

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DE 24-066

LIBERTY UTILITIES (GRANITE STATE ELECTRIC) CORP. d/b/a LIBERTY

Petition to Amend Tariff

Reply Memorandum

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty, through counsel, respectfully submits the following memorandum, providing responses to the questions posed in the Hearing Officer's July 11, 2024, Report and Recommended Prehearing Order, which the Commission adopted on July 17, 2024.

Background.

This docket presents the question of how to balance a municipality's right-of-way authority against the Commission authority to set and determine utility rates. By statute, municipalities have jurisdiction over placement and relocation of utility poles and wires in municipal rights-of-way (ROWS), not the Commission. RSA 231:177 ("Poles used by telephone, telegraph or other public utilities including railroads and street railways may be removed after 10 days' notice in writing of the intention to remove the same has been given by the commissioner of transportation or the highway agent of any city or town"); RSA 231:179 ("The notice of removal of any such pole shall designate the location in the highway to which the same shall be removed"). But these statutes do not prescribe who must pay the costs for such relocations, in turn leaving intact the Commission's plenary authority over utility rates and conditions for service.

By statute, the Commission has exclusive jurisdiction over utilities and their customers, including the authority to set rates for recovering costs to provide service to customers. RSA 374:2 (“All charges made or demanded by any public utility for any service rendered by it or to be rendered in connection therewith, shall be just and reasonable and not more than is allowed by law or by order of the public utilities commission). This includes authority to approve surcharges for certain costs, such as rate case expenses and environmental costs collected by gas utilities. But municipalities are not acting as utility customers when they dictate the location and relocation of utility facilities. Rather, they are acting as the owners of the ROWs.

In its petition, Liberty asks the Commission to determine who pays the incremental costs for relocations within municipal ROWs when the requested relocation is not the least cost option and the requestor is not a customer. The above statutes do not provide a clear answer: municipalities have the statutory right to dictate the location of electric facilities and the Commission has the statutory authority to determine rates utilities may charge to recover their costs.

Liberty’s proposed tariff language allows the Commission to resolve the issue without treading on the municipalities’ rights under RSA 231 by allowing Liberty to insist that the municipality requesting the higher-cost option pay the incremental costs before Liberty performs the work. Other options to resolve this issue include (1) having all utility customers bear the incremental costs, as is the case with most infrastructure that is not intended to serve specific customers; or (2) having the customers within the municipality demanding the higher-cost option pay the incremental costs through a location-specific surcharge because those in town customers theoretically benefit directly from the relocation project. With its petition, Liberty simply seeks

clarity on the Commission preferred method for the utility to recover the costs of municipality mandated relocation costs.

As stated above, Liberty proposes tariff language requiring that the municipality pay the incremental costs as a pre-condition to Liberty moving its lines underground as requested by the municipality. Liberty's proposed language would result in the municipality being treated similarly to existing tariff provisions that require a developer to make a "construction advance" to cover the incremental costs to ensure an equitable allocation of costs to customers. Liberty's proposal has the added benefit of requiring the cost-causer to be responsible for the incremental utility costs, not the utility or its customers.

Ultimately, the Company's primary goal in this docket is for the Commission to resolve the issue for all parties in a clear and definitive manner.

Background.

Liberty's petition provides the relevant background:

1. In Order No. 26,494 (July 1, 2021), the Commission approved a step increase that included costs Liberty incurred to relocate from overhead to underground certain distribution facilities on Main Street in Salem. Liberty requested recovery of approximately \$1.5 million for that project, which was approximately \$300,000 higher than the costs Liberty would have incurred had the relocated facilities remained overhead.
2. At hearing, the Commission questioned why all Liberty customers should bear the costs for Salem's insistence that Liberty relocate the facilities underground when an available overhead option was available:

[Commissioner Bailey:] But the Town asked you to replace the poles and wires. And if you had replaced the poles and wires, that would have been one thing. But you spent

additional money to bury at the Town's request. So why shouldn't the Town be responsible for that additional cost.

Transcript of June 24, 2021, hearing in Docket No. DE 19-064, at 130-131.

