

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DG 06-107

NATIONAL GRID USA AND KEYSPAN CORPORATION

Approval of the Indirect Acquisition of EnergyNorth Natural Gas, Inc. by way of the Merger of KeySpan Corporation with an Indirect Subsidiary of National Grid plc and Other Regulatory Approvals

Motion for Rehearing of the April 23, 2021, Order

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty, through counsel, respectfully moves the Commission pursuant to RSA 541:3 for rehearing of the April 23, 2021, secretarial letter (the “Order”) which “denied Liberty’s recovery from the Company’s Storm Fund of the amount of \$706,838,” and which directed Liberty to exclude from its Storm Fund recovery of “any amounts derived from the capitalization of transportation depreciation through the burden rate.”¹

Liberty seeks rehearing because (1) the Order was issued without providing Liberty the constitutionally and statutorily required notice and opportunity to be heard, and (2) on the merits, the Order reached incorrect conclusions due to the lack of evidence and consideration of information and legal argument that Liberty would have provided. The Order is thus “unlawful or unreasonable.” RSA 541:4.

In support of this motion, Liberty represents as follows:

¹ The Order also directed Liberty “to file all future storm cost recovery requests as a standard written communication in compliance with Puc 202.06. Any future requests for storm cost recovery filed through the Commission’s e-filing system for routine filings will be denied.” Liberty will follow this directive, but notes that the Commission has always specifically called for the filing of storm reports in this docket through its Electronic Report Filing system.

Background

1. The Commission authorized the creation of the Storm Fund in its July 12, 2007, order approving a settlement agreement on the National Grid – KeySpan merger in this docket. The settlement agreement provided that the Storm Fund is to pay for all of the operations and maintenance costs incurred by Liberty as the result of “major” storms. The settlement agreement also directed Liberty to file annual reports of Storm Fund activity. The settlement agreement states as follows:

5. Storm Contingency Fund

Effective with implementation of the rate plan, the settlement calls for Granite State to establish a storm contingency fund, to be credited each month by Granite State in the amount of \$10,000 (\$120,000 annually).^[2] The fund would be used to pay for all of the operations and maintenance costs incurred by Granite State as the result of major storms. A major storm is defined as a severe weather event or events causing 30 concurrent troubles (i.e., interruption events occurring on either primary or secondary lines) and 15 percent of customers interrupted or 45 concurrent troubles. Interest would accrue on positive or negative balances in the fund, calculated in accordance with the tariff provisions regarding interest expense on customer deposits. Commencing April 1, 2009, Granite State would file with the Commission a report detailing the collections credited to the fund, the details of any qualifying storm costs that were charged to the fund during the preceding calendar year, a description of the storm, and a summary of the damage to the distribution system, including the number and length of outages.

Order No. 24,777 at 13-14 (July 12, 2007) (emphasis added). The order specifically approved the Storm Fund: “Accordingly, we accept inclusion of the storm contingency fund as part of the rate plan.” *Id.* at 75.

² In Order No. 25,638 (Mar. 17, 2014), the Commission most recently approved an increase in the amount contributed toward the Storm Fund to its current level of \$1.5 million per year.

2. Liberty filed its Calendar Year 2019 Storm Fund Report (the 2019 Storm Report) on March 30, 2020, providing the Commission with the required information related to the 2019 storms and the resulting 2019 Storm Fund activity.

3. On March 23, 2021, Staff issued a Memorandum (the “Staff Memorandum”) recommending that the Commission (1) disallow recovery of \$706,838 from the Storm Fund as Liberty included in the 2019 Storm Report, and (2) adjust the 2019 Storm Report to remove the Company’s capitalization of transportation depreciation through the burden rate.

4. The Staff Memorandum’s first recommendation was based on new definitions, which Staff applied retroactively, of the terms “trouble” and “concurrent,” which terms are contained in the 2007 settlement agreement as quoted above, and which terms govern whether a storm event qualifies as a “major storm” eligible for cost recovery from the Storm Fund. Without any further process, the Commission adopted and retroactively applied the new definitions set forth in the Staff Memorandum, effectively changing the major storm criteria in the settlement agreement that has been applied regularly and consistently since the first Storm Report was filed in 2009. The Order caused the new definitions to retroactively take effect with the 2019 Storm Report.

