

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 24-066**

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

**Petition to Amend Tariff**

**Order Denying Salem's Motion to Dismiss and  
Requiring Salem to Amend its Proposal**

**ORDER NO. 28,107**

**February 26, 2025**

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty (Liberty) filed a petition to amend its tariff to allow the company to assess a charge against any municipality or other governmental entity that directs the company to alter, modify, or relocate utility infrastructure in a manner that the company would not have done absent the government directive. The Town of Salem (Salem) intervened in this docket and moved to dismiss the petition,<sup>1</sup> at least as applied to municipalities, on the grounds that: (1) the Commission lacks the jurisdiction to require municipalities acting within their statutory authority under RSA chapter 231 to pay Liberty for the alteration, modification, or relocation of utility infrastructure; and (2) it is inconsistent with state common law. Liberty objects to the motion to dismiss. The New Hampshire Department of Energy (DOE) and the Office of the Consumer Advocate (OCA) join Liberty's objection, and otherwise support Liberty's petition. All parties filed briefs in support of their positions.

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<sup>1</sup> Salem filed an objection to Liberty's petition on the grounds that the Commission lacked the authority to approve the petition and that the petition was facially inconsistent with New Hampshire law. Although it was not titled as such, the Commission construes the filing as a motion to dismiss the petition.

For the reasons that follow, the Commission DENIES the motion to dismiss. The Commission finds that it has the jurisdiction to authorize Liberty to assess the proposed charge against municipalities and that such charges are not facially inconsistent with the common law. However, the Commission acknowledges the concerns raised in Salem's motion, which could impact the practicability and effectiveness of the proposed tariff amendment. Therefore, the Commission directs Liberty to file an amended proposal that incorporates one of the suggestions Liberty made in its brief as laid out more fully in this order.

#### **I. BACKGROUND AND LIBERTY'S PETITION**

Liberty seeks to add the following provision to its tariff:

In the event that a municipality or other governmental agency ("municipality") requests or compels the Company directly or indirectly to (i) install facilities in addition to, different from, or instead of facilities which the Company would otherwise install; (ii) remove existing facilities and replace them with facilities different from facilities which the Company would otherwise provide; or (iii) modify facilities which the Company would otherwise not modify, or modify facilities in a manner different from the manner in which the Company would otherwise perform, any incremental costs associated with such installation, relocation, or modification shall be recovered from the municipality.

The municipality will have the option to either pay the full incremental costs before the start of construction or sign an agreement to pay the amount in 60 equal payments, plus interest at the rate of interest applicable to the Company's customer deposit accounts at the time of execution of the payment agreement. Once construction is complete, the Company shall true-up any estimated project costs used with actual costs, and either refund or charge the municipality accordingly over the term of the payment agreement, with interest.

All facilities the Company is requested or compelled to install in accordance with this section are the property of the Company.

See Liberty's Petition, Attachment A.

Notably, Liberty's tariff already allows the company to charge a *customer* the incremental costs of altering its infrastructure in a manner more costly than the company's standard practice at the customer's request, such as when a housing

developer requests that the utility bury electric distribution lines within a new neighborhood. The proposed amendment was designed to allow Liberty to charge governmental entities who are *not* acting as customers, but as regulatory authorities.

By its plain language, Liberty's tariff amendment is not limited to municipalities. However, Salem's motion to dismiss concerns municipal authority under RSA chapter 231 and the relationship between municipalities and public utilities that the statute creates is relevant to the parties' instant dispute. Therefore, the Commission briefly lays out the relevant provisions of that chapter. Under RSA 231:161, electric distribution utilities are allowed to petition municipalities for a license to locate their distribution infrastructure on public highways—which are not highways in the colloquial sense, but to rights-of-way over municipal land. If a municipality does not find that granting the license would be in the public good, it can either deny the license or impose conditions upon the license, such as requirements that the infrastructure be placed in a particular area within the public highway. *Id.* In either case, the utility can appeal the decision to the superior court, which reviews the municipalities' decision under the "public good" standard. *Id.* A municipality also has the authority to impose new conditions or require the removal of utility infrastructure which is currently within a public highway. RSA 231:163. The utility can likewise appeal this decision to the superior court, which reviews the decision under the public good standard. *Id.* As is relevant to the instant motion, the statute does not state who must pay for any conditions that a municipality requires.

Finally, as is relevant to the Commission's recommended amendment to Liberty's proposal, Liberty noted in its brief that as an alternative to imposing a direct charge against municipalities, it could assess a fee against its ratepayers within a municipality to recover the costs at issue. Liberty further noted that while it preferred

the direct charge because it would be easier to implement, it would be willing to pursue this alternative if approved by the Commission.

