

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

Sur-Reply to Commission Staff's Response to Motion for Rehearing

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty ("Liberty" or the "Company") submits this sur-reply¹ to address new issues, factual assertions, and claims contained in the June 30, 2021, response filed by the New Hampshire Public Utilities Commission Staff ("Staff")² to the Company's May 21, 2021, Motion for Rehearing ("Motion") of the Commission's April 23, 2021, Order³ in the above-captioned docket. The Motion seeks rehearing of the Commission's April 23, 2021, Order in this docket 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 failure to consider information and legal argument that Liberty would have provided if an opportunity to be heard had occurred. As a result, the Motion argues that the Order was "unlawful or unreasonable" consistent with RSA 541:4.

In its initial May 26, 2021, response to the Motion, Staff stated that it does not object to

¹ On this date, the Company filed a Motion for Leave to File Sur-Reply, requesting approval from the New Hampshire Public Utilities Commission ("Commission") to submit this sur-reply.

² Staff filed its initial response on May 26, 2021, but was subsequently directed by the Commission to supplement its response with legal argument in support of its position. Staff filed its supplemental response on June 30, 2021. The Company's references to Staff's response in this sur-reply are to the supplemental response filed on June 30, 2021, unless otherwise noted.

³ The "Order" was issued in the form of a Secretarial Letter on April 23, 2021, and contained certain rulings as described herein and in the accompanying Motion for Leave to File Sur-Reply.

the Company's request for an opportunity to be heard but Staff did not concede that Liberty's procedural due process arguments were valid or that the Order had been improperly decided.

Staff makes the following procedural arguments in its Response that the Company responds to below: (1) the Company should have responded to Staff's recommendations within thirty (30) days; and (2) Liberty's failure to file a response to the Staff recommendations within thirty (30) days is evidence that the Company did not dispute the findings. These are new arguments raised in Staff's Response and not previously addressed by the parties.

Further, in "support" of these arguments, Staff relies on factual "findings" related to the 2019 Storm Report. Liberty notes that Staff's Response fails to provide any legal arguments in support of its position asserted in its initial May 26, 2021, response but instead relies on its factual assertions (*i.e.*, Staff has failed to provide any legal support for its contention that the Company's due process rights were not violated). Staff's reliance on factual assertions simply highlights the need for additional process to allow Liberty to present evidence to rebut these factual assertions before a final Commission decision on the 2019 Storm Cost Recovery request is made. Allowing the Order to stand without further process would deprive the Company of its due process right to a determination on the merits.

I. Background

The Company filed its calendar year 2019 Annual Storm Fund Report on March 30, 2020, detailing three qualifying storm events and three pre-staging weather events including the costs incurred by Liberty (the "2019 Storm Report").⁴ On March 23, 2021, Staff issued a memorandum recommending that the Commission (1) disallow recovery of \$706,838 in costs related to the 2019

⁴ Staff argues that the Company should have filed the 2019 Storm Report with a new docket designation (Staff Response, at Bates 000001, fn.1). Contrary to Staff's assertion, the standard practice for these annual storm fund reports has been to file such reports in Docket No. DG 06-107. The Company has made all annual storm fund filings in this docket until 2021 when Staff requested opening a new docket for review of the 2020 calendar year storm fund report. No party has previously objected to this practice and therefore this argument is irrelevant to the issues before the Commission with respect to the 2019 Storm Report.

storms; and (2) adjust the Company's proposed cost recovery to remove capitalization of transportation depreciation through the burden rate. As detailed in the Company's Motion, the recommendation to disallow \$706,838 in storm costs was based on Staff's interpretation of the term "trouble" and "concurrent." Staff's interpretation of these terms was a new interpretation not previously considered or approved by the Commission and differs from what has been historically included in the Company's annual storm fund reports. As a result, there has been no opportunity for Liberty to weigh in or offer evidence to rebut Staff's interpretation. Instead, by issuing its Order adopting Staff's recommendations, the Commission retroactively applied a new interpretation to the Company's 2019 Storm Report. Staff's second recommendation to remove costs for capitalization of transportation depreciation was not supported by any authority and Liberty has similarly not been afforded the opportunity to provide evidence in support of its position on this issue; it is well known to Staff that this is an area of disagreement between Staff and the Company.

