THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities

DE 16-835

Complaint of Richard Balagur

Response to Complaint of Richard Balagur

Liberty Utilities (Granite State Electric) Corp., d/b/a Liberty Utilities, through counsel, respectfully submits the following response to Mr. Balagur's complaint.

Introduction.

Mr. Balagur alleges that Liberty owns -- and thus is responsible for the failure of -- an underground electric line that runs from a Liberty-owned pole, beneath a street and beneath a municipal parking lot, to a Liberty-owned transformer that serves his buildings. Liberty denies liability because the applicable tariff unequivocally states that the underground wires "shall be and remain property of the Customer," and thus Mr. Balagur is responsible for the repair. The primary issue for the Commission to decide is whether Liberty owns the underground line in question. Alternatively, Liberty's tariff precludes claims for "interruption of service."

Facts and Procedural History.

The location of the wire is not in dispute. The wire runs from a Liberty-owned pole on one side of Hanover Street, then beneath Hanover Street and under a city-owned parking lot, to a Liberty-owned transformer next to Mr. Balagur's buildings. Exhibit 1 is a collection of diagrams, maps, charts, and photographs. A review of Exhibit 1, as well as pages 14, 20, 48, and 49 (of 87) of

the attachments to Mr. Balagur's complaint, provide reasonable illustrations of the line and surrounding area.

There is no dispute that the wire in question was installed in the late 1960s as part of the City of Lebanon's redevelopment of the area after a devastating fire destroyed many downtown buildings. *See* Mr. Balagur's complaint at 3-4.

There is also no dispute that the wire failed on July 7, 2012, that the failure was beneath the parking lot, that Mr. Balagur's buildings were without power for a number of days, and that Mr. Balagur incurred costs for a temporary generator (shown in the photographs), for a contractor who tried to fix the line, and perhaps other expenses. When Liberty learned that Mr. Balagur's contractor was unable to repair the line, Liberty stepped in and made the repairs as a courtesy, incurring approximately $10,000 in labor charges and costs.

Mr. Balagur filed suit against Liberty and the City of Lebanon claiming one or both were responsible for the failed line and for Mr. Balagur's resulting damages. At mediation Mr. Balagur and Liberty agreed that Mr. Balagur would withdraw his court complaint, without prejudice, and file this complaint to allow the Commission to decide the utility-specific issue of whether Liberty is responsible for the underground line. Liberty also agreed that should the Commission find Liberty responsible for the failed underground line, Mr. Balagur can return to court for a hearing on damages. The court dismissed the claims against the City of Lebanon with prejudice.

The Issue.

The question presented to the Commission is whether Liberty is responsible for the line beneath the parking lot.

Liberty's Tariff and Argument.

Attached as Exhibit 2 is Liberty's Tariff No. 6, which was first in effect June 1, 1964, with revised pages inserted through April 27, 1971. Thus, Exhibit 2 reflects the tariff in effect when the underground line at issue was installed in about 1969. There are three sections of Tariff No. 6 relevant here.

First, Section 18 of Tariff No. 6 states that underground lines are customer-owned:

> A Customer's premises may be connected to the Company's aerial distribution wires through an underground connection upon payment by the Customer of the total cost thereof including the necessary riser, and that part of such connection located on the Customer's premises shall be and remain the property of the Customer. All underground service connected to the Company's underground cables beyond two feet inside the property line shall be paid for by the Customer and shall be and remain the property of the Customer.

Exhibit 2 at 15 (emphasis added). This language answers the primary question in this matter in Liberty's favor and the Commission could end its analysis here.

