

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 22-041

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. d/b/a LIBERTY
Petition for Approval to Recover Revenue Decoupling Adjustment Factor Costs**

Order Denying Motion to Dismiss

O R D E R N O. 26,677

September 6, 2022

In this order, the Commission denies without prejudice the motion of the Office of the Consumer Advocate to dismiss Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty's petition for approval to recover revenue decoupling adjustment factor costs.

I. PROCEDURAL HISTORY

On July 6, 2022, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (Liberty) filed a petition for approval to recover revenue decoupling adjustment factor costs (Petition). In support of its petition, Liberty pre-filed the direct testimony and attachments of Erica L. Menard, Liberty's Director of Rates and Regulatory Affairs.

On July 6, 2022, the Office of the Consumer Advocate (OCA) filed a letter of participation and a motion to dismiss Liberty's Petition (Motion).

On July 15, 2022, Liberty filed an objection to the OCA's July 6, 2022 motion to dismiss (Objection).

On August 1, 2022, the New Hampshire Department of Energy (DOE) filed a notice of appearance.

The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are

available on the Commission's website at

<https://www.puc.nh.gov/Regulatory/Docketbk/2022/22-041.html>.

I. SUMMARY OF PLEADINGS

a. Liberty's Petition, Pre-Filed Testimony, and Attachments

Liberty's Petition, supported by the pre-filed testimony of Ms. Menard, states that Liberty incorrectly returned \$4,023,830 to customers from 2018 through 2020, the period in which Liberty's first decoupling tariff was in effect, because the initial revenue decoupling mechanism (RDM) improperly compared the allowed revenue target for the low-income R-4 rate class, which has discounted rates, with the higher actual revenues collected from the R-3 rate class, which does not have discounted rates. Liberty stated that the relevant tariff language was corrected in Docket No. DG 20-105, the Company's most recent rate case.

Liberty requested the Commission's authorization to recover, through the Revenue Decoupling Adjustment Factor (RDAF), the \$4,023,830 that it maintained was erroneously returned to customers. Liberty proposed collecting this amount over two years, beginning November 1, 2022.

Liberty's petition and supporting pre-filed testimony go on to assert that Liberty implemented a complicated new tariff formula based on an interpretation of tariff language that was not inconsistent with the applicable tariff language. According to Liberty, that interpretation was guided by an informal regulatory process and implemented in good faith that if errors were later discovered, they would be corrected with the ultimate goal of achieving revenue neutrality.

According to Liberty, an error did occur, describing it as follows:

... a mismatch in the language that governed the annual reconciliation of the allowed and actual revenues for the low-income R-4 rate class [occurred]. The tariff directed a comparison of allowed revenues calculated using the lower, discounted rates charged to R-4 customers,

with the actual revenues from those customers calculated using the higher, non-discounted R-3 rates. This improper comparison of the allowed revenue targets (which were naturally much lower due to the discount) to the actual revenues collected (which were calculated based on the higher, non-discounted rate) suggested that Liberty's actual R-4 revenues far exceeded the allowed revenues and thus compelled the refunds at issue in this petition, even though no refund was due.

Petition at 2.

In support of its petition, Liberty cited the following authorities as a legal basis for recovery: Order Nos. 26,264 (June 24, 2019); 26,243 (Apr. 30, 2019); No. 26,140 (May 31, 2018); 21,897 (Nov. 6, 1995); and 25,286 (Oct. 31, 2011). According to Liberty, its request to collect these monies will produce just and reasonable rates as required by RSA 378:7.

b. OCA Motion to Dismiss

The OCA's Motion to Dismiss argued that if all facts alleged in the Petition and supporting testimony are true, the Commission cannot grant Liberty the relief it seeks as a matter of law. According to the OCA, Part 1, Article 23 of the New Hampshire Constitution prohibits new obligations in respect to a past transactions, i.e., retroactive rate setting. According to the OCA, a reconciling rate mechanism on its own is not unlawful, but its application must be limited to its explicit terms, in this case the request exceeds the terms of a mechanism intended to allow the Company to "recover the base revenue requirement approved in its most recent base-rate proceeding – no more and no less – despite fluctuations or reductions in sales..." OCA Motion at 5 (quoting Testimony of Erica Menard at Bates page 15, lines 14–17).

c. Liberty Objection

Liberty objected to the OCA's Motion to Dismiss, arguing that, at a minimum, there is a threshold issue of fact in this proceeding as to whether any retroactive ratemaking or other impermissible retroactive impact would occur if the request were

granted. According to Liberty, its petition establishes that it could have recovered the correct level of revenues by applying the approved tariff terms in a different manner, but still within the approved terminology of the tariff. Liberty went on to cite to Order No. 15,471, 67 NH PUC 113 (February 2, 1982) for the premise that the Commission has already determined that “retroactive ratemaking” does not apply to reconciling mechanisms that, by their very nature, are recovering over- and under-collections from a prior period.” Objection at 4.

