

STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION

Docket DG 23-067

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

Request for Change in Distribution Rates

Initial Brief in Support of October 1, 2023 Temporary Rate Effective Date

I. Introduction

The New Hampshire Public Utilities Commission (the “Commission”) issued Order No. 26,899 (October 31, 2023) approving temporary rates for Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (“Liberty” or the “Company”) effective November 1, 2023, in the above-referenced proceeding (the “Order”). The Order included approval for the Company to recover approximately \$500,000 in revenues that the Company would have recovered if temporary rates were approved for effect October 1, 2023, as requested by the Company (the “October 2023 Revenues”). Order at 8-9. The New Hampshire Department of Energy (“DOE”) filed a Motion for Rehearing of the Order on November 30, 2023 (the “Motion”). The Motion requested that the Commission (1) grant rehearing to reconsider the Commission’s Order with respect to the October 2023 Revenues; and (2) defer the decision on recoupment to the permanent rate phase of this proceeding (Motion at 7).

In support of these requests, the DOE argued that the Commission had acted in contradiction to RSA 378:29 (Motion at 5-7). The Office of the Consumer Advocate (“OCA”) filed a letter in support of the Motion on December 1, 2023. The Company filed an objection to the Motion on December 7, 2023 (the “Objection”). The Commission issued Order 26,923

(December 29, 2023) granting the Motion’s request for rehearing and scheduling a hearing for January 8, 2024, to further develop the record and hear from the parties with respect to the issues raised in the Motion and the Company’s Objection. Order No. 26,923 at 3.

During the January 8, 2024, hearing the Commission asked the parties to comment on the legality of a temporary rate effective date of October 1, 2023. In response to a request from the OCA to file briefs on this issue, the Commission issued a January 10, 2024, Procedural Order setting a briefing schedule to address this issue. The Company submits this initial brief pursuant to the schedule established in the January 10, 2024, Procedural Order and in support of a revised Commission Order that would set the rate effective date for temporary rates as October 1, 2023. As discussed below, setting the temporary rate effective date as October 1, 2023 is consistent with Commission precedent and caselaw. Further, allowing recovery of the October 2023 Revenues represents sound policy and supports the Commission’s preference for disposition through settlement.

II. Procedural Background

On July 27, 2023, Liberty filed its petition requesting a change in distribution rates (the “Petition”) together with supporting testimony and attachments. The Company’s petition included a request to implement temporary rates effective October 1, 2023. On August 25, 2023, the Commission issued Order No. 26,877 suspending the Company’s proposed tariffs for a period not to exceed 12 months and scheduling a hearing on Liberty’s request for temporary rates for September 27, 2023.

On September 26, 2023, the Commission issued a procedural order postponing the hearing on temporary rates until October 27, 2023. The procedural order stated that the hearing was being postponed because “...[DOE] has not filed a written position regarding the Company’s temporary

rate proposal with the Commission, nor has a settlement agreement been filed for the Commission's consideration." Procedural Order at 2. The Commission's Procedural Order further directed DOE to submit a filing indicating when it would file a written statement of position no later than September 29, 2023. Id. Also, on September 26, 2023 (after the issuance of the procedural order), DOE filed a written statement advising that the DOE and Liberty had "reached a settlement agreement under which Liberty would increase rates on a temporary basis designed to collect an additional \$8,700,000 (approximately) in revenue." DOE Position Statement at 1.

Liberty filed a letter in support of DOE's position statement on September 26, 2023, and requested that the September 27, 2023, hearing be reinstated.¹ The Commission issued a second procedural order on September 27, 2023, confirming that the hearing on temporary rates would be postponed until October 27, 2023. On September 28, 2023, Liberty filed a Motion for Order Nisi Approving Temporary Rates, Effective October 1, 2023 ("Motion for Order Nisi"). The Company's Motion for Order Nisi included an alternative request for relief to allow for recovery of the October 2023 Revenues during the temporary rate period if the temporary rate effective date was delayed until November 1, 2023 (Motion for Order Nisi at 6). This alternative request was made to ensure that the Company would not be harmed due a delayed hearing based on circumstances outside of its control; this alternative relief request was also intended to allow the Company to receive the full benefit of the settlement agreement reached between the parties (id.).

The Commission issued a procedural order on September 29, 2023, denying the Company's request for an order nisi but stating that "... the approach delineated by Liberty as an

¹ DOE's September 26, 2023, position statement indicated that DOE would be prepared to present the settlement to the Commission at a hearing on September 27, 2023, as originally scheduled. The Office of the Consumer Advocate ("OCA") filed a letter on September 27, 2023, expressing support for the settlement as outlined in the DOE position statement and confirming that OCA remained available to participate in a hearing on September 27, 2023.

alternative form of relief requested in its [Motion for Order Nisi] is reasonable, insofar as the recovery of the proposed settlement revenue requirement for temporary rates could be effectuated over a slightly shorter recovery period (of November 1, 2023 through July 31, 2024).” Sept. 29, 2023, Proc. Order at 2. The September 29, 2023, procedural order also (1) set an October 16, 2023, deadline for the Company to resubmit its proposed rate schedules with a proposed recovery period of November 1, 2023, through July 31, 2024; and (2) set an October 20, 2023, deadline for the DOE to file testimony regarding the temporary rates settlement proposal. Id.

