STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

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

Petition for Approval to Recover Revenue Decoupling Adjustment Factor Costs

Docket No. DG 22-041

Post-Hearing Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and, congenial to the briefing schedule announced by the Commission at the conclusion of its June 22, 2023 hearing in this docket, submits the following brief in opposition to the relief sought in the petition submitted by the subject utility:

I. Introduction

In this case, Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty ("Liberty") seeks to recover $4,023,830 (a sum we will hereinafter round to $4 million for ease of reference) in connection with service provided to customers during parts of 2018, all of 2019, and part of 2020. Immediately upon receipt of Liberty's petition, the OCA moved to dismiss the petition (tab 3) on the ground that the utility was seeking approval for an act of retroactive ratemaking that is impermissible as a matter of New Hampshire law, including a key provision of the state Constitution. Via Order No. 26,677 (September 6, 2022), the Commission denied the OCA motion but without prejudice. The Commission then conducted an

evidentiary hearing on June 27, 2023 (*see* tab 37 (hearing transcript, hereinafter cited as "tr.")), at which the Commission heard testimony from both Liberty and the Regulatory Support Division of the Department of Energy ("Department"). The evidence at hearing only served to bolster the OCA's contention that what is sought here is an impermissible act of retroactive ratemaking. Therefore, for the reasons that follow, the Commission must deny Liberty's petition.

II. The Facts

The facts are not in dispute and, indeed, are largely as described in the prefiled testimony of Liberty witness Erica L. Menard (exh. 1). On November 1, 2018, as a result of its 2017 rate case (Docket No. DG 17-048), Liberty implemented a revenue decoupling mechanism as set forth in the relevant pages of its Tariff 10, which are of record beginning at pages 1290 through 1296 of Exhibit 1.[1] The purpose of the revenue decoupling mechanism, which functions as a component of Liberty's Local Distribution Adjustment Clause ("LDAC"), is "to assure that the Company collects the base revenue requirement approved by the Commission in the Docket No. DG 17-048 rate proceeding, no more and no less, regardless of actual sales volumes." Exh. 1 at 6, lines 3-5.[2] This is accomplished by establishing

[1] In this brief, all page referenced are to the Bates page numbers, which sequentially paginate exhibits that themselves consist of a variety of separately paginated documents.

[2] As Ms. Menard further explains, the underlying purpose of a revenue decoupling mechanism is to encourage a utility to adopt initiatives that tend to reduce sales (i.e., energy efficiency and other demand-side management programs) by allowing the utility to recover its allowed revenue requirement regardless of sales fluctuations. Exh. 1 at 15, lines 2-17. As Ms. Menard notes at pages 26 of her testimony beginning at line 8 and including footnote 9, in 2016 the Commission directed utilities to implement revenue decoupling in ensuing rate cases as a successor to what is known as the Lost Revenue Adjustment Mechanism ("LRAM"). As Ms. Menard notes, the LRAM was adopted in connection with ratepayer-funded energy efficiency programs. The OCA disagrees, slightly, with

revenue-per-customer targets for each rate class and, via an annual reconciliation, comparing the targeted revenue to actual revenue collected from each rate class. *Id.* at lines 11-14. The difference between the targeted revenue and the actual revenue is then refunded to, or collected from, customers via the annual reconciliation. *Id.* at lines 14-16.

The issue at the heart of this docket arises out of the fact that, although there is rate class consisting of Liberty's residential customers – referred to in the tariff as the R-3 class – there exists a sub-class of residential customers (referred to as R-4 customers) who receive a rate discount because they are low-income ratepayers. *Id.* at 18, lines 3-19. This discount is revenue-neutral to Liberty because its cost is socialized among all other customers via other provisions of the Local Distribution Adjustment Clause. *Id.* at 19, lines 13-9 and 20, lines 1-2.

As explained most succinctly, at hearing, by Greg Therrien, the expert witness who designed the revenue decoupling proposal originally submitted by Liberty in the 2017 rate case, there was a significant difference between what he proposed in 2017 and what the Commission ultimately approved for effect on November 1, 2018. The original proposal called for three "customer class

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Ms. Menard's characterization of the reason the Commission decided utilities should replace their LRAMs with revenue decoupling. According to Ms. Menard, "[t]he LRAM did not enable recovery to account for distribution revenue lost due to other factors such as societal energy conservation, weather variations, or changes in economic conditions." Exh. 1 at 26, lines 10-12. Although this is a true statement, from the OCA's perspective a revenue decoupling mechanism is superior to an LRAM mainly because the latter functions entirely as an upward rate ratchet, compensating the utility for a presumed amount of revenue lost to energy efficiency, without verifying the presumed losses or allowing for the possibility of revenue *increases* that effectively operate as windfalls to the utility. In other words, a revenue decoupling mechanism is rigorous and symmetrical where an LRAM is not. There is, of course, a third alternative: simply relying on rate cases to adjust utility revenues to account for factors that cause sales fluctuations.