3. The answer to the Commissioner's questions was that the Company's tariff did not authorize charging municipalities for such costs. Transcript at 132. The electric lines in question were within the Town's right of way pursuant to a license granted by the Town. *See generally* RSA 231:161 *et seq.* And the Town has certain statutory rights to compel the Company remove the facilities altogether. RSA 231:177. Relying on that authority, the Town insisted that Liberty relocate the Main Street facilities underground. *See* Transcript at 132-134.
4. The Commission approved recovery of the incremental costs, but made clear that the Company should propose tariff amendments to address this situation in the future:

Further, concerning the issue of relocation of poles and wires from overhead to underground at a customer's request, as happened in Salem, we require that the Company propose to modify its tariff, as soon as practical, so that ... all customers who request relocation of existing overhead facilities be required to pay the excess cost, if the customer requests those facilities to be placed underground.

Order No. 26,494 at 7.

5. Note that the Commission's use of "customer" in the paragraph quoted above is not fully accurate. The Company has existing tariff language that requires a "customer" to pay the excess costs of relocating facilities. See Tariff at Original Page 15, at Section 27, "Relocation of Company-Owned Equipment", which is the section that immediately precedes the new tariff language
6. Here, however, the municipality is not acting as a utility customer but as the ROW owner/authority. The situation addressed in this petition arises when a municipality is acting as the owner of the public rights of way, not as a customer, and thus the entity authorized to grant licenses for utilities to locate facilities within those rights of way and authorized to require utilities to remove facilities from their rights of way.

Petition to Amend Tariff, at 1-3 (footnote omitted).

Liberty originally intended to address this issue in the Company's rate case in Docket No. DE 23-039 but given the delays in that docket and a new project in which Salem insists the Company relocate facilities underground at a higher cost than a viable overhead option, Liberty filed this petition to expedite resolution of the issue.

Issues.

The Hearing Examiner's Report and Recommended Prehearing Order listed the issues to be addressed in this filing.

- (a) As a matter of law, is the municipality required to bear the extra cost for any conditions imposed on a license issued under RSA chapter 231? Or, conversely, is the utility required to bear the extra expense for said conditions as a matter of law?**

Municipal Authority.

There is no clear authority requiring municipalities to bear the extra costs for conditions that they impose on licenses issued under RSA 231. As noted above, the ROW statutes (RSA 231) do not prescribe who must pay the costs for such relocations, in turn leaving intact the Commission's plenary authority over utility rates and conditions for service. As such, the Company believes the Commission has the authority to determine who should pay those incremental costs of utility service.

Municipalities have the authority to grant licenses or permits (the statute renders these terms interchangeable, RSA 231:161, VI), and to determine where utilities may locate their

facilities as a condition of allowing those facilities to exist in the public ROWs. RSA 231:161, V details that authority:

The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk

Municipalities typically exercise that authority by, for example, establishing initial locations for poles, wires, and pipelines, and then requiring utilities to move their poles and wires to accommodate a road widening project and/or requiring gas utilities to move underground piping to make way for a new sewer or water line. Those types of projects are completed using the business-as-usual least cost practices (e.g., selecting the least cost option and hiring the least contractor through a competitive bidding process).

The proposed tariff language in this docket addresses the different situation when a municipality insists on a more expensive option for its own reasons. On that issue, the governing statutes do not expressly state whether towns can demand relocations regardless of cost and the statutes do not prescribe whether the municipality, its citizens, or utility customers should bear the incremental costs. The closest the RSA 231 comes to regulating cost is the “public good” requirement imposed on municipalities in granting licenses. *See* RSA 231:161, II (“If the public good requires, the selectmen shall grant a permit for erecting or installing and maintaining such poles, structures, conduits, cables or wires”); RSA 231:163 (“The selectmen, after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires”).

Imposing conditions on a license that would cause unreasonable costs could conceivably run afoul of the “public good” requirement. As an extreme illustration, the extraordinary costs necessary to meet a hypothetical town requirement that the utility place underground every electric line in every town would clearly not be in the public good. It bears emphasis that neither the town nor the utility will pay these costs; it will be citizens of the municipality – either as city taxpayers or as utility customers – who will pay. The burden on these taxpayers and customers should enter the analysis of “public good.” See *Waste Control Systems v. State*, 114 N.H. 21 (1974) (“The analogous phrase ‘public good’ has been given a broad definition by this court and has been held not only to include the needs of particular persons directly affected ... but also... the needs of the public at large and the general welfare of the utility involved”); *Boston & Maine R.R. v. State*, 97 N.H. 380 (1952) (applying an economic analysis in determining the Commission’s evaluation of the “public good”).

