

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 20-105

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. d/b/a LIBERTY

Request for Change in Rates

DG 21-130

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. d/b/a LIBERTY

Winter 2021/2022 Cost of Gas and Summer 2022 Cost of Gas

DG 21-132

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

Winter 2021/2022 Cost of Gas

**Order Addressing Tariff Applicability and Interpretation
and Scheduling Prehearing Conference**

O R D E R N O. 26,611

April 15, 2022

In this order, the Commission addresses issues relating to tariff applicability and interpretation in Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty's (Liberty or the Company) recent rate case in Docket No. DG 20-105, and as also raised in Liberty's Cost of Gas dockets filed in September 2021, Docket Nos. DG 21-130 and DG 21-132. This order also schedules a prehearing conference to occur on July 12, 2022.

I. PROCEDURAL HISTORY AND BACKGROUND

On July 30, 2021, in Docket No. DG 20-105, the Commission issued Order

No. 26,505, conditionally approving a Settlement Agreement on Permanent Rates (Settlement Agreement on Permanent Rates). The conditions placed on approval of the Settlement Agreement on Permanent Rates did not impact those sections of the Settlement Agreement on Permanent Rates relating to Liberty's revenue decoupling mechanism (including terms applicable to the calculation of the Revenue Decoupling Adjustment Factor (RDAF)) or the temporary to permanent rate recoupment figure.

On August 1, 2021, in Docket No. DG 21-130, Liberty filed its winter 2021/2022 and summer 2022 Cost of Gas filing, including a proposed revenue correction in the amount of \$4,024,830 related to RDAF calculations for Gas Assistance Program revenue per customer associated with the calculation of the 2019-2020 and 2020-2021 RDAF adjustments. Liberty stated that this revenue correction was supported by the Settlement Agreement on Permanent Rates¹ and Order No. 26,505.

On August 13, 2021, in Docket No. DG 20-105, Liberty filed a compliance tariff following the issuance of Order No. 26,505: NHPUC No. 11 – Gas, Tariff for Gas Service.

On September 13, 2021, in Docket No. DG 20-105, the Commission issued a tariff non-compliance letter, noting that Liberty's tariff filed on August 13, 2021, did not reflect any changes to the RDAF. The tariff non-compliance letter directed Liberty to refile applicable revised tariff pages.

On September 14, 2021, in Docket No. DG 20-105, Liberty filed a response to the Commission's September 13, 2021, non-compliance letter. In its response, Liberty stated that Order No. 26,505 did not contemplate or approve any changes to the RDAF

¹ Exh. 49, Docket No. DG 20-105.

effective August 1, 2021, because the RDAF is a component of the Local Distribution Adjustment Charge² (LDAC), which is subject to periodic updates effective November 1 each year. Furthermore, Liberty argued that any changes to the RDAF methodology are to be taken into account as part of its LDAC filing in its next Cost of Gas filing (identified as having taken place in Docket No. DG 21-130).

On October 4, 2021, in Docket No. DG 21-130, the Office of the Consumer Advocate (OCA) filed a Motion in Limine Seeking Prehearing Determination that Request to Recover approximately \$4 Million Constitutes Illegal Retroactive Ratemaking.

On October 14, 2021, in Docket No. DG 21-130, the New Hampshire Department of Energy (DOE) filed a Motion “Joining in Part the Relief Requested by the OCA Motion in Limine Seeking Prehearing Determination that Request to Recover \$4 Million Constitutes Illegal Retroactive Ratemaking and in the Alternative, Proposes Bifurcation.”

On October 14, 2021, in Docket No. DG 21-130, Liberty filed an Objection to the OCA’s October 4, 2021, motion.

On October 19, 2021, in Docket No. DG 21-130, Liberty filed an updated winter 2021/2022 and Summer 2022 Cost of Gas filing, including updates to its LDAC including RDAF calculations, including updates to its proposed 2019-2020 and 2020-2021 RDAF adjustments.

² The Commission notes that Liberty’s tariff NHPUC No. 11 – Gas, Tariff for Gas Service refers to a Local Distribution Adjustment Clause; the Commission is of the opinion that the Local Distribution Adjustment Clause is more properly characterized as a charge than a clause, and that Liberty’s should revise its tariff language in the future to uniformly refer to the Local Distribution Adjustment Clause as the Local Distribution Adjustment Charge.

