

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty
Winter 2023/2024 Cost of Gas and Summer 2024 Cost of Gas and LDAC Filing

Docket No. DG 23-076

Motion for Rehearing of Order No. 26,898

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and moves pursuant to RSA 541:3 for rehearing of Order No. 26,898, entered in this docket on October 31, 2023, to the extent the order approves a “Fixed Price Option” (“FPO”) for the winter heating season now in progress.. In support of this request, the OCA states as follows:

I. Facts and Circumstances

On October 31, 2023, the Commission via Order No. 26,898 (“Order”) conditionally approved Cost of Gas (“COG”) rates for the 2023-2024 winter period (commencing on or after November 1, 2023) and the 2024 summer period (effective on May 1, 2024), both subject to monthly adjustment to account for fluctuations in fuel and transportation costs over which the utility has little or no control and as to which the utility recovers no profit. The Commission also approved a Fixed-Price Option, which allows “residential customers the opportunity to lock in a specific price per therm for the gas supply portion of the monthly bill from November 1

through April 30, regardless of market-price fluctuations.” Order at 4. The Order further noted that the FPO price is “set two cents higher than the initial rate proposed for non-FPO customers,” while

[t]he non-FPO rate fluctuates with market prices and is subject to monthly increases or decreases. Liberty initially proposed a residential FPIO program rate of \$0.6375 per therm, which was communicated to customers via letter. Liberty’s revised proposed residential FPO program rate as filed on October 23, 2023, is \$0.7763.

Id. The Order went on to note that the Department of Energy (“Department”) proposed the continuation of the FPO pursuant to the updated rates, subject to Liberty sending out, at shareholder expense, a new notification letter to all customers providing a three-week opportunity to disenroll. The Department also recommended that Liberty allow any customers who do not receive the letter to disenroll after the deadline and “that Liberty credit customers the difference between the non-FPO rate and the approved higher FPO rate.” *Id.* at 6. The OCA requested that Liberty simply cancel the FPO offering altogether. *Id.* (“The OCA supported the withdrawal of the FPO option for all Liberty gas customers, both in its core system and in its Keene Division”); see also tr. 10/19/23 (tab 24) at 117.

In its ruling, the Commission adopted the Department’s recommendations and, on the merits of the FPO offering itself, ruled simply that “because the program is described in Liberty’s tariff and has already been offered to customers this year, it should not be withdrawn.” *Id.* at 7-8.

II. Reasons for Rehearing

RSA 541:3 provides that within 30 days of “any order or decision” of the Commission, any person directly affected by the decision may seek rehearing of the order or decision. The Commission “may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.” *Id.*

A. The Fixed Price Option is per-se unjust and unreasonable.

RSA 374:2 requires that “[a]ll charges made or demanded by any public utility,” i.e., including charges effectuating reconciliation mechanisms and fuel-cost pass-throughs, must be “just and reasonable.” Moreover, “[e]very charge that is unjust or unreasonable . . . is prohibited.” *Id.*

The Commission should grant rehearing of its Order, to the extent it approved the proposed FPO rate and its implementation, because the Order contains no determination that the proposed rate is just and reasonable. Moreover, the Commission cannot make such a determination because it would not be supported by the record.

The Fixed Price Option as proposed by Liberty and as approved by the Commission is not just and reasonable because, in effect, it puts the utility’s residential ratepayers in the position of betting against each other with regard to fixed prices versus prices that fluctuate with market conditions. This kind of arbitrage is common in unregulated settings, e.g., the purchase and sale of fuel oil, where it is the *supplier* that assumes the risk that its revenue from fixed-price

customers will be inadequate to cover wholesale costs. Here, it is residential *customers* who the assume market risk because, in light of the reconciling nature of cost-of-gas rates, the utility is made whole regardless of how the FPO ultimately compares with market-based pricing.

The results of this arbitrage among Liberty’s residential customers, particularly as it is imposed on those customers who are either unaware of the FPO or unwilling to sign up for that option, cannot be just and reasonable as a matter of law. Pursuant to RSA 363:17-a, the Commission’s responsibility is to serve as “the arbiter between the interests of the customer and the interests of the regulated utilities.” Here it is effectively serving as the arbiter between risk-tolerant and risk-averse residential customers in a manner that is nowhere authorized by New Hampshire law.

