THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. _____

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY
Petition for Permanent Rates

PUBLIC UTILITIES COMMISSION DOCKET NO. DG 20-105

APPEAL OF LIBERTY UTILITIES PURSUANT TO RSA 541:6 AND SUPREME COURT RULE 10 FROM DECISIONS OF THE PUBLIC UTILITIES COMMISSION IN ORDER NO. 26,536, DATED OCTOBER 29, 2021, AND ORDER ON REHEARING, ORDER NO. 26,583, DATED FEBRUARY 17, 2022

Terri L. Pastori, Esq. (#12136)
Ashley D. Taylor, Esq. (#268994)
PASTORI | KRANS, PLLC
82 North Main Street, Suite B
Concord, NH 03301
(603) 369-4769
tpastori@pastorikrans.com
ataylor@pastorikrans.com

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A. PARTIES AND COUNSEL

1. Name and Counsel of Party Seeking Review

Appellant:	**Counsel:**
Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty 15 Buttrick Road Londonderry, NH 03053	Terri Pastori, Esquire (#12136) Pastori | Krans, PLLC 82 North Main Street, Suite B Concord, NH 03301 Ashley Taylor, Esquire (#268994) Pastori | Krans, PLLC 82 North Main Street, Suite B Concord, NH 03301 Michael Sheehan, Esquire (#6590) Liberty Utilities 114 North Main Street Concord, NH 03301

2. Names and Addresses of Other Parties and Counsel

Parties:	**Counsel:**
Office of the Consumer Advocate 21 South Fruit Street, Suite 18 Concord, NH 03301	Donald M. Kreis, Esquire Consumer Advocate 21 South Fruit Street, Suite 18 Concord, NH 03301
Department of Energy 21 South Fruit Street, Suite 10 Concord, NH 03301	Paul Dexter, Esquire Hearings Examiner/Staff Attorney Department of Energy 21 South Fruit Street, Suite 10 Concord, NH 03301

Administrative Agency Appealed From:

New Hampshire Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, NH 03301	Daniel C. Goldner, Chairman New Hampshire Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, NH 03301

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

Pursuant to RSA 541:6 and New Hampshire Supreme Court Rule 10, Liberty seeks review of two decisions of the New Hampshire Public Utilities Commission ("Commission") in Liberty's Distribution Rate Case, Docket No. DG 20-105. Specifically, Liberty seeks this Court's review of the Commission's decision in Order No. 26,536 (October 29, 2021) ("Order," Appendix at 1), denying Liberty's request to recover certain costs to assess the viability of the Granite Bridge project, then under consideration as an alternative to address its gas-resource constraints; and its decision in Order No. 26,583 (February 17, 2022) ("Rehearing Order," Appendix at 10), denying Liberty's motion for rehearing (collectively, the "Orders").

Liberty's Motion for Rehearing, dated November 24, 2021, is included in the Appendix at 19. The Office of the Consumer Advocate's Objection to Liberty's Motion for Rehearing, dated December 2, 2021, is included in the Appendix at 39. The Department of Energy's Objection to Liberty's Motion for Rehearing is included in the Appendix at 48.

C. QUESTION PRESENTED FOR REVIEW

1. Did the Commission err as a matter of law in concluding that RSA 378:30-a prohibited recovery of costs related to the investigation, evaluation, and assessment of a potential project because the Commission found those costs to be "associated with construction work if said construction work is not completed" where it is undisputed that construction work had never begun?

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

The statute at issue is RSA 378:30-a, which provides:

> 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.

RSA 378:30-a (2020). A copy of RSA 378:30-a is included in the Appendix at 20.

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

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

F. CONCISE STATEMENT OF THE CASE

The Commission misconstrued RSA 378:30-a, New Hampshire's "anti-CWIP" statute, in denying Liberty's request, pursuant to the Commission's general ratemaking authority, for recovery of certain costs. Liberty incurred the costs at issue when it surveyed, studied, and evaluated a potential least-cost option to expand its capacity for natural gas needed to serve its customers in New Hampshire. This appeal implicates the important question of whether RSA 378:30-a, which prohibits cost recovery for both the cost of "construction work in progress" and "any costs associated with construction work if said construction work is not completed," applies to costs incurred to survey, study, and evaluate a possible project prior to the commencement of construction. It is Liberty's position that the only reasonable construction of RSA 378:30-a is that it bars costs incurred after the commencement of construction and does not bar costs associated with assessing the feasibility of a potential project, which are the types of costs at issue in this appeal.

