

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION
Docket No. DG 23-067
Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty
Request for Change in Distribution Rates

Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate, a party to this docket, and submits the following brief pursuant to the procedural order entered by the Commission on January 10, 2024 (tab 50). At issue is the effective date for temporary rates, for purposes of reconciling temporary rates to permanent rates pursuant to RSA 378:29 in connection with the subject utility's request for new permanent distribution rates. The OCA contends that the appropriate effective date for temporary rates is November 1, 2023.

I. Facts and Circumstances

Via a filing made on July 27, 2023 (tab 4), Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty ("Liberty) filed a petition (with supporting testimony and exhibits) requesting that the Commission set new temporary and permanent distribution rates for effect on October 1, 2023. The Commission originally scheduled a hearing on the temporary rate request for September 27, 2023, but cancelled the hearing because no party had filed a statement of position or a settlement agreement. *See* Procedural Order of September 27, 2023 (tab 27). The

September 27 Procedural Order also suspended the temporary rate tariff pages, previously filed by the Company, beyond October 1. Ultimately, the parties agreed to a temporary rate increase of approximately \$8.7 million and the Commission conducted a temporary rate hearing on October 27, 2023.

In Order No. 26,899 (October 31, 2023), the Commission approved temporary rates in this case for effect on November 1, 2023. However, Order No. 26,899 authorized the subject utility to recover the temporary test-year revenue requirement that would have applied to the month of October, concluding further that at the end of the proceeding “the permanent rates ultimately approved will be reconciled back to an effective date of October 1, 2023.” Order No. 26,899 at 1.

The Department sought rehearing (tab 43), contending that the Commission’s determination as to temporary and permanent rate revenue associated with October was in error.¹ The Commission granted rehearing via Order No. 26,923 (December 29, 2023), established November 1, 2023, as the effective date for the temporary rates, and conducted a hearing on January 8, 2024. The difference between these two effective dates – October 1 versus November 1 – placed an estimated amount of \$500,000 at stake for the purposes of temporary rate reconciliation as required by RSA 378:29.

At the January 8 hearing, the Commission invited the parties to opine on whether it would be permissible to set October 1, 2023, as an effective date for

¹ The OCA filed a response in support of the Department’s Motion for Rehearing (tab 44) and Liberty filed a response in opposition (tab 45).

temporary rates pursuant to *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) and, if so, whether it would be appropriate to do so in the circumstances of this case. Assuming an October 1 effective date for temporary rates, the Commission asked the parties to consider whether it would be appropriate to fix the temporary rates at a level equal to current rates (thus yielding no net revenue increase for that month) while also allowing Liberty (via some to-be-determined reconciliation process) to recover the \$500,000 in revenue it would have received had the previously agreed upon temporary rates been made effective on October 1. At the same time, Liberty expressed concerns about confiscatory rates given the discussion of that constitutional issue in the *Pennichuck* case in the context of temporary rates.

The OCA remains convinced that November 1, 2023, is the appropriate date for making temporary rates effective – and that doing so would not result in confiscatory rates. Our reasoning follows.

II. The 1980 *Pennichuck Water Works* Decision

Although the *Pennichuck* decision contains an extensive discussion of temporary rates pursuant to RSA 378:29, the actual holding of the case is inapposite to the present circumstances. The 1980 decision stands for the proposition that the earliest date on which temporary rates can take effect, and thus the earliest date on which permanent rates can be backward-reconciled to permanent rates, is “the date on which the utility files its underlying request for a change in its permanent rates.” *Pennichuck* 120 N.H. at 567. The reason, according

to the Court, is that any rate-effective date earlier than that would amount to retroactive ratemaking in a manner that transgresses the New Hampshire Constitution. *See id.* at 566 (noting that “the customers of a utility have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change”).

The 1980 decision sheds no light on the question of whether the Commission may make temporary rates effective on a date that is *later* than the date on which the utility submits its request for new permanent rates. The opinion includes a discussion of whether this prohibition on retroactive ratemaking raises a separate constitutional issue – the prospect of rates that are so low as to be confiscatory, i.e., result in an effective taking of shareholder property without the just compensation required by the Fifth Amendment to the U.S. Constitution (as made applicable to the states via the Fourteenth Amendment). But that discussion, if anything, supports the idea that it is permissible for the Commission to have made temporary rates effective on November 1 rather than October 1.

“[W]here a merchant may immediately impose a price increase, a regulated utility may not be able to do so because of delays inherent in the regulatory process.” *Id.* “Such delays may well 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.” *Id.* at 566-67 (citations omitted, emphasis added). A one-month delay does not sink to the

level of confiscatory rates – and, indeed, the logical result of any argument to the contrary would be to hold that a utility is constitutionally entitled to upwardly adjusted revenues covering the exact date on which the utility’s earnings fell below some reasonable rate of return. That is precisely the sort of “plenary indemnification” that is anathema to utility law in New Hampshire. *Appeal of Public Service Company of N.H.* 130 N.H. 748, 755 (1988). In short, no constitutional or legal principle prohibits the Commission from deeming November 1, 2023, to be the rate-effective date for purposes of this proceeding. The only remaining question is whether the Commission should keep November 1, 2023, as the rate-effective date — it should.

III. Reasons to keep November 1, 2023, as the effective date

The Commission’s proposal, as offered at the January 8 hearing, amounts to drawing a distinction without a difference from Order No. 26,899 because there remains an underlying presupposition that Liberty is somehow entitled to the October 1, 2023, effective date, for reconciliation purposes, instead of November 1, 2023, when temporary rates went into effect. However, as previously addressed, Liberty is not entitled to temporary rates themselves, and there is no constitutional or legal principle which prohibits the Commission from deeming November 1, 2023, to be the rate-effective date for purposes of this proceeding.

Additionally, Liberty’s claim that the delays in the regulatory process were outside its control is untrue. The Commission acknowledged via its Procedural Order dated September 27, 2023 (tab 20), at page 2, that Liberty had options

available to it that would otherwise have, presumably, helped the Commission avoid rescheduling the temporary rate hearing from September 27, 2023, to October 27, 2023. *See* Procedural Order at 2 (explaining that Liberty could have sought waiver for the Commission's acceptance of these materials (such as a late-filed settlement agreement), waiver of Puc 203.20(e), or waiver of the Hearing Guidelines). Last, there were no bad faith actions taken by any of the parties that hindered or exacerbated the regulatory process.

Therefore, it cannot be in the public interest to have customers pay the cost of backward-reconciliation to October 1, 2023, when Liberty is not suffering a taking, had options available to it that it could have used to mitigate regulatory delay, and when it is otherwise permissible for the Commission to set temporary rates effective on November 1, 2023, pursuant to RSA 378:29. Thus, the OCA respectfully contends that the appropriate effective date for temporary rates in this proceeding is November 1, 2023.

IV. Conclusion

Considering the legal precedent and policy discussed above, the Commission should decline to change the effective date from November 1, 2023, to October 1, 2023, and issue an order to that effect clarifying the estimated \$500,000 at stake is not subject to reconciliation as contemplated in RSA 378:29.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

- A. Decline to change the effective date to October 1, 2023, from November 1, 2023,
- B. Issue an order clarifying that the October 2023 revenues estimated at \$500,000 is not recoverable, and
- C. Grant such further relief as shall be necessary and proper in the circumstances.

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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.



Michael J. Crouse