Second, Tariff No. 6 was amended between 1966 and 1969 to allow the Company to own underground wire, but only for "qualifying" residential or commercial developments, which are developments that have a minimum number of homes or businesses and that are "situated where no electric distribution system exists." Exhibit 2 at 30. If the developer proposes a "qualifying development" and satisfies a number of other specific planning and construction requirements, then the "underground systems installed in accordance with the provisions above shall be owned and maintained by the Company." Exhibit 2 at 46-47; *see* Tariff No. 6 at Pages 14-A though 14-D, Exhibit 2 at 30 - 47. The detailed and demanding requirements of these provisions underscore that company-owned underground lines was the exception, not the rule. The history of Mr. Balagur's properties and the installation of the line at issue in downtown Lebanon certainly do not fall under this exception.

Tariff No. 6 was amended in 1971 to allow for the Company to install underground equipment when the Company determined that "it is economically reasonable and practical to do so," and when a "municipal policy" requires underground utilities. In the latter case, the 1971 amendments to Tariff No. 6 allowed the Company to impose a surcharge to recover the added costs. Exhibit 2 at 48-50; *see* Order No. 10,257 (Apr. 27, 1971) (approving the new language). However, even if "it is economically reasonable and practical" to bury wires, or if a municipal policy required underground facilities, this new section of Tariff No. 6 repeated that the lines remained customer-owned: "As stated in the Company's Terms and Conditions, underground construction beyond a point two feet inside the property line will be at the customer's expense and will be owned and maintained by the customer." Exhibit 2 at 50.

Thus, the only exception in Tariff No. 6 to the broad rule that customers own underground lines was the new development provisions discussed above. The line at issue here in downtown Lebanon was obviously not installed under those provisions simply because the requirement of being "situated where no electric distribution system exists" could not be met. Exhibit 2 at 30. Mr. Balagur alleged no other facts that would render the line at issue company-owned under Tariff No. 6. Thus, under a plain reading of Tariff No. 6, the underground line at issue was customer-owned, not Company-owned.

Third, the Commission's October 28 letter asked the Company to provide a copy of the tariff that governed in July 2012 when the line failed. Tariff No. 18 went into effect July 3, 2012, and is attached as Exhibit 3 (the rates pages are not included). The Company does not concede that Tariff No. 18 applies to the dispositive question of whether the line at issue was Company owned. Any change in responsibility for equipment must only apply prospectively. That being said, a review of Tariff No. 18 still supports Liberty's position that the line was not Company-owned.

Section 19 of Tariff No. 18 is the successor to Section 18 of Tariff No. 6:

> A Customer's premises may be connected to the Company's aerial distribution wires through an underground connection where the Customer installs, owns and maintains all of the underground service including the necessary riser. All low voltage underground service connected to the Company's underground distribution cables beyond two feet inside the property line shall be installed by the Customer and shall be and remain the property of the Customer.

The first sentence applies here and repeats the longstanding general rule that underground lines are customer-owned. The second sentence applies to the now more frequent instances where the Company does own the underground facilities that serve whole neighborhoods, and simply establishes the boundary between Company-owned and customer-owned lines. The second sentence simply would not apply even if Tariff No. 18 governed.

The last paragraph of Mr. Balagur's complaint makes passing that "the bases of several transformers located on the City of Lebanon property, including the transformer involved in this situation, appear to have rusted but not repaired." Complaint at 4. Section 4 of Tariff No. 6 plainly states that the transformer foundation is customer-owned:

> The Customer shall furnish free of cost upon its premises the necessary space and provide suitable foundations, supports, housing, wiring and pipe and fittings for any transformers, rotary converters, switching arrangements, meters and other apparatus required in connection with the supply of electricity whether such equipment is furnished by the Customer or the Company. Such foundations, supports, housing, wiring and pipe and fittings, shall be in conformity with the Company's specifications and subject to its approval.

Exhibit 2 at 7 (emphasis added). The language hardly changed in Tariff No. 18:

> The Customer shall furnish, at no cost to the Company, the necessary space, housing, fencing and foundations for such equipment as will be installed upon its premises, in order to supply it with electricity, whether such equipment be furnished by the Customer or the Company. Such space, housing, fencing and foundations shall be in conformity with the Company's specifications and subject to its approval.