The Company submitted proposed rate schedules on October 16, 2023, that calculated recovery of the approximately \$8.7 million settlement agreement over a nine-month period. The DOE filed the testimony of Faisal Deen Arif on October 20, 2023, recommending approval of the proposed temporary rate amount of \$8,706,258 (the “DOE Testimony”) (DOE Testimony at 7). The DOE Testimony was silent with respect to the Company’s request to recover the October 2023 Revenues and the Company’s October 16, 2023, revised rate schedules that provided for recovery of the October 2023 Revenues (see DOE Testimony).

The Commission held a hearing on temporary rates on October 27, 2023. At the outset of the hearing, the OCA stated that it supported the proposed settlement amount of \$8.7 million (2023 Oct. 27 Tr. at 11). OCA also stated that it is OCA’s position that RSA 378:29 sets the commencement date for recoupment as November 1, 2023 (i.e., the effective date of temporary rates) (2023 Oct. 27 Tr. at 11). In response to OCA’s statement regarding recoupment, DOE stated that while its interpretation of RSA 378:29 is consistent with OCA’s interpretation, the recoupment amount and recovery will be part of the full rate case and could be considered at that time (id. at 14). OCA confirmed that it agreed with DOE that recoupment would be considered as part of the full rate case and had presented its position regarding the recoupment period for purposes of

preliminary matters (id. at 15). Without taking a position on the recoupment period, the Company confirmed that the recoupment period was an issue for consideration during the full rate case setting permanent rates (see id.). The Company did confirm, however, that it still proposed to recover the settlement amount including the October 2023 Revenues over a nine-month period (id. at 21). At the conclusion of the hearing, OCA and DOE expressed support for the settlement amount of approximately \$8.7 million without taking a position on the recovery period (see id. at 123, 129).

On October 31, 2023, the Commission issued Order No. 26,899 approving temporary rates for effect November 1, 2023 (the “Order”). The Order declined to allow recovery of the settlement amount over a nine-month period based on a determination that this would result in an increased weighted average cost of capital above the currently approved level. Order at 7. The Commission determined that such a result was contrary to Commission precedent and was unsupported by the record. Id. at 7-8. However, the Commission did approve recovery of the October 2023 Revenues at the time that permanent rates are set. Id. at 8. To allow for recovery of the October 2023 revenues, the Commission stated “[t]hus, at the end of the proceeding, the permanent rates ultimately approved will be reconciled back to an effective date of the temporary increase, of October 1, 2023.” Id.

The DOE filed its Motion on November 30, 2023, requesting that the Commission (1) grant rehearing to reconsider the Commission’s Order with respect to the October 2023 Revenues; and (2) defer the decision on recoupment to the permanent rate phase of this proceeding (Motion at 7). In support of its Motion, the DOE argued that the Commission had violated RSA 378:29 by authorizing a recoupment period beginning prior to the rate effective date for temporary rates (Motion at 5-7). The OCA filed a letter in support of the Motion on December 1, 2023. The

Company filed its Objection on December 7, 2023, arguing that the Commission was authorized to set a recoupment period that begins prior to the rate effective date for temporary rates and also proposing an alternative method to allow recovery of the October 2023 Revenues. The Commission issued Order 26,923 granting the Motion's request for rehearing and scheduling a hearing for January 8, 2024, to further develop the record and hear from the parties with respect to the issues raised in the Motion and the Company's Objection to the Motion. Order No. 26,923 at 3.

During the January 8, 2024, hearing the Commission asked the parties to comment on the legality of a temporary rate effective date of October 1, 2023 (2024 Jan. 8 Tr. at 39-44). As discussed below, the Company and DOE agreed at the hearing that there is a legal precedent for setting the temporary rate effective date as October 1, 2023 (*id.* at 42-43). The OCA, however, requested an opportunity to submit legal briefs on this issue (*id.* at 44). The Commission granted the OCA's request and issued a January 10, 2024, Procedural Order setting a briefing schedule. The Company submits this initial brief pursuant to the schedule established in the January 10, 2024, Procedural Order and in support of a revised Commission Order that would set the rate effective date for temporary rates as October 1, 2023.

III. Legal Analysis

The issue before the Commission is whether it can set a temporary rate effective date that predates the hearing on temporary rates. The Commission's proposal presented at the January 8, 2024, hearing is to set the rate effective date as October 1, 2023 (*i.e.*, a date before the October 27, 2023, hearing date) with no change to rates during the month of October 2023 followed by a rate change on November 1, 2023. Setting the temporary rate effective date as October 1, 2023, would allow the recoupment calculation at the time that permanent rates are set to include the October

2023 Revenues. This proposal also means that the recoupment calculation will be based on the actual difference between temporary rates and permanent rates rather than using the current estimate of the October 2023 Revenues.²

At the January 8, 2024, hearing, the DOE agreed that the Commission’s proposal did not appear to violate the temporary rate statute (2024 Jan. 8 Tr. at 43). The OCA requested additional time to consider the Commission’s proposal and questioned whether the proposal is in the public interest and represents sound policy (*id.* at 44). For the reasons set forth below, the Commission should determine not only that the proposal is consistent with Commission precedent but also that the proposal represents sound policy and supports the Commission’s preference for disposition through settlement. See, e.g., Order No. 26,433 at 18 citing RSA 541-A:31(V)(a) and RSA 541-A:38.