## II. ISSUES AND ANALYSIS

Salem moves to dismiss the petition as applied to municipalities on two, related grounds. First, and most fundamentally, Salem argues that the Commission does not have jurisdiction to authorize Liberty to charge municipalities for the cost of complying with the town's directives under RSA chapter 231. Second, Salem argues that this tariff amendment conflicts with the common law rule, expressed in *Opinion of Justices*, 101 N.H. 527 (1957), that utilities are required to pay for the costs of any government-imposed requirement to move or alter utility infrastructure located on public land.

Having reviewed the parties' arguments, the Commission finds that while Salem has not raised a basis to dismiss the petition on either ground, its arguments related to RSA chapter 231 raise concerns about the efficacy of Liberty's proposal. However, in the Commission's view, these concerns do not merit dismissal and can be resolved through changes to Liberty's proposed tariff. The Commission therefore first addresses Salem's arguments under RSA chapter 231, explaining why it does not find they merit dismissal and outlining its suggested amendment to Liberty's proposal. The Commission then addresses Salem's arguments under the common law.

### A. The Commission has the Authority to Approve the Proposed Rates Under RSA 374:2, but Liberty Should Amend its Proposal to Avoid Potential Conflict with Municipal Authority Under RSA Chapter 231

Salem first argues that, under RSA 231:160–163, municipalities have the authority to impose conditions on electric distribution infrastructure within public highways. And, because the statute does not state that municipalities are required to compensate the utility for the cost of altering or removing their infrastructure, Salem contends that the Commission cannot require municipalities to do so. Salem

maintains that if a public utility opposes the municipal directive, its remedy is to appeal the decision to the superior court and argue that the directive is not in the public good. *See* RSA 231:161, 163. Salem maintains that Liberty's proposed tariff interferes with this statutory process, and that the Commission therefore cannot approve it.

In response, Liberty, the DOE, and the OCA argue that the Commission does have jurisdiction to approve the tariff language pursuant to its general ratemaking authority under RSA 374:2. Specifically, these parties argue that the Commission has a general obligation under RSA 374:1 and :2 to ensure that all rates are just and reasonable. They note that if one municipality is allowed to impose requirements on Liberty's distribution infrastructure that go beyond the company's operating practices, and thus increase the company's costs, Liberty will recover these costs from *all* of its ratepayers. As Liberty's franchise area includes numerous municipalities, these parties contend this would be would an unjust and unreasonable result because individuals who do not benefit from the requirement would be required to pay for compliance with it. *See* DOE Memorandum of Law at 2 ("A core principle of utility rate making is that costs should be borne by the entities that cause the costs."). For this same reason, the parties contend that the Commission can allow Liberty to assess a rate against municipalities in these circumstances because it would be just and reasonable to require the municipality to pay for extra conditions it imposes on utility property within its borders. Relatedly, Liberty argues that because RSA chapter 231 is silent on who must pay the cost of complying with conditions imposed by that statute, the Commission's ratemaking authority under RSA 374:2 allows it to set rates for compliance with the statute.

In its brief, Liberty acknowledges that there is a potential conflict between the Commission's authority to approve rates and municipalities' statutory rights under RSA 231. Specifically, Liberty notes that, while the Commission can authorize Liberty to assess a charge for its services, the Commission does not have jurisdiction to force a municipality to pay for the services. Liberty contends, however, that the tariff language would allow Liberty to deny service (i.e., refuse to comply with the town's directive) if a municipality does not pay the approved rate. Liberty further acknowledges that this could itself create conflict if the municipality moves to enforce its directive pursuant to the statute without paying the approved rate. In other words, a conflict may arise with the terms of the tariff if the municipality argues that it does not need to pay the rate and uses its statutory authority to force Liberty to relocate its infrastructure. Liberty argues, however, that this conflict should be resolved in the state courts, which have jurisdiction to determine the scope of municipal authority under state statute.

The Commission does not find that Salem has raised a basis to dismiss Liberty's petition. With respect to assessing charges against municipalities, the Commission has the authority to do so under to RSA 374:2 and RSA 378:7. Under those statutes, the Commission has the authority to review and set the rates and charges that public utilities charge for their services. This would reasonably include the rate that Liberty charges to alter, modify, or relocate the company's distribution infrastructure. *See, e.g. Complaint of City of Reynoldsburg v. Columbus Southern Power Co.*, 134 Ohio St. 3d 29, 40 (2012). Therefore, the Commission has the jurisdiction to authorize Liberty to assess a charge against municipal entities to provide these services.

