THE STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITES COMMISSION

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

Petition to Recover Revenue Decoupling Adjustment Factor Costs

Docket No. DG 22-041

NEW HAMPSHIRE DEPARTMENT OF ENERGY'S INTIAL BRIEF

The New Hampshire Department of Energy ("DOE" or "Department") files its initial brief in opposition to Liberty's petition to recover $4 million passed back to customers through the revenue decoupling adjustment factor (RDAF) Year 1 (November, 1, 2018 to August 31, 2019) and RDAF Year 2 (September 1, 2019 to August 31, 2020).

I. INTRODUCTION

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty ("Liberty" or "the Company") seeks to recover approximately $2 million per year over the next 2 years to re-collect funds Liberty passed back to its customers through its Local Distribution Adjustment Clause (LDAC) RDAF component. The Company now believes it should not have. Liberty now maintains that Tariff 10, which it proposed to the Public Utilities Commission ("PUC" or "Commission") for approval, which the Commission subsequently approved, and which Liberty implemented in 2018, contained a formula flaw causing it to pass back funds to its customers via its RDAF. Liberty further claims that the flaw is contrary to the purpose of that tariff provision, and therefore the formula need not be observed. Liberty has the burden of proof. NH Admin Code Admin Rule Puc 203.05.

The Department opposes Liberty's requested relief. As discussed in further detail below, Liberty has failed to meet its burden of proof for several reasons. First, Liberty has not suffered

harm. The Department showed that in the context of Docket DG 17-048 (the distribution rate case where decoupling was introduced) Liberty's passing back of $4 million did not disadvantage Liberty because of manner in which the base distribution rate increase was designed in that rate case. Since Liberty was not harmed, it is not entitled to relief. Second, due to the staggered timing of the base distribution rate increase and the implementation of decoupling and the RDAF pass back, prior to the implementation of RDAF, Liberty's customers were disadvantaged in overpayment in the amount of $2.1 million (as estimated by the Department).

The Department also demonstrated through written testimony and analysis, and at the hearing held June 22, 2023, that Liberty's tariff formula was plain on its face and was applied precisely as it was written to pass back the $4 million at issue to customers. Applying the tariff formula is consistent with the periodicity in the tariff, and relevant RSAs. Third, even assuming for the sake of argument that the Commission finds that Tariff 10's formula is ambiguous, Liberty's attempt to effectively charge customers an increased rate for gas consumed years ago constitutes impermissible retroactive ratemaking. Finally, Liberty's request for relief should be denied for equity reasons, including Liberty's own failure to act promptly to prospectively address any alleged error, or otherwise "carve out" the issue.

II. ANALYSIS

A. Based on Economic, Accounting and Ratemaking Policy, Passing Back $4 million through the RDAF in 2018 and 2019 did not Disadvantage Liberty.

Liberty's case is premised on the notion that its Tariff 10 (which implemented decoupling and the RDAF in DG 17-048) contained an inadvertent "mismatch" between decoupling target revenues and decoupling actual revenues as those amounts pertain to Liberty's typical residential

customers (who take service under Rate R-3) and its residential low income customers, who receive a base rate discount through the Residential Low Income Assistance Program (RLIAP) program and take service under Rate R-4.

Tariff 10 is unambiguous in that the target and actual revenues are calculated on a different basis from each other; they do not "match."[1] *Compare* Tariff 10 Exh. 4, Bates 67 (Section 17 (D)(4)(i) - Benchmark Revenue per Customer is calculated for each Customer Class) *with* Tariff 10 Exh. 4 Bates 69 (Section 17(D)(5)(b) - ART-1 - for purposes of calculating the Actual Base Revenue, base revenues for Low Income rate class R-4, shall be determined based on non-discounted rate R-3). Under these tariff definitions and terms, actual revenue will very likely be higher than benchmark revenue and a decoupling pass back will result. The Department demonstrated that this mismatch was appropriate for RDAF Year 1 and RDAF Year 2 because both the RLIAP clause in Liberty's LDAC and the base distribution approved in Docket No. DG 17-048 compensated Liberty for the discount provided to low-income customers. That is Liberty was compensated twice, and therefore appropriately refunded the duplicate amount through the RDAF.