1. The History of Liberty's Granite Bridge Due Diligence.

Liberty is a regulated utility that provides natural gas distribution service to over 98,000 customers in 35 cities and towns in New Hampshire. As a public utility, Liberty is obligated to procure appropriate capacity and supply resources to meet the needs of its customers. Since at least 2013, Liberty has identified a capacity shortfall, necessitating new resources to meet its obligation to provide reliable service on its design day (*i.e.* the coldest day in its demand forecast). See, e.g., RSA 374:1 (2020) ("Every

public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable"); RSA 378:38 (2020) ("each electric and natural gas utility … shall file a least cost integrated resource plan with the commission [which] plan shall include … A forecast of future demand [and] An assessment of supply options including owned capacity, market procurements, renewable energy, and distributed energy resources" that will meet the forecasted demand); and N.H. Admin. Rules Puc 509.20(c) ("Each utility shall file annually … a report summarizing the upcoming winter period design day forecast [which] report shall include … The demand [forecast, and] The supply of [gas] available to meet design day demand").

As early as 2013, Liberty began analyzing various options to meet the identified shortfall in capacity. Liberty's system has long relied on a single transmission pipeline owned by Tennessee Gas Pipeline Company, LLC ("TGP") for the delivery of gas to its service territory in southern and central New Hampshire (the "Concord Lateral"). Liberty's system is not close to any other transmission pipeline. However, the existing capacity on the Concord Lateral, which parallels Interstate 93 from Dracut, Massachusetts, to Concord, New Hampshire, had been fully committed for years. Therefore, the options to increase Liberty's capacity were limited to paying TGP to upgrade the Concord Lateral, a substantial and expensive construction project, or finding a new source of capacity that could provide a separate feed into Liberty's system.

In 2014, Liberty entered into a contract with TGP to participate in the Northeast Energy Direct ("NED") project to fulfill its incremental

capacity needs. The NED project would have been a new pipeline travelling from Massachusetts through southwestern New Hampshire and ultimately connecting to Liberty's distribution system in Nashua. The Commission approved this contract in 2015. In 2016, however, TGP cancelled the NED Project, requiring Liberty to again investigate options to solve its capacity shortfall.

Liberty identified only two available capacity alternatives: (1) procure a new contract with TGP for TGP to construct new facilities to upgrade the existing TGP Concord Lateral (the "TGP construction contract"); or (2) explore the feasibility of a Liberty-sponsored supply and capacity project, which ultimately became known as Granite Bridge. Liberty's concept for Granite Bridge involved: (a) a natural gas pipeline running along New Hampshire's Route 101 corridor between Manchester and Exeter (where it would connect to another transmission pipeline to provide additional capacity and a second feed to Liberty's service territory); and (b) a liquefied natural gas ("LNG") facility in Epping, which would be the primary source of supply for the pipeline.[1] The TGP construction contract alternative was the more expensive alternative throughout the time that Liberty evaluated Granite Bridge.

As sponsoring Granite Bridge was a substantial undertaking, Liberty took the prudent step, in 2017, of requesting the Commission's pre-approval of the decision to choose the Granite Bridge alternative as the least cost option. See Liberty Utilities (EnergyNorth Natural Gas) Corp.

[1] Liberty anticipated that it would buy less expensive gas in the summer to fill the LNG tank to be used during peak times in the winter.

d/b/a Liberty Utilities, Petition to Approve Firm Supply and Transportation Agreements and the Granite Bridge Project, Docket No. DG 17-198 (N.H. P.U.C. Dec. 21, 2017) ("Granite Bridge PUC Proceeding"). Put simply, Liberty did not want to undertake such a significant endeavor and begin construction work on Granite Bridge without knowing whether the Commission would ultimately approve the decision to proceed as prudent. See RSA 374:2 (2020) (public utilities to provide reasonably safe and adequate service); RSA 374:7 (2020) (Commission's authority to "investigate … the methods employed by public utilities in manufacturing, transmitting or supplying gas" and "to order all reasonable and just improvements and extensions in service or methods" to supply gas); RSA 378:7 (2020) (rates collected by a public utility for services rendered or to be rendered must be just and reasonable); RSA 378:28 (2020) (all utility plant to be included in permanent rates must be found by the Commission to be prudent, used, and useful).

