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October 1, 2018

Ms. Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. DG 17-048
Energy North Natural Gas Corp. d/b/a Liberty Utilities
Permanent and Temporary Rate Proceeding
Secretarial Letter of September 24, 2018

Dear Ms. Howland:

The Office of the Consumer Advocate (OCA) is submitting this letter in response to yours of September 24, 2018 in the above-referenced docket. The September 24 secretarial letter instructed Energy North Natural Gas Corp. d/b/a Liberty Utilities (Liberty) to address three specific issues related to the revenue decoupling mechanism approved in this docket via Order No. 26,122 (April 27, 2018). Our comments here are related to the last of those issues.

The secretarial letter noted that page 46 of Order No. 26,122 directed Liberty to file "illustrative tariffs demonstrating the rates, terms, and conditions required to implement decoupling in conformance with existing law." According to the secretarial letter, the Commission has determined that Liberty's June 11, 2018 tariff filing "does not address this requirement." Accordingly, the Commission instructed Liberty via the secretarial letter to submit a legal memorandum "explaining how the real-time weather normalization portion of the tariff as filed is 'in conformance with existing law.'" The Commission then referenced two aspects of "existing law" in particular: RSA 378:3 and the decision of the New Hampshire Supreme Court in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980).

As an initial matter, the OCA objects to the directive in the secretarial letter on procedural grounds. The Commission approved real-time weather normalization,

over the objection of Staff, in Order No. 26, 122. This determination is final and unappealable pursuant to RSA 541. *See, e.g., Appeal of Northern New England Tel. Operations*, 165 N.H. 267, 271-72 (2013) (noting that arguments may be raised on appeal if they relate to any matter determined in the action or proceeding, were included in an application for rehearing within thirty days of “any order or decision, and the agency's ruling on the application was timely appealed”) (citations and internal quotation marks omitted) and *In re Town of Seabrook*, 163 N.H. 635, 653-55 (2012) (discussing *res judicata*, collateral estoppel and finality in the context of administrative proceedings).

On June 22, 2018, via Order No. 26,219, the Commission partially granted a rehearing motion made by Liberty with respect to the effective date of the rate design changes previously approved. On July 10, 2018 the Commission partially granted a motion for clarification filed by Liberty with respect to certain issues related to the Company's revenue requirement. These proceedings on rehearing are limited to the specific issues raised by Liberty in its rehearing and clarification motions. The substance of the decoupling plan approved in Order No. 26,122 is not subject to rehearing.

In these circumstances, the Commission may not revisit the issue of real-time weather normalization without invoking RSA 365:28, which would require notice, hearing, and any other limitations or formalities imposed via the requirement of due process. *See Appeal of Office of Consumer Advocate*, 134 N.H. 651, 657-58 (1991). The OCA also reserves the right to raise other issues related to due process arising out of the secretarial letter in conjunction with recent meetings held among the parties and Staff on the subjects raised in the letter.

Without waiving any right to raise these procedural concerns, the OCA urges the Commission to reaffirm its previous determination that real-time weather normalization is consistent with applicable New Hampshire law. For purposes of this argument, we assume that “real time weather normalization” is as defined in the illustrative tariff submitted by Liberty on June 11, 2018, i.e., “the difference between actual distribution revenue billed to each customer in each billing cycle for each month or portion thereof during the Winter Period, and what distribution revenue for each customer's bill would have been based on normalized therm deliveries for the same period. The resulting charge or credit will be added to or subtracted from each customer's bill at the time the bill is rendered (i.e., ‘real time’).” We also assume that real-time weather normalization proceeds as described in the illustrative tariff: “The real-time weather normalization adjustment is calculated as the difference between actual distribution revenue billed to each customer in each billing cycle for each month or portion thereof during the Winter Period, and what distribution revenue for each customer's bill would have been based on normalized therm deliveries for the same period. The resulting charge or

credit will be added to or subtracted from each customer's bill at the time the bill is rendered (i.e., 'real time')."

RSA 378:3 provides that no change may be made "in any rate, fare, charge, or price" imposed by a utility, "except after 30 days' notice to the commission and such notice to the public as the commission shall direct." This provision does *not* require 30 days' notice every time a utility normalizes individual customer billings based on weather under the revenue decoupling plan proposed and approved in this docket. The adjustment described in the illustrative tariff, which varies the amount a particular customer will be billed on a monthly basis, is simply not a change to a "rate, fare, charge, or price" as the General Court used the phrase.