Based on the foregoing, the Company filed its Motion seeking an opportunity to be heard on these issues.

II. The Company Was Not Required to Respond to the Staff Recommendation Within Thirty Days

Staff argues that the Company's due process rights were not violated because the Company had 30 days to object to Staff's recommendation before a Commission decision was issued and chose not to (Staff Response at Bates 000002). Staff's argument is apparently based exclusively on the premise that 30 days elapsed between the filing of Staff's recommendation on March 23, 2021, and the Commission's order on April 23, 2021. Instead of citing to any procedural rule *requiring* a response to Staff's recommendation within 30 days, Staff relies on its assertion that "the Company had ample opportunity to object to Staff's recommendation-but chose not to-in the 30 days between Staff's filing of its recommendation and the Commission's decision in its secretarial letter of April 23, 2021" (*id.* at Bates 000008). Where there was no requirement for the

Company to respond within a certain timeframe, this argument is misleading at best. Absent a procedural rule governing responses to Staff recommendations or other Commission directive, there is no basis for the premise that the Company somehow has lost its opportunity to respond.

This is particularly true where the Commission regularly sets a schedule for responses to Staff recommendations. For example, in Docket No. DG 16-812, a cost of gas proceeding, Staff filed a December 22, 2016, recommendation asserting that the Company's gas affiliate should remove certain production cost expense and adjust its cost of gas rates accordingly. The Company's affiliate did not file a response within 30 days. Instead, the Commission issued an order setting a procedural schedule to address Staff's recommendation; the schedule included discovery, rebuttal testimony, and a hearing. See, Order No. 25,986, at 3 (Feb. 7, 2017). Notably, the Commission's Order was issued more than 30 days following the filing of Staff's recommendation.

Similarly, on February 14, 2019, Commission Staff filed a recommendation to terminate the Company's Cast Iron/Bare Steel replacement program in Docket No. DG 11-040. The Commission responded to this recommendation with a secretarial letter directing the Company to file a response by a date certain. And, most recently, in Docket No. IR 20-089 (opened to address issues related to the pandemic), Staff filed a November 13, 2020, recommendation related to accounting treatment of pandemic related costs. This recommendation was followed by a Secretarial Letter setting a December 4, 2020, deadline for utilities to respond.

Based on the foregoing, there is a Commission precedent for setting a procedural schedule to address Staff recommendations and thus the fact that the Company did not submit a response within 30 days is neither proof that the Company was afforded the proper opportunity to respond, nor that Liberty accepted Staff's recommendations.

In fact, Staff reached out to the Company prior to filing its March 23, 2021, recommendation seeking any additional data in support of Liberty's conclusion that the three 2019 storm events

identified in the 2019 Storm Report were qualifying events (Staff Response, Attachment at Bates 000011-000012). It is clear from this email exchange between Staff and the Company that there are differing interpretations on what is a qualifying event that require additional process. Therefore, Staff's contention that "there was no indication that the Company's disagreed with Staff's recommendation, much less objected to it" is wholly inaccurate based on a plain reading of the attachment provided with the Response (see Response at Bates 000002, see also Response Attachment at Bates 000011). Instead, counsel for the Company specifically stated that it would be contrary to long-standing precedent for Staff to apply a new interpretation of the term concurrent to the 2019 Storm Report, and that counsel expected that Staff would not suggest any error by the Company with respect to its interpretation of "concurrent" (see Response Attachment at Bates 000011).

III. Conclusion

As demonstrated in the Motion and this sur-reply, the merits of the Order should be addressed through additional process that allows Liberty to provide evidence in response to the assertions raised by Staff in its Response and its underlying recommendation. Staff's Response relies on factual assertions that are incorrect and only serve to highlight the need for discovery and/or a hearing on these issues before an ultimate determination can be made. For these reasons, the Commission should grant the Motion and set a procedural schedule for consideration of the 2019 Storm Report.

Respectfully submitted,

LIBERTY UTILITIES (GRANITE STATE ELECTRIC)
CORP. D/B/A LIBERTY

By its Attorney,



Date: July 13, 2021

By: _____

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Certificate of Service

I hereby certify that on July 13, 2021, a copy of this sur-reply has been electronically forwarded to the service list in this docket.



Michael J. Sheehan