

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DG 20-152**

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.  
d/b/a/ LIBERTY UTILITIES—KEENE DIVISION**

**Winter 2020-2021 Cost of Gas**

**Order Disallowing Historic CNG Demand Charges**

**ORDER NO. 26,480**

**May 14, 2021**

**APPEARANCES:** Michael J. Sheehan, Esq. for Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities Keene Division; the Office of the Consumer Advocate by Christa Shute, Esq., on behalf of residential ratepayers; and Mary E. Schwarzer, Esq., on behalf of Commission Staff.

This order disallows recovery of compressed natural gas demand costs incurred for a 26 month period before Liberty Keene began providing compressed natural gas to any of its customers.

**I. PROCEDURAL HISTORY**

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities Keene Division (Liberty, Liberty Keene, or the Company) is a public utility distributing propane-air and natural gas in Keene. On September 17, 2020, Liberty Keene filed its proposed cost of gas (COG) and fixed price option (FPO) rates for winter 2020-2021. That was the second winter period Liberty Keene planned to use CNG to meet a portion of Keene customer supply requirements. *See* Order No. 26,305 at 4, 9 (October 31, 2019). The Company's proposed rates were based on forecasted propane and compressed natural gas (CNG) supply costs, including but not limited to a proposed prorated portion of CNG supply contract demand charges incurred over a period of 26 months

prior to the Company commencing natural gas service, from August 2017 through September 2019 (historic demand charges). Exhibit 4 at 8-9.

The Liberty Keene filing included pre-filed joint testimony of David B. Simek, Manager, Rates and Regulatory Affairs; Deborah M. Gilbertson, Senior Manager, Energy Procurement; and Catherine A. McNamara, Rates Analyst II; employees of Liberty Utilities Services Corp., as well as proposed revised tariffs and schedules. On October 15, Staff pre-filed testimonies of Stephen P. Frink, Director of the Gas and Water Division, and Randall S. Knepper, Director of the Safety and Security Division. On October 20, the Company pre-filed Rebuttal Testimony of Steven M. Mullen, Director, Rates and Regulatory Affairs for Liberty Utilities (EnergyNorth Natural Gas).

The Commission issued Order No. 26,421 (October 30, 2020), setting an interim COG rate and FPO rate for the winter 2020-21 period, effective November 1, 2020, and scheduling the continued hearing for November 2, 2020. On November 5, 2020, the Commission scheduled a continuation of the November 2 hearing for November 18, 2020.

During the hearing on November 18, the Commission made two record requests. *See* Clerk's Report (11/18/20); N.H. Admin. R., Puc 203.30(a). The first request directed the Company to provide any information or analysis prepared by an employee or consultant during the period of May 2016 through May 2017 that supports CNG as an appropriate and cost-effective fuel for the Keene distribution system (in whole or in part) related to contracts it entered in October 2016, November 2016, and May 2017. Hearing Transcript of November 18, 2020, (Tr. 11/18/20-A<sup>1</sup>) at 95-103, 108-09. The second record request asked the Company to provide any written communications between Liberty and Monadnock Marketplace customers

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<sup>1</sup> The November 18, 2020, hearing was recorded by two different stenographers. The transcript for the first session is referenced as "Tr. 11/18/20-A" and the transcript of the second session is referenced as "Tr. 11/18/20-B."

related to the conversion from propane-air to CNG, including but not limited to letters, notices, or anything else written from 2016 to the present. Tr. 11/18/20-B at 30-32.

The Company's response to the Commissioner's Record Requests was timely filed on November 25, 2020. It was accompanied by a motion for protective order and confidential treatment. *See* confidential Hearing Exhibits (Exh.) 23, and (not confidential) Exh. 24. The Company marked Exhibit 23 confidential in the entirety, "conditioned on the Company filing versions of the exhibit that duly mark (for the confidential version) and redact (for the public version) the confidential information no later than December 4, 2020." *See* Motion for Protective Order (11/23/20). To date, the Company has not filed a redacted version of Exhibit 23.

The Commission issued Order No. 26,428 (December 2, 2020), which provisionally approved a Liberty Keene COG rate of \$1.0253 per therm and a fixed price option (FPO) rate of \$1.0453 per therm (adjusted to \$1.0277 per therm) for the December 2020-April 2021 period. Because a sufficient record had been developed in this proceeding to address Liberty's request to recover historic demand charges, the Commission resolved to do so in this order.

Liberty Keene's filings and all parties' and Staff's subsequent docket entries, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at: <https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-152.html>.

## **II. BACKGROUND**

The Commission makes the following findings of fact:

The Company issued a Request for Proposals (RFP) for CNG service in May of 2016. Tr. 10/23/20 at 54; Exh. 6 at 14.<sup>2</sup> The Company stated that the selected vendor was the least cost

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<sup>2</sup> All page references for exhibits are to Bates-numbered pages.

respondent. Tr. 10/23/20 at 24. The Company's initial CNG contract was signed in October of 2016 for a term of December 1, 2016, through May 31, 2017. Exh. 6 at 13 n.1; Tr. 11/18/20-A at 10 (correcting Exh 6. n.1, to clarify Company "did not take" service under the initial CNG contract). The initial contract did not include any demand charges. Tr. 10/23/20 at 84; Tr. 11/18/20-A at 65, 94-95; Tr. 11/18/20-B at 24; Exh. 4 at 8-9, 13, 15; Exh. 6 at 13-15. This initial contract was negotiated when Liberty planned to locate a decompression skid<sup>3</sup> behind the Price Chopper supermarket in the Monadnock Marketplace. Tr. 11/18/20-A at 64-65.

The Price Chopper location did not include the extra distribution main that is part of what Liberty describes as its current "temporary" facility. *Id* at 91. Liberty did not go forward with the initial plan and the October 2016 contract was terminated. *Id.* at 64-65.