groupings," each with its targeted revenue per customer and actual revenue per customer. Tr. at 53, lines 19-24. The proposal ultimately implemented was more granular, such that the reconciliation applicable to the R-4 low-income customers occurred separately from the one applicable to the remaining R-3 residential customers not receiving the discount. *Id.* at 55, lines 1-6.

Here's the problem: By operation of the specific language in Tariff 10, the actual revenues received from R-4 customers was reconciled to the targeted revenues for R-4 customers without adequately taking the effect of the discount into account, by including the discount in the targeted revenue (referred to in the tariff as "benchmark") revenue). *Id.* at 61, lines 15-18 ("the benchmark was set too low, meaning that included the low-income discount in that calculation"). The specific language in question is the definition of "Benchmark Base Revenue Per Equivalent Bill" appearing at page 35 of Tariff 10 (exh 1 at 1293), as applied via the equation appearing at page 36 of the tariff (*id.* at 1294) and page 37 of the tariff (*id.* at 1295) (defining the relevant variable in the equation"). The effect was "Benchmark Base Revenue Per Equivalent Bill" – i.e., targeted revenue – that was 60 percent lower than the comparable per-bill target revenue for the R-3 class. Exh. 1 at 50, lines 3-10. This flaw in the tariff language was corrected via Tariff 11, which went into effect on September 1, 2020 in the wake of Liberty's subsequent rate case, Docket No. DG 20-105. *Id.* at 70, lines 14-20 and 71, lines 3-6.

The record in this case contains a panoply of other assertions, both factual and legal in nature. But, as explained *infra*, these contentions are either irrelevant

or inconsistent with applicable law. In the opinion of the OCA, the undisputed facts recited above are the only ones necessary for the Commission to consider in the course of reaching the correct result here.

III. Liberty has presented the Commission with an impermissibly moving target in this docket.

In considering the utility's claims here, the Commission must take into account how Liberty's theory of the case has impermissibly metamorphosed since the Company filed its initial petition in on July 6, 2022. Although Liberty has consistently referred to a "mismatch" between the operation of Tariff 10 and the intended purpose of a decoupling mechanism, initially the Company argued that the tariff language itself was flawed and that the Company simply followed a tariff that contained improvident language. *See, e.g.*, Petition (tab 1) at paragraph 3, page 2 (describing an "improper comparison" in the tariff of revenue targets to actual revenues); *id.* at paragraph 5 (describing the comparison the tariff "should have directed"); and paragraph 6, page 3 (noting that the tariff language was "corrected"); *see also* exh. 1 at 4, lines 13-14 ('[i]nadvertently, the tariff . . . gave conflicting directions for reconciling revenue targets with actual revenue collections for R-3 and R-4 customer classes"); *id.* at 5, lines 6-9 ("*by operation of the approved . . . tariff language*, revenues associated with the Company's low-income program were refunded . . . although no refund was actually due") (emphasis added); *id.* at 7, line 10 (referring to a "mismatch *embedded in the tariff*") (emphasis added); *id.* at 8, line 8 (describing the comparison the the tariff "should have directed"); *id.* at 9, lines 3-4 (noting that the "mismatch arose from how the tariff language evolved"

from what was originally proposed in DG 17-048); *id.* at lines 14-16 (describing what the tariff "should have" stated); *id.* at line 20-22 ("the Company, *following the then-approved tariff language*, issued refunds to customers as indicated by the . . . reconciliation process, totaling $4,023,830 over a two-year period") (emphasis added); *id.* at 10, line 12 ("it was the approved . . . tariff that directed the flawed method"); *id.* at lines 14-16 ("the Company followed the tariff provisions precisely," causing the "mismatch"); *id.* at 25, line 10 ("the Company conducted its reconciliation in strict compliance with the approved tariff"); *id.* at 39, lines 5-7 (contending that a "change in language" between the originally proposed and ultimately approved versions of the tariff caused the problem).

