STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

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

Request for Change in Rates

Docket No. DE 20-105

Objection of the Office of the Consumer Advocate to Motion for Rehearing

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and respectfully opposes the RSA 541:3 motion for rehearing filed on November 24, 2021 by the subject utility, Energy North Natural Gas Corp. ("Energy North"). In support of its position, the OCA states as follows:

I. Introduction

On October 29, 2021, the Commission entered Order No. 26,536, denying the request of Energy North to recover approximately $7.5 million in costs associated with the Company's abandoned Granite Bridge project. Following an evidentiary hearing that was specifically devoted to this question, the Commission ruled that such recovery is precluded by RSA 378:30-a, commonly referred to as the "anti-CWIP" statute ("CWIP" being an acronym for "construction work in progress"). Energy North contends that the Commission misapplied the statute. Therefore, Energy North asks that the Commission grant rehearing, reverse course, and

determine that the Company may recover the disputed costs via its Local Distribution Adjustment Clause ("LDAC") over a period of five years.

The Commission must reject this request. Via its rehearing motion, Energy North continues its assault on a statute it dislikes and would prefer the Commission disregard. For the reasons that follow, the Commission cannot distort the anti-CWIP statute in the manner urged by Energy North, nor fail to heed the statute's inexorable command.

II. Reply to Energy North Objection

The crux of the Company's argument on rehearing is succinctly stated in paragraph 12 of its motion: Rehearing is warranted, according to Energy North, "because the Commission's decision rests solely on an isolated interpretation of the second sentence of RSA 378:30-a, which contradicts the statutory interpretation delineated by the [New Hampshire Supreme] Court in *Appeal of Public Service Company of New Hampshire*," 125 N.H. 46, 52 (1984) ("*PSNH*"). We address each of those contentions in turn.

A. Proper Construction of RSA 378-30-a

After briefly summarizing the familiar approach to statutory interpretation as adopted by the New Hampshire Supreme Court, the Commission noted that "the three sentences of RSA 378:30-a speak to roughly similar ideas" but that the Court in PSNH "concluded that they must each have independent effect and not be redundant to each other." Order No. 26,536 at 5 (citing *PSNH* at 54). Although the Commission noted that the PSNH decision deemed the second sentence in RSA

378:30-a to be dispositive of that case, the Commission's order does not treat the instant controversy in such fashion. Rather, the agency's entirely sound conclusion is that "the Commission can identify no other plausible purpose for undertaking [feasibility] studies [related to Granite Bridge] and the other actions it [i.e., Energy North] took that resulted in the costs at issue except in preparation for a construction project." *Id.* The Commission therefore found that the $7.5 million in costs were incurred in connection with "construction work" as that term is used in RSA 378:30-a and that it is "beyond dispute that the construction work in question was never 'completed' within the meaning of the statute." *Id.* at 6.

This amounts to a commonsense, straightforward application of an unambiguous statute that was adopted in 1978 with such a firm legislative resolve that (as the Commission explicitly acknowledges) the General Court essentially stated the same command in three successive sentences. The Commission focused on the second sentence only insofar as that one was deemed dispositive in PSNH, which concerned a construction project that was commenced but ultimately abandoned. But the OCA in its post-hearing pleading directed the Commission's particular attention to the *third* sentence of RSA 378:30-a as well.

The third sentence of the anti-CWIP statute reads: "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." The Commission may wish to clarify that this sentence also supports a determination, based on the entirety of RSA 378:30-a and its evident purpose, that capital projects such as Granite Bridge are appropriate for cost recovery only if and when they become used and useful.

It is noteworthy – indeed, it is arguably dispositive – that the General Court via the second sentence explicitly did not limit its rule of non-recovery to costs associated with "constructing" utility infrastructure but also to "owning, maintaining, or financing" it. Obviously, financing and ownership are inevitably costs incurred prior to construction; Energy North, in effect, asks the Commission to ignore the statute's explicit reference to pre-construction activities.

At hearing, in its post-hearing brief, in its reply brief, and now in its rehearing motion, Energy North seeks to lure the Commission into violating the command of the New Hampshire Supreme Court not to "consider words and phrases in isolation, but rather within the context of the statute as a whole" so as to "interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *White v. Auger*, 171 N.H. 660, 666-67 (2019) (citations omitted). One could, as Energy North again urges the Commission to do, distinguish among "construction," "construction work," and "construction work in progress," so as to exempt from the recovery prohibition costs that would have been subject to capital recovery but for project cancellation. But, as we pointed out in our initial brief, the overall purpose of RSA 378:30-a is to overrule a preexisting interpretation of the phrase "used and useful" by the Commission (from 1978) that

was in derogation of the simple cost-of-service ratemaking principle that a project not actually serving customers should not be paid for by customers. Post Hearing Brief of the Office of the Consumer Advocate (tab 58) at 5.