5. The Order also relied on the Staff Memorandum to remove costs for capitalization of transportation depreciation, but cited no authority for this change. Staff’s position was that the Company incorrectly capitalized a portion of its fleet vehicle depreciation expense as a component of gas plant costs and should instead expense the entire amount. However, the Company’s practice for the capitalization of transportation depreciation is supported by the FERC Uniform System of Accounts and is consistent with past practice.

6. As noted, the Commission did not conduct any process following issuance of the Staff Memorandum. The Commission did not issue an order of notice indicating that it was going to adjudicate the recommendations raised in the Staff Memorandum. Nor did the Commission provide the Company the opportunity to file a response to the Staff Memorandum, as the Commission often does in response to Staff recommendations.³

7. The Order summarily disallowed over \$700,000 in costs without providing Liberty due process to provide evidence and legal briefing on in support of cost recovery. The Commission acted without the evidentiary record necessary to reach proper conclusions.

8. The Order adopted the Staff recommendation in full without exploration or consideration of the Company's position. The Order stated: “[T]he Commission has denied Liberty's recovery from the Company's Storm Fund of the amount of \$706,838” Order at 2. And regarding the capitalization of transportation depreciation, “The Commission further directs Liberty to ensure that all future requests for approval of recovery from the Company's Major Storm Fund are prepared in accordance with applicable FERC regulatory accounting requirements.”

9. By this motion, the Company seeks rehearing and reconsideration of the Order.

Motion for Rehearing

10. The standards governing a motion for rehearing pursuant to RSA 541:3 are well established. In a recent order granting rehearing of an order that resolved a docket without first

³ See, e.g., November 24, 2020, letter in Docket No. IR 20-089 requesting responses to the Staff Memorandum on accounting treatment for pandemic related costs and lost revenue; see also the February 26, 2019, letter in Docket No. DG 19-054, requesting a response to Staff's memorandum recommending termination of Liberty's Cast Iron/Bare Steel replacement program.

issuing an order of notice, thus depriving intervenors the opportunity to be heard, the Commission articulated the legal standard as follows:

The Commission may grant rehearing or reconsideration for “good reason” if the moving party shows that an order is unlawful or unreasonable. A successful motion must establish “good reason” by showing that there are matters that the Commission “overlooked or mistakenly conceived in the original decision,” or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision.” A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome.

Liberty Utilities (EnergyNorth Natural Gas) Corp., Order No. 26,087 at 3-4 (Dec. 18, 2017) (citations omitted).

11. As a preliminary matter, there is no question that the Order constitutes an order of the Commission that is subject to rehearing.⁴

12. Good reason exists for the Commission to grant rehearing. First, by issuing the Order without providing Liberty with notice and an opportunity to be heard on the issues raised in the Staff Memorandum, the Commission violated statutory and Constitutional due process requirements.

13. RSA 541-A:31, I requires an order of notice “if a matter has reached a stage at which it is considered a contested case.” A “contested case” is “a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.” RSA 541-A:1, IV.

⁴ See 2012 Legislative Audit Report at page 14, noting the Commission’s use of secretarial letters in lieu of orders in some instances, and the Commission’s statement that such letters meet the full terms of RSA 363:17-b and are principal tools used to convey Commission determinations.

http://www.gencourt.state.nh.us/LBA/AuditReports/PerformanceReports/PUC_2011.pdf

14. The Order determined Liberty's right to recover approximately \$700,000⁵ and effectively altered the terms of a Commission-approved 2007 settlement agreement without a hearing process. This action clearly affects the Company's legal rights, duties and privileges. Therefore, the Commission's review of those costs is "required by law to be determined ... after notice and an opportunity for hearing."

15. A review of these costs is required by law as provided in the New Hampshire Constitution and in RSA 365:19. The Due Process Clause of the New Hampshire Constitution requires notice and an opportunity to be heard: "Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner." *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. 267, 273-74 (2013) (quoting *Appeal of Pennichuck Water Works*, 160 N.H. 18, 36 (2010)).