In the wake of the OCA argument that the Company was improperly seeking to impose tariff changes retroactively, and the submission of written testimony by the Department (tab 24), Liberty's story shifted palpably. Via the rebuttal testimony of Ms. Menard and Mr. Therrien submitted on May 23, 2023, the Company stopped claiming that Tariff 10 was wrong and began arguing that it was "ambiguous." *See* exh. 5 at 8, lines 11-16 ("ambiguity was inadvertently embedded in the tariff language" which "resulted in issues with the reconciliation calculation"); *id.* at 11, lines 6-9 (claiming that "ambiguous language was established through negotiations with Commission Staff and the Office of the Consumer Advocate during the rate case").

The ambiguity theory metastasized further at hearing to a claim that the Tariff 10 is internally inconsistent. According to Liberty witness Therrien, the

tariff is ambiguous because the specific language at page 37 of the tariff (exhibit 1, page 1295) is in conflict with the purpose of the decoupling mechanism as stated at page 34 (exhibit 1, page 1292): "to establish procedures that allow the Company . . . to adjust, on an annual basis, its rates for firm gas sales and firm transportation in order to reconcile Actual Base Revenue per Customer with Benchmarked Base Revenue per Customer." *See* tr. at 71, lines 2-10 (describing these two tariff provisions as "unreconcilable").

The "law of the case" doctrine, and the related doctrine of judicial estoppel, preclude Liberty from presenting such a moving target. *See, e.g., Saunders v. Town of Kingston*, 160 N.H. 560, 567 (2010) ("such issues has have actually been decided, either explicitly, or by necessary inference, constitute the law of the case") (citation omitted); *Balzotti Global Group, LLC v. Shepherds Hill Proponents, LLC*, 173 N.H. 314, 320 (2020) ("The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase") (citation omitted). Liberty survived the OCA's motion to dismiss based on its "we followed the clear directives of the tariff" argument and cannot introduce arguments contradictory to its original position while relying on a significantly new theory or theories at this stage.

IV. Liberty is blatantly attempting to engage in retroactive ratemaking.

As we previously argued, a public utility's tariffs "define the terms of the contractual relationship between a utility and its customers" and "have the force and effect of law and binds both the utility and its customers." *Appeal of*

Pennichuck Water Works, 120 N.H. 562, 566 (1980) (citations omitted). Therefore "the customers of a utility have a right to rely on the rates which are in effect at the time they consume the services provided by the utility, at least until such time as the utility applies for a change." *Id.* In New Hampshire this principle is not just law – it is *constitutional* law, thanks to Part 1, Article 23 of the New Hampshire Constitution, which prohibits laws (including tariffs enjoying the force and effect of law) that create "a new obligation in respect to a past transaction." *Id.*

Liberty claims these principles do not apply here because revenue decoupling is a reconciliation mechanism, and rate reconciliation is not considered retroactive ratemaking. But when a utility applies a reconciliation mechanism and thereby imposes new charges for past service when the account being reconciled has a negative balance, it is doing so pursuant to tariff language that was in effect at the time the applicable service was rendered. Here, Liberty is attempting not a mere reconciliation but, rather, a reconciliation based on tariff language that it wishes to correct and apply retroactively. The utility cannot do this without transgressing the principles articulated in the *Pennichuck Water Works* case.

This point is substantially identical to an observation made by Commissioner Simpson, approaching the question from a slightly different angle. He asked both Liberty's witnesses why any disputes involving these early decoupling years were not resolved, implicitly, when the Company signed a settlement agreement, ultimately approved by the Commission, that resolved its 2020 rate case. Tr. at 131, lines 12-24 and 132, lines 8-9. "I don't know how to answer that," said Ms.

Menard forthrightly. Tr. at 132, line 10. The answer is that Liberty is attempting to change rates now that applied to service rendered prior to the conclusion of its previous rate case – a classic case of retroactive ratemaking.

V. The tariff is not ambiguous.

Because a public utility tariff "has the same force and effect as a statute" it must be interpreted "in the same manner" as a statute would be interpreted. *In re Verizon New England, Inc.*, 158 N.H. 693, 695 (2009). Established principles of statutory construction are fatal to Liberty's "ambiguity" theory. Ultimately, Liberty appears to have conceded that the applicable decoupling reconciliation formula, though flawed, was clear in itself, arguing that the ambiguity arises out of an alleged inconsistency with the purpose of revenue decoupling as stated in the tariff. As the late Justice Scalia and his co-author Bryan A. Garner point out in their respected treatise, *Reading Law: The Interpretation of Legal Texts* (Thompson/West 2012) ("Scalia & Garner"), "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails." Scalia & Garner at 183; *see also EnergyNorth Natural Gas v. City of Concord*, 164 N.H. 14, 16 (2012) (same) (citation omitted). Moreover, in claiming that the formula is inconsistent with the stated purpose of the mechanism, Liberty indulges in an interpretive exercise the U.S. Supreme Court has rejected as too simplistic. As the Court observed in 1987,

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 526-26 (1987); *see also Woodford v. Ngo*, 548, 81, 117 (Stevens, J., dissenting).