1. RLIAP/GAP Revenues through the LDAC

Liberty collects revenue to offset the R-4 discount through the RLIAP component in its LDAC. *See* Tariff 10, Third Revised Page 97 Exh.4 at 132 (where the Low-Income Discount is noted as "Gas Assistance Program (GAP) and is included in all the LDAC rates developed on this Tariff Page 97). *See* Dkt. DG 20-013 (where RLIAP became the GAP program)

[1] The Department uses the phrase "mismatch" for consistency with Liberty. However, the Department uses "mismatch" without any inference of error.

2. Distribution Revenues and Rates from DG 17-048

The Department demonstrated clearly that Liberty's revenue deficiency calculation in Docket DG 17-048 included all the costs to serve typical residential customers (R-3) and low-income residential customers (R-4)) and did not include the RLIAP/LDAC revenue collected by Liberty. Exh. 4, at 200, 202 (showing all costs to all customers serve being included in the revenue deficiency calculation of $13,036,958 while the revenues from RLIAP were removed from the calculation as negative gas costs on line 7); Transcript (TR.). at 179-183. These LDAC/RLIAP revenues were specifically added to the revenue targets used by Liberty when developing the final rates approved in Docket DG 17-048 on its spreadsheet titled Rates 5. Exh 4, at 186, line 42, at 327, line 42, and at 376, line 42. This treatment results in Liberty having been fully compensated in the distribution rates set in DG 17-048 for the discount it provided to low income customers.

3. Liberty Was Not Disadvantaged When It Passed Back $4 Million to Customers

In the context of Docket No. DG 17-048, the Company was compensated twice for the R-4 discount (once through the LDAC and once through base rates). Accordingly, when the decoupling tariff went into effect in October 2018, after the final rates were established in Docket No. DG 17-048, it did not disadvantage Liberty that the decoupling tariff worked to pass back the R-4 discount to Liberty's customers by incorporating different calculations of target revenues and actual revenues (*i.e.,* the "mismatch"). From a ratemaking perspective, there is no need for the Commission to grant Liberty's requested relief.

4. Liberty's Customers Were Disadvantaged By the Base Rates Set in DG-17-048 Prior to RDAF Implementation

In the course of examining Docket No. DG 17-048, the Department observed a timing difference between the effective dates of the various treatments of the RLIAP/GAP revenues and concluded that the timing difference worked to the disadvantage of Liberty's customers. As indicated above, the base distribution rates established in DG 17-048 compensated Liberty for the R-4 discount (as did the RLIAP/GAP component of the LDAC). The distribution rates approved in Docket DG 17-048 were as a practical economic matter in place as of July 1, 2017, which is the effective date of the temporary rates approved in that case. This is because of RSA 378:29's recoupment provision allows a utility to recoup the difference between what temporary rates collected and what permanent rates would have collected had they been in effect during the period when temporary rates were effective (in this case, July 1, 2017). Further, the RLIAP/GAP LDAC provision whereby the Company recovers the R-4 discount from all customers was effective on an ongoing basis (i.e., before and after DG 17-048).

As discussed, the decoupling "mismatch" which advantaged customers by passing back funds to Liberty's customers through the RDAF, effectively offsetting this double recovery, did not become effective until November 1, 2018. Tariff 10, Exh. 4 Bates 11. Therefore, for the sixteen months from July 1, 2017 through October 31, 2018, Liberty was double compensated for the RLIAP discount. DOE estimates the amount of that double recovery to be $2.1 million. *Id.* at 21-22; Deen & Thompson Testimony at 22, line 18. From an economic/ratemaking perspective, Liberty's customers were disadvantaged by that amount and this disadvantage could be cured by a rate refund. Nonetheless, while a refund is economically appropriate, it is inconsistent with the plain text of RSA 365:29, and therefore DOE does not recommend a refund of this $2.1 million.

B. Tariff Requirements, Periodicity, Prudence Attached to Annual Over/Under Calculations in Commission Order, Relevant Statutes

The section provides an overview of key tariff definitions and LDAC component periodicity, statutes that address reparations and retroactive ratemaking, and summarizes the operation of the cost of gas mechanism and the prudence of under/over calculations. These fundamentals support the Department's position that Tariff 10's RDAF formula is clear and should be enforced as written and resulting in no $4 million recovery for Liberty. Similarly, these fundamentals support the Department's position that Liberty's requested $4 million recovery constitutes retroactive ratemaking and should be denied. Further, in the opinion of the Department, equity arguments support leaving the $4 million passback from 2018-2020 to customers in place.