However, in October 2019, before receiving approval from the Commission that Granite Bridge was the prudent choice, and before even submitting an application for a siting permit from the New Hampshire Site Evaluation Committee ("SEC") pursuant to RSA 162-H:5, a less expensive option materialized. Additional capacity on the Concord Lateral unexpectedly became available, and TGP offered Liberty significantly reduced pricing for the additional capacity. As a result, Liberty immediately suspended its evaluation efforts of Granite Bridge. When Liberty ultimately signed a contract with TGP for the right to transport

40,000 dekatherms of natural gas per day through the Concord Lateral, Liberty discontinued its evaluation of the Granite Bridge project entirely.[2]

2. Liberty's Request for Cost Recovery for the Granite Bridge Due Diligence.

After Liberty discontinued its evaluation of Granite Bridge, it filed a motion to add a request to recover the Granite Bridge costs to the rate case then pending before the Commission, Docket No. DG 20-105. See Liberty's Motion to Amend Petition (Nov. 20, 2020) (Appendix at 55). The Commission allowed Liberty's request to recover the Granite Bridge costs to become part of the general rate case. See Supplemental Order of Notice (Dec. 18, 2020) (Appendix at 108).

The costs for which Liberty sought recovery were limited to costs necessary to fulfill Liberty's RSA 378:37 obligation to survey, study, and investigate the feasibility of Granite Bridge to determine whether it was, in fact, the least-cost alternative available at the time. Granite Bridge never progressed beyond a conceptual stage. At no time did Liberty commence pre-construction or construction-related activities in furtherance of the project. Thus, for the entire time that Liberty incurred the Granite Bridge costs, no final decision had been reached as to whether Liberty would proceed with Granite Bridge or with the TGP construction contract. The analysis was not complete.

[2] The Commission approved the new TGP contract on November 12, 2021. See Liberty Utilities (EnergyNorth Gas) Corp. d/b/a Liberty, Docket No. DG 21-008, Order No. 26,551 (N.H.P.U.C., Nov. 12, 2021). The Conservation Law Foundation's appeal of the Commission's order approving the new TGP contract is presently before this Court as Docket No. 2022-0077.

The specific types of costs for which Liberty seeks recovery can be summarized as follows: (1) engineering to develop preliminary designs and analyze capital cost estimates; (2) environmental assessment, analysis, and compliance; (3) general consulting expenses for services associated with certain viability tasks and regulatory activities in the Granite Bridge PUC Proceeding; (4) commission-related expenses for the Commission Staff's consultant and for the court reporter in the Granite Bridge PUC Proceeding; (4) internal labor for the assessment of the viability and feasibility of the potential project, management of external resources, and review of detailed costs analyses conducted by Liberty personnel; and (5) the expense to secure an option to purchase land in Epping for the proposed LNG facility and options to acquire easements to locate the metering stations at either end of the proposed pipeline, which were needed to assess feasibility. See Supplemental Testimony of Francisco C. DaFonte, William R. Killeen and Steven E. Mullen (Nov. 20, 2020) at 28-29 (Appendix at 89-90).

3. The Commission's Order and Order Denying Rehearing.

On October 29, 2021, the Commission issued an Order denying Liberty's request for cost recovery on the sole basis that RSA 378:30-a barred recovery, erroneously concluding that the Granite Bridge feasibility costs were costs "associated with construction." See Order (Appendix at 1-9). Specifically, the Commission found that "[t]he feasibility studies that Liberty undertook for the Granite Bridge project are unambiguously costs 'associated with construction,'" reasoning that it "can identify no other plausible purpose for undertaking these studies and the other actions it took that resulted in the costs at issue except in preparation for a construction

project." See id. at 5 (Appendix at 5). The Commission did not engage in any analysis related to when "construction work" commences within the meaning of RSA 378:30-a, nor did it make any findings concerning the reasonableness or prudency of the costs.

On November 24, 2021, Liberty filed a motion for rehearing, arguing, *inter alia*, that the costs for which Liberty sought recovery were associated with feasibility work, not "construction work," a fact that the Commission overlooked in the Order. Liberty further noted that, not only had there been no physical plant construction, but it had not even begun the complicated and involved process of seeking a siting permit from the SEC, a statutory prerequisite to the commencement of constructing the Granite Bridge pipeline and the Granite Bridge LNG facility, each of which would have been classified as an "energy facility" as defined in RSA 162-H:2, VII (2020). See RSA 162-H:5, I (2020); see also RSA 162-H:2, III (2020) (defining "commencement of construction").

