

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

DKT NO. DG 21-130

LIBERTY UTILITIES (EnergyNorth Natural Gas) CORP.

D/B/A LIBERTY

Winter 2021/2022 Cost of Gas and Summer 2022 Cost of Gas

The Department of Energy Joins, in Part, the Relief Requested in the Office of the Consumer Advocate's Motion in *Limine* Seeking Prehearing Determination that Liberty's Request to Recover \$4 million Constitutes Illegal Retroactive Rate Making, and in the Alternative, Proposes Bifurcation

NOW COMES the Department of Energy (Energy), and joins, in part, with the relief requested in the Office of the Consumer Advocate's Motion in *Limine*, Seeking Prehearing Determination that Liberty's Request to Recover \$4 million Constitutes Illegal Retroactive Rate Making. In the Alternative, Energy proposed that the matter be bifurcated to allow the Commission additional time to consider the matter in this docket, and that the Commission remove the proposed recovery from rates to be implemented November 1, 2021. See N.H. Admin Rule Puc 203.07 (e).

In support of this motion, the Department of Energy (Energy) states as follows:

1 In his motion, filed October 4, 2021, the Consumer Advocate asserted that Liberty's request to recover \$4,024,830 constitutes illegal retroactive rate making. See OCA Mot. In *Limine*.

2. According to Liberty, the approximately \$4 million was improperly refunded to residential customers through the Revenue Decoupling Adjustment factor (RDAF) due to error. Petition (filed September 1, 2021) Testimony Simek/McNamara at Bates 15.

A. Allowing Liberty to recover the \$4 million, post-reconciliation, constitutes illegal retroactive rate making

3. Liberty has yet to explain precisely the process whereby the alleged error occurred, and whether it was due to an error in the decoupling formula Liberty requested, an error in the tariff page(s) Liberty prepared, an error in Liberty's application of its decoupling plan, or something else.

4. The source of the error is irrelevant. It is black letter law in New Hampshire that a public utility may not impose a rate increase on a retroactive basis. See Appeal of Pennichuck Water Works, 120 N.H. 562, 566 (1980) (it is a basic legal principle that a rate is made to operate in the future and cannot be made to operate retroactively). The Pennichuck Court grounded its analysis in Part I, Article 23 of the New Hampshire Constitution. Id. at 565. In New Hampshire, the State may not create a new obligation in respect to a transaction already past. Id. at 566.

5. The above standard not as harsh a standard as Liberty would have the Public Utilities Commission (PUC) believe. As stated by the Pennichuck Court, it "merely requires that public utilities, like other businesses, monitor their costs of doing business, and employ sound business judgement in determining when they should seek a rate increase for future services." Id. at 567; see also PUC Order No. 26, 193 at 22 (June 20, 2021) in Docket No. 19-132 (acknowledging this principle and applying it to "terms such as ownership of an financial responsibility for the maintenance of equipment").

6. The prohibition on retroactive rate-making is a standard the PUC Staff (now Energy Staff) have applied to Staff's own recommendations to the PUC when those recommendations included error. As the (now retired) Director of the PUC Gas Division explained last year in the Liberty-Keene Winter 2020-2021 Cost of Gas hearing, PUC Staff inadvertently failed to exclude a small amount of incremental costs associated with the first month CNG went live in the Liberty Keene franchise, in October 2019. Staff's inadvertent act meant the October 2019 incremental costs were reconciled and paid as part of the Summer 2020 Liberty-Keene Cost of gas proceeding, approved by the PUC, and thus found prudent (notwithstanding PUC Staff's objection to the recovery of incurred incremental costs in all other CNG COG dockets). As Director Frink explained in November of 2020, "... we are not going to go back and say, 'you can't recover...'", Transcript Docket No. DG 21-152 November 2, 2021 at 117-118, 99-100 (same) 98-100 (prudence attached post reconciliation). Stated a different way, Director Frink explained, "[O]nce you're approved recovery of an over /under recovery in the rate, to go back and disallow that would be retroactive rate making." Transcript at 53; see Order No. 26,351 (May 1, 2020) (Liberty-Keene Summer 2020 COG Order)

B. Liberty is solely responsible for its decoupling formula, its application and formula "inputs".

7. Liberty seems to be describing its own decoupling framework as a collaborative project in which Liberty, the OCA and then PUC Staff (now Energy) Analysts were unintentionally confused. Liberty's strategy distorts the regulatory framework. Liberty's obligation to its customers and shareholders is to present regulators with fully vetted and reviewed models, in which all "inputs," applications, formulas, descriptions, tariff language and results have been checked, and double checked, in advance, before they are filed. While the OCA and Energy employ talented professionals, those professionals are not supposed to be

experts in all fields and are not charged with insulating Liberty from errors. It is Liberty's own job to do that. OCA and Energy analysts perhaps serve as a second opinion. Yet primarily, and potentially in opposition to public utilities, including Liberty, Energy seeks to assure that regulatory goals or benchmarks have been met, or perhaps advocates to expand or change them. Similarly, OCA's primary loyalty lies with residential customers.

