STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

Docket No. DG 22-041

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty

Petition for Approval to Recover Revenue Decoupling Adjustment Factor Costs

INITIAL BRIEF OF LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. D/B/A LIBERTY

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty ("Liberty" or the "Company") submits this initial brief pursuant to the schedule set by the New Hampshire Public Utilities Commission (the "Commission") during the hearing conducted on June 22, 2023, in this docket. In this proceeding, Liberty respectfully petitions the Commission to recover an under-collection of $4,023,830 million that was erroneously refunded to customers due to the operation of tariff language that caused a mismatch to be embedded in the tariff implementing the Company's Revenue Decoupling Mechanism ("RDM"), as of November 1, 2018. The mismatch became apparent only at the point that the tariff was applied in the first decoupling year, 2018-2019; remaining unresolved through the second decoupling year, 2019-2020.[1]

Importantly, no party in this proceeding is contesting the quantification of this error, nor even that it occurred. As Chairman Goldner summed up at hearing: "The Company is trying to collect $4 million; the Department of Energy is trying to return $2 million; and, based on the OCA's preliminary statement, the OCA believes the answer is 'zero.'" (Transcript of June 22, 2023, evidentiary hearing (hereinafter "Tr.") at 40). If the mistake were found and had fallen to the benefit of customers, this case would not exist. The expectation of all parties – including the Company -- would be to return the mistaken over-collection to customers through the *reconciling* RDM. There would be no debate. There would be universal recognition that the Commission has

[1] The Company and the Commission revised the tariff language during the Company's most recent rate case, Docket No. DG 20-105, eliminating ambiguous language and the operative mismatch caused thereby, effective in the third decoupling year.

the authority to correct errors in the reconciling mechanisms to maintain just and reasonable rates for customers. Therefore, in the interest of fundamental fairness, the Commission should approve the refund of the $4 million under-collection, consistent with the clear intent of the RDM and Commission precedent in other instances where similar errors have been remedied to assure just and reasonable rates.

The Company's Initial Brief is organized to cover the following three issues: First, the Company identifies the mismatch created by the tariff language and the ambiguities that exist within the tariff that would allow the Commission to resolve the mismatch within the confines of the tariff. Second, this Initial Brief reviews the sequence of events that occurred during the first two years of implementation of the Company's RDM tariff, wherein the Company attempted to address its concerns regarding the mismatch between revenue targets and actual revenues, as well as the legalities surrounding correction of this error by the Commission.

Lastly, this Initial Brief responds to claims asserted by the New Hampshire Department of Energy ("DOE"), arguing that the Company has over-collected the low-income discount rate. This is a red herring devised solely to confuse (and defuse) the issue around the inequity of the Company's revenue loss through the RDM. DOE's assertion that the Company's base rates included recovery of the low-income discount -- essentially as a line-item expense in the cost of service -- ***is fully incorrect*** and should be squarely rejected. In Docket No. DG 17-048, the Commission approved base rates based on a revenue requirement determined by the Commission, along with the recoupment of the low-income discount through the Local Distribution Adjustment Charge ("LDAC"), by operation of the Residential Low Income Assistance Program ("RLIAP"). Liberty does not recover the total cost of serving low-income customers through base rates. Rather it recovers a portion of low-income revenue through discounted base rates and the remaining portion (equaling the discount) through the RLIAP component of the LDAC. The Company has not collected the low-income discount in base rates and through the RLIAP, as claimed by DOE.

I. Background

On July 5, 2022, the Company filed its Petition for Approval to Recover Revenue

Decoupling Adjustment Factor Costs ("Petition") and supporting Direct Testimony of Erica L. Menard ("Menard Testimony") outlining the timeline and application of the 2018 RDM tariff that resulted in an under-collection of $4,023,830 in revenues. Through the Menard Testimony, the Company explained the mismatch embedded in the 2018 RDM tariff that resulted in the erroneous $4 million refund to customers in direct conflict with the intent of the RDM tariff.[2]

In Order No. 26,122 (April 27, 2018), the Commission allowed Liberty to implement the RDM beginning on November 1, 2018. Order No. 26,122, at 45-46. To implement the RDM, Liberty establishes a revenue per customer target for each rate class, or "allowed" revenue target (Exh. 1, at Bates 0006). The allowed revenue targets are then reconciled annually with the actual revenues collected from customers in each respective rate class, with the difference either collected from, or refunded to, Liberty's customers through a revenue decoupling adjustment factor ("RDAF") beginning on November 1 of the following year (id. at Bates 0006 and 0030).

As illustrated in the Menard Testimony and testimony at hearing, the initial 2018 RDM tariff improperly compared the allowed revenue target for the low-income R-4 rate class, which is calculated using discounted rates, with the higher actual revenues collected from the R-3 rate class, which are revenues arising from non-discounted rates (Exh. 1, at Bates 0007-0009). This mismatch is the result of language that was first proposed to implement the RDM model filed at the outset of the 2017 case and that was then changed over several revisions to implement a different RDM model, although all models operate under the same theory that there must be a matching of the derivation of target revenues with the actual collected revenues. (Exh. 1, at Bates 0006; Tr. at 20). The mismatched tariff language was corrected in the Company's most recent base rate case, Docket No. DG 20-105, and the Company applied the new tariff language in its subsequent cost of gas ("COG") filings where the 2020-2021 and 2021-2022 RDAF reconciliations occurred. *See* Docket No. DG 21-130 and Docket No. DG 22-045.