The Office of the Consumer Advocate and the New Hampshire Department of Energy objected to Liberty's motion. On December 22, 2021, the Commission issued an Order suspending the Order (Order No. 26,536), pending its consideration of the issues that Liberty raised in its motion for rehearing. See Order No. 26,558 (Dec. 22, 2021) (Appendix at 112).

On February 17, 2022, the Commission denied Liberty's motion for rehearing, rejecting Liberty's argument that it had misconstrued RSA

378:30-a. See Rehearing Order (Appendix at 10-18).[3] Affirming its conclusion that the feasibility costs were barred, the Commission reasoned that "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 the third sentence of RSA 378:30-a," which the Commission noted references costs of ownership and financing. See id. at 7 (Appendix at 16). For the reasons outlined below, the Commission erred as a matter of law in denying Liberty's motion for rehearing and should have found that the costs related to the Granite Bridge due diligence are recoverable.

G. JURISDICTIONAL BASIS FOR APPEAL

RSA 541:6 provides the jurisdictional basis for this appeal from the Commission's Orders.

[3] The Commission also found that Liberty's booking of the costs to Account 183, "Other preliminary survey and investigation charges" is irrelevant, and that the Commission heard and considered the policy arguments and other arguments relating to allowing exit fees in another docket and, therefore, Liberty did not present good reason for rehearing. See Rehearing Order at 7-8 (Appendix at 16-17).

H. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION AS TO WHETHER THE COMMISSION ERRED AS A MATTER OF LAW IN CONSTRUING RSA 378:30-A TO DENY COST RECOVERY FOR FEASIBILITY STUDIES, AND THIS APPEAL WOULD PROVIDE AN OPPORTUNITY FOR THE COURT TO CLARIFY AN ISSUE OF GENERAL IMPORTANCE TO THE STATE'S UTILITIES, THE CITIZENS OF NEW HAMPSHIRE, AND ADVANCE THE ADMINISTRATION OF JUSTICE.

This appeal implicates an important issue of first impression concerning whether RSA 378:30-a, which prohibits cost recovery for both costs associated with "construction work in progress" and "any costs associated with construction work if said construction work is not completed," applies to costs to investigate, evaluate, and assess a possible project prior to the commencement of any construction. It is Liberty's position that the only reasonable interpretation of RSA 378:30-a is that it bars costs incurred after the commencement of construction and not costs related to feasibility assessments, which are at issue in this appeal. This appeal affords the Court an opportunity to determine when "construction work" begins for the purposes of RSA 378:30-a's second sentence. The Commission's current interpretation of the statute disincentivizes regulated utilities from adequately evaluating the full spectrum of options to arrive at the least-cost option for customers. With that question resolved, the Commission can properly identify those "costs associated with construction work" – *i.e.* costs incurred from the point work commenced – that are barred if the construction work is not completed.

RSA 378:30-a provides in its entirety:

> 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.

RSA 378:30-a (2020).

In the Order, the Commission relied on the second sentence of the statute in denying Liberty cost recovery, which provides: "At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed." The Commission reasoned that Liberty's costs were in "preparation for a construction project" and therefore were "costs associated with construction." See Order at 5 (Appendix at 5). As discussed in more detail below, the Commission's analysis and conclusion contradict the plain meaning of the second sentence of RSA 378:30-a, which bars recovery where construction "work" has necessarily begun but is not currently in progress because it ended prior to completion of the construction work. Liberty never began "construction work" on Granite Bridge.

In the Rehearing Order, the Commission attempted to buttress its conclusion that RSA 378:30-a bars recovery of Liberty's feasibility costs by relying on the third sentence, noting that it prohibits costs that are "broader than costs of actual physical construction." See Rehearing Order at 7 (Appendix at 16). As argued below, this conclusion cannot withstand scrutiny because the third sentence does not have any application beyond the first sentence of RSA 378:38-a (*i.e.* construction work in progress), which even the Commission acknowledged is not applicable here.

1. The Commission misconstrued RSA 378:30-a when concluding that it barred Liberty's feasibility costs for a project not built and before any construction work commenced.

RSA 378:30-a bars recovery of construction expenses in three different scenarios, all rooted in the premise that construction work had commenced. As this Court has determined, "although the three sentences of RSA 378:30-a speak to roughly similar ideas, each must have independent effect and not be redundant to each other." See Appeal of Public Serv. Co., 125 N.H. 46, 54 (1984) ("PSNH").

i. The first sentence of RSA 378:30-a is inapplicable to the costs at issue.