According to Liberty, an error in the application of the tariff is a mistake that is subject to remedy through operation of the reconciling mechanism because otherwise, no mistake could ever be cured through a reconciling mechanism including a simple math error, which defies the very purpose of having a reconciling mechanism. Liberty argued that the OCA’s Motion must fail because (1) the cited case law, and the ratemaking principle established therein, pertain to base-rate changes and not to the operation of any reconciling mechanism; and (2) the cited case law contemplates a retroactive “increase” in cost recovery caused by a change in the tariff operation, whereas here the Company is seeking to obtain recovery of under-collected revenues that are necessary to maintain revenue neutrality associated with provision of the low-income discount rate. Liberty cited to Massachusetts case law, Fitchburg Gas & Elec. Light Co. v. Dep't of Telecommunications & Energy, 440 Mass. 625, 801 N.E.2d 220, (2004), for the proposition that reconciling mechanisms are an exception to the prohibition against retroactive ratemaking.

II. COMMISSION ANALYSIS

In ruling on a motion to dismiss, the Commission determines whether the facts alleged in the petition and supporting pleadings and pre-filed testimony, and all reasonable inferences, could support the relief sought. Decisions on such motions are

made before a factual record is developed, requiring the Commission to assume that all the Petitioner's assertions are true. *Public Serv. Co. of N.H.*, Order No. 25,213 at 71 (Apr. 18, 2011). We need not assume the truth of the statements in the pleadings that are merely conclusions of law. *Clark v. N.H. Dep't of Emp't Sec.*, 171 N.H. 639, 645 (2019). We engage in a threshold inquiry that tests the facts in the complaint against the applicable law. *Id.*

Liberty claims that it erroneously retained less revenue than it should have for services rendered when it applied the RDM formula to issue refunds to customers between 2018 and 2020. For authority to recover this erroneously refunded amount, Liberty cited five prior Commission Orders, and asserted that granting the request to recovery would result in just and reasonable rates pursuant to RSA 378:7.

With respect to applicable law, we note that Liberty's Petition does not identify any specific statute or rule that explicitly authorizes the relief it seeks, rather Liberty argues that commission precedent supports its request and would result in just and reasonable rates, consistent with RSA 378:7.

The Commission is not bound by its prior holdings. The Commission is, however, bound by statutory authorities and its enacted rules. We note that Liberty cites to Order No. 21,897 (Nov. 6, 1995), which was the impetus for the adoption of NH Code Admin. R. Puc 1203.05 (e) and (f), relative to back billing for erroneously uncollected approved revenues. Although erroneously uncollected approved revenues are distinguishable from erroneously refunded revenues, we also recognize that Puc 1203.05 (e) and (f) establish a framework to remedy company errors and is consistent with RSA 378:14, which directs that regulated utilities shall not charge "greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with

the commission and in effect at the time such service is rendered.” Puc 1203.05(f)(3) requires that any billing for uncollected revenues meets the standards contained in RSA 378:7. As applied, Puc 1203.05 (e) and (f) has been limited by prior Commission determinations to two years of recovery, applying by analogy RSA 365:29, which limits a utility’s liability for reparations to customers to two years. *See Exeter and Hampton Electric Company*, Order No. 24,049 at 7 (September 9, 2002).

We also note the case law cited to by the petitioner in its Objection, Fitchburg Gas & Elec. Light Co. v. Dep’t of Telecommunications & Energy, 440 Mass. 625, 638, 801 N.E.2d 220, 230 (2004). That Court stated:

Retroactivity is inherent in the very nature of a CGAC. Unlike the base rate, which is a calculation of rates going forward based on historical data, the CGAC adjusts semi-annually for utility costs as they actually have been incurred, according to a mechanically applied technical formula. See *Consumers Org. for Fair Energy Equality, Inc. v. Department of Pub. Utils.*, *supra* at 606, 335 N.E.2d 341. The formula itself is a fixed “rate” that cannot be changed outside the hearing procedure mandated by G.L. c. 164, § 94. See *id.* at 604, 335 N.E.2d 341. But the “dollars and cents” amount inserted into the flow-through formula is presumptively not fixed. *Id.*

Although not directly addressing the question whether the mechanical application of a technical formula can be remedied *ex post*, we agree with the premise that the formula itself is that which is fixed in the ratemaking context. We conclude that where there is an allegation that an approved reconciling mechanism resulted in an erroneous under collection of revenues and that that under collection could be remedied within the language of the formula in effect at the time, that the company should be provided the opportunity present a case for recovery based on RSA Ch. 378 and analogous rules Puc 1203.05 (e) and (f). This determination is without prejudice to the OCA’s right to raise its arguments about retroactivity later in this proceeding.

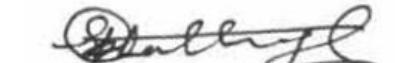
Based upon the foregoing, it is hereby

ORDERED, that the Office of the Consumer Advocate's Motion to Dismiss is DENIED WITHOUT PREJUDICE.

By order of the Public Utilities Commission of New Hampshire this sixth day of September, 2022.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket# : 22-041

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