In a nutshell, Liberty's refund to customers of the $2 million Liberty now associates with R-4 "error" during the November 1, 2018 through October 31, 2019 period was reconciled and found prudent, and thus included in per-therm rates in COG Order No. 26,305, effective November 1, 2019. Prudence findings, including the finding that the core over/under LDAC formulas resulted in specific figures, became final as a matter of law on December 1, 2019. *See* Order No. 26,480 (May 14, 2021) at 18-20. The same review and prudence finding applied to the second RDAF year as well. *See* COG Order No 26,419, effective November 1, 2020. "carved out" by the Commission for further review.

Controlling tariff language requires that reconciliations be made annually for twelve-month periods (or shorter for initial periods). *In re Verizon New England Inc.*, 158 N.H. 693, 695 (2009) (tariffs have the force and effect of law). Tariff 10 is clear that the purpose of reconciling clauses is to reconcile and bring up to date revenue collections from the prior period, i.e., the prior twelve-months. Tariff language permits interim LDAC revisions, with the review and the

approval of the Commission, "to minimize the magnitude of **future** reconciliation adjustments. *See* Tariff 10, Exhibit 4 at 073 Second Revised Page 41 (emphasis added), Second Revised Page 32, First Revised Page 33 (LDAC); Fourth Revised Page 34, Second Revised page 35; Third Revised Page 36 (RDAF); First Revised Page 40; Sixth Revised Page 48 (RLIAP/GAP).

Periodicity of relevant LDAC components and LDAC reconciliation and recovery periods is illustrated in the following table:

DOE Table --Periodicity of RDAF and RLIAP Components in Tariff 10

LDAC Component	Cost Review Period	Rate Reconciliation Period	LDAC Recovery Period	Core Under/Over Final as Matter of Law
RDAF Year 1	11.1.18 to 8.31.19	11.1.18 to 10.31.19	11.1.19 to 10.31.20	Dec. 1 2019
RDAF Year 2	09.1.19 to 8.31.20	11.1.19 to 10.31.20	11.1.20 to 10.31.21	Dec. 1 2020
RLIAP Year 1 (now GAP)	11.1.18 to 10.31.19	11.1.18 to 10.31.19	11.1.19 to 10.31.20	Dec. 1 2019
RLIAP Year 2 (now GAP)[2]	11.1.19 to 10.31.20	11.1.19 to 10.31.20	11.1.20 to 10.31.21	Dec 1. 2020

The General Court permits reparations to customers for public utilities' "illegal or unjustly discriminatory rate, fare, charge, or price demanded," but only for a period of two years. RSA 365:29, :3, :4. The General Court authorizes utilities to make what it terms a "reduction in retroactive rates" but only if payment "has not been made" and the result will not be discriminatory. RSA 378:4. When a utility has been granted the relief it seeks by the

[2] The RLIAP benefit in place through October 31, 2020 provided a year-round 60% discount on distribution rates to R-4 customers. The revised and renamed GAP benefit effective November 1, 2020 provided a 45% discount on both supply and distribution for Winter Period only). *See* Docket No. 20-031, Order No. 26,397 (August 27, 2020).

Commission in initial dockets, as here, the General Court has not authorized retroactive recovery for public utilities.

The General Court has not provided a method whereby a utility, granted the relief it requests from the Commission for rates, or formulas, or anything else, is entitled to seek to recover funds retroactively, i.e., increase rates, based upon the utility's own mistake, error, or ill-advised business risk once customers have already paid, as is the case in the instant docket. There is a statute that permits utilities to pass what are termed "retroactive" rates to reduce customer costs in certain circumstances. RSA 378:4 states "Retroactive Reduction. The commission may approve a general retroactive **reduction** in rates by any public utility, covering service **for which payment has not been made**, when **no discrimination** will be caused thereby." (Emphasis added). This statute supports the policy of holding a utility responsible for all aspects of the relief it requests, including the normal risks all businesses face. RSA 378:4, in effect since 1917, is silent with regard to retroactive increases in rates.