For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." To satisfy due process, the notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture. Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise

⁵ If the Company cannot recover the \$706,838 through the Storm Fund regulatory asset, those costs must be reversed from the deferral and recorded as an expense to the income statement. This would result in an increase to expenses and would effectively result in those costs not being recovered because the annual funding level for the Storm Fund is based on historic activity in the fund. If the measurement of allowable storm fund activity changes outside of a rate case, any reduction in the allowable costs available for recovery from the storm fund would not be captured in a corresponding change to the non-major storm costs that are recovered through base distribution rates, as determined in a prior rate case. Therefore, the \$706,868 would increase expenses, decrease earnings, and result in non-recoverable costs. Prudent storm restoration expenses—with prudence not being an issue in this proceeding—are fully recoverable, with the split between major storm costs and non-major storm costs only differing in how they are recovered. Changes to that allocation outside of a proceeding where the rate treatment is also changed upsets the pre-determined balance.

interested parties of the pendency of the action and afford them an opportunity to present their objections.

In re School Administrative Unit #44, 162 N.H. 79, 87 (2011) (quotations and citations omitted).

16. Similarly, RSA 365:19, which specifically applies to the Commission, echoes the above constitutional requirements:

In any case in which the commission may hold a hearing it may, before or after such hearing, make such independent investigation as in its judgment the public good may require; provided, that, whenever such investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof.

(Emphasis added.)

17. Notwithstanding these requirements, the Commission failed to issue an order of notice indicating it would adjudicate the recommendation in the Staff Memorandum to disallow the Company's recovery of approximately \$700,000 from the Storm Fund. Indeed, the Commission issued no notice of any kind in response to the Staff Memorandum.⁶ The Staff Memorandum does not constitute Commission notice because Staff does not speak for the Commission; the Staff Memorandum cannot serve as "notice" of the nature and scope of the Commission's proceeding.

⁶ Note that the Company has filed annual storm reports since 2009 and the Commission has never issued an order of notice nor a substantive order regarding any of these prior reports. The only Commission actions in response to the prior storm reports was to issue four secretarial letters extending the filing due date. Also note that the only other Staff memorandum in response to a storm report filing was in July 2017, in which "Staff accept[ed] the report as filed." There is thus no precedent for litigating storm reports.

18. The Commission had never previously acted on Storm Reports. They were filed to report Storm Fund activity and the Company made adjustments to the Storm Fund by agreement after non-adjudicative review by Staff and the Audit Division.

19. As a consequence of failing to provide Liberty with notice, the Company did not have an opportunity to state its legal positions, to provide evidence in opposition to the Staff Memorandum, or to cross-examine Staff on its recommendations. Thus, there are many important facts that the Commission “overlooked or mistakenly conceived in the original decision,” because there was no evidence provided (and thus was “unavailable”) “prior to the issuance of the underlying decision.” Order No. 26,087 at 4.

20. The Order purports to change the criteria for cost recovery through the Storm Fund, which can only be changed in a rate case. The Company applied the criteria set forth in the approved 2007 settlement agreement. The Commission cannot change those terms outside of a rate case process. The Order’s retroactive adoption of Staff’s new definition should be reconsidered and reversed.

21. Similarly, on the issue of capitalized fleet depreciation expense, the Company was not provided due process to respond to the Staff Memorandum and demonstrate that the Company’s accounting treatment of these costs complies with the FERC Uniform System of Accounts.

22. The Company seeks rehearing and reconsideration of the Order’s directive to deviate from the FERC USoA and change the Company’s practice of capitalizing fleet depreciation expense.

Conclusion

The Company has consistently filed its Storm Reports in accordance with the terms of the approved 2007 settlement agreement, and neither Staff nor the Commission ever took issue with the Company's approach from 2009 through 2021. The Order imposed substantive changes to the reporting requirements and to the criteria for determining qualifying events, all outside of a rate case and without due process. Since the Order affects Liberty's substantive legal rights, rehearing is warranted.

WHEREFORE, Liberty respectfully requests that the Commission:

- A. Grant this motion for rehearing and reconsider the Order;
- B. Reject Staff's recommendations; and
- C. Grant such other relief as is just and equitable.

Respectfully submitted,
Liberty Utilities (Granite State Electric) Corp., d/b/a
Liberty
By its Attorney,



Date: May 21, 2021

By:

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Certificate of Service

I hereby certify that on May 21, 2021, a copy of this Motion has been forwarded to the service list.



Michael J. Sheehan