RSA 378:29 governs recoupment and states

“[i]f, upon final disposition of the issues involved in such proceeding, the rates as finally determined are in excess of rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.”

Temporary rates are permitted pursuant to RSA 378:27 to allow the utility to earn “a reasonable return on the cost of the property of the utility used and useful in the public service...”. As stated in the Company’s Objection to the Motion, the Court has held that the Commission can

² The Company estimated the October 2023 Revenues as approximately \$500,000. If permanent rates are different than temporary rates, the October 2023 Revenues will similarly be different. Setting the temporary rate effective date as October 1, 2023, will allow for inclusion of the actual October 2023 Revenues once permanent rates are known. This is consistent with the Company’s request in its Objection to the Motion to Dismiss to defer consideration of recoupment until the permanent rate phase of this proceeding (see Objection at 10).

order temporary rates to take effect as early as the date on which a utility files its rate case: “Accordingly, we hold that the earliest date on which the PUC can order temporary rates to take effect is the date on which the utility files its underlying request for a change in its permanent rates.”. *Appeal of Pennichuck Water Works*, 120 N.H. 562, at 567 (1980)). The Court allowed early implementation of temporary rates in recognition of the fact that utility rates may not be immediately changed because of “delays inherent in the regulatory process.” *Id.* at 566. It is therefore clear that the Commission is authorized to set October 1, 2023, as the temporary rate effective date as that date is well after the July 27, 2023, filing of the Company’s petition and the Company’s August 28, 2023, publication of the Commission’s Commencement of Adjudicative Proceeding. See Company Affidavit of Publication dated August 31, 2023.

With respect to whether it is in the public interest and sound policy to set October 1, 2023, as the rate effective date in this case, it is also clear that the answer is yes. There were assertions by DOE at the January 8, 2024, hearing that there is no guarantee that a utility will be authorized to adjust its rates on the date requested in a petition (2024 Jan. 8 Tr. at 36). This is not disputed (*id.* at 50). However, delays in the rate effective date become problematic where the parties have entered into a settlement agreement that anticipates a specific rate effective date. Here, the parties engaged in settlement discussions to reach agreement on a temporary rate for effect October 1, 2023. The parties reached an agreement that resulted in a temporary rate significantly lower than the temporary rates requested by the Company (see DOE Position Statement at 2, explaining that one component of the settlement agreement was the Company’s agreement to remove half of the plant investment associated with its investment in its Customer First/SAP system). This means that the Company has already agreed to substantial concessions as part of the settlement agreement.

When the rate effective date was delayed (for reasons outside of the Company's control³), a further reduction in the revenues to be recovered by the Company resulted. The settlement amount agreed to was \$8.7 million (see DOE Position Statement); with the delay of the rate effective date, the amount was further reduced to approximately \$8.2 million. Setting the temporary rate effective date as October 1, 2023, will mitigate the impacts of the delay by allowing the Company to recover the October 2023 Revenues through recoupment. Failure to allow recovery of the October 2023 Revenues would undermine the settlement negotiation process by sending a signal that, in this case, Liberty cannot be assured it will receive the benefit of the bargain it agreed to. More broadly, it may send an undesirable signal to all parties who practice before the Commission as they negotiate settlement agreements.

IV. Conclusion

As detailed above, the Commission is authorized to set the effective date for temporary rates as October 1, 2023, to allow for a recoupment period that begins on October 1, 2023. Allowing the Company the full benefit of the settlement agreement reached by the parties supports disposition through settlement consistent with the Administrative Policy Act by ensuring that the settlement process remains fair to all parties.

³ See Company Objection at 7; see also September 26, 2023, Procedural Order.

Respectfully submitted,

Liberty Utilities (Granite State Electric)
Corp., d/b/a Liberty

By its Attorneys,



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By: _____

Michael J. Sheehan, Esq. #6590
114 North Main Street
Concord, NH 03301
(603) 425-8085
Michael.Sheehan@libertyutilites.com

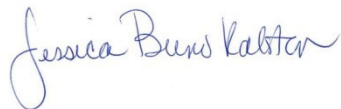


By: _____

Jessica Buno Ralston, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, MA 02110
(617) 951-1400
jralston@keeganwerlin.com

Certificate of Service

I hereby certify that on January 23, 2024, a copy of this initial brief has been forwarded to the service list for docket DG 23-067.

A handwritten signature in blue ink that reads "Jessica Buno Ralston". The signature is written in a cursive style with a large initial 'J'.

Jessica Buno Ralston