C. Tariff No. 10's RDAF Formula is Not Ambiguous and Should Be Enforced as Written

Tariffs memorialize the terms between utilities and customers for the manner, framework and method whereby public utility services will be provided to the customer and the rate and manner in which customers will pay those charges. As such, a tariff is a contract. As the New Hampshire Supreme Court has explained however:

> the vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC, do not simply define the terms of the contractual relationship between a utility and its customers. They have the force and effect of law and bind both the utility and its customers. Because a tariff has the same force and effect as a statute, [the Court] interpret[s] a tariff in the same manner that [It] interpret[s] a statute.

In re Verizon New England Inc., 158 N.H. 693, 695 (2009) (citations omitted). The principles of statutory construction are well-established. As recently explained by the New Hampshire Supreme Court, when interpreting a statute:

> . . . [The Court] look[s] first to the language of the statute itself, and, if possible, construe[s] the language according to its plain and ordinary meaning. [The Court] give[s] effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [The Court] also construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. [The Court] do[es] not construe statutes in isolation; instead, [the Court] attempt[s] to construe them in harmony with the overall statutory scheme.

See In Re Guardianship of C.R., 174 N.H. 804, 807 (January 2022) (citations omitted).

Further, the NH Supreme Court has explained that even when clear tariff language appears to be inconsistent with rules or underlying orders, clear and unambiguous tariff language will be enforced. The Court noted "if a tariff should be amended, it should be amended as a result of regulatory process and not by a decision of [the adjudicator]. *Verizon New England Inc*. 158 N.H. at 699. In this docket, Liberty has the burden of proof to show, by a preponderance of the evidence, and despite its past conduct, the RDAF formula in Tariff No. 10 is ambiguous on its face. *See* NH Admin Code Admin Rule Puc 203.05.

Turning to the present matter, the RDAF formula at issue in Tariff No. 10 has been subject to repeated scrutiny. *See* Deen & Thompson Testimony Bates 006-007; June 22, 2023 Transcript 172-73 and 216-218 (Deen & Thompson explained why tariff language is clear and unambiguous); Docket No. DG 19-145, Hearing Exhibit 5 (Pre-filed testimony of PUC Staff Analyst Al Azad Iqbal). The formula itself is in no way confusing, it states: "For purposes of calculating the Actual Base Revenue, base revenues for Low Income rate class R-4, shall be

determined based on non-discounted Rate 3." Liberty's attempt to re-write its own formula is inappropriate.

In Liberty's Winter 2019-2020 Summer 2020 Cost of Gas proceeding, Liberty explicitly identified and applied the plain meaning of Tariff No. 10's RDAF formula that is (again) at issue in this docket. *See* Dkt. No. DG 19-145 October 11, 2019 Transcript at 26-29 (David Simek). Liberty explained updates to its filing as follows:

> The Company's initial filing included **two different scenarios** for the [RDAF]. **One scenario calculated actual revenues based on the calculation in the tariff,** which calculated residential low income customer revenues using non-low income residential rates. The other scenario calculated actual revenues based on non-low income residential rates . . . . During discussions with Staff, Mr. Iqbal . . . stated that the calculation in the tariff was essentially correct. . . because of how the Residential Loa Income Assistance Program is handled within the [LDAC]. [Liberty incorporated those changes and] ..**for the remainder of the calculation within the tariff, that we continue calculating it just as it states**...."

Id. (Emphasis added). At the conclusion of the hearing in Docket No. 19-145, Liberty asked the Commission to accept and approve its revised updated schedules, including Liberty's application of the plain meaning of Tariff No. 10's RDAF formula, "as filed, both the cost of gas rate and the associated changes." DG 19-145 October 11, 2019 Transcript at 85. The Commission should find that Liberty's testimony and request for relief in DG 19-145 weigh significantly against finding the very same tariff language ambiguous for the purpose of reclaiming RDAF funds here. Consistent with the New Hampshire Supreme Court's emphasis on applying the plain meaning of tariff provisions, the Commission should uphold the plain meaning of Tariff No. 10's RDAF provision. *See Verizon New England Inc.,* 158 N.H. at 699