The first sentence of the statute plainly bars costs associated with "construction work in progress," which the Commission correctly determined is not applicable here. See Order at 6 (Appendix at 6). It is undisputed that Liberty was not engaged in any construction work "in progress" at the time Liberty filed its petition for cost recovery. Thus, the first sentence of RSA 378:30-a does not apply.

ii. RSA 378:30-a's second sentence does not operate to bar recovery of the costs at issue and is also inapplicable.

The Commission relied on the second sentence of RSA 378:30-a to deny Liberty cost recovery, which provides: "At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed." See RSA 378:30-a. This provision does not contain the phrase "in progress" as in the first sentence. The second sentence bars recovery of costs associated with construction work that had begun but is no longer in progress because the work ended prior to "reaching its desired objective." See PSNH, 125 N.H. at 54. The Commission erred in concluding that this sentence applies to Liberty's costs because Liberty had not begun any "construction work" that was later "not completed."

The Commission began by misconstruing the meaning of the second sentence in the context of the statute as *not* requiring the commencement of actual construction work. The first and third sentences of RSA 378:30-a both address "construction work *in progress*," clearly contemplating actual construction had begun and was still "in progress." Although the second sentence addresses work that is no longer "in progress" because the work terminated prior to reaching its desired objective, the second sentence still shares the common denominator of all three sentences – that the construction work began. Stated another way, the second sentence's reference to work that was "not completed" necessarily requires the work to have begun.

Liberty never began construction. As described below, Liberty was likely years away from breaking ground on the project. Liberty's engineering work and other assessments to determine whether Granite Bridge was feasible and would be the lower cost option, which are the costs at issue here, do not constitute "construction work" under the statute.

Perhaps recognizing that the plain statutory language did not support its conclusion, the Commission expanded the reach of RSA 378:30-a by ignoring the word "work" in the second sentence, and finding that costs "associated with construction" are barred. By ignoring the limitation created by the use of the word "work," which modifies the preceding word "construction" in the phrase "associated with construction work," the Commission determined that the statute bars all costs associated with "preparation of a construction project." See Order at 5 (Appendix at 5). The Commission's expansive interpretation contravenes the plain meaning and plain language of the statute. In construing RSA 378:30-a as it did, the Commission violated a basic rule of statutory interpretation, requiring it to give full effect to all words in the statute. See Garand v. Town of Exeter, 159 N.H. 136, 141 (2009) (quoting Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008)) ("[t]he legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect"). Likewise, statutes should not be construed in such a way that would lead to an absurd result. See State v. N. of the Border Tobacco, LLC, 162 N.H. 206, 212 (2011); see also Weare Land Use Ass'n v. Town of Weare, 153 N.H. 510, 511 (2006) (statutes should be interpreted to lead to a reasonable result).

Here, giving all words in the second sentence their full effect underscores the Commission's error. The universe of costs associated with "construction," the Commission's selective quotation, is an expansive one which could encompass mere conceptual efforts that may, or may not, lead to breaking ground and the commencement of construction. In contrast, the phrase "costs associated with construction *work,*" which is the unambiguous statutory language, can only mean construction activities that have actually begun implementing the previously conceptual-only efforts. Liberty never commenced any "construction work" and thus the second sentence of RSA 378:30-a, the sentence the Commission relied on in the Order, does not apply.

While RSA 378:30-a does not address when "construction work" commences, another relevant statute does. Pursuant to RSA 162-H:5, I, the construction of large energy projects in New Hampshire cannot commence unless and until a siting permit from the Site Evaluation Committee ("SEC") is secured. See RSA 162-H:5, I (2020) ("No person shall commence to construct any energy facility within this state unless it has obtained a certificate pursuant to this chapter."). The Granite Bridge pipeline and the Granite Bridge LNG facility would each have been an "energy facility" within the SEC's jurisdiction. See RSA 162-H:2, VII(a) (2020).

RSA 162-H:2, III defines "commencement of construction" for the purpose of determining what work cannot be done before obtaining a necessary permit. RSA 162-H:2, III provides in its entirety:

> "Commencement of construction" means any clearing of the land, excavation or other substantial action that would adversely affect the natural environment of the site of the proposed facility, but does not include land surveying, optioning or acquiring land or rights in land, changes desirable for temporary use of the land for public recreational uses, or necessary borings to determine foundation conditions, or other preconstruction monitoring to establish background information related to the suitability of the site or to the protection of environmental use and values.