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[2] On July 6, 2022, the Office of Consumer Counsel ("OCA") filed a letter of participation in this proceeding along with a motion to dismiss Liberty's petition with prejudice. On July 15, 2022, the Company filed an objection to the OCA's motion. The DOE filed its appearance in this docket on August 1, 2022, but did not respond to the OCA's motion. The Commission denied the OCA's motion to dismiss in Order No. 26,677 (Sept. 6, 2022).

The Commission held a duly noticed prehearing conference on November 1, 2022. On December 1, 2022, Liberty filed a Supplement to Petition for Approval to Recover Revenue Decoupling Adjustment Factors ("Supplemental Petition") providing the tariff provisions for RDAF calculations, explanations, and live excel spreadsheets for performing the RDAF calculations. On April 20, 2023, the DOE filed the Joint Direct Testimony of Faisal Deen Arif and Mark Thompson ("DOE Testimony"), and on May 23, 2023, the Company filed the Joint Rebuttal Testimony of Erica L. Menard and Gregg H. Therrien ("Rebuttal Testimony"). The parties held two technical sessions on March 2, 2023, and March 28, 2023, and one technical session and settlement conference on June 1, 2023. An evidentiary hearing was held on June 22, 2023. The record also includes the Company's responses to two sets of information requests from DOE, DOE Sets 1 and 3, and one Commission record request.

II. 2018 RDM Tariff

A. Background

In its initial filing in Docket No. DG 17-048, the Company submitted the pre-filed, direct testimony of Greg H. Therrien, Assistant Vice President with Concentric Energy Advisors, describing the status of revenue decoupling across the U.S. and presenting the design of the Company's proposed RDM and associated tariff provisions (Exh. 1, at Bates 0016). Specifically, the Company proposed to add tariff provisions that would implement the RDM through Section 17(C.1) of the LDAC tariff (id.). The proposed language described the manner in which the Company would annually reconcile Actual Revenues to Target Revenues and then recover or return any difference through the Revenue Decoupling Adjustment Factor ("RDAF") in rates (id.). However, the RDM approved by the Commission differed materially from what the Company had proposed and instead arose from a joint proposal of the Company and the OCA (id. at Bates 0007).

The purpose of the RDM is to assure that the Company collects the base revenue requirement approved by the Commission in Docket No. DG 17-048, no more and no less, regardless of actual sales volumes (Exh. 1, at Bates 0006). Because the RDM functions to collect the authorized revenue requirement independent of the amount of gas sold, the utility's ability to

recover that revenue requirement between rate cases is preserved despite sales declines caused by energy conservation and energy efficiency initiatives (id.). The Company's RDM operates in accordance with approved tariff provisions included as a component of the LDAC (id.).

From a simplified perspective, Liberty's RDM establishes revenue per-customer ("RPC") targets for each rate class, which are referred to as the "allowed" revenue targets (Exh. 1, at Bates 0006). In the annual RDM reconciliation, the allowed revenue target for each rate class is compared to the actual revenues collected from customers in each respective rate class (id.). The difference between allowed revenue targets and actual revenues collected is refunded to, or collected from, customers through the annual reconciliation process (id.). In this construct, it is imperative that the allowed revenue targets and the actual revenues collected are stated on the same basis for each rate class, e.g., R-3 revenue targets are compared to R-3 actual revenues, so that the difference between the allowed revenue target and actual revenues collected is truly the amount that should be refunded to customers, or recovered back from customers, as part of the annual RDM reconciliation (id. at Bates 0007). Assuring that this differential is correctly identified is necessary to assure that the Company is collecting the authorized revenue requirement (id.).

This objective was not achieved under the initially approved RDM tariff, NHPUC No. 10 Gas (id.).[3] Following the Company's initial filing, substantial discussion occurred in the docket in relation to a range of issues, including the Company's revenue decoupling proposal (id. at Bates 0035). In February 2018, the Company reached a settlement of all issues with the OCA, which was submitted to the Commission for approval on March 2, 2018 (the "Revised Agreement") (id.). The Revised Agreement included a full decoupling mechanism using the RPC method (id.).[4] Thus, the Revised Agreement expressly contemplated that the RDM would take the form of an RPC model, with R-3 and R-4 customers aggregated into the "Residential" customer group (Tr. at 54; see also Exh. 1, at 33-34).

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[3] NHPUC No. 8 was the tariff effective when the Company filed its rate case in Docket No. DG 17-048. NHPUC No. 9 was the proposed tariff in the initial rate case filing in Docket No. DG 17-048, which the Commission suspended at the outset of that docket by Order No. 26,015 (May 8, 2017) (id. at Bates 0007, fn. 2).

