

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

DG 23-076

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. d/b/a LIBERTY
Winter 2023-2024 and Summer 2024 Cost of Gas and LDAC Filing**

THE DEPARTMENT OF ENERGY’S OBJECTION TO THE OFFICE OF CONSUMER ADVOCATE’S
“MOTION FOR REHEARING OF ORDER No. 26,898 [REGARDING THE FIXED PRICE OPTION]”

NOW COMES the New Hampshire Department of Energy (“DOE” or “Department”), pursuant to NH Admin. R. Puc 203.09, and filed this timely objection to the Office of the Consumer Advocate’s “Motion for Rehearing of Order No. 26,898.” The OCA seeks rehearing in order to ask the Commission to completely eliminate Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (“Liberty” or “the Company”)’s the Fixed Price Option (FPO).

In summary, and as explained in more detail below, the DOE opposes the OCA’s request because:

The OCA has failed to introduce new evidence or otherwise present argument it could not have made at hearing, suggesting that Order No. 26,989 is arbitrary or illegal. The Commission has also already considered, in this docket, the bulk of arguments the OCA made in its motion for rehearing,

Further, the FPO is just and reasonable; Order No. 26,898 at 8-9 finds the FPO rate just and reasonable; and past precedent establishes that the FPO is just and reasonable.

The Commission’s notice that the FPO would be adjudicated and Liberty’s notice to customers of FPO rates was sufficient. Moreover, this docket does not include sufficient notice to the Commission or ratepayers that the FPO may be eliminated entirely, notwithstanding that the OCA seeks that outcome here.

There is inherent value to consumers in providing a choice between the non-FPO and FPO program.

As reported by the Company, over 10,000 Liberty customers have enrolled in the FPO program and it is too late in the winter season to eliminate a FPO rate that customers have requested, relied upon, and contracted for. Discontinuing the program now would confuse customers.

In support the DOE states as follows.

I. PROCEDURAL BACKGROUND

Order No. 26,898 (“Order”) conditionally approved the cost of gas (COG) rates, i.e., supply rates, for the 2023-2024 Winter and 2024 Summer periods, subject to further review, including but not limited to audits not relevant here. *See* Order (November 1, 2023). The Order explicitly approved fixed price option (FPO) rates in the amount of \$0.7763 per therm. The Order identified the FPO rate at 8-9 and conditionally approved them for reasons unrelated to the nature of the FPO program. *See* Order at 8 (“... we [the Commission] *find the proposed 2023-2024 winter and 2024 summer COG rates just and reasonable subject to the conditions above....*”).

The FPO rate 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.

As stated in the Order, “Liberty initially proposed a residential FPO program rate of \$0.6375 per therm, which was communicated to customers via letter.” Order at 4. This rate was \$0.02 higher than the non-FPO rate. *See* DOE Technical Statement of Amanda Noonan (October 26, 2023).

As stated in the Order, Liberty revised the FPO offer rate on October 23, 2023 to \$0.7763 per therm. The revised FPO rate remained \$0.02 higher than the revised non-FPO rate. *See* Order at 4; DOE Technical Statement of Amanda Noonan (October 26, 2023); OCA Mot. Rehearing Attachment (Liberty’s Second FPO Letter).

The FPO rate was revised by Liberty after the scheduled hearing in this docket. At the hearing, Liberty identified a “significant booking error,” which required adjusted rates. Order at 5. The OCA’s position statement, as filed on October 26, 2023 raised concerns inherent in the nature of the long-existing FPO program regarding risk allocation. The OCA’s position statement also suggested that Liberty had initially offered an incorrect FPO rate. However, as demonstrated by the sample copy of the FPO Letter Liberty mailed on or about September 25, 2023, Liberty described the rates as “submitted for approval” and stated that “approval is expected prior to November 1.” Liberty’s initial FPO letter does not guarantee a rate. *See* Exhibit 6 at Bates 16-19 (including sample FPO Letter to EnergyNorth customer).

At the hearing, the FPO changes and complications were discussed in detail. *See* Transcript of October 19, 2023 Hearing at 44, 86, 117, 121-23; *see also* DOE Technical Statement of Amanda Noonan (October 26, 2023). Liberty noted that last minute adjustments to the FPO rates, based upon a volatile market, had been done in the past. Transcript of October 19, 2023 Hearing at 122-23.

As the commencement of this docket, the Commission issued its *Commencement of Adjudicative Proceeding and Notice of Hearings* (Sept 19, 2023) (hereinafter “Notice”). The *Notice* explicitly stated that that the issues presented included “whether Liberty’s proposed rates are just and reasonable....” *See Notice* at 4. Although Liberty did not explicitly reference the FPO rate in an of itself, Liberty’s filing certainly did. *See* Testimony of Culbertson and King at 9 (Sept 1, 2023). Therefore, the FPO rate was included in the *Notice* by reference to the filing and within the phrase “proposed rates.” In contrast, the *Notice* in no way suggests that the significant number of customers who participate in Liberty’s EnergyNorth’s FPO program are at risk of the FPO program being completely eliminated –the relief the OCA seeks here. Compare Notice with OCA Mot. for Rehearing.

II. LEGAL STANDARD

A Commission “*may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.*” *See* RSA 541:3, Puc 203.07 (f). “Good reason” may be shown by identifying new evidence that could not have been presented in the underlying proceeding or by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Public Service Company of New Hampshire*, Order No. 25,239 at 4-5 (June 23, 2011). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome, it identifies new bases upon which it is claimed the order is unlawful or unreasonable. *See id.* at 4-5.