Exhibit 3 at 8. Mr. Balagur's claim that Liberty is responsible for the transformer foundation should be denied.

Finally, both Tariff No. 6 and Tariff No. 18 state that Liberty is immune from Mr. Balagur's claim for damages. Tariff No. 6 states:

> The Company shall not be liable for, or in any way in respect of, any interruption, discontinuance or reversal of its service, due to causes beyond its immediate control, whether accident, labor difficulties, condition of fuel supply, the attitude of any public authority, failure to receive any electricity for which in any manner it has contracted or inability for any other reason to maintain uninterrupted and continuous service; provided, however, that if the Company is unable for any of the causes enumerated above to supply electricity for a continuous period of two days or more, then upon request of the Customer, the Demand Charge, if any, shall be suspended for the duration of such inability.

Exhibit 2 at 10. Tariff No. 18 has nearly identical language:

> The Company shall not be liable for, or in any way in respect of, any interruption, abnormal voltage, discontinuance or reversal of its service, due to causes beyond its immediate control whether accident, labor difficulties, condition of fuel supply, the attitude of any public authority, or failure to receive any electricity for which in any manner it has contracted, or due the operation in accordance with good utility practice of an emergency load reduction program by the Company or one with whom it has contracted for a supply of electricity, or inability for any other reason to maintain uninterrupted and continuous service; provided, however, that if the Company is unable for any of the causes enumerated above to supply any electricity for a continuous period of two days or more, then upon request of the Customer, the Demand Charge, if any, shall be suspended for the duration of such inability.

Exhibit 3 at 8.

Since Mr. Balagur's claim arises out of an "interruption [or] discontinuance … of its service," Liberty is not liable for such claims under both tariffs if the interruption resulted from "causes beyond its immediate control," including "accident … or for any other reason." The reason for the interruption of service here is the failure of a 40 year old line. Thus, Liberty cannot be held liable if that failure was "beyond [Liberty's] immediate control."

Mr. Balagur makes no allegations of having prior problems with the power supply, of giving Liberty notice of such problems, or that Liberty had any other source of knowledge that the line was about to fail. Mr. Balagur offers no expert opinion that good utility practice requires replacing all

underground wires before they reach the 40 years that elapsed here. Liberty is thus entitled to the protection of the tariff language above that shields it from liability for interruptions of service.

The Commission's October 28 letter asked the Company to provide certain information in its response. First, the Commission asked for the tariff pages in effect in 1969 when the line was installed and in 2012 when the failure occurred. Those tariff pages are contained in Exhibits 2 and 3. Second, the Commission asked for all of Liberty's filings in the state court litigation. Those documents are contained in Exhibit 4. Third and fourth, Liberty collected all maps, diagrams and photographs of the underground facilities and "showing what facilities the underground facilities in question are connect to" in Exhibit 1.

Finally, the Commission asked whether the underground line in question is or has ever been included in the Company's rate base. The answer is "no" because the Company's position is, and has always been, that it does not own underground lines (except for the few housing development situations described above). It is a difficult negative statement for the Company to prove although there is nothing particular about this installation that would have caused the Company to depart from its policy of the customer owning the underground service.

WHEREFORE, Liberty Utilities (Granite State Electric) Corp., d/b/a Liberty Utilities, respectfully asks the Commission to:

a. Find, as a matter of law, that Liberty did not own the line that failed under the municipal parking lot;

b. In the alternative, find, as a matter of law, that the tariff shields Liberty from liability for Mr. Balagur's "interruption of service" complaint; and

c. Grant any further relief deemed just and proper.

Respectfully submitted,

LIBERTY UTILITIES (GRANITE STATE ELECTRIC) CORP. D/B/A LIBERTY UTILITIES

By its Attorney,

Date: November 7, 2016 By: _____

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Certificate of Service

I hereby certify that on November 7, 2016, a copy of this response has been forwarded to the service list in this docket.

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Michael J. Sheehan