VI. Liberty's position is inconsistent with principles of contract law.

Because, as noted *infra*, a tariff has the force and effect of law but also states the terms of the contractual relationship between a utility and its customers, it is useful if not actually necessary to consider what the law of contracts teaches about this situation. The interpretation of a written contract is a question of law, not fact. *Clear Choice MD, PLLC v. Henriques*, 2021 N.H. LEXIS 137 at *5 (citation omitted). The tribunal must "give the language used by the parties its reasonable meaning, considering the circumstances, and the context in which the agreement was negotiated, and reading the document as a whole." *Id.* (citation omitted). "The language of a contract is ambiguous if the parties could reasonably disagree as to the meaning of that language." *Id.* (citation omitted). It is a "fundamental principle of contract law" that "doubtful language is to be construed most strongly against the party who used it in drafting the contract." *Trombly v. Blue Cross/Blue Shield*, 120 N.H. 764, 771 (1980) (citation omitted).

Liberty's witnesses readily agreed that application of the formula in the tariff led inexorably to the loss of the $4 million at issue. That, indeed, is the gist of the petition and the written testimony from Ms. Menard attached thereto. The Department's witnesses shared this view. Therefore, as a matter of law, Liberty loses under application of the black-letter law of contracts. But if the Commission were somehow to determine the existence of a contractual ambiguity in light of the

allegedly inconsistent purpose statement in the tariff, any doubt must be resolved against Liberty as the party that drafted the tariff and filed it with the Commission for approval.[3]

VII. Does Liberty actually *owe* money to customers?

The Department presented evidence at hearing to the effect that, not only is Liberty not entitled to collect an extra $4 million from customers – the Company is also obliged to refund some $2.15 million *to* customers arising out of the operation of the Company's tariff between the July 1, 2017 effective date of new permanent rates (from the 2017 rate case) and the November 1, 2028 effective date of the decoupling tariff. *See* tr. at 171, lines 9-13 and 19-20 (explaining that the allegedly missing

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[3] In applying this principle, the Commission should not allow itself to be distracted by the suggestions in the record that the Company proposed two different approaches to the decoupling tariff only to have a mistaken version imposed upon the utility. *See, e.g.*, tr. at 123, lines 23-24 and -24, lines 1-3 (Liberty witness Menard stating "we had proposed two different ways of calculating the benchmark; one produced one set of results, the other produced another set of results. The path that was approved was the 'mismatch' approach").

In Docket No. DG 19-145, which was opened *inter alia* for the purpose of reconciling LDAC charges (including the revenue decoupling adjustment factor, then beginning its second year of operation, the prefiled testimony of Liberty witnesses David B. Simek and Catherine A. McNamara stated that they "discovered that with respect to low-income customers the formulas approved in the Company's tariff to calculate the Actual Base Revenue per Customer and the Benchmark Base Revenue per customer do not use the same basis between the two formulas to calculate the revenue per customer." Exh 2 in Docket No. DE 19-145 at 11, line 21 and 12, lines 1-3. The prefiled testimony of Commission Staff witness Al-Azad Iqbal noted that Staff (predecessor to the Regulatory Support Division of the Department) disagreed with this view and that "[t]he Company ultimately agreed with Staff, and made a revised filing on October 7, 2019, that proposed to adjust schedules and testimony" as a result. Exh. 5 in DG 19-145 at 2, lines 4-8 and 13-14. The revised testimony filed on October 7, 23019 omitted the claims about the decoupling formula. *See* exh. 3 in DG 19-145 at 12-R. Accordingly, the Commission approved tariff changes that did not address the problem originally identified by Mr. Simek and Ms. McNamara. *See* exh. 4 in DG 19-145 (proposed tariff) and Order No. 26,306 (2019) at 7 (approving tariff language).

Ms. Menard acknowledged all of the above in this docket during her testimony on redirect. *See tr.* At 160, lines 12-14 and 161, lines 1-9. The ineluctable reality is that if the language of Tariff 10 was incorrect, the Company nevertheless acquiesced to this language during the 2019 LDAC reconciliation and submitted tariff pages accordingly. Thus, the Company remains entirely responsible for the effect of the tariff language it filed with the Commission.

revenue was actually included in the revenue requirement approved at the end of the 2017 rate case); *id.* at 174, lines 20-24 and 175, lines 1-11 (noting that the Company has been "compensated twice"); *id.* at 193, lines 11-15. The Department's witnesses elaborated on this contention in detail with reference to Excel spreadsheets; Liberty was unable to refute these contentions despite its aggressive cross-examination of the Department's lead witness, Faisal Deen Arif.