On October 22, 2021, In Docket No. DG 21-130, the Commission issued Order No. 26,535, addressing the OCA's October 4, 2021, motion. In that Order, the Commission limited the scope of the October 25, 2021, Cost of Gas hearing to only cost of gas commodity issues and the implementation of previously approved adjustments. The Commission therefore dismissed, without prejudice, Liberty's proposed recovery of approximately \$4 million associated with RDAF adjustments for the 2019-2020 and 2020-2021 periods.

On October 25, 2021, in Docket No. DG 21-130, the Commission held a hearing on Liberty's Cost of Gas filing. At hearing, DOE made an oral motion to suspend any finding of prudence or finality in this docket, specifically referencing over/under reconciliations for the RDAF. The Commission invited the parties to file briefs on their position on DOE's oral motion.

On October 27 and 28, 2021, in Docket Nos. DG 21-130 and DG 21-132, Liberty, DOE, and the OCA each filed briefs relating to the RDAF calculation issue and on DOE's oral motion. DOE's brief was styled as a motion to suspend.

On October 27, 2021, in Docket No. DG 21-130, Liberty filed responses to Commission record requests.

On October 28, 2021, in Docket Nos. DG 21-130 and DG 21-132, DOE filed cursory comments relating to Liberty's October 27, 2021, record request responses.

On October 28, 2021, in Docket No. DG 21-132, Liberty filed updated proposed tariff pages.

On October 29, 2021, in Docket No. DG 21-130, Liberty filed a response to DOE's October 28, 2021, cursory comments.

On October 29, 2021, in Docket Nos. DG 21-130 and DG 21-132, DOE filed a letter addressing issue related to Tariff No. 11 language.

On October 29, 2021, in Docket No. DG 21-130, the Commission issued Order No. 26,541 Establishing Cost of Gas Rates; and in Docket No. DG 21-132, the Commission issued Order No. 26,542 Establishing Cost of Gas Rates. In those orders, the Commission included specific language approving COG and LDAC rates on a provisional and interim basis. See Order No. 26,541 at 11–12; Order No. 26,542 at 9–10.

On November 14, 2021, in Docket No. DG 21-132, Liberty filed a compliance tariff.

On November 15, 2021, in Docket No. DG 21-130, Liberty filed a compliance tariff.

On November 16, 2021, in Docket Nos. DG 21-130 and DG 21-132, DOE filed comments regarding Liberty's November 15, 2021, compliance filing.

On November 19, 2021, in Docket Nos. DG 21-130 and DG 21-132, Liberty filed a letter in response to DOE's November 16 comments, as well as compliance tariffs.

On November 22, 2021, in Docket Nos. DG 21-130 and DG 21-132, DOE filed a response to Liberty's November 19, 2021, letter.

On November 23, 2021, December 23, 2021, January 25, 2022, February 21, 2022, and March 24, 2022, in Docket Nos. DG 21-130 and DG 21-132, Liberty filed Cost of Gas adjustment tariff pages.

On December 8, 2021, in Docket No. 21-130, Liberty filed a compliance tariff.

On December 10, 2021, in Docket No. 21-130, Liberty filed a corrected compliance tariff.

In response to each tariff filing made by Liberty, the Commission issued tariff compliance or non-compliance letters on a provisional basis. Each of these letters contained the same clause: "it has been confirmed that these rates are temporary,

interim, and provisional until such time as the issue of the applicability and interpretation of Liberty's NHPUC No. 11 tariff is resolved. See Order No. 26,541 (October 29, 2021) and Order No. 26,542 (October 29, 2021). At such time that the tariff issue is resolved, the Commission will conduct a review and confirm the permanent rates in effect." See, e.g., NHPUC Letters in Docket Nos. DG 21-130 and DG 21-132 dated November 30, 2021, December 15, 2021, December 16, 2021, December 28, 2021, January 25, 2022, February 22, 2022, and March 31, 2022.