D. Liberty's Claim to Recover $4 million Constitutes Retroactive Ratemaking

Consistent with Tariff No 10's definitions and framework, and RSAs regarding reparations and retroactive ratemaking, the purpose of reconciling clauses is to reconcile and bring up to date revenue collections from the prior period, i.e., the prior twelve-months. Even assuming for the sake of argument that the Commission concludes that the RDAF formula in Tariff No. 10 is ambiguous and/or otherwise contains a clear error , and therefore concludes that the RDAF formula returning approximately $2.1 million to customers in the cost of gas (COG) Docket No. DG 19-135 via Order No. 26,206 (October 31, 2019) and again in the subsequent COG Docket No. DG 20-141, via Order 26,419 (October 30, 2020) was an error, allowing Liberty to correct its own business error, twenty-one and nine[3] months after the over/under calculations became final as a matter of law constitutes unconstitutional and impermissible retroactive rate making. Liberty has the burden of proof to show, by a preponderance of the evidence that the recovery it now seeks does not constitute impermissible retroactive ratemaking. *See* NH Admin Code Admin Rule Puc 203.05.

Part 1, Article 23 of New Hampshire's State Constitution states "retrospective laws are highly injurious and unjust. No such laws, therefor, should be made, either for the decision of civil causes or the punishment of offenses." In applying the provision to public utilities rates, the New Hampshire Supreme Court held that:

> [C]ustomers of a utility have a **right to rely on the rates in effect at the time that they consume the services provided by the utility**, at least until such time as it applies for a change. Once customers consume a unit of those services, they are legally obligated to pay for it and in that sense the transaction has been completed and the charges are set in accordance with the rates then in effect and on file with the PUC or with rates later approved by the PUC based

[3] Months between Dec 1 2019 and Sept 1, 2021/ Dec 1, 2020 and Sept 1, 2021 respectively. *See* DOE Periodicity Table, above.

> on a pending request for a change. **If the PUC were to allow a rate increase to take effect applicable to services rendered at any time prior to the date the petition for the rate increase was filed, it would be retroactively altering the law and the established contractual agreement between the parties.** In essence, it would be creating a new obligation in respect to a past transaction, in violation of part 1, article 23 of our State Constitution and, due to the retroactive application, would also raise serious questions under the Contract Clause of the Federal Constitution.

Appeal of Pennichuck Water Works, 120 N.H. 562, 566 (1980) (emphasis added). The Court added:

> Moreover, it is a basic legal principle that **a rate is made to operate in the future and cannot be made to apply retroactively**.

Id. The Court continued:

> [The utility] and amici curiae both raise the argument that the failure of the PUC to grant retroactive rate increases, such as those proposed here, result in public utilities being **forced to service the public at rates that are confiscatory and therefore unconstitutional**. Under the procedure that is set forth in this opinion and the order of the PUC that is presently before us, such an argument is without merit. **Our decision today merely requires that public utilities, like other businesses, monitor their costs of doing business and employ sound business judgment in determining when they seek a rate increase for future services. We see no constitutional requirement that mandates the PUC to correct, retrospectively, errors in judgment made by the utility.**

Id. at 567 (Emphasis added); *see Boston Edison Company v. FERC,* 611 F 2d 8, 9-10 (1979) ("once the customer pays the over/under amount as determined by the filed formula no more is owed regardless of whether the utility has in fact recovered its actual costs." As between the customer and utility, it is the utility which should bear the risk of any under recovery stemming from the utility's choice of fuel adjustment clause. The burden is on the utility to design and file a fuel clause. "It is not the purpose of a fuel adjustment clause to relieve utilities of all the risks of doing business").

The application of the *Pennichuck Water Works* analysis to this case is straight-forward. Liberty alleges that it made an "error" which was memorialized in Tariff 10's RDAF formula, and which resulted in refunding $4 million to customer years ago, and now asks the Commission to allow it to increase rates to "correct" its error. Assuming current customers are identical to 2017-2019 customers, this would retroactively increase rates in a manner that is impermissible. To the extent Liberty asserts it under-recovered in 2017- 2019, its revenue requirements were addressed in its next rate case, Docket No. DG 20-105.