[4] The Company's initial RDM proposal was a "total company" mechanism where the reconciliation would compare the total authorized revenue requirement to the total revenue collected from all customers.

The Company's compliance filing subsequent to Order No. 26,122 (April 27, 2018) was entitled NHPUC No. 10, not No. 9, as required by Puc 1603.06(j), (k), and (l). NHPUC No. 9 contained the Company's initial RDM proposal, which was substantially modified prior to being approved and included in NHPUC No. 10 (Exh. 1 at Bates 0007).[5] Subsequent to the Commission's approval of NHPUC No. 10, the Company timely prepared its first reconciliation of revenues for the R-4 low-income class, which revealed that the tariff's calculation of the allowed revenue target and the actual revenues collected appeared to be mismatched (Exh. 1, at Bates 0007; Tr. at 29). Applying the precise definition of Benchmark Base Revenue Per Customer and Actual Base Revenues (in exclusion of all other tariff terms) produced a mismatched comparison of discounted and non-discounted revenues, respectively, yielding a refund to customers although no refund was due (Exh. 1, at Bates 0007-0008; Tr. at 29-30). The refund had the effect of returning the value of the R-4 low-income discount to customers, although the tariff should have operated to allow the Company to receive those collections. (Id.; Tr. at 61-62; 129).

An alternative interpretation of the tariff, encompassing the meaning and operation of other terms included in the tariff, would compare non-discounted target revenues to non-discounted actual revenues, so that both sides of the comparison would have treated the R-4 rate discount in the same fashion, as was the intent in the Revised Agreement (Exh. 1, at Bates 0008). This confusion was not easily identified or remedied through the two COG proceedings conducted in 2019 and 2020, where the first two RDM reconciliations occurred, although the Company raised the issue of an apparent disconnect in the application of the tariff terms (Exh. 1, at Bates 0008).

The disconnect arose from how the tariff language evolved as to whether: (1) the RDM tariff provisions aggregate R-3 (non-low-income) customers and R-4 (low-income) customers into a single (residential) category for purposes of developing the "allowed revenue target;" or, (2) the RDM tariff provisions created separate groups for R-3 and R-4 customers so that they would have separate allowed revenue targets (id. at Bates 0009; see Tr. at 61-62). Where the tariff provisions separate R-3 and R-4, then the low-income discount applies to the allowed target revenues for the

[5] The Commission approved NHPUC No. 11, the tariff currently in effect in the Company's most recent rate case, Docket No. DG 20-105, which contains adjustments to the RDM language eliminating the mismatch.

R-4 rate class, but not to the R-3 rate class (Exh. 1, at Bates 0009). If the two rate classes are treated as an aggregated whole, i.e., as a combined residential customer group, then the R-3 and R-4 customers are treated the same in setting the allowed revenue target (id.).

This matters because the RDM tariff definition for "Actual Base Revenues" explicitly states that actual revenues collected must be calculated using the R-3 rate class, which are non-discounted revenues (Exh. 1, at Bates 0009). Thus, to maintain comparability, the allowed revenue targets used in the RDM reconciliation must be likewise non-discounted (id.). However, during the time this mismatch was unresolved, refunds were issued to customers through the RDM reconciliation (totaling $4,023,830 over two years) (id.). The RDM tariff provisions were revised in the Company's 2020 rate case and the issue was eliminated on a going forward basis (id. at Bates 0009-0010). However, the amount of $4,023,830 remains owed to the Company as an under-collection in the RDM (id. at Bates 0010).

B. Argument

1. The Latent Ambiguity in the 2018 RDM Tariff Caused the Inadvertent Refund to Customers of $4 Million.

Regarding tariff interpretation, the well settled holding in the Appeal of Pennichuck Water Works states that tariffs "do not simply define the terms of the contractual relationship between a utility and its customer [but] have the force and effect of law and bind both the utility and its customers." Appeal of Pennichuck Water Works, 120 N.H. 562, at 566 (1980) ("Pennichuck"). Importantly, the N.H. Supreme Court has concluded that a contract is ambiguous when the parties reasonably differ to its meaning. Commercial Union Assurance Cos. v. Town of Derry, 118 N.H. 469, 471 (1978). Further, the Court has held that ambiguities in contracts shall be resolved based on the intent of the parties and that the parties' intent will be determined by applying objective standards rather than subjective states of mind. C & M Realty Trust v. Wiedenkeller, 133 N.H. 470, 476 (1990). A latent ambiguity occurs when the ambiguity does not readily appear in the document at issue but instead arises from a collateral matter when the document's terms are applied or executed. Black's Law Dictionary (11th ed. 2019). "In the case of a latent ambiguity and uncertainty, the actions of the parties previous to, and contemporaneous with, (but not subsequent

to), the agreement are admissible to explain it, by directing its application." Id., citing Joseph Chitty Jr., A Practical Treatise on the Law of Contracts 24 (1827).