As the OCA has itself recently summarized:

The standard is an intentionally broad one inasmuch as RSA 541:4 limits any issues in a subsequent appeal to the NH Supreme Court to those grounds presented to the agency via a[n] RSA 541:3 rehearing request. Essentially the purpose of RSA 541:3 is to give the Commission a fair opportunity to correct. [any] errors prior to subjecting the agency and interested parties to the rigors of the appellate proceedings.

See Dkt. No. DW 20-117, Response of the Office of the Consumer Advocate to Motion for Rehearing of Order No. 26,809 (May 16, 2023). Nonetheless, the OCA has failed to meet the requisite legal standard. The arguments it raises were, or could have been, raised at hearing. In addition, the FPO is just and reasonable; notice both to the Commission and to rate payers was legally sufficient. Further policy grounds (value of choice and to avoid customer confusion) support leaving the FPO, as modified by the rate increase and a second mailing to FPO enrollees, in place.

III. DOE ANALYSIS

The OCA has not introduced any new evidence, or evidence that was otherwise unavailable to it in advance of hearing, in support of its motion for rehearing. *See* Oct 19, 2023 Transcript. Order at 4-5, 8-9. Therefore, the OCA's motion for rehearing should be denied as a matter of law. The OCA is also mistaken in the grounds it alleges for rehearing as explained below, and should be denied for that reason as well.

The OCA asserts that the Order "contains no determination that the proposed FPO rate is just and reasonable." The OCA is mistaken. As cited above, the Order explicitly makes that finding, subject to conditions not relevant here. *See* Order at 8 and 9. Further, while the OCA is of the opinion that the FPO program allows customers to bet against each other, the FPO is a longstanding component of Liberty's cost of gas and has been found just and reasonable time and again. *See, e.g.,* Docket DG 22-045, Order No. 26,715 (Oct 31, 2023) at 4-5, 9, 10. An FPO program is required in Liberty's Tariff No. 11. *See* DOE Technical Statement of Amanda Noonan citing Liberty Tariff No. 11, Section 17 Q. In addition, the FPO letters (as mailed on September 25, 2023) alerted consumers to the fact that no final FPO rate was guaranteed. *See* Exhibit 6 at Bates 16-19. The second set of FPO letter provided extended notice and sufficient opportunity to withdraw. *See* DOE Technical Statement of Amanda Noonan; Order; OCA Mot. for Rehearing Attachment.

The OCA has not identified any statute or administrative law that prohibits the FPO structure or requires the utility to take on the risk of higher or lower rates when offering a fixed rate. Any surplus is used by the Company to reduce the overall COG in the subsequent winter season. *See* DOE Technical

Statement of Amanda Noonan at 2 citing Dkt. No. DG 22-045, Exhibit 11 (Liberty's response to DOE TS 1-3. Neither has the OCA provided any economic analysis demonstrating that the FPO is not beneficial.

At hearing, the Commission indicated an interest in opening an investigative docket, to which all parties were amenable. *See* October 19 Transcript at 21-22 (suggestion by OCA); DOE Technical Statement of Amanda Noonan (DOE would participate). That process, which would allow sufficient notice of elimination of the FPO program, is the path the OCA ought to pursue. There is no notice in the Commission's *Notice* that the FPO program could be eliminated. Accordingly, it is procedurally inappropriate to eliminate it, or to consider doing it, at present.

The OCA incorrectly asserts that there was inadequate notice of the increased FPO rates. From its inception, Liberty's filing provided notice the FPO rates would be \$0.02 higher than the non-FPO rates established by the Commission to be effective November, 1, 2023. *See* Testimony of Culberth and King at 9. The final order continued that relationship between non-FPO rates and FPO rates. Order at 8-9. To find that "adequate notice" would require Liberty to predict all final rates 30 days in advance is antithetical to the purpose of a COG hearing, which is to subject proposed rates to rigorous analysis and potential adjustment.

Policy reasons also support DOE's objections to the relief the OCA proposes. There is inherent value in presenting consumers with choice—here a choice between FPO and non-FPO rates. The Company has reported that more than 10,000 EnergyNorth customers have signed up for the 2023-2024 FPO rate. Choice has value. In addition, December 2023 is a timeframe well into the winter season and FPO customers have both signed up (entered into a contract with Liberty) and been subject to a revised rate. Canceling the program at this time would lead to widespread customer confusion. *See* DOE Technical Statement Amanda Noonan at 3-4 (proposing broad measures to inform customer of the increased FPO rate and support customer contract for FPO rates consistent with Liberty's tariff).

IV. CONCLUSION

WHEREFORE, for the reasons stated above, the Department of Energy respectfully requests that this honorable Commission:

- A. FIND that the OCA failed to state “good reason” to grant its motion for rehearing because all arguments raised were raised or could have been raised at the hearing;
- B. FIND that the FPO program is just and reasonable, as explicitly stated by Order No. 26,898 at 8-9;
- C. FIND that Liberty rate payers and the Commission were given sufficient notice that FPO rates were subject to change and that steps take in the form of a second mailing were sufficient to address the FPO rate increase;
- D. FIND that there is insufficient notice, in the form of OCA’s motion, to eliminate the FPO program, given that Liberty reports more than 10,000 customers are enrolled, six weeks of the winter period have already passed; there is value in choice, and eliminating the program would create customer confusion.
- E. GRANT such other relief as is just and reasonable.

Respectfully Submitted,

December 5, 2023

/s/ Mary E Schwarzer
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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2023, consistent with current Commission policy, a copy of the foregoing objection is being sent to the Service List solely in electronic format.

/s/ Mary E Schwarzer
Mary E. Schwarzer
Staff Attorney/ Hearings Examiner