B. Inadequate and Misleading Notice to Customers

Moreover, even if the proposed FPO rate of \$0.7763 per therm could be deemed just and reasonable, the timing and method of its implementation are also impermissible under New Hampshire law. On September 1, 2023, the utility filed proposed tariff pages that included, inter alia, an FPO rate of \$0.6375 per therm. See “Illustrative Third Revised Page 94,” appended to the Company’s September 1 written testimony (tab 4).

Pursuant to N.H. Code Admin. Rules Puc 1603.07(a) and (b), this revised tariff page would have gone into effect 30 days later (i.e., on October 1, 2023) but for

the Commission’s “Commencement of Adjudicative Proceeding and Notice of Hearings” (tab 7) issued on September 19, 2023. Although the September 19 notice did not explicitly suspend the effective date of the tariff pages filed on September 1, this is a reasonable inference from the Commission’s stated intent to hold a hearing for the purpose of determining “whether Liberty’s proposed rates are just and reasonable pursuant to RSA 374:2 and RSA chapter 378.” *Id.* at 4.

The September 19 Notice contained neither a general suspension of all tariff pages filed on September 1 nor *any reference to the Fixed Price Option* and, thus, there was no warning to affected customers that the FPO rate might be other than as proposed by Liberty in its September 1 filing. Instead, customers received a letter, dated September 25, inviting them to sign up for the Fixed-Price Option at \$0.6375 per therm as long as they did so by October 26, 2023.¹ The letter notes that the \$0.6375 price had been “submitted to the New Hampshire Public Utility [sic] Commission for approval” but contains no other warning that the rate on offer might not actually be available.

Just three days before the October 26 deadline for customers to select the Fixed Price Option, Liberty made a revised filing with the Commission including tariff pages reflecting an updated FPO rate of \$0.7763 per therm. Assuming the Commission posted the utility’s October 23 filing promptly to the agency’s virtual file room, it would have required extreme vigilance on the part of a customer to understand that the previously offered rate was no longer available and that the

¹A sample version of this letter is in the record as Bates page 18 of Exhibit 6.

previously required October 26 response was no longer operative as well. Indeed, the entire October 26 filing – containing an effective date of November 1 – is in rank derogation of the RSA 378:3 requirement that filed tariffs do not go into effect “except after 30 days’ notice to the commission and such notice to the public as the commission shall direct.” Relying on the originally offered FPO rate of \$0.6375, more than ten thousand Liberty customers signed up by the October 26 deadline. *See* November 22, 2023 e-mail from Counsel to Liberty (appended hereto, including Liberty’s subsequent FPO letter to customers as mailed on November 15 pursuant to the requirements of Order No. 26,898).

Although the record supports no inference that anyone involved in any of this intended to mislead customers or otherwise lead them astray, the fact remains that a scenario like this cannot be what the General Court had in mind when it adopted RS 378 (including the 30-day notice provision of RSA 378:3) nor can it be what the Commission contemplated when it promulgated Rule Puc 1603.07 to implement this notice requirement. The ineluctable reality is that the practice the Commission has adopted for the consideration of Liberty’s annual FPO proposal cannot be squared with applicable law nor with the notions of consumer protection such law effectuates. This is not the first year such problems have arisen, but it should be the last.

III. Conclusion

In light of the mess described above, there is only one outcome that is consistent with the public interest. The Commission should grant rehearing and

issue an order cancelling the Liberty Fixed Price Option for the current winter (thus placing all residential customers on the otherwise applicable cost-of-gas rate) while recommending the utility not propose any similar programs in the future. The state's other gas utility – Northern Utilities, d/b/a Unitil – manages to serve its customers while charging just and reasonable rates, but without a confusing fixed-price option that pits customer against customer. The public interest requires Liberty to do the same – and, as required by Order No. 26,898, provide prompt written notice to affected customers at Company expense.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Grant rehearing of Order No. 26,898 pursuant to RSA 541:3, and
- B. Enter a new order cancelling the proposed Fixed Price Option as proposed by the subject utility on October 23, 2023, as described above, and
- C. 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

November 28, 2023

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.

A handwritten signature in blue ink, appearing to read "DKreis", written in a cursive style.

Donald M. Kreis