The purpose and intent of the Company's RDAF is well established in the then-controlling 2018 RDM tariff, NHPUC No. 10, which states:

> Revenue decoupling eliminates the link between volumetric sales and Company revenue in order to align the interests of the Company and customers with respect to changing customer usage by establishing an allowed revenue per customer ("RPC"). The Company is allowed to collect that RPC for the number of actual customers it has in a given month. The purpose of the Revenue Decoupling Adjustment Factor ("RDAF") is to establish procedures that allow the Company, subject to the jurisdiction of the NHPUC, to adjust, on an annual basis, its rates for firm gas sales and firm transportation in order to reconcile ***the difference between the Actual Revenue collected and the Allowed Revenue***."

(Exh. 1, at Bates 1292) (emphasis added).

Further, the plain language of the Revised Agreement states:

> [T]he annual revenue per customer adjustment will be determined by calculating the difference between actual annual distribution revenue per customer and approved annual distribution revenue per customer for two groups of customers: (a) the residential classes and (b) the commercial and industrial classes. Approved annual distribution revenue per customer for each of these two groups will be based on the approved distribution revenues and test year average customer counts for each group. The difference in total distribution revenues is calculated using this revenue per customer variance multiplied times the actual average annual customer count. This amount will be recovered from or refunded to each group over the subsequent 12-month period through a uniform charge per therm for each group.

(Exh. 1, at Bates 0036, citing Exh. 29 in Docket No. DG 17-048, at 11 (highlighting added) (Attachment ELM-1, Bates 1089)).

However, within the definitions in NHPUC No. 10, the use of the term "Customer Class Group" was maintained, but slight modifications were made to the definitions of "Actual Base Revenue" and "Benchmark Base Revenue Per Customer" to address a separate issue under discussion regarding customer counts (Exh. 1, at Bates 0039, 1292-1293). These wording changes inadvertently modified the basis of the RPC targets from "Customer Class Groups" to "Customer Class" (id.). This change in language caused the allowed revenue target (or Benchmark Base Revenue per Customer) to be set ***individually*** for the R-3 and R-4 customer classes, which thus

caused the low-income discount to be included in the ***target*** R-4 revenues but ***not in the calculation of the actual revenues collected*** (id., emphasis added; Tr. at 56, 66). This was contrary to the purpose and intent of the Company's RDM and the Revised Agreement because the language in the definitions of the allowed revenue targets and actual revenue collections did not follow the same method (Tr. at 66). This application violates the purpose and intent of the reconciling mechanism (Tr. at 56, 71).

Therefore, a latent ambiguity exists in the application of the 2018 RDM tariff as there are contradicting terms and definitions resulting in different ways to interpret and apply the tariff. This only became apparent through the Company's application of the tariff and subsequent under-collection of revenue, as the Company could have implemented the tariff in two separate ways based on the inconsistent language in the purpose and intent section and the definitions (see Tr. at 127). Following a strict application using the definitions, the R-4 Benchmark Base Revenues were to be set on a discounted basis, but R-4 Actual Base Revenues collected were not because the R-3 non-discounted rate was applied for both R-3 and R-4 rate classes (Exh. 1, at Bates 0051; Tr. at 20, 71, 127). On the contrary, the purpose and intent of the RDM, in conjunction with the Revised Agreement, was that the R-3 and R-4 rate classes would have been combined, without the discount, for both Benchmark Base Revenues and Actual Base Revenues, resulting in the proper reconciliation of the RDM (Tr. at 20, 71).

Reflecting the intent of the parties shown through the Revised Agreement and in the "purpose" of the RDM tariff, the resolution is to use the non-discounted R-4 rates when calculating ***both*** the Benchmark Base Revenues and Actual Base Revenues. This results in the Company's collection of the authorized revenue requirement, no more and no less. Further, the actions of the parties previous to, and contemporaneous with, application of the tariff, illustrate that this is the correct application of the tariff, and it alleviates the issue through the proper reconciliation of the RDM. Therefore, the correct remedy for this latent ambiguity in the Company's tariff NHPUC No. 10 is a refund of the $4 million under-collected through the reconciling mechanism, as intended through the RDM.

2. Collection of Past Under-Collected Revenues Through a Reconciling Mechanism Does Not Constitute Retroactive Ratemaking.

Although New Hampshire prohibits "a public utility from imposing a rate increase on a retroactive basis," there is a fundamental difference between collecting an increased cost through base rates (and applying the increased base rate retroactively to past consumption) and collecting revenues on a pass-through basis through a reconciling mechanism. On that point, the Commission has previously ruled, "[t]he Commission does not accept the Company's argument that the disallowance of any portion of the penalty that was included in the summer cost of gas adjustment is retroactive ratemaking. The nature of the fuel clauses approved by this Commission are such that they are always based on estimated costs for a forward-looking period and ***subject to reconciliation***. Over and under-collections are carried in deferred accounts and are brought forward to a future adjustment period. Furthermore, ***if the Commission Staff found errors in the past bookings of the cost of gas adjustment, an adjustment would be made***." Concord Natural Gas Corp., 67 N.H. PUC 113, 114 (1982) (emphasis added).