Liberty seeks to distinguish the New Hampshire Supreme Court's prohibition on retroactive rate making by asserting that the prohibition only extends to distribution rates, or base rates, and that the Court did not consider reconciling mechanisms. *See* Dkt. No DG 21-130 Liberty's Motion in Limine at 3-4. While the *Pennichuck Water Works* Court did not explicitly identify reconciling mechanisms, there is no reason to conclude the holding is inapplicable to reconciling clauses. Moreover, historically, cost of gas calculations were a standard part of gas companies' permanent rate proceedings. *See* Order No. 26,480 at 16-18 (forward looking semi-annual COG mechanisms "preferred because, *inter alia*, it provided a reconciliation of estimated and actual gas costs and usage data and identified excessive over or under collections during the semi-annual period"). Liberty seeks to retroactively increase rates for gas consumed years ago and through use of the word "recover" essentially pretends that the $4 million "recovery" is something else.

Liberty itself provides no New Hampshire authority for the Company's assertion that "[r]etroactive ratemaking does not occur where a reconciling mechanism is collecting or refunding revenues to customers by its normal operation, pursuant to approved tariffs and regulations and without change in the underlying costs recovered through base rates." Dkt No.

DG 21-130 Liberty Obj. to Mot. in Limine at 3-4. Neither Liberty's tariff nor New Hampshire statutes permits it to make retroactive adjustments to increase charges outside the 12-month window. *See* Liberty's Obj. to Mot. in Limine at 5, para 8 (describing a reconciling process circumscribed by the twelve-month period and a finite calculation).

Liberty seems to assert that but for "an error" the Company *could* have collected the $4 million in the past, and therefore it has an on-going right to do so. The prohibition on retroactive ratemaking is not based on whether, absent alleged error, the Company "could have" collected the rate during a prior time period. The focus on retroactive ratemaking is the customer's "right to rely on the rates in effect at the time they consumed the services from the utility" and the utility's obligation to accept the consequence of its own business risks and errors. *See Pennichuck Water Works*, 120 N.H. at 566-67. Liberty's argument that the prohibition on retroactive ratemaking does not apply where reconciling clauses are intended to be "revenue neutral" has the same flaws – there is no exception in Tariff No. 10 to permit retroactive reconciliation for an unlimited period of time to achieve "revenue neutrality." Similarly, the focus must be on the customer's right to rely on the rates in effect at the time they consumed the services, not "revenue neutrality." *See* Liberty Obj. Mot. Limine at 12.

Liberty further argues that the prohibition on retroactive ratemaking "arose from the filed rate doctrine." Id at 12-14. Liberty asserts that doctrine "prohibits utilities from charging rates for its services other than those approved and filed with the Commission." Id. The prohibition on retroactive ratemaking arises from the State and Federal Constitution's prohibition on retroactive alteration of contractual relationships between the utility and its customers. *See Appeal of Pennichuck Water Works* at 566-67. However, Liberty's own reconciling components are described in detail in its tariff and the schedules Liberty files in cost of gas dockets identify

the over/under collections sought for each LDAC components in dollars and cents. There is also a defined point of finality wherein the over/under collections are found prudent, and subsequently "final as a matter of law." *See* Department Table, above. The "filed rate doctrine" thus applies to reconciling clauses and base rates alike.

Finally, Liberty relies upon a Massachusetts case, *Re Fitchburg Gas & Elec. Light Co*., 2001 WL 1131828 (2001) (affirmed 440 Mass. 625, 637 (2004) (hereinafter "*Fitchburg Gas*"). That case is readily distinguishable. In the first instance, *Fitchburg Gas* authorized the return of $675,000 to customers that the utility had inadvertently collected between 1988 and 1997 as a result of double-booking certain costs in both base rates and its cost of gas adjustment clause (CGAC), in error. *See Fitchberg Gas* (Mass D.T.E) 2001 WL 1131828 (2001) at 11, affirmed 440 Mass.637. Here, Liberty seeks a $4 million recovery, to compensate itself for its own error, to customers' detriment. The policy concerns underlying the *Fitchburg Gas* decision to return funds to customers due to long-standing utility error do not equally support an order upholding Liberty's right to compensate itself for its own error in this docket. Neither did *Fitchburg Gas* have reason to consider RSA 365:29's two-year limitation on customer reparations.

Significantly the Massachusetts Supreme Judicial Court explained:

> Retroactivity is inherent in the very nature of a CGAC. Unlike the base rate, which is a calculation of the rates going forward based on historical data, the CGAC adjusts semi-annually for utility costs as they have actually 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 Sec 94.** But the dollars and cents amount inserted into the flow-through formula is presumptively not fixed.