The October 2016 contract was replaced the following month with a November 2016 contract for CNG. Exh. 6 at 13 and n1; Tr. 11/18/20-A at 10. That contract expanded gas volume to 51,000 MMBTu annually for the contract term to permit some customer expansion beyond existing customers in the Monadnock Marketplace. Tr. 10/23/20 at 43-46, 87-91; Tr. 11/18/20-A at 106-07; Exh. 17. The November 2016 contract also included demand charges and an expanded term of May 1, 2017, through April 30, 2020. Tr. 10/23/20 at 70-71, 84; Exh. 4 at 8-9, 13, 15; Exh. 6 at 13-15.

An amendment to the November 2016 contract was executed in May 2017 (the "May 2017 contract"). Exh. 6 at 13-14. The May 2017 contract maintained the same gas quantity, increased the mobilization fee and had a contract term of July 1, 2017, through June 30, 2021. Tr. 10/23/20 at 89-91; Tr. 11/18/20-A at 115-17, Exh. 17. The skid was delivered in July 2017;

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<sup>3</sup> A "skid" is a device that takes the CNG from a truck, decompresses it, and transfers it into the gas piping system underground. Tr. 10-23-20 at 23-24.

Liberty began paying demand charges in August. Tr. 10/23/20 at 70-71; Tr. 11/18/20-A at 115-117; Exh. 4 at 8-9, 13, 15; Exh. 6 at 13-15.

The demand charges at issue include the costs related to the supplier's skid and supplier services. Tr. 10/23/30 at 23-25. Liberty also paid a separate mobilization fee in July 2017. *Id.* at 23-25, 83-86; 91-92; Tr. 11/18/20-A at 22; *see* Exh. 15, 17. The skid was not built to the standards required by 49 CFR Part 192, which are different from the American Society of Mechanical Engineers (ASME) B31.3 standards that CNG suppliers typically use when supplying CNG to an end user. Tr. 11/02/20 at 27, 28, 80; Tr. 11/18/20 B at 38-39. Liberty brought the skid into compliance with 49 CFR Part 192 in October 2017. Tr. 11/18/20 B at 38-39. Liberty did not, however, produce an acceptable plan for conversion of the Marketplace until February 2019, and the Commission did not approve the operational safety of converting the Marketplace until July 2019. *See* Order No. 26,274 (July 26, 2019) at 3, 14. Liberty stated that when each of the contracts was signed, the Company expected to serve CNG in the latter part of 2017. Tr. 10/23/20 at 23; Tr. 11/18/20 A at 69-70, 113-14.

Ultimately, Liberty incurred CNG supply contract demand charges for 26 months, from August 2017 through September 2019, before the Company was able to serve natural gas derived from CNG to Liberty Keene customers. Tr. 10/23/30 at 70-71; Exh. 4 at 8-9. It is undisputed that Liberty began serving CNG to approximately 20 Monadnock Marketplace customers at the end of the Summer period, in October 2019. Tr. 10/23/20 at 69-70; Tr. 11/2/20 at 116-118; Exh. 6 at 21.

### **III. POSITIONS**

#### **A. Liberty Keene**

This is the first docket in which Liberty has sought recovery of the historic demand charges. Tr. 10/23/20 at 61. Liberty proposed amortizing the costs for the entire expense over a

three-year period, with one-third to be paid annually, 80 percent in the winter periods and 20 percent in the summer periods. *See* Exh. 4 at 8-9, 23.

In support of its request for recovery, Liberty argued that the Commission should apply the “typical prudence standard” to determine whether Liberty’s decision to enter into, and later amend, its CNG contract was prudent. Exh. 6 at 9. Liberty asserted that Commission Staff inappropriately applied a “retrospective approach” to analyze the prudence of the Company’s actions. *Id.* at 14.

Liberty stated that the historic demand charges were prudently incurred because the CNG contracts were reasonable when Liberty entered into them. Tr. 10/23/20 at 29. Liberty asserted that, based on what the company knew at the time, it was reasonable and prudent to enter into the contract and subsequent amendment. Exh. 6 at 7-8, 13-20, 25. Liberty stated that it was going to serve customers in the Marketplace with CNG and retire blowers that Liberty believed created safety and reliability issues. Tr 11/18/20 A at 64-66. Liberty also argued that the CNG contracts’ structure and volumes were based on an analysis that indicated those results were the best option for customers, and stated that least cost supply was not the only reason to transition to CNG. Tr. 10/23/20 at 39-42; Tr. 11/18/20-A at 27, 64-66, 71-74; Exh. 6 at 7-8, 13-20, 25.

Liberty explained it expected to put the CNG facility online in 2017 and, therefore, it was prudent to have a CNG contract in place. Exh. 4 at 8-9. Liberty stated that “the Company needed to be ready at any point during the period from August 2017 through September 2019, as [Liberty] could have received the go-ahead to put the CNG system online at any time.” *Id.* Liberty stated that an approximate six-month lead-time was necessary to install and hook up the skid to allow gas to flow. Tr. 10/23/20 at 24-35.

The Company argued that it was reasonable to incur demand charges beginning in August of 2017 because on May 1, 2018, the Commission approved the inclusion of CNG in the

Summer 2018 Keene cost of gas rate. Exh. 4 at 9. Liberty stated that it entered into a supply contract months ahead of when it expected to provide service because it is standard practice with a supply contract for planning and logistical reasons, and because the temporary CNG facility still had to be transported and connected to the Company's distribution system. Exh. 6 at 13-14. In addition, the Company stated that it was prudent to enter into a multi-year CNG supply contract because the CNG facility was temporary and not owned by Liberty, and without a multi-year contract the Company may have had to change suppliers and incur expensive mobilization fees annually, until a permanent CNG facility could be put in operation. *Id.* at 14.