With respect to Salem's arguments related to RSA chapter 231, the Commission finds that these arguments do not go to jurisdiction but instead the feasibility and effectiveness of any charge. In particular, the Commission acknowledges Salem's arguments about the potential conflict that could result from applying such a charge against a municipality acting under RSA chapter 231, which could affect the feasibility of Liberty's proposal for two related reasons. First, the Commission has no jurisdiction over municipalities with respect to this issue and cannot force them to pay for services. In fact, while the Commission has authority over utilities and the rates they charge for their services, it generally lacks jurisdiction over utility customers. In the ordinary course, a public utility's remedy for lack of payment would be to refuse to provide the requested service (consistent with statutory requirements). Thus, the only way a charge would be effective is if Liberty has the ability to refuse to provide the service to municipalities if they do not pay the charge.

This, however, relates to the second issue. The Commission cannot exempt Liberty from RSA chapter 231. Nor does the Commission have the authority to determine whether a municipal directive is within the "public good," as that statute requires, or otherwise enforce that statute.<sup>2</sup> Under the terms of the statute, that power lies with the superior court. Accordingly, if a municipality acts pursuant to RSA chapter 231, the Commission cannot exempt Liberty from compliance with that statute on the condition that the municipality pay Liberty for the service, nor can the

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<sup>2</sup> Notably, the petition arose from a conflict between Liberty and Salem wherein Salem ordered Liberty to bury electric distribution lines within the town pursuant to RSA chapter 231. The Commission acknowledges Liberty's and the OCA's arguments that this order was not a legitimate exercise of Salem's authority under the statute because it would not be within the "public good" for a single municipality to order a utility to bury its electric lines at the expense of all of the utility's ratepayers. However, the Commission cannot itself determine whether Salem's actions were authorized under the statute.

Commission determine which directives fall within the statute's ambit.<sup>3</sup> Significantly, nothing about this statutory scheme prevents the Commission from authorizing a fee under RSA 374:2. At the same time, it does mean that any charge may be uncollectible or require litigation to determine whether it is collectible.

Accordingly, while the Commission can authorize a charge against municipalities for modifications or relocations of utility infrastructure, it is unclear how practical or effective such a charge would be under the statutory scheme. Specifically, the Commission is concerned that doing so could create confusion between municipalities and Liberty, encourage litigation, create different classes of expenses that are collectible based on the outcome (or presumed outcome) of litigation and the willingness and ability of particular municipalities to litigate the issue, and possibly result in Liberty failing to recover appropriate costs. For these reasons, the Commission finds that while Salem has not raised a basis to dismiss Liberty's petition, Liberty should amend its proposal to avoid potential conflict with RSA chapter 231.

Specifically, as noted in the background section, Liberty has proposed as an alternative that it could assess a surcharge against a municipality's residents who are Liberty ratepayers to recover the costs associated with municipal directives. In its brief, the DOE noted that the Commission likely has the authority to approve such a surcharge under RSA 378:11, which authorizes the Commission to assess different rates against different classes of ratepayers if there is a rational basis for the different treatment. While both parties viewed this as an inferior alternative because it would be more difficult to assess and administer than a direct charge against the municipality

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<sup>3</sup> This does not mean that any cost associated with complying with a municipal directive under RSA chapter 231 can automatically be recovered from Liberty's ratepayers even in the absence of an amendment to Liberty's tariff. Pursuant to RSA 378:28, any expense that Liberty recovers must be prudently incurred. Therefore, Liberty has an obligation to protect its rights and ensure that it is not complying with inappropriate directives under RSA chapter 231 and then attempting to pass the costs onto its ratepayers.



itself, they both represented that it would be preferable to allowing the cost to be passed onto all ratepayers directly. Notably, this approach would not implicate the concerns about RSA chapter 231 that Salem has raised.

Although the Commission makes no final decision absent a definite proposal before it, the Commission finds that this is an appropriate solution to explore. Specifically, the Commission agrees with Liberty, the DOE, and the OCA that allowing municipalities to socialize the costs associated with their municipal directives among all of a utility's ratepayers could result in unjust and unreasonable rates. This is because ratepayers in one municipality may be forced to pay for utility improvements in another municipality even though they did not cause the increased expense and they may not benefit at all from the municipal requirement. In addition, because residents elect their municipal leadership, and would be the primary beneficiaries of any municipal directive, it would likely be just and reasonable to pass these costs onto these ratepayers. Further, it would allow for democratic accountability by ensuring that residents accept that their municipal directives will result in higher utility rates. Finally, the Commission appears to have the authority to approve such a surcharge under RSA 374:2, RSA 378:7, and RSA 378:11 and, because the Commission must approve any rate increase, RSA 378:3, it would allow for appropriate oversight of any surcharges imposed on municipal residents. Therefore, the Commission finds that would be an appropriate alternative to a direct surcharge on municipalities.