8. Neither can Liberty appropriately deflect responsibility for any decoupling error or miscalculation onto the Public Utility Commission (PUC) itself. The PUC is charged with adjudicative authority to determine what is just and reasonable, and what is prudent, for both Liberty and for Liberty's customers. The cost of gas (COG) mechanism:

generates a seasonal rate that is a mix of incurred costs and revenues, and forecasted costs and revenues. Prudence is reviewed in a COG proceeding when a supply or demand element is reviewed and reconciled based on actual [reported] costs [or credits].... Once the over or under recovery is approved and included in the upcoming periods rates, the incurred costs are considered prudent, and the over or under recovery will not be retroactively adjusted.

See Order 26,480 (May 14, 2021) at 18-20, Dkt. No. DG 20-152 (explaining the structure of the COG mechanism and prudence review).

9. Thus, while the COG mechanism includes a reconcilable process, reconciliation is designed to account for projected/prospective costs that are unknowable, and subsequent comparison to actual incurred costs, as reported by the utility and reviewed by Energy Staff. Alternatively, reconciliation may be employed by a utility to intentionally defer review and reconciliation pending future thresholds, as Liberty-Keene strategically chose to do when it deferred reconciliation of historic demand charges until the Liberty-Keene CNG system was up and running. Deferral eschews review and recovery, pending future review. See Order 26,480 at 6 (DG 21-152 is "the first docket in which Liberty has sought recovery of the historic demand charges").

10. Reconciliation was not intended to re-visit or “do-over” costs which have been subject to review, reconciled, and found prudent in a PUC Order. Cf. Appeal of Granite State Electric Co., 120 N.H. 532, 538-39 (1980) (PUC order did not become final until appeals from order were exhausted or the time for filing appeal had run, thus order on remand could substitute new rates). Absent appeal, such a “do-over” would constitute retroactive rate making.

11. Further, the record does not support Liberty’s assertion that it was simply following what then PUC Staff directed it to do. In Docket No. DG 19-145, Hearing Exhibit 5, at Bates 3, then PUC Staff Analyst Al Azad Iqbal merely noted that the decoupling formula should follow the tariff, (as written by Liberty and approved by the Commission). He stated, “For purposes of calculating the Actual Base Revenue, base revenue for Low Income rate class R4 shall be determined based on non-discounted rate R-3... The intent of the RDAF and the intent of the tariff match perfectly in this context.”

12. Liberty was free to disagree, but it did not; Liberty agreed. See Transcript Dkt. No. DG 19-145 October 11, 2019 at 26-28 (Liberty describing changes made). Liberty did not object at hearing, ask the Commission to adopt a different approach, or appeal the final cost of gas order issued in DG 19-145. See Order No. 26,306 (October 31, 2019) at 5-7.

13. In addition, Liberty has more knowledge about its proposals and business than any other docket participant. As documented in Docket No. DG 19-145, Hearing Exhibit 5, referenced above, following Mr. Iqbal’s recommendation that the formula be consistent with the tariff, Mr. Iqbal further stated, “Staff’s review of the Company’s RDAF calculations **was limited to the data provided by the Company. Staff did not check the veracity of inputs in the models used in the filing.** Staff reserves the right to identify other issues or concerns with this filing. See Dkt. No. DG 19-145, Hearing Exhibit 5 at 5 (emphasis added). Responsibility for the

decoupling formula, its interpretation and/or application, including the “inputs” rests with Liberty, to its profit or to its detriment.

14. In summary, as a matter of black letter law, Liberty is not entitled to the “do-over” it seeks. Liberty’s request stretches the “subject to reconciliation” or “subject to audit” language often found in Commission orders too far. Even assuming that Liberty has correctly identified an error, Liberty’s refund of the RDAF over collection during the November 1, 2018 through October 21, 2019 period was reconciled and found prudent, and thus included in rates in the EnergyNorth Winter 2019-2020 COG Order. See Order No. 26,206 (October 31, 2019) (Dkt 19-135, establishing rates effective November 1, 2019). Similarly, Liberty’s refund of the RDAF over collection during the November 1, 2019 through October 31, 2020 period was reconciled and found prudent, and thus included in rates in the EnergyNorth Winter 2020-2021 COG Order. See Order No. 26,419 (October 30, 2020), (Dkt. No. DG 20-141, establishing rates effective November, 1, 2020). Those reconciled rates are not subject to retroactive adjustment. See Order 26,480 (May 14, 2021) at 18-20

WHEREFORE, the Department of Energy respectfully requests the Public Utilities Commission to:

- A. DETERMINE as a matter of law that Liberty Utilities (EnergyNorth Natural Gas) Corp., d/b/a Liberty may not recover the \$4,024,830 which the Company claims was “improperly refunded to residential customers;” as such would constitute illegal retroactive rate making; and
- B. GRANT the Office of Consumer Advocate’s Motion in *Limine* and STRIKE references to the allegedly improper “refund” from the Company’s prefiled testimony; or, in the alternative,

- C. BIFURCATE the matter to allow the Commission additional time to consider the arguments outside the expedited portion of this cost-of-gas proceeding,
- i. REMOVE the money from the current cost of gas calculation; and
 - ii. SCHEDULE a subsequent hearing, if appropriate; and
- D. GRANT such other and further relief as is equitable and just.

Respectfully Submitted,

/s/ Mary E. Schwarzer

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October 14, 2021

CERTIFICATE OF SERVICE

October 14, 2021

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

/s/ Mary E. Schwarzer

Mary E. Schwarzer