The courts in New Hampshire have not yet examined whether the concept of "retroactive ratemaking" would apply in relation to the operation of a reconciling mechanism. However, rulings of the Massachusetts Supreme Judicial Court follow the same concept articulated by the Commission in Concord Natural Gas Corp., i.e., that the nature of reconciling mechanisms is to allow prospective recovery of past over- or under-collections. Specifically, the Massachusetts Supreme Judicial Court affirmed that reconciling mechanisms like the cost of gas adjustment are an exception to the prohibition against retroactive ratemaking. Southern Union Co. v. Dep't of Pub. Util., 458 Mass. 812, 822-823 (2011); Fitchburg Gas & Elec. Light Co., D.T.E. 99-66-A at 16, 24-27 (2001) ("[I]nsofar as this case arose from the operation of the [Cost of Gas Adjustment], it implicates a reconciling mechanism that lies outside the retroactive ratemaking stricture that constrains Department action under G.L. c. 164, s. 94."), affirmed, Fitchburg Gas & Elec. Light Co. v. Dep't of Telecomm. & Energy, 440 Mass. 625, 637 (2004) ("Fitchburg").

In Fitchburg, Fitchburg Gas and Electric Light Company appealed from a decision of the Massachusetts Department of Public Utilities (then the Department of Telecommunications and

Energy) ("MDPU"), ordering that the utility repay its customers for overcharges that resulted when the utility included identical inventory finance charges in both its base rate and supplemental cost of gas adjustment clause ("CGAC"). The utility claimed that the MDPU's directive to return revenues to customers through the CGAC constituted retroactive ratemaking. However, in affirming the MDPU's decision, the Court explained:

> We have not previously been asked to determine whether the rule against retroactive ratemaking should be applied to adjustments in the CGAC, but we have no difficulty in concluding that an order retroactively adjusting a CGAC is well within the department's general supervisory authority over utility costs … and is consistent with its "broad authority to determine ratemaking matters in the public interest." ***Retroactivity is inherent in the very nature of a CGAC***. Unlike the base rate, which is a calculation of rates going forward based on historical data, ***the CGAC adjusts semi-annually for utility costs as they actually have been incurred, according to a mechanically applied technical formula***. The formula itself is a fixed "rate" that cannot be changed outside the hearing procedure mandated by G.L. c. 164, § 94. ***But the "dollars and cents" amount inserted into the flow-through formula is presumptively not fixed***. They represent costs over which utilities often have little bargaining power or control, and it would defeat the very purpose of a CGAC to require these costs to be frozen until the expensive and cumbersome process of a rate change hearing is completed.

Fitchburg, 440 Mass. at 637 (emphasis added).

Therefore, the reconciling nature of the RDAF puts customers on notice of potential changes to the rates and remedying errors does not constitute retroactive ratemaking.

III. Commission Authority

A. Background

The Commission, DOE, and OCA became aware of the tariff issues and underlying ambiguity in the language through the Company's first COG reconciliation proceeding, Docket No. DG 19-145 (Exh. 1, at Bates 0050; Tr. at 49). The Company recognized the issue and notified the Commission that the results of the COG reconciliation showed a relatively large over-collection of base revenues, which was not expected and appeared unusual (id.). As the Company examined what could be causing the unusual differential, the Company identified that there was a mismatch occurring between the Benchmark Base Revenue targets and the Actual Base Revenue computation, which would make it appear that a refund was due to customers when it was not (id.).

Therefore, as part of the Company's initial filing in Docket No. DG 19-145, Company Witnesses David Simek and Catherine McNamara correctly identified and succinctly explained the issue in their initial testimony, "[t]he approved Benchmark Base Revenue per Customer calculation uses low-income residential heating revenue (rate R-4) in the calculation while the Actual Base Revenue per Customer calculation uses the residential heating rate (rate R-3) to calculate the rate R-4 revenue. In other words, the formulas in the tariff use the R-4 rate to calculate the benchmark R-4 revenue per customer and use the R-3 rate to calculate the actual R-4 revenue per customer" (Exh. 1, at Bates 0051, citing Docket No. DG 19-145, Initial Filing of September 3, 2019, Initial Testimony of Simek/McNamara at 9–10, Bates 012 (Att. ELM-1, Bates 1494)).

In view of the relatively large revenue refund that resulted from strictly following the definitions and formulas in the RDM tariff, Company Witnesses Simek and McNamara developed an alternative RDAF calculation that would eliminate the mismatch by placing the Benchmark Base Revenue targets and Actual Base Revenue computation on the same, comparative basis (Exh. 1, at Bates 0052). The Company then presented the two alternative computations in the reconciliation of the 2018–2019 Decoupling Year (id.). During a subsequent technical session conducted on September 23, 2019, Commission Staff presented its opinion to the Company that the use of the discounted R-4 rates to calculate the Benchmark Base Revenue targets and the non-discounted R-3 rates to calculate Actual Base Revenue collections was correct, essentially because strict application of the tariff's definitions required this outcome, despite being contradictory to the tariff's purpose and intent (id. at Bates 0055). Based on discussion with Commission Staff and other parties, the Company agreed to resubmit its initial filing, adjusting the schedules and testimonies to strictly follow the RDM tariff formula (id.). However, adhering to the strict definitions – without regard for other tariff terms—continued the error (Exh. 1, at Bates 0058).