Fitchberg Gas, 440 Mass at 638 (Emphasis added). Liberty's request for a $4 million payment from customers is based upon Liberty's allegation that the RDAF formula was 'in error." Thus, Liberty seeks to alter what the Massachusetts Supreme Judicial Court states is a "fixed 'rate' that

cannot be changed outside the hearing procedures mandated by G.L. c.164 Sec 94." Just as the New Hampshire Supreme Court concluded in *Verizon New England Inc.,* the Massachusetts Court concluded that if a tariff formula should be amended, it should be amended as a result of regulatory process and not by a decision of the adjudicator. Consistent with the *Fitchburg Gas* analysis, Liberty's request to alter the Tariff 10 formula based on "error" must be denied. *See also Appeal of Pennichuck Water Works* 120 N.H. at 566-67 ("tariffs have the force and effect of law and bind both the utility and its customers").

E. Additional Equity Considerations

Even if the Commission were to agree that Liberty was unjustly disadvantaged by the operation if its decoupling mechanism in 2018 and 2019, recovery now (irrespective of its legality) is ill advised. First, the customers that received the decoupling pass backs is 2018 and 2019 are almost certainly not the same customers who would pay the $4 million if Liberty's request is granted. Second, if Liberty had retained the $4 million in 2018 and 2019 as it claims it should have, no one knows whether Liberty might have delayed DG 20-105 (its 2020 gas distribution rate case) for a year or more, with an unknowable impact on the outcome of the rate case. That case resulted in an $8.0 million increase effectively as of August 1, 2020, due to the recoupment provisions of RSA 378:29.

Further, Liberty had a range of options available to it to address its concerns in a more timely manner which it did not pursue, including timely appeal. Accordingly, recovery should be denied based on the equitable doctrine of laches. *See* Dkt. No. DG 21-130 Testimony of Simek and McNamara (Sept. 1, 2021) Bates 015 line 8-10 (Liberty wishes to correct passback).[4]

[4] The Department rejects Liberty's assertion in the Simek/McNamara testimony that Liberty's requested "correction" was approved in Docket DG 20-105 Settlement Agreement.

Boston Edison Company v. FERC, 611 F 2d 8, 10 (1979) (As between the customer and utility, the burden is on the utility to design and file a fuel clause).

Liberty seems to be describing its own decoupling framework as a collaborative project in which Liberty, the OCA and then PUC Staff Analysts were unintentionally confused. Liberty's strategy distorts the regulatory framework. Liberty's obligation to its customers and shareholders is to present fully vetted and reviewed models, and tariff pages, before they are recommended to the Commission. While the Department of Energy employs talented professionals, those professionals are not charged with insulating Liberty from errors.

F. Tariff Excerpts, Prudence of Under/Over Calculation

1. Tariff excerpts

Liberty's request for relief does not account for relevant and controlling Tariff 10 language. As stated in Tariff No. 10:

> [T]he purpose of the Local Distribution Adjustment Clause ("**LDAC**" or this "Clause") is to establish procedures that allow the Company, subject to the jurisdiction of the NHPUC, **to adjust, on an annual basis**, its delivery charges in order **to recover** . . . Revenue Decoupling Adjustment Factor ("RDAF") . . . . Residential Low Income Assistance Program costs ("RLIAP") and any other expenses the NHPUC may approve from time to time.
>
> Effective Date of [LDAC]: The LDAC shall be **filed annually** and become effective on November 1, of each year pursuant to NHPUC approval. In order to minimize the magnitude **of future reconciliation adjustments**, the Company may request interim revisions to the LDAC rates, subject to review and approval of the NHPUC.

Exh. 4 at 064-65, 073, i.e., Tariff 10, Second Revised Page 32, First Revised Page 33; Second Revised Page 41. (Emphasis added; title underlined in original).

As stated in Tariff 10, the purpose of the **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 Actual Base Revenue per Customer with Benchmark Base Revenue per Customer. The Company's RDAF eliminates the link between volumetric sales and Company revenue in order to align the interest of the Company and customers with respect to changing customer usage. . . . The first Decoupling Year shall be the 10-month period from November 1, 2018 to August 31, 2019. Each subsequent **Decoupling Year** shall be the twelve months commencing September 1 through August 31. . . . The **Billing Year** is the 12-months commencing November 1 immediately following the completion of the Decoupling Year.. . . . . At the conclusion of each Decoupling Year, the Company **shall calculate** a Decoupling Revenue Adjustment to be used to determine the RDAF **for the next** Billing Year, effective November 1.