B. The 1984 *Public Service Company of New Hampshire* Decision

Energy North's suggestion that the Commission has misapplied *PSNH* is likewise unpersuasive. As we have previously noted, *id.* at 7, PSNH actually counsels against recovery of Granite Bridge Costs because the case stands generally for the proposition that a utility cannot get out of RSA 378:30-a on a technicality (there, the fact that the project was abandoned after construction began and was thus no longer "in progress"). But even if the Commission were to avoid absorbing that general lesson, *PSNH* certainly cannot withstand the gloss placed upon it by Energy North on rehearing. According to Energy North, because the Court in *PSNH* referred to "construction work" (as that exact term appears in the second sentence of the statute) as "in its common sense referring to a physical structure," recovery is permissible here because no "physical structure" ever came into existence. Energy North Motion for Rehearing at 11, citing *PSNH*, 125 N.H. at 54. But that would amount to an overextension of the actual holding in *PSNH*, which is that the effect of RSA 378:30-a does not evaporate when construction work is no longer "in progress" but abandoned.

C. Policy Arguments

If Energy North has made anything clear via its quest to recover the $7.5 million in Granite Bridge costs, it is that the utility – like essentially all utilities –

wishes there were no anti-CWIP statute in New Hampshire. The statute has certainly had its vocal detractors over the years and in some circles it is believed that RSA 378:30-a caused significant harm to electric customers by forcing PSNH into bankruptcy 34 years ago.

In this instance, Energy North complains via its rehearing motion that "New Hampshire utilities are required to explore and develop supply and delivery options on a daily basis and the theory that the cost of any viability, feasibility, or design analysis that does not result in completed utility plant is precluded for recovery would . . . severely constrain utility planning and engineering efforts, ultimately having a detrimental effect on customers." Energy North Rehearing Motion at 14. This contention is flawed for several reasons.

First, the Commission did *not* conclude in Order No. 26,536 that no costs associated with viability, feasibility, or design analysis can ever be recovered from customers absent a completed project and placement of the costs into rate base. The decision in this case is limited to its facts – costs incurred to gear up for a particular construction project that a utility presented to the Commission but ultimately withdrew. The parade of horrible hypotheticals offered by Energy North should be ignored.

Second, routine planning efforts are part of the statutorily mandated, least-cost-integrated resource planning process and are thus appropriate for recovery as a component of a utility's operating costs. Energy North might have a more compelling case for recovery of costs associated with Granite Bridge had that project

ever been part of an approved least-cost integrated resource plan – but that is not the situation the Commission confronts here, as has already been pointed out. *See* OCA Reply Brief (tab 61)at 5.

Third, to the extent that RSA 378:30-a inhibits utilities from exploring capital projects that deserve consideration, Energy North's beef is with the Legislature and not the Commission. The OCA does not concede that the anti-CWIP statute has a detrimental effect on utility planning processes, but the proper place for such an argument with Energy North is in the hearing rooms of the State House and Legislative Office Building.

D. Energy North Now vs. Northern Utilities Then

The only remaining basis on which Energy North seeks rehearing appears at page 18 of its motion at paragraph 31, which states in relevant part: "Liberty undertook an analysis that is virtually identical to that presented in Docket DG 99-050 by Northern Utilities . . . . The only difference between the Company's request in this proceeding and customer payment of the Exit Fee in Docket DG 99-050 would be how the costs are labelled, i.e., 'Exit Fee' instead of 'Survey and Feasibility Costs.'"

It is disappointing to see a utility make an assertion that it knows to be incorrect. As we explained in our post-hearing brief, referring to a similar case decided in 1996, the exit fee in question was incurred in connection with a Commission-approved precedent agreement of the sort that pipeline developers enter into with local distribution companies so as to demonstrate project need to the

Federal Energy Regulatory Commission for purposes of approval under the Natural Gas Act. As we previously noted, and as we reiterate here, whether the issue is the exit fee incurred by the state's other natural gas utility in Docket No. DG 95-345 or the one similarly incurred in Docket No. 99-050, the difference from present circumstances is that, unlike the precedent agreements in those dockets, the Commission never so much as hinted at a favorable inclination toward the Granite Bridge project.

III. Conclusion

For the foregoing reasons, the Commission must deny the pending motion for rehearing.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the motion of Energy North Natural Gas Company for rehearing of Order No. 26,536, and

B. Clarify Order No. 26,536 as necessary.

Sincerely,

Donald M. Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.m.kreis@oca.nh.gov

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Certificate of Service

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

Donald M. Kreis