The Company attempted to fix this issue again in September 2020, when the Company made its next COG filing in Docket No. DG 20-141 (Exh. 1, at Bates 0068). The Company presented its RDM reconciliation for the 2019–2020 RDM cycle (September 2019–August 2020) and the same mismatch existed between the Benchmark Base Revenue targets and the rates used

to calculate the Actual Base Revenue collected (id.). Again, the magnitude of the refund indicated an ambiguity in the application of the tariff, but the issue was again not resolved (id.).

The provisions of the RDM were revisited one last time during the course of the Company's most recent rate case, Docket No. DG 20-105, which was filed on July 31, 2020 (Exh. 1, at Bates 0069). At this point, the quantification of the error was still not clear, although the mismatch was acknowledged by all parties. By the time the rate case was concluded, the Company knew the refunds it was issuing were larger than should be expected and the Company's independent audit simultaneously identified several issues that Liberty was not aware of (id.). Second, the parties to the rate case agreed that the proceeding, which was the first rate case since the RDM was implemented, created a timely opportunity to consider refinements and improvements, as referenced by the Commission in the Order that approved the RDM in 2018 (id.). In particular, a settlement that was agreed to by the Company, Staff, and the OCA and filed with the Commission on June 30, 2021, indicated that clarifications of the sections of the Company's tariff that pertain to decoupling would be a priority (id., citing Attachment ELM-1, Bates 1622–1670).[6]

B. Argument

1. The Commission Has the Authority and the Responsibility to Remedy the Under-Collection by Allowing Recovery.

The Commission has the authority to interpret and apply the tariff in a manner consistent with the intent of the RDM – and in the interests of establishing just and reasonable rates – due to the ambiguity identified in the RDM tariff terms through its application over the past several years. The Commission has previously corrected mistakes after-the-fact to mitigate unintended numerical errors resulting in the reconciliation of significant revenues (Exh. 1, at Bates 0076). For instance, while preparing its COG filing for Docket No. DG 18-137, the Company discovered that it had

[6] On August 13, 2021, the Company filed an updated tariff in compliance with directives set forth by the Commission in Order No. 26,505 (Exh. 1, at Bates 0070, citing Attachment ELM-1, Bates 1671–1829). The parties to the settlement in Docket No. DG 20-105 jointly developed the tariff changes for the specific purpose of alleviating the embedded mismatch discovered in relation to the reconciliation of the RDM (id.). These directives were set forth in the Commission's final decision approving tariff changes in Order No. 26,505 (July 30, 2021) (id., citing Attachment ELM-1, Bates 1830–1846).

over-collected several years earlier, during Winter 2014/15, on Energy Efficiency-related costs that it had recovered through the LDAC (id., citing Exhibit 3 in Docket No. DG 18-137, the Amended Technical Statement of David B. Simek and Catherine A. McNamara, at 1 (Attachment ELM-1, Bates 2032)). The impact on rates when the Company returned the $1.3 million overcollection was significant, lowering the LDAC by $0.0163/therm for Winter 2018/19. Importantly, the Commission accepted and approved the correction, ***years after the fact*** (id. at Bates 0077). *See* Order No. 26,188 at 2 (Nov. 1, 2018).

Similarly, in two dockets of the Company's electric affiliate, Liberty Utilities (Granite State Electric) Corp. ("Granite State"), Granite State notified the Commission that it intended to investigate the beginning balances of several reconciling charges all the way back to the time Liberty acquired Granite State from National Grid in 2012 (Exh. 1, at Bates 0077). Granite State thought that the beginning balances that were being carried through these yearly reconciliation filings, and that were continuations of beginning balances inherited from National Grid, were inaccurate (id.). The Commission encouraged the Company to pursue that investigation and to include the Commission's Audit Division in the work (id.). As a result of those investigations, Granite State discovered that the beginning balances related to reconciling energy service costs were off by $9 million, and the Commission approved the return of that $9 million to customers over a two-year period (id. at Bates 0078). Order No. 26,264 at 8 (June 24, 2019). Granite State also discovered that the beginning balances related to the transmission and stranded costs were off by $900,000 in Granite State's favor, and the Commission approved Granite State's recovery of that $900,000 (id. at Bates 0079). Order No. 26,243 (Apr. 30, 2019).

