the plain meaning of RSA 378:30-a renders it inconsistent with New Hampshire law for the Commission to permit Energy North to recover from ratepayers any costs associated with the canceled Granite Bridge project. In arguing to the contrary, Energy North contends that section 30-a imposes such a restriction only on "construction" costs and, because construction of the Granite Bridge project never began the anti-CWIP statute does not apply.

This is a misreading of the statute's plain language. The terms "construction," "construction work," and "construction work in progress" are not specifically defined in the statute, but their meaning can be easily and straightforwardly discerned from the context in which those words are used. In particular, the final sentence of RSA 378:30-a is dispositive. It reads: "All cost 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 customers." The project development costs at issue here are clearly "costs associated with constructing, owning . . . or financing construction work in progress" even though construction remained in the future at the time the costs were incurred and, we now know with hindsight, the construction will never occur.

Any other interpretation would lead to an absurd result, something that is precluded given the principles of statutory interpretation adopted by the New Hampshire Supreme Court as enumerated in the OCA's initial brief. Under the interpretation advance by Energy North, had the company moved one shovel-full of dirt in support of this project, recovery would be precluded (because the project was never used and useful) but, because the utility delayed the project, ratepayers are potentially liable for $7.5 million. Moreover, Liberty would have the Commission ignore the expansive language in this statutory sentence ("including, but not limited

to . . ."), which points the Commission in precisely the opposite direction. In other words, when the General Court declared that its prohibition on recovery of costs associated with construction would not be limited to the costs specifically enumerated elsewhere in the sentence, it meant for the Commission (and, if necessary, the Court) to err on the side shielding ratepayers from costs that are linked to, related to, or necessary for the commencement of, construction unless and until the construction is completed and the asset(s) used and useful..

As did the OCA, Energy North relies on *Appeal of PSNH*, 125 N.H. 46 (1984). The focus on this decision is appropriate, given that it is the only opportunity taken by the New Hampshire Supreme Court to interpret the language in RSA 378:30-a. But, for the reasons explained in the OCA's initial brief, the 1984 *Appeal of PSNH* case supports rather than undermines the notion that cost recovery is precluded here. We have already explained, in our initial brief, why this is so: The 1984 decision adopts an expansive interpretation of which costs are out-of-bounds for recovery pursuant to the statute.

In its brief, Energy North draws the Commission's attention to this pair of sentences in the opinion, quoted here in its entirety: "The term CWIP [i.e., construction work in progress] must be used with care, however, for it can have any one of three related meanings. It can of course refer to the partially complete physical construction. It can also be used in technical senses to refer to the cost of that construction, or finally to that cost after it has been added to the rate base." Energy North Brief at 10, citing *Appeal of PSNH*, 125 N.H. at 50. Energy North's

reliance on this language is misplaced for two distinct reasons. First, the costs at issue here fit into the second example described by the court: "the cost of . . . construction," even though in the instant case the physical aspects of such construction never began. Second, even if the language supported the interpretation advanced by Energy North, it would be *dicta* inasmuch as, a temporal matter, *Appeal of PSNH* covered only construction commenced and then discontinued. The question of pre-construction costs of a cancelled project was simply not addressed.

The same points can be made about the paragraph from the 1984 opinion quoted at page 11 of the Energy North Brief (found at page 53 of volume 125 of the New Hampshire Reports), including the language highlighted by Energy North: "uncompleted physical plants are what the statute must mean by 'construction work in progress.'" The costs at issue here most assuredly are those associated with "uncompleted physical plant[]" inasmuch as capital assets such as engineering and acquisition of property rights associated with physical construction never begun are obviously those of physical plant that remains uncompleted.

II. "Best Interest of Customers to Find the Least-Cost Resource?"

At page 5 of its Brief, Energy North urges the Commission to impose cost recovery here because the utility "worked diligently to develop the cost and feasibility analysis needed to prove out" its Granite Bridge initiative and "[t]hroughout the process, the Company acted *solely* in the best interest of customers to find the least cost-resource" (emphasis added). While intending no

criticism of Energy North, including any suggestion of non-diligence, the OCA would respectfully point out that (1) this utility, like any investor-owned enterprise, never acts "solely" in the interests of its customers but, rather, undertakes activities that are intended to benefit shareholders (who seek maximum return on investment) at least as much as customers (who seek safe and reliable service at the lowest possible cost); (2) as noted in our initial brief, sometimes diligence and efforts to do well by doing good are simply not rewarded, essentially because of bad luck; and (3) there has never been a finding that Granite Bridge was "the least-cost resource," even prior to late 2019 when a viable Concord Lateral alternative manifested itself. The place for that "least-cost" determination would have been Docket No. DG 17-152, the utility's 2017 Least-Cost Integrated Resource Plan, a document that *to this day* remains pending before the Commission for approval.

Moreover, although the issue was never litigated because Energy North withdrew its request for approval of the Granite Bridge project, opinion in Docket No. DG 17-198 was divided on the question of whether Energy North pursued its proposal in a selfless quest to do right by its customers. *See, e.g.*, Testimony of John Antonuk, John Adger, and James Letzele, filed by Staff on September 13, 2019 (Tab 77) at 25-27.[1] Although certain key numbers in the testimony excerpt in the

[1] **Q. How do you view the distribution of risk and reward in the Company's proposal?**

A. The Company's proposed distribution of risk and reward skews heavily toward Liberty Utilities, which will earn returns whether or not its cost estimates (albeit presumably subject to prudence review) or its growth forecasts prove accurate. Customers take installation cost and growth risk, in return for barely positive benefits even if those estimates and forecasts prove accurate.

[continued]

footnote are redacted, the Commission, Staff, and Energy North obviously have access to the information.

III. Conclusion

The remainder of the arguments advanced by Energy North in its brief were addressed by the OCA in its initial brief and/or by the Commission Staff in its well-argued initial brief (the arguments and positions of which the OCA adopts here by reference). Recovery of costs associated with the Granite Bridge project is precluded by RSA 378:30-a and, even if the statute were not a bar, Energy North has failed to meet its burden in establishing as a matter of fact any basis for cost recovery.

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

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Customers might receive a benefit of $23.5 million in levelized costs, spread out over 20 years under those circumstances. That "return" for customers is far too low, uncertain, and subject to reversal to justify obliging them to carry the costs of an investment of some $260.5 million. In stark contrast, the Company's calculations show it receiving cumulative Net Income of [REDACTED] over the same period. Moreover, the very same cost growth that threatens even the marginal Company-forecasted customer economic benefits, further benefits the Company through higher returns recovered through customer rates.

Q. What is your view of the balance of risks and rewards with respect to the Granite Bridge Pipeline?

A. The Company's analysis suggests that customers would save approximately $51 million in reduced TGP charges over the forecast period. At the current cost estimates, the Company would receive approximately [REDACTED] in Net Income over the forecast period.[4] Again, customers would bear the risk of reduced load growth and increased costs, but those risks would be spread over all customers, rather than just Sales and Non-Exempt Transportation customers. The Company's income stream would last until well after the forecast period, but the benefits of the pipeline would be similarly long-lived.

(Footnotes omitted.)

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

Sincerely,

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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