

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 20-105

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY**

Petition for Permanent Rates

Order Denying Motion for Rehearing of Order No. 26,536

ORDER NO. 26,583

February 17, 2022

In this order, the Commission denies Liberty Utilities' motion for rehearing of Order No. 26,536 pertaining to its request to recover approximately \$7.5 million in costs related to the Granite Bridge project.

I. BACKGROUND AND PROCEDURAL HISTORY

In Order No. 26,536 (October 29, 2021), the Commission found that RSA 378:30-a barred recovery of approximately \$7.5 million in costs Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (Liberty) incurred related to Granite Bridge, a proposed gas supply project which was to include a new natural gas pipeline and liquified natural gas (LNG) storage, and denied Liberty's request to recover those project costs.

On November 24, 2021, Liberty filed a Motion for Rehearing of Order No. 26,536.

On December 3, 2021, both the Office of the Consumer Advocate (OCA) and the New Hampshire Department of Energy filed objections to Liberty's Motion for Rehearing of Order No. 26,536.

On December 22, 2021, the Commission issued Order No. 26,558, in which it suspended Order No. 26,536 while it considered the merits of Liberty's Motion for Rehearing and the objections.

On January 18, 2022, Liberty filed a letter regarding the Motion for Rehearing.

On January 19, 2022, the OCA filed a letter in response to Liberty's January 18, 2022 letter.

Order No. 26,536, Liberty's Motion for Rehearing of Order No. 26,536, the objections, and related docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at:

<https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-105.html>.

II. POSITIONS OF THE PARTIES

a. Liberty

According to Liberty, good reason exists to rehear Order No. 26,536 because it unlawfully denied cost recovery. In support of its position, Liberty argued that Order No. 26,536 is unlawful because it misconstrues RSA 378:30-a and disregards the underlying evidentiary record.

In support of its argument that the Commission misconstrued RSA 378:30-a, Liberty argued that the Commission mistakenly interpreted the second sentence of RSA 378:30-a in isolation and ignored the plain meaning of the statute and the precedent in *Appeal of Pub. Serv. Co. of N.H.*, 125 N.H. 46 (1984) (*PSNH*). According to Liberty, the Commission did not establish that the identified costs were in preparation for a construction project as opposed to costs incurred to evaluate and assess the costs and viability of one or more project alternatives. To this point, Liberty construed the holding in *PSNH* as limiting the statutory prohibition against recovery of

construction work to only the physical aspects of construction, as opposed to pre-physical construction project activities, such as feasibility studies.

In support of its argument that the Commission disregarded record evidence, Liberty stated that the Commission did not address that the majority of disallowed costs were booked in Account 183, titled Preliminary Survey and Investigation Charges.

Finally, Liberty argued that the Commission's distinction between the instant matter and exit fees approved for recovery in Docket No. DG 99-050 was speculative and not fact-based, arguing that factually the matters are similar but for the classification of the costs as survey and feasibility as opposed to exit fees.

b. Office of Consumer Advocate

The OCA objected to Liberty's Motion for Rehearing of Order No. 26,536. In support of its objection, the OCA argued that the Commission properly construed RSA 378:30-a, arguing that undue weight was not given to the second sentence, while also noting that the third sentence is dispositive of any argument limiting application of the statute to physical construction activities due to its inclusion of pre-construction categories of expense such as "owning" and "financing." The OCA recommended that the Commission clarify that the third sentence of the RSA 378:30-a also supports the Commission's determination.

The OCA reiterated its prior arguments relating to the legislative intent and language of RSA 378:30-a and the holding in *PSNH*. With respect to Liberty's policy-based arguments, the OCA refuted those arguments, stating that it is not within the Commission's discretion to overrule a legislative determination on recoverability based on policy. The OCA also pointed out that Liberty is not precluded from recovering

costs associated with routine planning and preliminary project investigations through the Least Cost Integrated Resource Planning framework in RSA 378:37 *et seq.*

According to the OCA, the determination in Order No. 26,536 was a fact specific determination that the costs sought for recovery were incurred to prepare for a particular construction project. Finally, in response to Liberty's argument relating to Docket DG 99-050, the OCA posited that several specific factual differences exist, including that the exit fees in Docket DG 00-050 were associated with a Commission-approved precedent agreement, whereas the Commission never approved any aspect of the Granite Bridge project.

c. New Hampshire Department of Energy

Energy objected to Liberty's Motion for Rehearing of Order No. 26,536. In support of its objection, Energy argued that Liberty did not state good cause for rehearing because Order No. 26,536 was based on sound reasoning, was neither unreasonable nor unlawful, and that the Commission did not overlook or mistakenly conceive any matters. With respect to the evidentiary support for the Commission's determination, Energy argued that contrary evidence exists in the record, including testimony that established the costs were incurred in preparation for a construction project, that evidence in the record supported that the costs were engineering costs, permitting costs, route design, or otherwise project-specific costs as opposed to general planning costs. Energy also argued that Order No. 26,536 does not deny recovery of planning costs, but only costs that were incurred for a specific project that was never placed into service. In support of this argument, Energy cited to portions of the record where Liberty acknowledged that Least Cost Integrated Resource Planning costs pursuant to RSA 378:37 *et seq.* were not included in the request for recovery and

routine planning costs would be expensed, where the identified costs would be capitalized if the project had been placed in service.

d. Liberty Letter

Liberty's January 18, 2022 letter supplemented the legal argument in its Motion for Rehearing, positing that a definition contained in RSA Ch. 162-H was relevant to the Commission's analysis of its Motion.

e. Office of Consumer Advocate Reply Letter

On January 19, 2022, the OCA requested in the first instance that the Commission strike Liberty's January 18th letter as untimely pursuant to RSA 541:3. The OCA went on to argue that the definition cited to in the letter is not material, and only distantly related, if at all, to the arguments in Liberty's Motion.