Liberty further explained that this was the first time that Liberty had been involved with connecting CNG to the Company's distribution system, and "that there were unknown obstacles and delays involved with getting the installation finalized to the satisfaction of all parties." Exh. 4 at 8-9. Liberty asserts that the factors that led to Liberty's 26-month delay in providing CNG service were factors Liberty did not know, and could not reasonably have been expected to anticipate. Tr. 11/18/20-B at 17-19; Exh. 6 at 13-20, 25. Liberty identified those factors as including: Staff's concern that Liberty did not have a franchise to serve CNG which resulted in Liberty's petition for declaratory judgment in Docket 17-068, a/k/a the "Franchise Docket"; the six months it took the Commission to rule on Liberty's petition; the Safety Division's "recommended change" in the jurisdictional demarcation point which the company asserts it reasonably believed was at a different location, and which gave rise to the need for substantial modification of the CNG facility; and motions for rehearing and reconsideration in the Franchise Docket. Exh. 6 at 15-16.

Liberty also argued that the Commission approved the CNG contract, and thus the historic demand charges, in its Summer 2018 COG Order, Order No. 26,126 (May 1, 2018). *See* Tr. 10/23/20 at 28-29. Liberty reasoned that, because CNG costs were included in that docket

filing, and were part of what was approved in the rate as “just and reasonable,” the CNG contract was deemed prudent. Tr. 11/18/20-A at 31-35; Tr. 11/18/20-B at 4-5. Liberty emphasized that the 2018 rate approval and the fact that costs filed in this docket were consistent with the CNG contract terms, signaled prior approval of historic demand charges as prudent. *See* Tr. 11/18/20-A at 32-35, 41.

Liberty also argued that a July 2019 Commission order in the Franchise Docket approved the Monadnock Marketplace conversion to CNG, including the COG contract. Liberty relied on the portion of the order that stated, “Accordingly, we grant Liberty the permission and approval to undertake the conversion of the Keene system, subject to the conditions set forth herein.” *See* Tr. 11/18/20-A at 16-18, 20, 51-53, quoting Order No. 26,274 (July 26, 2019) (what Liberty referenced as the “Clarifying Order”).

Finally, Liberty explained that in 2016, prior to signing any CNG contracts, Liberty created a list of alternatives for replacement of a blower system, which included installation of a CNG feed for the Monadnock Marketplace. That list was provided to the Commission and included in the Safety Division’s March 31, 2016, Report (2016 Report)<sup>4</sup> following the Safety Division’s investigation of a December 2015 blower incident in an investigatory docket, Docket No. IR 15-517. Tr. 11/18/20-A at 59-61, 79 -92. In the list, Liberty noted it identified prospective alternatives to the blower system the Company was considering, including option number 6 which was to install a CNG feed that would allow for the deactivation of the high pressure blower system. Tr. 11/02/20 at 70-73; Tr. 11/18/20-A at 83-86 (referencing the 2016 Report at 17).

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<sup>4</sup> This report is part of Docket No. IR 15-517, “Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities – Keene Division: Investigation into December 19, 2015 Operational Incident”, and on the Commission’s website here, at Tab 7: [New Hampshire Public Utilities Commission \(nh.gov\)](http://www.nh.gov).



Liberty argued that Staff was mistaken regarding a need for explicit approval to enter into a CNG supply contract, and that, instead, supply and capacity contracts are included as part of Cost of Gas proceedings, during which contracts are “approved by implication.” Exh. 6 at 17-19. Liberty asserted that similar circumstances exist with regard to the CNG contract here, the costs of which the Company claims were expressly discussed and approved in Order No. 26,126 during the Keene Summer 2018 Cost of Gas docket. *Id.* at 19. According to the Company, Staff attempted to draw a distinction with CNG and the need for explicit approval by referring to a previous docket in which the Commission approved Liberty’s acquisition of what is now the Keene Division. *Id.* at 19-20.

#### **B. OCA**

The OCA recommended that any determination regarding the prudence of historic demand charges should be deferred and resolved in a rate case. It argued that expedited COG proceedings were not intended to include more complex issues, including prudence, even the prudence of supply costs. Tr. 11/18/20-B at 47-48. In the alternative, the OCA concurred with Staff’s position that the recovery of CNG demand costs incurred prior to the Company commencing CNG service should be disallowed. Tr. 11/18/20-B at 49-50.

The OCA disagreed with Liberty’s argument that prior Commission orders found the CNG contract, including historic CNG demand charges, prudent. *See* Tr. 11/18/20-A at 19, 26-28, 51-54 (proposing to witness that, in both Order No. 26,247 and Order No. 26,305, the Commission reaffirmed that the conversion had not yet been evaluated as prudent).

The OCA stated that the Commission’s Winter 2018-2019 COG order, Order No. 26,184 at 6 (October 30, 2018) indicated “an approval of rates with the CNG costs removed.” Tr. 11/18/20-A at 50-51. The OCA clarified that, in the Summer 2019 COG order (Order No. 26,241 (April 29, 2019)), the Commission declined to address Staff’s concern with regard to

CNG costs that may exceed the cost of alternative fuels yet also indicated that Staff could raise that issue in future dockets, including in the Company's next rate case. *Id.*

Finally, the OCA argued that if a utility is obtaining alternate fuel, that fuel should cost less than the fuel currently in use in order to be deemed prudent. Tr. 11/18/20-B at 47-48. The OCA argued that the Company should have known that providing CNG in the Summer of 2018 would have been more expensive than propane, not less expensive, as was represented in the Company's filing. Tr. 11/18/20-B at 47-48.

### **C. Staff**

Staff argued that Liberty did not meet its burden of proof to show that the historic CNG demand charges were prudently incurred, and Staff recommended that those costs be disallowed. Staff asserted that the Company did not take steps to identify and mitigate the risks that were reasonably foreseeable before Liberty executed the three CNG contracts. Staff argued that, given what Liberty knew, or reasonably should have known, before the CNG contracts were signed, it was unreasonable for Liberty to overlook relevant regulatory requirements, and it was unreasonable of the Company to structure and sign contracts with a foreseeable significant risk that payment of demand charges would be required before CNG was served. *See* Exh. 9 at 14-21; Exh. 10 at 5-12; Tr. 11/2/20 at 23-32.