See Exh. 4 at 066, 067, 066, 068, i.e., respectively Tariff No. 10 Fourth Revised Page 34, Second Revised Page 35, Fourth Revised Page 34, Third Revised Page 36.

As stated in Tariff 10, the purpose of this RLIAP provision is:

> to establish a procedure that allows the Company, subject to the jurisdiction of the NHPUC, **to recover the revenue shortfall (costs)** associated with customers participating in the Residential Low Income Assistance Program ("RLIAP"). Such costs, as well as, associated administrative and marketing costs shall be recovered by applying an RLIAP rate to all firm sales and transportation service throughput. . . . . The RLIAP rate shall be filed with the Company's Winter season Cost of Gas Clause filing and **shall be determined annually** by the Company and be subject to review and approval of the Commission. . . . The "Gas Assistance program Residential Heating Rate. . . [is] Classification No. R-4.

Exhibit 4 at 072, 082 Tariff 10 First Revised Page 40, Sixth Revised Page 48.

As described in Tariff No. 10's definition of LDAC and LDAC components, Liberty's tariff authorizes annual reconciliation, that accounts for the twelve-month period are made consistent with one another, as a foundation for the next projected year's rates. Further, in order to minimize the magnitude of "future reconciliation adjustment," Tariff No. 10 authorizes the Company to request "interim" LDAC adjustments, subject to the review and approval of the Commission. *See* Exh. 4 at 073, 064, 063, i.e., Tariff No. 10, Second Revised Page 41, Second

Revised Page 32 and First Revised Page 31. No mention is made in the tariff of any retroactive reconciliation(s), and thus the tariff does not authorize them.

2. <u>Prudence of Under/Over Calculation</u>

The cost of gas (COG) mechanism includes both "pass through" supply per therm costs and broader, systemic LDAC costs. However, the mere intent of cost neutrality does not insulate reconciling clauses from scrutiny. Further, each reconciling clause must become final at some point. This is achieved through defined annual periods for cost review, reconciliation and recovery memorialized in tariffs. The adjustments to reconcile the previous twelve-month LDAC period – consistent with tariff formulas and periodicity – generates a "core" over/under number, that is presented to the Commission, reviewed, and if accepted becomes prudent and final

The Commission has described the reconciliation process in Order No. 26,480. 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 period's rates, the incurred costs [or credits] are considered prudent, and the over or under recovery will not be retroactively adjusted.

Order No. 26,48 at 18-20. This structure of reconciliation, prudence and finality has served utilities and their customers well. For example, utilities were shieled from retrospective taxes and PUC Staff were bound by an inadvertent error that had already been submitted, recommended and found prudent. *See* Opinion of the Justices, 123 N.H. 349, 354-55 (1983); Docket No. DG 21-152 November 2, 2021 Transcript at 53; *see* Order No. 26, 351 (May 1, 2020) (Liberty-Keene Summer 2020 COG Order).

III. CONCLUSION

WHEREFORE, for the reasons set for above, the Department of Energy respectfully recommends that the Public Utilities Commission find that Liberty has failed to meet its burden of proof and:

1) Deny Liberty's request to collect $4 million through its LDAC for decoupling funds passed back to customers in 2018-2020 on the grounds that Liberty was not economically disadvantaged by the pass backs;

2) Find that Tariff No. 10's RDAF formula is clear and must be enforced as written to leave the $4 million passback at issue with Liberty's customers, or in the alternative

3) Find that Liberty's request to recovery $4 million dollars due to Company "error" is barred by the prohibition on retroactive ratemaking;

4) Find that Liberty was advantaged by over-collections estimated at $2.1 million for the period July 1, 2017 through October 31, 2018; and

5) Grant such other and further relief as is just and reasonable.

Respectfully submitted,

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July 27, 2023

Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included in the Commission's service list for this docket on this date, July 27, 2023.

/s/ *Mary E. Schwarzer*
Mary E. Schwarzer