Another example occurred in Re Northern Utilities, in which Northern Utilities made a retroactive billing adjustment: "[t]he under collection occurred because Northern's Rate Department had inadvertently failed to change billing rates on the January 1, 1995 effective date the Commission had authorized Northern to collect the Business Profits Tax in its rates" (Exh. 1, at 0080, citing Re Northern Utilities, 80 NH PUC 721 (Nov. 6, 1995)). The new rate should have been in effect for a six-month period of time (id.). In response to learning of this adjustment, the Commission opened a docket "to consider utility authority to bill customers retroactively." (id.,

citing Re Northern Utilities, 80 NH PUC at 723). After receiving comment from many parties, the Commission ruled as follows: "[U]tilities are entitled to collect their tariffed rates though they ought to collect them in a timely manner. When a utility erroneously fails to bill the tariffed rates on the effective date authorized, then, depending on the circumstances, corrective billing is the appropriate remedy in an amount and manner approved by the commission" (id., citing 80 NH PUC at 723). Considering this precedent, the Commission has authority to allow recovery of the $4 million in under-collected revenues.

Moreover, the Commission has a responsibility to implement just and reasonable rates for both customers and its regulated utilities. The PUC is under an "obligation to fix a rate of return which will meet the constitutional standards not only at the time the order is made but for a reasonable period of time thereafter." New England Tel. & Tel. Co. v. State, 113 N.H. 92, 96, 302 A.2d 814, 817 (1973). Delays in the regulatory process might result in a utility being forced to provide services to the public at rates which are inadequate for it to realize a reasonable rate of return, thereby raising the possibility that the rates being charged during the delay would result in an unconstitutional confiscation from the utility. Appeal of Pennichuck Water Works, 120 N.H. 562, 566-567, citing Public Service Co. v. State, 102 N.H. 66, 150 A.2d 810 (1959). It is also true that public utilities have a right not to be forced to accept rates that are so low as to be confiscatory ***without the ability to later recoup the rate differential that was lost due to the regulatory delay***. Id. at 567, citing Oklahoma Gas Co. v. Russel, 261 U.S. 290, 293, 43 S.Ct. 353, 354 (1922).

The Company identified and targeted this issue in three separate dockets prior to this current proceeding over the last five years (Exh. 1, at Bates 0050-0069; Tr. at 134; 160-162). Within those five years, the Company was operating under the faulty tariff, NHPUC No. 10, for two of those years and consequently experienced financial harm totaling $4 million, which, as compared to calendar year 2022, is 14 percent of its overall revenue (Tr. at 159). The Company has put forth considerable evidence showing the calculation of the tariff and the unintended consequences of its application in practice due to the latent ambiguity in the language and the intent. Therefore, the Company should not be penalized for the lapse in time due to regulatory

delay in remedying this issue and the Commission should approve the recovery of the $4 million in revenues lost as a result.

IV. Base Rates and RLIAP

A. Background

On April 20, 2023, the DOE submitted testimony claiming that Liberty over-collected $2,152,105 in base rates from July 1, 2017, to October 31, 2018 (the 16 months prior to the first decoupling year) (DOE Testimony at Bates 000008). DOE asserts that the Company incorrectly accounted for Rate R-4 discounts in its revenue requirement calculation.

B. Argument

1. Liberty's Base Rates Were Correctly Calculated and Set in Docket No. DG 17-048.

DOE incorrectly characterizes the calculation and implementation of the Company's base rates. The final decision in Docket No. DG 17-048 resulted in a permanent base rate increase of $8,060,117 effective May 1, 2018 (Exh. 5, at Bates 015, citing Order No. 26,122 at 55 (Apr. 27, 2018)). This base rate increase did not cover the cost associated with providing the low-income discount to customers (id.). As noted above, the Company recovers the cost of providing the low-income discount separately through the RLIAP component of the LDAC, which is not part of base distribution rates (id.). Furthermore, it would be inappropriate to have included the R-4 low-income discount in the base-rate revenue deficiency (id.). The Company has never included recovery of the R-4 low-income discount as part of its base rate revenue requirement, nor does DOE make any attempt to make such a demonstration (id.). Instead, the Company has always recovered the low-income discount through a reconciling mechanism outside of base rates (id.).

More specifically, the Company does not recover the full cost of serving low-income customers through base rates because these customers are extended a discounted base rate (Exh. 5, at Bates 016). The difference between the amount the Company recovers in base rates from low-income customers and the discount amount is collected through the RLIAP factor, which operates outside of base rates. The permanent base rate increase of $8,060,117 in Docket No. DG

17-048 did not recover the low-income discount extended to customers (id.). DOE claims, "the revenue requirement calculation, thus, compensated Liberty for the R-4 discount" (Exh. 4, at Bates 000014). If the Company added the RLIAP discount to actual revenues, then the Company would have recovered the RLIAP discount twice, once through a distribution rate increase and second through LDAC rates (Exh. 5, at Bates 016). This did not occur, nor has DOE offered any valid evidence showing that outcome to have occurred (id.). There was also a step rate adjustment incorporated into base rates, which was a further revenue adjustment allowance for base rate revenue requirements and approved by the Commission. Order No. 26,122 at 55 (Exh. 5, at Bates 017). The change in base rates for the step adjustment did not alter the relationship between base rates and the LDAC (or the embedded RLIAP) (id.).