Staff disagreed with Liberty's argument that prior COG orders found the CNG contract or historic demand charges at issue prudent. Staff explained that given the nature of the Commission's COG mechanism itself, which includes both incurred and forecasted costs, prior COG orders did not find CNG costs prudent, because only actual costs can be reviewed and found prudent by the Commission. Staff also relied on an explicit statement in the prior Liberty Keene Winter 2019-2020 COG Order. *See* Exh. 9 at 7-14; Tr. 11/02/20 at 43-50, 97-98; Order No. 26,305 at 7 (October 31, 2019). Finally, Staff disagreed with Liberty's argument that prior

Commission orders in the Franchise Docket made prudency findings. In support, Staff relied on the text of the Franchise Docket orders themselves, and Order No. 26,122 (April 27, 2018), the order in Liberty's most recent rate case. Staff narrowed down its arguments into three primary areas:

**1. The CNG contracts were imprudent when signed**

Staff disagreed with Liberty's argument that the conversion of the Monadnock Marketplace from propane air to CNG was necessary in 2016 or 2017 to address safety concerns. Tr. 11/2/20 at 32-41. Mr. Knepper noted that the December 2015 blower incident was resolved in no more than 70 minutes, with a few weeks of follow up, and that the blower system continued to operate safely from January 2016 through October 2019. *Id.* at 33-34. By January 2016, Liberty had repaired the high pressure blower equipment that had shut down in 2015, and Liberty turned off that blower when it commenced CNG service. *Id.* Staff noted that in April of 2018, the Commission had already considered and rejected Liberty's view that the Monadnock conversion was necessary for safety reasons or economically justifiable on its own. *Id.* at 35-36; *see* Order No. 26,122 at 41 (April 27, 2018). Accordingly, Staff asserted that Liberty's implicit argument that the Company was required to contract for CNG service quickly for safety reasons was unavailing. Staff asserted that given the information that was widely available to Liberty before it signed the CNG contracts, it was imprudent for Liberty to contract for CNG supplies in the manner it did. Tr. 11/2/20 at 23-32, 41-43.

Staff argued that from the beginning of the CNG contracting project, Liberty conflated steps a utility should take to serve CNG with those that would be permissible were Liberty a CNG end-user. New Hampshire Code of Administrative Rules, Puc 506.01 requires utilities to meet more stringent standards than those end-users must meet, standards which are incorporated by reference to 49 CFR Part 192.7. Exh. 10 at 5-8, 10-11; Tr. 11/2/20 at 23-29.

Staff asserted that, because Liberty was unaware of the standards it was required to meet as a utility, the Company approved manufacturing the skid to comply with incorrect ASME B31.3 standards. Tr. 11/2/20 at 26-28. Staff explained that Liberty's approach resulted in additional expense and a delay of several months while the skid was modified to meet the safety standards required of a utility. Exh. 10 at 5-12; Tr. 11/2/20 at 23-42; Tr. 11/18/20-B at 38-39. Staff argued that Liberty's approach resulted in the Company providing an initial operating plan with more than 180 defects that were contradictory, lacking in detail, or that otherwise required updating. Exh. 10 at 5, 10-11. Safety Division Staff could only recommend Commission approval of the plan as sufficient to meet safety requirements in July 2019, after significant Division work and review. Exh. 10 at 5-12; Tr. 11/2/20 at 23-42; Exh. 9 at 9-12; *see* Order No. 26,274 at 6, 11-12. Staff asserted that the responsibility for the delay in service of CNG lies squarely with Liberty. *See* Exh. 9 at 17-22 Exh. 10 at 5, 7-12. In Staff's view, Liberty could have identified and remedied the majority of those 180 defects in the operating plan during the project's planning stages and before CNG contracts were signed, if Liberty had applied 49 CFR 192.7 standards as required by Puc 506.01. *See* Exh 10 at 11-12; *see* Tr. 11/2/20 at 23-42.

Staff stated that Liberty knew or should have known about relevant regulatory requirements in 2016 and 2017 because Puc 506.01 and 49 CFR 192.7 were in effect for decades before Liberty signed the CNG contracts. Tr. 11/2/20 at 26-30. In addition, Staff noted that a July 26, 2014, order from the New York Public Service Commission (NYPSC) described how a utility's intent to serve CNG to customers would be treated and categorized in New York State (for rate making purposes). *See* Tr. 11/2/20 at 29-30; Exh. 10 at 8, 107-117 (NYPSC Order). Therefore, Staff argued, well before the CNG contracts were signed, the existing regulations and the NYPSC Order would have put a reasonable utility on notice of potential regulatory issues,

and a reasonable utility would have taken steps to avoid, address, or mitigate those issues.

Tr. 11/2/20 at 43-50.

Staff also argued that Liberty's CNG contracts were imprudently structured. Liberty's November 2016 and May 2017 CNG contracts allowed demand charges to accrue when Liberty was unable to obtain regulatory approval, and (assuming approval), to accrue even if CNG was not flowing for initial mechanical or structural reasons. Tr. 10/23/20 at 71; Tr. 11/18/20-A at 105, 110-11. Staff argued that this oversight was unreasonable, because the provision of CNG was novel, and because Liberty has included regulatory escape clauses in other contracts. Tr. 10/23/20 at 71 (regulatory escape clauses part of other Liberty contracts); Tr. 11/2/20 at 23-26 (Staff summary of what a reasonable utility executive would have considered); Tr. 11/18/20-A 105-121; Tr. 11/18/20-B at 15, 18-19. Staff explained that Liberty's CNG contracts also included a marketer basis charge, which the Company did not realize until after CNG flowed and the supplier billed for CNG service in November 2019. Tr. 10/23/20 at 63-65, 86 (marketer basis charge one component of incremental costs), *see* Exh. 15, 17. Staff argued that Liberty's inattention to contract terms was unreasonable.