See RSA 162-H:2, III (2020).[4] Liberty performed none of the activities identified in this statute as construction work, not only because Liberty did not have a permit from the SEC to do so, but also due to the fact that Liberty was still assessing feasibility of the potential project. It is undisputed that Liberty never applied for a siting permit from the SEC. As

[4] In its motion for rehearing, Liberty argued that construction of the Granite Bridge project would have required a siting permit from the SEC, noting that Liberty did not make an application for a siting permit, nor were any pre-construction or construction activities commenced, citing RSA 162-H:5, I. See Motion for Rehearing at ¶ 7 & n. 5 (Appendix at 24-25). Liberty called the Commission's attention to RSA 162-H:2, III in a letter to Commission Chairman Goldner dated January 18, 2022, noting that Liberty had previously referenced RSA 162-H:5 and raised the issue of no construction having commenced in its motion for rehearing. See Appendix at 114-15. In the Rehearing Order, the Commission incorrectly depicted the January 18, 2022 letter as raising "new arguments." See Rehearing Order at 5 (Appendix at 14). This Court has previously held that while parties must raise all *arguments* before the trial court or agency, the Court "will not restrict a party only to those authorities cited to the trial court." See Riverwood Com. Props. v. Cole, 134 N.H. 487, 490 (1991); see also State v. Schachter, 133 N.H. 439, 440 (1990) (holding that a party need only raise its "general theory" of its case in the lower court and would not "lose its right to appeal on that theory simply because it cited for the first time on appeal a statute that it believed to be favorable to its position."). As such, the definition of "commencement of construction" can be properly raised in this appeal.

such, Liberty was far removed from any commencement of construction related to Granite Bridge.

"Where reasonably possible, statutes should be construed as consistent with each other." See Appeal of Union Tel. Co., 160 N.H. 309, 319 (2010) (citing Appeal of Derry Educ. Assoc., 138 N.H. 69, 71 (1993)). In situations where two statutes deal with similar subject matter, they must be construed "so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." See id. (citing Appeal of Campaign for Ratepayer Rights, 142 N.H. 629, 631 (1998)). Reading RSA 378:30-a and RSA 162-H:2, III together, there can be no question that Liberty's feasibility expenses are not associated with "construction work" within the meaning of RSA 378:30-a, as none of the work in question approached triggering commencement of construction, as defined with specificity by RSA 162-H:2, III.[5] Liberty did not clear land, excavate, or take any other substantial action that would adversely affect the natural environment of the site of the proposed facilities. Indeed, the SEC statute precluded Liberty from doing

[5] "Optioning or acquiring land or rights in land" is excluded from RSA 162-H:2, III's definition of "commencement of construction." This means that the optioning or acquiring land rights alone does not trigger commencement of construction for the purposes of not only RSA 162-H:5, I, but also RSA 378:30-a. While it may be argued that the third sentence of RSA 378:30-a suggests that the costs of "owning" are excluded from recovery, Liberty respectfully submits that the third sentence reference to "costs" modifies "construction."

In any event, RSA 162-H:2, III and RSA 378:30-a can be construed harmoniously because the third sentence of RSA 378:30-a is only applicable to the unavailability of rate recovery once construction has begun and is in progress, and RSA 162-H:2, III applies to evaluate whether construction has begun for the purposes of necessitating a siting permit.

so because Liberty did not have an SEC permit. If anything, Liberty's efforts were more in line with the type of work specifically excluded from "commencement of construction" for the purposes of obtaining a siting permit, including land surveying, test borings, and other preconstruction monitoring to establish background information related to the suitability of the sites.