Nevertheless, the Department indicated at hearing that it was still considering the legal implications of this evidence and would await its briefing opportunity before taking a position on whether the Commission should order a refund. *See* tr. at 43, lines 6-23 ("it may be that, when we look at the law . . . that we come to the conclusion that, economically, it makes sense, but . . . five years after the fact, it's not legal or not good policy"). In these circumstances, the Office of the Consumer Advocate respectfully reserves the right address this issue via its reply brief in light of whatever position the Department ultimately takes on the rigorous analysis conducted by its witnesses, Mr. Arif in particular.

VIII. The Future of Decoupling

The OCA has noted, with interest, the concerns raised by Commissioner Simpson at hearing. While Ms. Menard and Mr. Therrien were on the stand, he asked:

> I wonder whether, under what has been presented to us today, whether the Company can accurately implement these complex tariffs? When you have multiple options for interpretation, and it appears that the Company chose an option . . . that was not advantageous to the Company, that was a decision that was made. And, now, we're being asked to revise what the Company filed [with] us when we approved your tariff. . . . How can we have confidence

> in the Company's ability to implement tariffs, with reconciliations and decoupling, and many different changing variables?

Tr. at 143, lines 11-24.[4] Later, Commissioner Simpson stated that he "would just leave everybody with a question. If everyone in this room struggles to understand how these tariffs work, imagine the actual customer?" *Id.* at 147, lines 9-11.

These important questions cannot be resolved in the instant proceeding for the simple reason that broad concerns about whether decoupling remains good public policy were not noticed for resolution here. Nevertheless, in the interest of clarity, and because no party is more responsible than the OCA for the advent of revenue decoupling among New Hampshire's gas and electric utilities, we offer some observations.

Complexity is a feature, rather than a bug, of the tariffs filed by public utilities everywhere. Both the Department and the OCA do their best to work alongside our utilities in quest of tariff language that is effective, unambiguous, and clear. Ultimately, however, the responsibility for these things lies with the utilities and the Commission must expect these companies to discharge this responsibility competently and vigilantly. The fact that this docket documents one utility's struggle to implement decoupling must not become a pretext for abandoning such mechanisms because they are challenging.

As for the public, the OCA does not pretend, and the Commission should not pretend, that customers of Liberty will read the decoupling tariff and come away

[4] The crux of Liberty's reply to this query came from Ms. Menard, who stated: "[U]nder compression of time, maybe some things were missed." Tr. at 144, lines 17-18. This laudably forthright answer, in a sense, can be understood as dispositive of the entire case.

with an understanding of how the mechanism works or why it exists. That would be the equivalent of asking people to read the Social Security Act for insight about when to claim their federal retirement benefits, or to parse the Internal Revenue Code to figure out how to complete a federal tax return. Even the regulations of the Social Security Administration and the Internal Revenue Service are too prolix to enlighten the general public, and the language of a decoupling tariff is no different. It is, rather, the job of utilities, the Department, the OCA, and the Commission to develop other materials and communication channels to explain and justify revenue decoupling for the general public.

The Commission should keep in mind that, as described *infra* at note 2, decoupling replaced a far more flawed mechanism that should not be restored. It may be time to progress beyond the revenue adjustments we have now, but the answer does not lie in moving backward. Rather, in due course, the OCA will ask the Commission to adopt new and innovative approaches to rate design, perhaps by refining decoupling mechanisms based on experience but, more likely, via broad rate reforms that further solidify the connection between shareholder interests and desired outcomes for customers.

In the meantime, both the Commission and the parties to this docket must live with an answer that is unsatisfying because its effect will inevitably be to punish one of our utilities for being the first to step forward with a decoupling mechanism. Unfortunately, the law allows no other outcome than the one we urge here.

IX. Conclusion

For the reasons stated above, the Commission should deny the petition submitted by Liberty in this docket. Retroactive ratemaking is impermissible in New Hampshire thanks to our state's Constitution; the Commission should affirm this principle here in terms that leave no doubt about the issue.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the petition of Liberty Utilities (Energy North Natural Gas Company) d/b/a Liberty, *with* prejudice, and

B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

Donald M. Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.m.kreis@oca.nh.gov

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Certificate of Service

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

Donald M. Kreis