Staff also recommended the Commission find that the Company's decision to sign the CNG contracts at issue was inadequately supported by detailed economic forecasting. Staff found it significant that Liberty did not identify any analysis to support Liberty's conclusion that providing CNG under the contracts at issue in 2016 and 2017 would be financially viable and of benefit to both the Company and Keene customers. Exh. 9 at 7-8; Tr. 10/23/20 at 27, 33, 35-40, 54-55; Tr. 11/2/20 at 24-26; Tr. 11/18/20-A at 71.<sup>5</sup> For example, in March 2016, Liberty

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<sup>5</sup> Note: Staff did not present argument regarding Liberty's response to the Commission's Record Requests as the Company responses were filed after the last day of testimony.

planned to “pursue [CNG conversion] as option, Bill Clark to pursue economics,” yet the Company was unaware of Mr. Clark’s economic analysis. *See* Tr. 11/18/20-A at 71.

In addition, Staff emphasized that Liberty’s March 2016 analysis in support of “Option 6” was inaccurate. Staff noted that Liberty’s March 2016 estimated cost of “between \$50,000 and \$500,000” for converting the Monadnock Marketplace based on the “temporary” Production Avenue location, was a gross underestimate.

Staff argued that Liberty could not show that signing the CNG contracts, when it did, with the substantive and structural issues as presented above, was prudent. Staff also recommended that the Commission find Liberty’s actions imprudent.

## **2. Prior COG orders did not find historic demand charges prudent**

Staff posited that prior COG orders did not find the CNG contracts or the historic demand charges prudent, for two reasons. First, Staff argued that it is the nature of the COG mechanism to combine incurred and forecasted costs and, by definition, forecasted COG costs are not capable of reconciliation, and therefore cannot be accepted as prudent. *See* Exh. 9 at 8-14; Tr. 11/2/20 at 43-51. Second, Staff argued that the Winter 2019-2020 COG Order found, as a matter of law, that no prudence finding had been made. *See* Order No. 26,305 at 7 (October 31, 2019) (quotations and citations omitted); Exh. 9, 8-9.

## **3. The Franchise Orders do not support a prior finding of prudence**

Staff asserted that prior Commission orders in Docket No. 17-068, “the Franchise docket” did not make relevant prudence findings. In support, Staff relied on the text of the Franchise docket orders themselves, and Order No. 26,122 (April 27, 2018). In Order No. 26,122, issued in Liberty’s most recent rate case, the Commission stated:

As for the Keene production costs of \$148,410, we find that Liberty failed to justify those costs in this proceeding. Liberty made significant enhancements to address the risk of a similar event and did not provide

evidence that the incremental costs of manning the plant were reasonable or justified. Accordingly, we deny recovery of these costs.

Because we find around-the clock staffing of the Keene production plant is not just and reasonable, we reject the Company's argument that the current cost of converting a small portion of the Keene system to CNG is necessary for reliability and safety reasons or is economically justified on its own terms. Furthermore Liberty testified that the conversion could lead to additional growth, and it is therefore appropriate to include the cost of the initial conversion to CNG in the risk sharing mechanism delineated above.

Order No. 26,122 at 41; *see also* Order No. 26,294 at 12 (September 25, 2019 (*citing* Order No. 26,122)). Staff asserted that the above text further rebuts Liberty's argument that the Commission found the Keene conversion prudent when it issued Order No. 26,274, the "Clarifying Order" in July of 2019, in as much as the Company was on notice that the Commission had explicitly disallowed the costs of the conversion fifteen months earlier. Staff also agreed with the OCA interpretation that the Commission reiterated its position in the Franchise docket two months after the Clarifying Order was issued (and before CNG was served in Keene). *See* Exh. 9 at 11; Tr. 11/2/20 at 104-114.

Staff also argued that Liberty's reliance on the Clarifying Order is misplaced even within the four corners of the order itself. Staff pointed out that the July 2019 order merely gave Liberty the assurance that the Commission found the Company's plan to proceed with "Phase I" of the Keene conversion, consistent with the Safety Division's safety recommendations and requirements and did not include a finding of prudence. Order No. 26,274 at 6-14, Tr. 11/2/20 at 104-114, 121-123; Exh. 9 at 11 (adequate plans are not equivalent to prudent plans). Staff argued that Liberty erred when it relied on the ordering clause in isolation. In the body of the Clarifying Order the Commission stated:

In this order, we clarify our declaratory ruling in Order No. 26,065, accept the Safety Division's recommendation that we permit the Company to commence conversion of Phase I, and require the same reporting and

assessment requirements for the conversion of Phases II through V of the Keene system.

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In Order No. 26,065, we cautioned that the declaratory ruling did not include any finding of prudence. In this order, we clarify that Order No. 26,065 should not be construed to constitute pre-approval of as yet undefined proposals for future capital projects within Liberty's Keene service territory. The Company stated in the acquisition proceeding that it would pursue conversion to CNG or LNG "[i]f it's economical to do so, and results in lower cost to customers."

As Staff testified in Liberty's most recent rate case, the Company has not provided a comprehensive business plan for the Keene system conversion and has provided little to no economic analysis or justification of the costs of the proposed system to ratepayers.

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A detailed report of the cost of the Company's current efforts to convert the initial portion of the system to CNG shall be provided within 90 days of the issuance of this order. Future reports with the requisite cost details shall be filed no later than 180 days in advance of each future expansion phase. Receipt of the reports shall not be deemed pre-approval of projected expenditures or a finding of prudence.

Order No. 26,274 (July 26 2019) at 6, 10-11, 12, respectively (*citations omitted*); *see also* Exh. 9 at 7 (listing seven relevant orders that did not convey or that explicitly rejected conversion, including CNG contracts, as prudent).