However, the Commission acknowledges Liberty's concerns that this would be more difficult to administer than a direct charge against a municipality. In the Commission's view, the best solution would be a proposal that offered municipalities the option of either paying an upfront direct charge consistent with Liberty's existing proposal. If the municipality rejects this offer, Liberty could then seek to recover the

costs through a surcharge on its ratepayers who live within the relevant municipality. This would avoid extensive (and expensive) litigation and allow Liberty to recover all costs associated with municipal directives from the appropriate parties.

In sum, the Commission DENIES the motion to dismiss on the grounds that municipal authority under RSA chapter 231 prevents the Commission from authorizing a charge against municipalities under RSA 374:2. But the Commission directs Liberty to refile its proposal in a manner consistent with this order to avoid potential conflict with municipalities and ensure more effective recovery of expenses.

#### B. Common Law

In addition to its arguments under RSA chapter 231, Salem also maintains that the proposed tariff amendment contradicts the common law rule that a utility is required to cover the cost of moving its infrastructure when ordered to do so by a government entity. *See Opinion of the Justices*, 101 N.H. at 528 (“Utility facilities are located within public highways with permission and license and are subject to reasonable regulation and control under the police power. Consequently, utilities are required to relocate their facilities *at their own expense* whenever public health, safety or convenience require change to be made.” (emphasis added)). Because the Commission has ordered Liberty to amend its proposal, it makes no final conclusions that any proposal will be consistent with the common law. However, the Commission finds that a charge against a municipality or surcharge on a municipality’s residents approved pursuant to RSA 374:2 is not facially inconsistent with the common law and is therefore not grounds to dismiss the petition in its entirety.

In enacting RSA chapter 231, the legislature essentially codified the common law rule and laid out a clear process for when and how municipalities can impose conditions on utility facilities in public highways—i.e., subject them to “reasonable

regulation.” *See id.* (“While the obligation to remove or relocate utility facilities is placed on the owner by the common law, the legislature may change this rule.” (emphasis added)). As noted above, if a municipality acts pursuant to that statute, a utility must comply with the statute. As the Commission has already stated, the Commission cannot alter municipalities’ rights under that statute.

However, the cited common law principle discusses the relationship between utilities and municipalities. It does not refer to or implicate the Commission’s power to authorize utilities to assess rates and charges under RSA 374:2. In fact, there is nothing in the Commission’s enabling statutes that would prevent it from approving rates or charges against municipalities or their residents for the services discussed in this order. And Salem has not cited any law that would limit the Commission’s authority to authorize a rate or charge against a municipality or its residents under RSA 374:2. Therefore, the Commission does not find that a tariff amendment that imposes a rate or charge for services for the modification or relocation of utility infrastructure is a facial violation of the common law. Therefore, there is no ground to dismiss the petition on this basis.

Accordingly, the Commission concludes that it both has jurisdiction to approve Liberty’s tariff amendment and that the tariff amendment (including as adjusted by the Commission’s proposed change) is not facially inconsistent with state common law. The Commission will therefore not dismiss the petition on either ground raised by Salem.

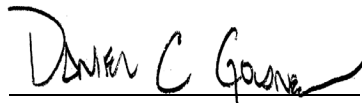
**Based upon the foregoing, it is hereby**

**ORDERED**, that Salem’s motion to dismiss is DENIED; and it is

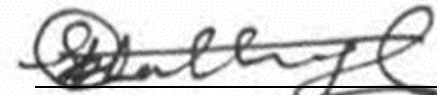
**FURTHER ORDERED**, that Liberty shall file an amended proposed tariff in a manner consistent with this order within 35 days of the issue date of this order; and it is

**FURTHER ORDERED**, that the Commission will provide further process for the review of the amended proposal after receiving Liberty's updated filing.

By order of the Public Utilities Commission of New Hampshire this twenty-sixth day of February, 2025.



Daniel C. Goldner  
Chairman



Pradip K. Chattopadhyay  
Commissioner



Mark W. Dell'Orfano  
Commissioner

# Service List - Docket Related

Docket#: 24-066

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