

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

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

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (“Liberty” or the “Company”) submits this reply brief pursuant to the January 10, 2024, Procedural Order issued by the New Hampshire Public Utilities Commission (the “Commission”) allowing legal briefs on the Commission’s proposal to modify Order No. 26,899 to set the temporary rate effective date as October 1, 2023, and in response to the initial brief of the Office of the Consumer Advocate (“OCA”) arguing that the Commission should decline to change the effective date for temporary rates from November 1, 2023, to October 1, 2023, in the above-referenced proceeding (“OCA In. Br.”).

The OCA makes the following arguments in support its position that the Commission should maintain the November 1, 2023, effective date: (1) the Commission’s proposal set forth at the January 8, 2024, hearing in this case “amounts to drawing a distinction without difference from Order No. 26,899;” (2) Liberty could have sought a waiver for the Commission’s acceptance of the late filed settlement agreement; and (3) it cannot be in the public interest to allow recoupment to October 1, 2023, when Liberty is not suffering a taking (OCA In. Br. at 5-6).

As detailed below, none of these arguments has merit. As outlined in the Company’s Initial Brief, setting the temporary rate effective date as October 1, 2023, is consistent with Commission

precedent and caselaw. Further, allowing recovery of the approximately \$500,000 in revenues that the Company would have recovered if temporary rates were approved for effect October 1, 2023 (the “October 2023 Revenues”) represents sound policy and supports the Commission’s preference for disposition through settlement.

I. Discussion

As an initial matter, the OCA includes a discussion of the *Pennichuck Water Works* case cited by the Company in its Objection to the Department of Energy (“DOE”) Motion for Rehearing that appears to misunderstand the issues presented in that case. The OCA states “[t]he 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” (OCA In. Br. at 4 (emphasis in original)). The *Pennichuck* decision did not discuss whether rates can be set on a date that is *later* than the date on which the utility submits its request because there is no dispute (and there was no dispute in the *Pennichuck* case) regarding the Commission’s authority to do so. No party disputes whether the Commission was authorized to set the temporary rate effective date as November 1 (OCA In. Br. at 4). The issue here is whether the Commission is authorized to set the rate effective date as October 1, 2023, a date prior to the hearing on this matter.

The issue in *Pennichuck* was whether the Commission could set rates retroactively. *Appeal of Pennichuck Water Works*, 120 N.H. 562, at 565 (1980)). As discussed in the Company’s Objection to the DOE’s Motion for Rehearing, the Court in *Pennichuck* declined to allow for a retroactive rate adjustment but did determine that the Commission can order temporary rates to take effect as early as the date on which a utility files its rate case. *Id.* at 567. Specifically the Court stated: “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.” Id.

The Company supports the Commission’s proposal to set the temporary rate effective date as October 1 to allow the Company to receive the full benefit of the settlement agreement reached in this proceeding. The *Pennichuck* case is directly applicable to determining the legality of the Commission’s proposal and supports a conclusion that October 1, 2023, is not an impermissible rate effective date. October 1, 2023, is a date after the submission of the Company’s petition to the Commission and therefore a permissible rate effective date pursuant to precedent. The OCA has not demonstrated that there is any prohibition on setting October 1, 2023, as the rate effective date.

The OCA’s argument regarding whether the Commission’s proposal creates a difference without distinction ignores the intent of the Commission’s proposal which is to allow for recoupment to October 1, 2023 (i.e., the Commission’s proposal is designed to achieve the same objective¹) while addressing the statutory violations alleged by the DOE. Order No. 26,899 at 8; see also 2024 Jan. 8 Tr. at 26. In response to Order No. 26,899, the DOE filed its Motion for Rehearing arguing that Order No. 26,899 violates the plain language of RSA 378:29 (DOE Motion for Rehearing at 5). The Commission’s Order No. 26,923 granted rehearing to further develop the record and hear from the parties. Order No. 26,923 at 3. During the hearing held on January 8, 2024, the Commission engaged in discussions with the parties regarding methods to allow for

¹ Notably, in addition to addressing DOE’s concerns raised in its Motion for Rehearing, the Commission’s proposal would allow the recoupment calculation to be based on the actual difference between temporary rates and permanent rates rather than using the current estimate of the October 2023 Revenues. 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 Company Objection at 10).

recovery of the October 2023 revenues that would not violate RSA 378:29 (see, e.g., 2024 Jan. 8 Tr. at 26, 31). It was therefore clear that the Commission was seeking a different methodology to allow the Company to recover the October 2023 Revenues through recoupment.

The OCA's Initial Brief confuses the procedural events leading up to the cancelation of the September 27, 2023, hearing on temporary rates (OCA In. Br. at 5-6). The OCA argues that the postponement of the September 27, 2023, hearing was not outside of the Company's control and that the Company "had options available to it that would otherwise have, presumably, helped the Commission avoid rescheduling the temporary rate hearing" (OCA In. Br. at 6 citing September 27, 2023, Procedural Order at 2). The OCA is referring to the Commission's statements in its September 27, 2023, Procedural Order regarding the late filed hearing materials (id.). However, the procedural order referenced by the OCA was actually issued *after* the hearing had already been postponed (see September 26, 2023, Procedural Order). Further, the very reason that the Company submitted the hearing materials after hours was due to the timing of reaching a settlement agreement.² Whether or not the Company should have sought waiver of the deadline for submitting the settlement agreement and other hearing materials, the Commission's September 27, 2023, Procedural Order made clear that receipt by the Commission of the settlement agreement mere hours before the hearing provided insufficient time for the Commission's consideration of the issues. September 27, 2023, Procedural Order at 2. Accordingly, it stands to reason that even if the Company had requested a waiver of the hearing guidelines the hearing would have been

² The Company does agree with the OCA that there was no bad faith action taken by any party and has not argued to the contrary (OCA In. Br. at 6). However, regardless of intent and best efforts by all parties the practical result of reaching a settlement agreement just one day prior to a hearing is that the Company is the only party that bears any financial consequences. As discussed below, this puts the parties on unequal footing and could have implications to future settlement processes without a reasonable remedy.

postponed to October 27, 2023, to allow time to consider the substance of the settlement agreement prior to the hearing date.

The OCA's final argument that allowing for recoupment to October 1, 2023, cannot be in the public interest if the Company is not suffering a taking ignores the potential impacts to the settlement process. The Commission prefers disposition of matters through settlement where possible and appropriate (Company's Initial Brief at 7 citing Order No. 26,433 at 18 citing RSA 541-A:31(V)(a) and RSA 541-A:38). As detailed in the Company's Initial Brief, delays in the rate effective date become problematic where the parties have entered into a settlement agreement that anticipates a specific rate effective date. When the rate effective date was delayed, a revenue reduction resulted that was in addition to the substantial revenue reduction agreed to as part of the settlement agreement. 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. The OCA's Initial Brief completely ignores these policy considerations that support allowing an October 1, 2023, rate effective rate.

II. Conclusion

As detailed above and in the Company's Initial Brief, 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. This allows the Company to receive the full benefit of the settlement agreement reached by the parties and supports disposition through settlement consistent with the Administrative Policy Act.

Respectfully submitted,

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By its Attorneys,



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Certificate of Service

I hereby certify that on January 30, 2024, a copy of this reply 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