#### **IV. COMMISSION ANALYSIS**

##### **A. History of the Cost of Gas Mechanism**

In the first instance, "[t]here are no statutes or Commission rules regarding how a [COG] is to be structured or calculated" *Claremont Gas Light Company*, Order No. 17,949, 70 NH PUC 940 (November 15, 1985). Traditionally, the COG was adjudicated within periodic rate cases, and thus subject to an overarching prudency review. *See id.* at 938. In that context, fuel costs were treated like other operating expenses in setting electric and gas utilities' rates; test year fuel costs were adjusted for known and measurable changes and the amount was included as an allowable expense to be recovered through rates. *Id.* at 937.



During the 1970s however, in a time of rapidly changing prices, standard regulatory treatment of fuel costs was found to be inflexible and unable to adequately accommodate fuel cost volatility. *Id.* at 942. Pursuant to its plenary ratemaking authority in RSA 378:7, the Commission implemented the COG adjustment mechanism as a way to reflect increases and decreases in supply costs in customer rates without having to go through extended proceedings to change fuel delivery rates. *See, e.g., id.* at 491; *Northern Utilities, Inc. 2017-2018 Winter/Summer Cost of Gas Filing*, Order No. 26,068 at 2, 5 (October 31, 2017). Initially, some COG adjustment mechanisms were monthly in nature and required utilities to estimate both the cost of gas and customer usage. *See Claremont Gas Light Company*, 70 PUC at 939, 941.

In 1974 and 1975 gas companies with fixed long-term contracts or a dedicated supplier were placed on forward-looking semi-annual (winter/summer) COG adjustments. *See id.* at 938-941. The forward-looking semi-annual formula was preferred because it provided for rate continuity, stability, a reconciliation of estimated and actual gas cost and usage data, and a trigger mechanism that identifies excessive over or under collections during the semi-annual period. *Id.* at 941-942 (requiring Claremont Gas Company to adopt the forward-looking semi-annual formula and deferring discussion of forward-looking monthly COG).

“The conditions which led the Commission to institute fuel adjustment mechanisms—volatile fuel costs—no longer exist in the propane market or the market for other fuels [to the same degree experienced in the 1970s].” *Id.* at 942. As recently as 2004, however, unanticipated events can, nonetheless, return the marketplace to a volatile status with little if any notice. *See Northern Utilities 2005/2006 Winter COG*, Order No. 24,540 at 18 (October 31, 2005) (“There is extreme volatility in the energy market at present, due to a number of issues including the impacts of Hurricanes Katrina and Rita on natural gas production.”).

“Over time, fuel adjustment clauses have become an important ratemaking concept in most regulatory jurisdictions in this country,” and remain useful to promptly address over or under collections and the semi-annual reconciliation of estimated and actual gas cost and usage data. *See Claremont Gas Light Company*, 70 NH PUC at 942. COG dockets have encompassed complex supply, demand, and related transportation matters in prior years. For example, *Northern Utilities Inc. 2005/2006 Winter COG*, Order No. 24,540 (October 31, 2005), the Commission addressed an established Proportional Responsibility (PR) allocation methodology, revealed to be biased against New Hampshire in the allocation of fixed capacity related demand costs between New Hampshire customers and Maine customers. In that COG docket, the Commission rejected the utility’s argument that the existing PR allocation methodology assured full recovery of Northern’s incurred costs, (previously found acceptable), notwithstanding bias against New Hampshire consumers. *See id.* at 15-17.

As in times past, the Commission “continues to review whether fuel adjustment clauses are an appropriate part of the ratemaking process, given the relative stability in gas prices.” *See Claremont Gas Light Company*, 70 NH PUC at 945. We continue to favor the COG mechanism for the reasons stated.<sup>6</sup>

### **B. Structure of the Cost of Gas Mechanism**

The COG mechanism generates a seasonal rate that is a mix of incurred costs and revenues, and forecasted costs and revenues. Prudence is reviewed in a COG proceeding when a supply or demand element is reviewed and reconciled based on actual costs. *See Tr. 11/2/20* at 44-50. As step one in the COG rate-setting process, a utility reconciles the actual costs and

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<sup>6</sup> *See* <https://www.puc.nh.gov/Gas-Steam/howgasratesareset.htm> (defining both delivery and commodity charges, and explaining “[t]he Commission does regular audits and prudence reviews of all supply decisions and related costs”).

revenues for the previous parallel period, i.e. the previous winter period, for an up-coming winter rate, or the previous summer period for an up-coming summer rate. Once the over or under recovery is approved and included in the upcoming period's rates, the incurred costs are considered prudent, and the over or under recovery will not be retroactively adjusted.

Tr. 11/2/20 at 52-53. This is consistent with the timing of prudence reviews in other contexts.

See Order No. 25,694 at 9, 11 (July 15, 2014) (contract approval is not prudence finding); Order No. 26,122 at 28-31 (disallowing imprudent costs).

Step two in the COG rate-setting process layers the forecasted costs and forecasted revenues for the up-coming period on top of the reconciled over or under recovery that was calculated in step one. The forecasted portion of the COG rate however, (when approved), reflects a reasonable supply plan and projection of revenues, but the forecasted portion of the rate is not subjected to prudence review until step one of a subsequent COG proceeding, when actual costs and revenues are known. See Tr. 11/2/20 at 47.

### **C. Prudence Review**

“When reviewing whether a utility has been prudent in its decision-making, the Commission may reject management decisions when inefficiency, improvidence, economic waste, abuse of discretion or action inimical to the public interest are shown.” *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, Petition for Permanent and Temporary Rates*, Order No. 26,122 (April 27, 2018) at 22 (citing *Public Service Company of New Hampshire*, Order 25,565 at 20 (August 27, 2013) and *Appeal of Easton*, 125 N.H. 205, 214 (1984)). “[P]rudence judges an investment or expenditure in light of what due care required at the time an investment or expenditure was planned and made....” *Appeal of Conservation Law Foundation*, 127 N.H. 606, 637 (1986) (stating, in *dicta*, that “[i]f the entire investment in a given asset was foreseeably wasteful, the entire investment must be excluded; if only some of the

constituent costs attributable to a given asset were foreseeably wasteful, the value for rate base purposes of the investment in this asset must be reduced accordingly.”) One of the critical prudence considerations when evaluating actions and decisions is to eschew the perspective of hindsight, and rather to “consider the actions in light of the conditions and circumstances as they existed at the time they were taken.” *See* Order No. 26,122 at 22. Applying the principle of prudence below, we conclude that contracting to pay demand charges when Liberty did so was economically and foreseeably wasteful and therefore imprudent.