II. SUMMARY OF FILINGS AND PARTY POSITIONS

a. Motion in Limine (Docket No. DG 21-130)

i. Office of the Consumer Advocate's Motion filed October 4, 2021

The OCA sought a determination that Liberty's request to recover approximately \$4 million related to RDAF calculations for Gas Assistance Program revenue per customer constituted illegal retroactive ratemaking. In support of its position, the OCA cited constitutional principles, caselaw, the Filed Rate Doctrine, statutory provisions, and Commission precedent. The OCA sought a determination that Liberty could not recover the approximately \$4 million; that references to the approximately \$4 million dollars be stricken from Liberty's pre-filed testimony; and a determination that evidence related to the disputed \$4 million would be inadmissible at hearing based on irrelevance.

ii. Liberty's Objection filed October 14, 2021

Liberty objected to the OCA's motion. In its objection, Liberty provided a detailed history and chronology of the R-4 RDAF issue, including stating that the Company identified and raised the issue in its 2018-19 and 2019-20 COG dockets, as well the 2020-21 RDAF calculation. Liberty stated that the parties intended to address the R-4 RDAF issue in detail in its distribution rate case, Docket No. DG 20-105.

Liberty characterized the R-4 issue as recurring, and that the terms of the Commission orders in at least one COG docket contained language indicating that all components of a COG filings are reconciling and thus can be adjusted in future proceedings to correct any earlier mistakes discovered after “further inquiry,” “[b]ecause actual costs and revenues are reconciled every year, any adjustments needed as a result of further inquiry into the matters addressed in this order, including final audits and actual costs.” Order No. 26,419 at 7 (Oct. 30, 2020). In support of its position, Liberty also cited caselaw from New Hampshire and Massachusetts to refute the OCA’s invocation of the Filed Rate Doctrine, differentiated reconciling rates and the intent of rate neutrality from that doctrine, and emphasizing the rates would be prospective in nature only, therefore retroactive ratemaking is not implicated. Liberty requested that the Commission deny the OCA’s motion and schedule a separate hearing to address the merits of Liberty’s request to recover \$4,024,830.

iii. Department of Energy’s Motion filed October 14, 2021

DOE joined in part the OCA’s motion. DOE agreed that Liberty’s request to recover approximately \$4 million constituted illegal retroactive ratemaking. DOE argued that Liberty should be responsible for prudently designing and implementing its decoupling formula. DOE joined the OCA’s requests for relief, proposing in the alternative to granting the OCA’s motion the Commission bifurcate the proceeding to consider the approximately \$4 million issue separately from the expedited COG process.

b. Post-Hearing Briefing (Docket Nos. DG 21-130 and DG 21-132)

i. Liberty's Brief filed October 27, 2021

With respect to the RDAF calculation, Liberty argued that it correctly applied its approved tariff provisions to the entirety of the 2020/2021 decoupling year. According to Liberty, the annual reconciliation process is defined by the terms of the currently effective tariff for the annual decoupling year. Liberty characterized the operative difference between Tariff No. 11 and the previous tariff as relating to the R-4 allowed revenue per customer that was previously calculated on a discounted basis. Under Tariff No. 11, the R-4 allowed revenue per customer is calculated without discount and is the same as for an R-3 customer. According to Liberty, two different mechanisms cannot be applied to perform the same reconciliation, the currently effective tariff is the prevailing rule, and it is not retroactive because the effect would only apply to future consumption, not past consumption.

With respect to whether the Commission should suspend any determination of finality with respect to the LDAC rates and LDAC rate inputs, Liberty argued that as reconciling mechanisms, and with reference to language in past Commission COG orders, no additional suspension of finality is necessary because no finality applies to reconciling mechanism in the first instance.

ii. Office of the Consumer Advocate's Brief filed October 28, 2021

The OCA posited that its arguments relating to impermissible retroactive ratemaking had been deferred not resolved, and that all issues related to the effect of the decoupling mechanism prior to August 1, 2021, should be heard in a future docket in order to effectuate the intent of Order No. 26,505. The OCA argued that Liberty's attempt to apply new tariff language prior to its effective date constituted impermissible retroactive ratemaking unless the previously applicable tariffs allowed Liberty to 'clarify' the decoupling mechanism in the manner it now seeks. In support of

its position, the OCA cited to constitutional principles, caselaw, and rules of statutory construction. The OCA stated that the record was insufficient, requested further process, and agreed with DOE's request to make decisions about the RDAF mechanism provisional, so that they are subject to future reconciliation.