The obvious purpose of RSA 378:3 was to give the Commission a meaningful opportunity to exercise its authority to suspend a tariff and conduct a full investigation of utility rates – historically, the central task of a utility regulator. There can be no doubt this has already occurred here; the basis for real-time weather normalization, its implications for customers as well as shareholders, the mechanics of such normalization, and the policy arguments both pro and con, were aired extensively in the hearings that preceded Order No. 26,122. To conclude, in these circumstances, that RSA 378:3 precludes a tariff that includes a real-time weather normalization mechanism would be an absurd result. The New Hampshire Supreme Court has recently reemphasized the longstanding principle that one must presume the General Court never intends an absurd or illogical result when it legislates. *In re Teresa E. Craig Living Trust*, 2018 WL 2018 WL 4266433 at *1 (citation omitted). RSA 378:3 was originally adopted in 1911, long before revenue decoupling had been invented as a means of increasing the welfare of both utility customers and utility shareholders. It would therefore be improvident to assume that the General Court intended in 1911 to preclude the development of such mechanisms; to hold otherwise is the sort of slavish literalism that is inconsistent with the accepted canons of statutory construction. *See, e.g., Hogan v. Pat's Peak Skiing LLC*, 168 N.H. 71, 74 (2015) ("Without legislative history to guide us, "[w]e construe statutes to address the evil or mischief that the legislature intended to correct or remedy"); *see also id.* at 73 ("do not consider words and phrases in isolation, but rather within the context of the statute as a whole") (citations omitted) and *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965) ("Unquestionably the courts, in interpreting a statute, have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results or would thwart the obvious purpose of the statute")(citations and internal quotation marks omitted).

Nor does the decision of the New Hampshire Supreme Court in *Appeal of Pennichuck Water Works*, decided in 1980, preclude real-time weather normalization as described in the illustrative tariff. The *Pennichuck* case stands simply for the proposition that retroactive ratemaking is inconsistent with the

Commission's enabling statutes, Part 1, Article 23 of the New Hampshire Constitution (precluding retroactive laws), and the Contracts Clause of the U.S. Constitution. The Commission may not "allow a rate increase to take effect applicable to services rendered at any time prior to the date the petition for the rate increase was filed." *Appeal of Pennichuck Water Works*, 120 N.H. at 566.

Real-time weather normalization does *not* have the effect of causing a rate increase (or, for that matter, a rate decrease) to apply to services rendered prior to the rate change. The tariff permits an interested customer to calculate the applicable rate on any given day prior to consumption. This is not an example of a utility asserting the right to revisit past transactions and correct them; for this reason, the Appellate Court of Illinois five years ago rejected the very claim about revenue decoupling that is suggested by the secretarial letter here. *See Madigan v. Illinois Commerce Comm'n*, 988 N.E.2d 146, 154-55 (Ill. App. Ct., 2d Dist. 2013), vacated on other grounds, 25 N.E.3d 587, 601 (Ill. 2015).

To the best of our knowledge, no utility commission or court has rejected revenue decoupling as an impermissible example of retroactive ratemaking. Meeting the need to explain revenue decoupling to customers clearly and satisfactorily, both in the tariff and in other materials provided to customers, may be challenging. But "hard to explain" is not the same as insufficiently noticed pursuant to RSA 378:3 or retroactively effective in the sense precluded by *Pennichuck*.

Moreover, if real-time weather normalization is inconsistent with the statutory and constitutional prohibition on retroactive ratemaking applicable in New Hampshire, a variety of longstanding reconciling mechanisms included in utility rates would likewise be vulnerable. Stranded cost recovery, storm cost recovery, fuel adjustment clauses and the like are all accepted aspects of New Hampshire utility rates; all allow utilities to adjust future rates to make up for over- and under-recovery of previously incurred costs.

For the foregoing reasons, it is the respectful contention of the OCA that the Commission should not and, indeed, may not, revisit its decision to approve the revenue decoupling plan (including real-time weather normalization) in this docket under the guise of requiring Liberty to submit a tariff that complies with the Order.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Maurice Kreis". The signature is fluid and cursive, with a long horizontal stroke at the end.

D. Maurice Kreis
Consumer Advocate

cc: Service List