**D. No prior Commission Orders Found These Historic Demand Charges Prudent**

Liberty argued that one ordering clause in Order No. 26,274, the “Clarifying Order,” meant that the Commission had found the Keene conversion, and thus the CNG contracts and the historic demand charges, prudent. Commission orders, however, must be read as a whole. Here, the four corners of the Clarifying Order demonstrate that the order merely confirms that Liberty had complied with Safety Division requirements, and no more; prudence remained at issue. In addition, Order No. 26,064, the Initial Franchise Order, explicitly stated that it did not find any aspect of the Keene conversion prudent. The Clarifying Order did not reverse that initial decision. Therefore, it was unreasonable for the Company to construe the Clarifying Order otherwise. *See* Order No. 26,065 (October 20, 2017) and Order No. 26,274 (July 26, 2019).

The Summer 2018 COG proceeding, and the five Liberty Keene COG proceedings since the Company’s forecasted rates first included CNG did not result in either an explicit or implied finding that the historic demand charges are prudent.

*(1) Summer 2018 COG*

The Summer 2018 COG proceeding was the filing in which Liberty introduced CNG supply. Liberty did not request reimbursement for any CNG related incurred costs or revenues

for 2017, as part of the “step one” over and under recovery calculation. Thus, CNG related costs were not approved by the Commission as prudent. *See* Order No. 26,126 (May 1, 2018).

*(2) Summer 2019 COG*

CNG was not made available to Liberty Keene customers during the Summer 2018 period. *See* Tr. 11/18/20-B at 22. As before, Liberty did not seek reimbursement for any historic demand charges for the May 2018-October 2018 Summer period (or any prior period) during the step one over and under recovery reconciliation. Therefore, no CNG related costs were reconciled or reviewed, and no CNG related costs were approved as prudent by the Commission. *See* Tr. 11/2/20 at 48-50; Order No. 26,241 (April 29, 2019).

*(3) Winter 2018-2019 COG*

Liberty explained in its filing that no CNG had been served during the prior Winter 2017-2018 period, and Liberty’s filing did not seek reimbursement for any CNG related costs (including historic demand charges from any period). Therefore, no CNG-related costs were found prudent in the Winter 2018-2019 rate the Commission implemented. The Commission approved Liberty’s *forecasted* supply plan projecting CNG use as “reasonable.” The Commission was not put on notice of the contracting matters at issue in the current docket, and no prudence determination was made. *See* Order No. 26,184 (October 30, 2018).

Both the Winter 2018-2019 COG, and the following Summer 2019 COG proceedings implemented forecasted rates that assumed CNG would be available and – at least temporarily – more expensive than propane air. In those dockets, Staff flagged its concern that Liberty Keene’s forecast supply plan was not economic i.e. not “least cost.” For the Winter 2018-2019 period, the Commission approved winter rates based on propane because the continued use of propane was the least cost option and because the Company said introduction of CNG would not

occur until after the winter period as “there was no longer sufficient time to convert customers before the winter season starts.” *See id.* at 4.

(4) *Winter 2019-2020 COG*

In the Winter 2019-2020 COG docket, Liberty’s filing again did not seek reimbursement for historic demand charges incurred during the November 2018-April 2019 period (or any prior period) during the step one, reconciliation stage of the process. This, in combination with the fact that CNG had not been served in the prior Winter 2018-2019 period, meant that no CNG costs were reconciled or otherwise approved by the Commission as prudent. In its Winter 2019-2020 COG order, the Commission approved Liberty’s *forecasted* supply plan for CNG use as reasonable. The Commission required the Company to track incremental incurred costs or savings resulting from the use of CNG in place of propane. Order No. 26,305 (October 31, 2019); Tr. 11/2/20 at 18-20, 43-50 (rejecting incurred CNG costs and approving forecasted CNG costs). The Commission *explicitly* stated that the CNG contracts had yet to be found prudent. Order No. 26,305 at 7. Liberty did not appeal Order No. 26,305.

(5) *Summer 2020 COG*

In the Summer 2020 COG docket, as in prior dockets, Liberty did not seek compensation for historic demand charges, incurred during the period May 2019 through September 2019 (or any prior period). Tr. 11/2/20 at 48. The historic demand charges were not presented for reconciliation and therefore were not found prudent by the Commission.

In support of its argument that historic demand charges had already been found prudent, Liberty relied on a recent Commission order, Order No. 26,409 (October 6, 2020) in which the Commission stated that two contracts, a supply contract and a capacity contract, “were discussed and approved in Liberty’s 2018 cost of gas docket, DG 18-137.” *See* Exh. 6 at 18-19. Liberty’s position misconstrues the approval referenced therein. For purposes of the COG proceeding, the

contract rates and rate terms were approved as reasonable, subject to future reconciliation after a prudence determination. The contracts were not found prudent.

As illustrated above, the COG mechanism did not operate to make a COG rate prudent. The rate is not fully based on actual costs, and approval of a prospective rate as “reasonable” does not alter that. Finally, the Winter 2019-2020 COG Order *explicitly* stated that the CNG contracts had yet to be found prudent. That order was not appealed and is a final ruling on the merits.