iii. Department of Energy's Motion filed October 27, 2021

The DOE styled its post-hearing filing as a motion. In its motion, the DOE sought suspension of any otherwise automatic prudence and/or finality finding regarding over/under reconciliations for the period November 1, 2020, through October 31, 2021, in order to preserve the R-4 RDAF issue for further consideration and review, additionally noting that Liberty appears to have applied tariff language effective August 1, 2021, as far back as calendar year 2019, which would be inconsistent with the tariffs in effect during those times. DOE noted it was unclear whether Tariff No. 11 was even in effect based on the non-compliance letter in Docket No. DG 20-105, and Liberty's response to that letter stating that nothing contemplates or approves changes to the RDAF effective August 1, 2020.

DOE requested the Commission suspend any automatic prudence and/or finality that would otherwise attach to calculations that serve as the basis for rates; suspend Liberty's application of the new RDAF formula to the November 1, 2020 through October 31, 2021 reconciliation period in the pending docket, and to calendar year 2019; schedule a hearing on the tariff matters to resolve legal questions and calculate appropriate refund to customers, if any; and order Liberty to address the tariff non-compliance letter in Docket No. DG 21-105.

III. COMMISSION ANALYSIS

We have reviewed Tariff NHPUC No. 11 – Gas, Tariff for Gas Service, as filed in Docket No. DG 20-105 on August 13, 2021, the initial tariff non-compliance letter filed on September 13, 2021, and the plethora of other filings in these inter-related matters.

We are therefore mindful that each of the parties, at different times, requested further process relating to the R-4 RDAF calculation issues based on various legal arguments that may or may not be addressed by this order, and that Order No. 26,535 intended to remove the R-4 RDAF issue from the COG proceeding in Docket No. DG 20-130. However, the R-4 RDAF could not be constrained to only the approximately \$4 million from past decoupling years, as monthly Revenue Decoupling Adjustment figures also are a matter of contention in 2020-2021 decoupling year.

The Settlement Agreement on Permanent Rates in Docket No. DG 20-105 and related tariff changes clarify that the initial revenue per customer shall be calculated based on rate class group not individual customer class and is a figure that is approved by the Commission in a full rate case. Under NHPUC No. 11 – Gas, Tariff for Gas, the approved revenue per customer used in the calculation of Monthly Allowed Revenue is different than the analogous figure under the previous tariff.

Under both NHPUC No. 10 – Gas, Tariff for Gas and NHPUC No. 11 – Gas, Tariff for Gas, however, the difference between the Monthly Allowed Revenue (or its functional equivalent) and actual distribution revenue (or its functional equivalent) in any given month is recorded as a monthly Revenue Decoupling Adjustment. At the time the Company calculates its RDAF (the reconciling factor applied to customer bills) for the next year, for effect each November 1, the Company uses these recorded monthly Revenue Decoupling Adjustments as an input into its formula.

...Revenue Decoupling Adjustment shall be determined by calculating the monthly difference between the Benchmark Base Revenue per Customer times the actual number of Equivalent Bills for the applicable Customer Class and the Actual Base Revenue for that month. ***The sum of these monthly Revenue Decoupling Adjustments in the Decoupling Year shall be divided by forecasted Billing Year sales to derive the volumetric rate per therm to be applied to customers' bills in the Billing Year.*** The Revenue Decoupling Adjustment shall also include a reconciliation component for the previous Decoupling Year, which represents the difference between the accrued decoupling amount in the Decoupling Year compared to the actual revenues billed in the billing Year.

NHPUC No. 10 – Gas, Tariff for Gas at Third Revised Page 36 (emphasis added).