Boiled down, there is no clear answer to the Hearing Examiner’s specific question of whether “the municipality [is] required to bear the extra cost for any conditions imposed on a license issued under RSA chapter 231.” But Liberty maintains that the Commission has authority to resolve that issue by approving the proposed tariff language under its general authority to set rates and determines conditions of utility service.

Commission Authority.

The Commission has general authority over utilities and the relationship with their customers, which is largely governed by each utility’s Commission-approved tariffs. The line extension provisions of Liberty’s tariff offer guidance here.

Liberty's line extension provisions *do* require third party developers to bear the incremental costs to connect customers when those costs exceed what the tariff otherwise allows. For example, Policy 4 of Liberty's Tariff, which appears at Original Page 74 and governs commercial and industrial developments, states:

The Company will determine the roadway infrastructure required to meet the distribution service requirements of the commercial development.

In accordance with the Formula below (the "Formula"), the Company shall determine whether a payment, by the Customer, of a Construction Advance shall be required. The "Allowed Credit per Buildable Lot" (B) will be a predetermined cost calculated by the company. This cost is located in the Schedule of Fees for Line Extensions in the Company's Terms and Conditions. The Construction Advance shall be paid in full prior to the start of any construction.

(Emphasis added.)

This section of Liberty's tariff defines "Customer" as a "developer, contractor, builder or other entity ("Customer") [who] proposes to construct a commercial or industrial development and no suitable distribution facilities exist." Original Page 72. Although this section of the tariff does not require the "developer, contractor, builder or other entity" to make the payment for excess costs, it does preclude Liberty from doing further work until payment is received: "The Construction Advance shall be paid in full prior to the start of any construction." Liberty believes that tariff is instructive here, especially when the municipality is the cost causer.

Although the Commission cannot require a third party – the municipality – to make a payment, the Commission can properly condition Liberty's work on that municipality's project on receiving that payment. If approved, the proposed tariff language would authorize Liberty to refuse performing the work – putting its overhead distribution lines underground – until the

municipality paid the incremental difference, in the same manner as in Liberty's existing line extension tariff allows Liberty to decline performing work until the develop has paid the Construction Advance, as quoted above.

Thus, to answer the Hearing Examiner's specific question of whether "the utility [is] required to bear the extra expense for said conditions as a matter of law," RSA 231 does not answer that question. However, if approved, the proposed tariff would allow the utility to refuse to perform work until the utility received payment for the excess costs.

Liberty acknowledges that a conflict would remain between the town's statutory authority to demand that a utility relocate facilities and the utility's authority under its Commission-approved tariff¹ not to do the work until paid. Unfortunately, that dispute may have to be resolved elsewhere. Liberty's request now is that the Commission adopt a reasonable resolution of that issue by approving the proposed tariff language.

(b) If neither option in (a) is required as a matter of law, should the Commission otherwise approve the petition? Relevant to this consideration are the following questions:

i. What legal authority does the Commission have to require municipalities to pay the difference between the two options?

As discussed above, by approving the proposed tariff language, the Commission would not be requiring the town to make the payment. Rather the Commission would be authorizing Liberty not to do the work unless the payment is made. Put simply, the Commission does not have

¹ In New Hampshire, Commission-approved tariffs have the "full force and effect of law." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980).

authority to require municipalities to pay the incremental relocation costs, but the Commission does have the have authority to prescribe the utility's conditions of service.

ii. Would requiring municipalities to pay the difference between the two options rather than ratepayers promote just and reasonable rates as required by RSA 374:2 and 378:7?

Yes, with the clarification noted above on the Commission's inability to require the municipality to make any payments. The Commission has long interpreted the "just and reasonable rates" standard as requiring utilities to choose the least cost design for a project and to execute those projects at least cost, often by following a competitive bid process, so long as those least cost options support safe and reliable service. Thus, authorizing Liberty to decline a more expensive option unless and until the town paid the incremental cost would help keep customers rates "just and reasonable." Approving Liberty's proposed tariff language also has the added benefit of putting the payment obligation on the cost causer rather than utility customers.

iii. What standard of review should the Commission apply to the petition?

The Commission should apply the "just and reasonable rates" standard to this petition. As discussed above, the proposed tariff language is analogous to the existing line extension policies. Those policies exist to ensure a reasonable allocation of costs between the utility and the customer/developer. Changing that allocation by requiring the utility to bear more of these costs will cause rates to increase. Since the proposed tariff language will directly impact customer rates, the "just and reasonable rates" standard is appropriate.

iv. How have municipalities and utilities historically resolved this issue?