#### **E. Liberty acted imprudently when it executed CNG contracts**

Liberty acted imprudently when it executed the CNG contracts at issue in 2016 and 2017. During that timeframe, the Company should have been aware of the significant differences that flowed from its status as a utility supplying CNG as opposed to the status as a purchaser of CNG. Liberty’s failure to account for that distinction led Liberty to apply incorrect standards with regard to constructing the skid. More than eighteen months later, the same errors continued to create defects in the Company’s CNG plans, which were insufficient from a safety or engineering perspective. Exh. 10 at 4-6. Guidance that would have allowed the Company to avoid those significant errors existed in the form of long-standing Commission regulation, Puc 506.01, and in 49 CFR Part 192.7. At a minimum, those regulations would have prompted a reasonable utility to consider the possibility that standards other than those the Company initially relied on could be controlling, and would significantly alter timelines for CNG service.

A reasonable utility that conducted due diligence would have considered a variety of timelines and risks. *See* Exhibit 10 at 8, 107-117; *see also* confidential Exh. 23 at 33, 35, 38, 44, 49-51, 73. In addition, Liberty was unable to provide any analysis to support its decision to sign the CNG contracts when it did. Liberty’s list of March 2016 options to replace a blower system it considered problematic suggested the Company would pursue an economic analysis of

supplying CNG to the Monadnock Marketplace. Liberty, however, produced no evidence that a study was actually done. *See* 2016 Report, Appendix 2 at 103; Tr. 11/18/20-A at 87-89 (discussing 2016 Report Appendix 2, page 103, item 14) (“...Bill Clark to pursue economics.”); confidential Exh. 23.

The Commission has also previously rejected Liberty’s argument that conversion was necessary to address safety concerns, or economically justified on its own terms in Order No. 26,122 at 41 (April 27, 2018) and in Order No. 26,294 at 12 (September 25, 2019). *See* Exh. 9 at 6-11; Exh. 10 at 5-12.

Because Liberty overlooked key information including its responsibilities as a gas distribution utility, it executed CNG contracts that separated supply and demand charges well before CNG was reasonably likely to be served. This led the Company to install the skid and begin paying for demand charges 26 months before the Company was capable of serving CNG. In executing the contracts, Liberty also overlooked a marketer basis charge. Liberty’s decision to sign the CNG contracts and risk incurring demand charges before CNG was reasonably likely to be permitted to flow was inconsistent with due diligence and a reasonable decision to mitigate financial risks. We recognize it is sometimes necessary to enter into contracts prior to all regulatory approvals being in place. Liberty might have mitigated its risks by including a regulatory out clause in the CNG contracts, yet did not. Liberty unreasonably overlooked what should have been the foreseeable complexities and delays inherent in developing a new CNG supply. Accordingly, we disallow the 26 months of historic CNG demand charges as imprudent.

#### **F. Motion for Confidential Treatment**

Liberty has requested confidential treatment of Exhibit 23. Because of the short time between the record request that led to the creation of the exhibit and the filing deadline, the volume of the pages produced, and the volume of information on those pages that the Company



considers confidential, Liberty sought confidential treatment of the entire exhibit “conditioned on the Company filing versions of the exhibit that duly mark (for the confidential version) and redact (for the public version) the confidential information no later than December 4, 2020.” *See Motion for Protective Order* (11/23/20). To date, the Company has not filed a redacted version of Exhibit 23. This is inconsistent with Commission requirements. *See* N.H. Admin. R., Puc 201.04 and 203.02. We direct Liberty to work with Staff and the OCA to file a redacted version of Exhibit 23 to disclose to the public all information that is not confidential. Liberty’s exhibit shall be filed not later than ten business days following the issuance of this order, or the Commission may deem Liberty’s request for confidential treatment to have been waived.

## **V. CONCLUSION**

At the time Liberty entered into the CNG contract under which it would incur the historic demand charges, it was reasonably foreseeable that the Company would likely be unable to commence the delivery of CNG for a substantial period of time. Liberty knew, or should have known, following review of existing regulations and appropriate due diligence, that substantial delays in its ability to deliver CNG were likely. Liberty nonetheless proceeded to obligate itself to terms and conditions that would result in the payment of wasteful demand charges during the lengthy period it took Liberty to bring its planned deployment of CNG into compliance with safety regulations. The Company did not include a regulatory out clause in the contract that could have prevented such charges if deployment was delayed pending regulatory approvals. Liberty overlooked the marketer basis charge in its contract. Further, the Company failed to produce, in testimony or in response to Record Requests, a careful economic analysis that supported executing and implementing the CNG contracts at the time. Liberty’s inability to demonstrate an economic analysis for this significant expenditure falls short of what is expected from a reasonably prudent utility. Those decisions demonstrate that Liberty’s actions and

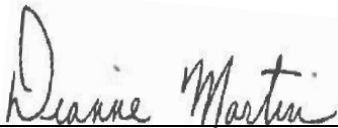
decisions in incurring the historic demand charges were not prudent. No prior Commission order has found the contract prudent. Accordingly, recovery of Liberty's CNG demand charges for the period August 2017 through September 2019 are disallowed.

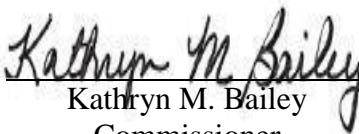
**Based upon the foregoing, it is hereby**

**ORDERED**, that Liberty Keene's requested recovery for any portion of demand charges incurred from August 2017 through September 2019 is **DENIED** as imprudent; and it is

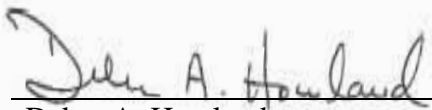
**FURTHER ORDERED**, that Liberty Keene shall work with Staff, the OCA, and the Clerk's Office, to file a redacted version of Exhibit 23, and Liberty Keene shall file the redacted exhibit with the Clerk's Office no later than ten business days following the issuance of this order.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of May, 2021.

  
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Dianne Martin  
Chairwoman

  
\_\_\_\_\_  
Kathryn M. Bailey  
Commissioner

Attested by:

  
\_\_\_\_\_  
Debra A. Howland  
Executive Director

## Service List - Docket Related

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Printed: 5/14/2021

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