The costs Liberty seeks to recover are not barred as associated with "construction work" as construction work was undisputedly never commenced. The costs for which Liberty seeks recovery are limited to costs to assess the feasibility of the potential project. As outlined above, these costs were related to preliminary engineering, environmental assessment, general consulting, Commission-related costs, internal labor related to feasibility, and costs associated with the acquisition of options for the potential purchase of land and easements. None of the activities for which costs were incurred are associated with the "commencement of construction."

iii. <u>The third sentence of RSA 378:30-a is additionally inapplicable to the costs at issue.</u>

The third and final sentence in RSA 378:30-a provides: "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." As an initial matter, the third sentence of RSA 378:30-a provides detail of some

of the costs associated with "construction work in progress," the recovery of which the first sentence in RSA 378:30-a prohibits. As there was no "construction work *in progress*" on Granite Bridge, the Commission correctly declined to apply the first sentence of RSA 378:30-a in assessing Liberty's request for cost recovery. See Order at 6 (Appendix at 6) (noting "the phrase 'associated with construction work' in the second sentence of RSA 378:30-a must mean something other than 'construction work in progress' in order to read the statute consistently with the presumption against redundancy," and concluding the second sentence alone barred recovery). As such, the examples of costs associated with "construction work in progress" in the third sentence of RSA 378:30-a are inapposite to any proper interpretation of the second sentence.

Furthermore, the Commission made a sweeping and erroneous pronouncement that the examples in the third sentence apply to "construction work," "construction project[s]," and "construction work in progress." See Rehearing Order at 7 (Appendix at 16). Such a determination is not supported by a plain reading of RSA 378:30-a and is erroneous as a matter of law.

2. This Court's decision in PSNH supports Liberty's interpretation of RSA 378:30-a as not barring costs associated with feasibility studies prior to the commencement of any actual construction.

In construing the meaning of "construction work" in the second sentence of RSA 378:30-a, this Court in PSNH opined that, "taking 'construction work' in its common sense referring to a physical structure, it carries no suggestion that it refers to uncompleted construction work only

before, but not after, abandonment." See PSNH, 125 N.H. at 54. However, the central dispute in the PSNH case focused on whether construction work was completed; there was no dispute that PSNH had commenced construction. In PSNH, this Court was presented with the issue of whether RSA 378:30-a precluded recovery of PSNH's investment in a physical plant on which construction had commenced but was abandoned prior to completion of construction. See id. at 51. The Court observed that the interlocutory transfer for the matter on appeal did not specifically describe how the value of the investment was computed, but "we assume it includes both the cost of *actual* construction and the cost of money used to pay for it." Id. (emphasis added).

The Court concluded that PSNH's expenses associated with the construction of its uncompleted and abandoned plant were barred by the second sentence of the statute because they are costs "associated" with the uncompleted construction work, which had commenced but was no longer "in progress," having been abandoned prior to completion. See id. at 54. The Court found that the second sentence of RSA 378:30-a was not ambiguous and that "completed" means that the work "concluded upon reaching its desired objective." See id. The Court notably declined to read "costs associated with construction work" in the statute's second sentence as "costs associated with construction work in progress." Id. at 53-54. Likewise, it declined to interpret "construction work in progress" in the technical accounting sense. See id. at 53.

Although PSNH does not address the central question of this appeal – whether costs are "associated with construction work" for purposes of the

second sentence in RSA 378:30-a, the opinion makes two things clear when the costs are associated with purely conceptual work. First, the references to "owning" and "financing" "construction work in progress" from the third sentence of RSA 378:30-a cannot be read into the statute's second sentence in order to construe the statute consistently with the presumption against redundancy, and the Court's warning that "construction work in progress" is not synonymous with "construction work." See id. at 54. Second, the Court's interpretation of the statute suggests that actual construction is a *sine qua non* of the bar contained in the second sentence. Id. Based upon the foregoing, the Commission's rationale in the Orders to deny Liberty's request for cost recovery is unsustainable and erroneous.

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 Liberty's Motion for Rehearing. See Motion for Rehearing, Appendix at 19.

J. CONTENT OF RECORD ON APPEAL

Liberty requests that the Court require the Commission to transmit to the Court the entire record for appeal in New Hampshire Public Utilities Commission Docket No. DG 20-105.

Respectfully submitted,

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.

By its attorneys,

PASTORI | KRANS, PLLC

Dated: March 18, 2022 By: */s/ Terri L. Pastori*

Terri L. Pastori, (#12136)
Ashley D. Taylor (#268994)
82 North Main Street, Suite B
Concord, NH 03301
(603) 369-4769
tpastori@pastorikrans.com
ataylor@pastorikrans.com

CERTIFICATE OF SERVICE

I hereby certify that, consistent with N.H. Sup. Ct. R. 26 and Supplemental Sup. Ct. R. 18, on March 18, 2022, I served the foregoing Notice of Appeal electronically and by first class mail to those parties listed above in Section A(2) of this notice.

/s/ Terri L. Pastori
Terri L. Pastori

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