Lastly, DOE has not accurately characterized how the Company uses the revenue requirement to establish rates for rate design purposes (Exh. 5, at Bates 018). DOE referenced Liberty's rate design model, RATES-5, and claimed that the R-4 discount of $1,614,079 is added a second time (id.). As described in Attachment 8 to the DOE testimony, at Bates 000423-000424, rates are set in three steps (id.). First, the "cost of service" is determined through a review of the Company's proposed revenue requirement and the proposed revenue requirement reflects the total (representative) cost of serving all customers (id.; Tr. at 93). ***The rate that a low-income customer will actually pay is irrelevant to this first step*** (id., emphasis added). The revenue requirement is the amount of total expenses, plus the return the Company needs to collect to effectively serve its customers (Tr. at 94).

The second step is to apply the allocated cost of service study ("ACOSS"), which computes the proportional cost responsibility of each customer class, with all customers included in one customer class or another (Exh. 5, at Bates 018). In this step, 100 percent of the cost to serve low-income customers (and all other customers) are accurately reflected in the revenue requirement and the ACOSS because the purpose of the study is to figure out how the approved revenue requirement should be divvied up across all customer classes, in accordance with cost causation principles (id.). Again, ***the rate that a low-income customer will actually pay is irrelevant to this second step*** (id., emphasis added).

In the third step, tariffed rates are then designed to recover the revenue requirement in accordance with the cost-causation principles per the ACOSS (id.). For low-income customers, the tariffed rate will be calculated as the residential rate that recovers 100 percent of their proportional responsibility for the approved revenue requirement, discounted by the amount of the low-income discount (id. at Bates 018-019; Tr. At 105). In this step, and only in this third step, the Company incorporates RLIAP revenues into the revenue calculation so that discounted tariffed distribution rates plus the RLIAP revenues will produce recovery of 100 percent of the allowed revenue requirement for the R-4 customers, all else remaining equal (Exh. 5, at Bates 019). As part of that rate design process, the new RLIAP revenue amount is calculated and removed from the determination of base distribution rates, and the Company recovers 100 percent of the RLIAP amount through the RLIAP factor of the LDAC (id.; Tr. at 105). DOE's analysis reflects a misunderstanding of this ratemaking process.

2. Temporary Base Rates Were Appropriately Reconciled in the Establishment of Permanent Base Rates in Docket No. 17-048.

In Docket No. DG 17-048, the Commission established temporary rates pursuant to a settlement agreement. The Temporary Rates Settlement Agreement allowed the Company to recover an annual distribution service increase of $6,750,000 effective for service rendered July 1, 2017[7] (Exh. 5, at Bates 014). The Company implemented the agreed-upon increase to base rates through an across-the-board increase of 9.56 percent to all firm classes, including Rate R-3 and R-4 (id.). Liberty did not change its rate design or rate recovery mechanisms during Docket No. DG 17-048 and therefore base rates continued to recover base rate revenues while the LDAC recovered reconciled rate revenues, including the RLIAP (id. at Bates 015).

Liberty correctly reconciled the temporary rates pursuant to RSA 378:29 in the establishment of permanent rates (Exh. 5, at Bates 017). The recoupment period for the reconciliation of permanent and temporary rates was only 10 months, not 16 months as DOE has testified, because the implementation of temporary rates was July 1, 2017, and the implementation

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[7] "Settlement Agreement Regarding Temporary Rates," Docket No. DG 17-048, June 2, 2017, Exhibit 2.

of permanent rates was May 1, 2018 (id. at Bates 017, 014). The Commission and parties to the proceeding reviewed the recoupment amount in Docket No. DG 17-048 and it was modified extensively during the hearing process and during the subsequent six-month rehearing process (id. at Bates 017). The recoupment amount was complicated by factors such as income tax rate reductions due to the intervening Tax Cuts and Jobs Act of 2017, and revisions to other first-time adjustments such as the introduction of a year-end customer count adjustment (id.). As a result of those complicating factors, the recoupment amount was heavily scrutinized by the participants in Docket No. DG 17-048, including, Commission Staff; was supported by the parties; and was approved by the Commission (id.).[8]

V. Conclusion

The Company respectfully requests that the Commission allow the recovery of the revenue under-collection of $4,023,830 associated with the application of the RDM tariff provisions in 2018-2019 and 2019-2020. The Company further requests the Commission reject DOE's claims that the Company over-collected $2 million through its base rate proceeding in Docket No. DG 17-048, as these claims are meritless.

[8] Citing, Order No. 26,149 (June 22, 2018) (granting rehearing); Order No. 26,156 (July 10, 2018) (granting request for clarification); and Order No. 26,187 (Nov. 2, 2018) ("resolv[ing] all pending issues raised on rehearing")).

Respectfully submitted,

Liberty Utilities (EnergyNorth Natural Gas) Corp.
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By its Attorneys,

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Certificate of Service

I hereby certify that on July 27, 2023, a copy of this initial brief has been electronically forwarded to the service list in this docket.

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