Counsel is not aware of this issue arising for Liberty in the past, other than the situation with Salem in the DE 19-064 step adjustment proceeding that prompted this filing. Liberty is aware anecdotally that the City of Concord paid Unutil the excess cost to relocate facilities underground during its Main Street project several years ago.

v. How do other utilities' tariffs address this issue?

The New Hampshire tariffs of Unutil and Eversource do not seem to address this issue.

The tariff of Commonwealth Edison Company (“ComEd”), which governs service to customers in the Chicago area, has provisions that allow ComEd to recover the type of costs at issue in this docket. The following excerpt illustrates its basic mechanics:

In the event that a Local Government Unit enacts an ordinance ... to compel the Company ... to perform any of the following ... remove existing facilities and replace them with facilities different from facilities which the Company would otherwise be required to provide in such replacement ... then the costs of providing such service, or installing, removing, replacing, modifying or maintaining such facilities are recovered from the Company’s retail customers located within the boundaries of such Local Government Unit in accordance with the provisions of the Adjustment Computation and Application section of this rider.

The balance of the tariff, attached, provides further details.

Liberty is also aware that Massachusetts utilities are authorized by statute to impose a town-specific surcharge to recover costs to relocate overhead lines to underground. *See* MA Gen L ch 166 § 22. This chapter of Massachusetts law establishes a complex process for towns to pass an “ordinance or by-law which shall require a utility to remove its poles and overhead wires and associated overhead structures,” §22D, and for the utilities to recover their costs through a surcharge as follows: “any utility shall impose and collect as a capital contribution towards the

cost of construction a surcharge of two per cent on its total billing to each customer located in a city or town which has in force and effect an ordinance or by-law adopted in accordance with section 22D.” MGLA ch 166 §22M.

vi. Are there are any other legal or practical considerations the Commission should consider in reviewing Liberty’s petition?

Liberty is not aware of any other considerations but underscores how the proposed tariff language supports the concept of having the cost causers bear the incremental costs.

(c) Assuming that it is appropriate to pass on the costs to municipalities, is Liberty’s proposed language the most efficient and fair manner of doing so?

With the clarification that the proposed language does not automatically impose these costs on the municipality but authorizes Liberty to decline the work unless paid, then yes, Liberty believes its proposed approach is the most simple, efficient, and fair. Liberty’s option has the added advantage of forcing the municipality to fully assess the costs and benefits of relocating utility lines rather than simply forcing the utility to pay those costs to be recovered from utility customers.

i. How will any disputes between a municipality and Liberty arising under this provision be resolved?

Disputes could be resolved through the complaint process now administered by the Department of Energy. It is also possible that a municipality could bring an action in court seeking an order compelling the utility to perform the more expensive work. The court would then determine whether the “public good” standard in RSA 231 includes an evaluation of costs. That is, whether the municipal directive to put facilities underground at higher cost is in the public good as compared to the less expense option of allowing the lines to remain overhead.

ii. Should the extra cost be passed onto the municipality directly or, as suggested by Liberty’s counsel at the prehearing conference, should the costs be recovered through a surcharge on Liberty’s customers within the municipality?

Ultimately, Liberty believes that its proposed tariff language is the best option for resolving this issue by putting the burden on the municipality. Liberty’s proposal is to require the municipality to pay the costs directly, as discussed above, and allow the utility to refuse to move its lines if the municipality does not pay. Although Liberty could recover the relocation costs through location-specific surcharges on customers in the area requiring the work as mentioned at the prehearing conference and employed in Illinois and Massachusetts, that option will force utility customers to pay costs resulting from the town’s actions, and will impose additional costs and administrative burdens through the Company’s billing system and additional mechanisms to track and reconcile the precise costs to be collected through the surcharge. That option also may cause customer confusion on the added surcharge.

iii. Is Liberty’s proposed language sufficiently narrow to only apply to circumstances wherein a municipality imposes conditions on licenses granted under RSA chapter 231?

Yes, Liberty believes its proposed language is sufficiently narrow.

Conclusion.

For the reasons discussed in its petition and above, Liberty respectfully asks the Commission to approve the proposed tariff language.

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

By its Attorney,



Date: August 6, 2024

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Certificate of Service

I hereby certify that on August 6, 2024, I electronically forwarded a copy of this memorandum to the service list.



Michael J. Sheehan