III. COMMISSION ANALYSIS

As a preliminary matter, we address Liberty's Letter of January 18, 2022. RSA 541:3 is dispositive of the issue of whether Liberty can raise new arguments after the 30-day deadline to file for rehearing of a Commission order. The party seeking rehearing must specify "all grounds for rehearing" within the 30-day statutory deadline. As Liberty's January 18, 2022 letter contained new arguments and was filed more than 30 days after the issuance of Order No. 26,536, the Commission has not and will not consider either Liberty's new arguments raised on January 18, 2022 or the OCA's January 19, 2022 substantive reply to those arguments because they were untimely filed. The Commission declines to strike the filings from the general record or docket book, while noting that exhibits become part of the evidentiary record of a proceeding only if and when admitted into evidence at a hearing.

The Commission may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3; RSA 541:4;

Rural Telephone Companies, Order No. 25,291 (November 21, 2011); *see also Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 25,970 at 4-5 (December 7, 2016). A successful motion must establish “good reason” by showing that there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citations omitted), or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision,” *Hollis Telephone Inc.*, Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Public Service Co. of N.H.*, Order No. 25,970, at 4-5 (citing *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015)).

In Order No. 26,536, the Commission considered each party’s legal arguments relating to RSA 378:30-a, restated the full text of RSA 378:30-a¹, and analyzed the New Hampshire Supreme Court’s interpretation of RSA 378:30-a in *PSNH*, including the Court’s conclusion that although the three sentences of RSA 378:30-a speak to roughly similar ideas, that they must each have independent effect and not be redundant to each other. The Commission determined that the underlying Granite Bridge project costs were costs “associated with construction.” Order No. 26,536 at 5.

We therefore, do not agree that Liberty stated good cause to grant rehearing. Liberty did not present new evidence, nor did it establish that the Commission misconstrued RSA 378:30-a relating to the denial of cost recovery associated with the

¹ The full text of RSA 378:30-a bears repeating: “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.”

Granite Bridge project. Liberty's argument that the Commission mistakenly interpreted the second sentence of RSA 378:30-a in isolation and ignored the plain meaning of the statute RSA 378:30-a is not persuasive. As pointed out by the OCA, the definition of cost associated with construction work, construction project, or construction work in progress is broader than costs of actual physical construction pursuant to the text of third sentence of RSA 378:30-a. That sentence is an illustrative list that specifically includes costs of ownership and financing, which do not fit within Liberty's arguments pertaining to physical construction. As pointed out by the OCA and Energy, these costs were not routine planning to determine the least-cost course of action, but were costs incurred in furtherance of a specific course of action, i.e., a specific project, Granite Bridge.

Furthermore, we do not agree that record evidence was ignored. As Energy points out, it is clear that evidence in the record demonstrates that the disputed costs were distinct from least-cost planning costs. Regardless, as noted in Order No. 26,536 at 5, *PSNH* holds that 378:30-a does not use the term "Construction Work in Progress" in the technical accounting sense. Liberty's argument that because costs were booked to Account 183 as "Other preliminary survey and investigation charges" is unpersuasive in challenging the Commission's denial of cost recovery with regards to the Granite Bridge project. The operative question is whether the costs were "associated with construction," not how Liberty chose to document those costs for accounting purposes. Here, these costs were plainly associated with the construction of the Granite Bridge project.

It is also apparent that the Commission heard and considered the policy arguments (*see* Order No. 26,536 at 5) and other arguments relating to Docket No. 99-


050. *Id.* Therefore, we agree with the OCA that Liberty's Motion does not present good reason for rehearing on these bases.

As such, the Commission finds that Liberty has not stated good cause to rehear the Commission's in Order No. 26,536.

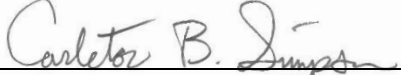
Based upon the foregoing, it is hereby

ORDERED, the Liberty's Motion for Rehearing of Order No. 26,536 (October 29, 2021) is DENIED.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of February, 2022.



Daniel C. Goldner
Chairman



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket# : 20-105

Printed: 2/17/2022

Email Addresses

ClerksOffice@puc.nh.gov
william.clark@libertyutilities.com
julianne.m.desmet@oca.nh.gov
paul.b.dexter@energy.nh.gov
lynn.h.fabrizio@energy.nh.gov
kerri-lyn.gilpatric@energy.nh.gov
Robert.Hilton@libertyutilites.com
maureen.karpf@libertyutilities.com
ckimball@keeganwerlin.com
tklaes@blueridgecs.com
donald.m.kreis@oca.nh.gov
jayson.p.laflamme@energy.nh.gov
Ian.McGinnis@fticonsulting.com
catherine.mcnamara@libertyutilities.com
jmierzwa@exeterassociates.com
Robert.Mostone@LibertyUtilities.com
steven.mullen@libertyutilities.com
dmullinax@blueridgecs.com
amanda.o.noonan@energy.nh.gov
ocalitigation@oca.nh.gov
jralston@keeganwerlin.com
michael.sheehan@libertyutilities.com
david.simek@libertyutilities.com
karen.sinville@libertyutilities.com
Mark.Stevens@LibertyUtilities.com
heather.tebbetts@libertyutilities.com
dvenora@keeganwerlin.com
david.k.wiesner@energy.nh.gov
jrw@psu.edu