Put another way, the way Liberty is authorized to calculate the variance between the distribution revenue it should collect and the revenue it actually collects each month is modified under NHPUC No. 11 – Gas, Tariff for Gas. Whereas the mechanics of how (and the timing of when) the annual reconciliation is to occur under both tariffs remained the same in concept: the recorded monthly variances are used to calculate the RDAF for effect each November 1.

We therefore conclude that, but for the tariff non-compliance letter of September 13, 2021, in Docket No. DG 21-105, there is no dispute that as of August 1, 2021, the parties intended and agreed for the monthly Revenue Decoupling Adjustment to be calculated based on the language in Tariff NHPUC No. 11 – Gas, Tariff for Gas Service, consistent with Settlement Agreement on Permanent Rates. However, the prior eleven monthly Revenue Decoupling Adjustments remain in dispute. Based on our analysis of the revised tariff language above, we find no support for the proposition that monthly Revenue Decoupling Adjustments recorded prior to August 1, 2021, should be recalculated for the purposes of determining the RDAF in Docket No. DG 21-130. As such, Liberty's letter filed on September 14, 2021, in

Docket No. DG 20-105³ correctly identified that the RDAF rate on page 101 of its August 13, 2021, compliance tariff filings was not intended to change on August 1, 2021. Our order will issue accordingly to withdraw the tariff non-compliance letter of September 13, 2021, in Docket No. DG 21-105 because prior monthly Revenue Decoupling Adjustments, and therefore the existing RDAF rate, were not affected at that specific point in time.

Additionally, although not directly relevant to our determination on tariff interpretation and applicability above, we note that section 14.3 of the Settlement Agreement on Permanent Rates contains a Distribution Revenue Reconciliation that should control whether the parties can seek any further reconciliation of rates between the effective date of temporary rates in Docket No. DG 20-105 (October 1, 2020) and the effective date of permanent rates. The mechanism of temporary rates included adjustments to increase the revenue per customer amounts for each of Liberty's rate classes, and the Commission's Order on temporary rates in Docket No. DG 20-105 noted issues relating to test year decoupling adjustments and revenue from other rate classes being used to cover the R-4 discount offered to low-income distribution customers. *See* Order No. 26,412 at 5–6 (September 30, 2020).

Additionally, we also note that Liberty stated that the parties intended to resolve the R-4 revenue per customer issue in Docket No. DG 20-105, *see* Liberty's Objection to Motion in Limine at 10 ("The parties agreed to address the R-4 rate issue in detail in the then pending distribution rate case, Docket No. DG 20-105.") These additional

³ We note, as does DOE, that Liberty's September 14, 2021 letter was not responsive to the directives in the non-compliance letter, and conclude that it had no legal effect apart from stating the Company's position.

factors may be relevant in reaching a final determination on any arguments related to remaining R-4 issues not related to issues of tariff applicability and interpretation.

To aid in the final disposition of this matter, a prehearing conference is scheduled on July 12, 2022, at 9:00 a.m. in Docket Nos. DG 20-105, DG 21-130, and DG 21-132. The parties will be expected to address the status of the following outstanding issues:

- 1) Whether a reconciliation adjustment(s) to the RDAF factor, as approved on a temporary, interim, and provisional basis pursuant to Order Nos. 26,541 and 26,542, is necessary and appropriate, and if so in what amount;
- 2) The status of the approximately \$4 million R-4 issue, as dismissed without prejudice from Docket No. DG 21-130 by Order No. 26,535;
- 3) Whether any tariff interpretation issues remain outstanding; and
- 4) To hear any further argument on the December 27, 2021, reports filed in Dockets Nos. DG 21-130 and DG 21-132, relating to future processes for filing, review, and consideration of future LDAC charge adjustments and COG rates.

Based upon the foregoing, it is hereby

ORDERED, that the Commission's tariff non-compliance letter dated September 13, 2021, in Docket No. DG 21-105 is **WITHDRAWN**; and it is;

FURTHER ORDERED, that NHPUC No. 11 – Gas, Tariff for Gas Service as filed on August 13, 2021 in Docket No. DG 20-105 became effective August 1, 2021; and it is

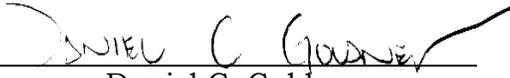
FURTHER ORDERED, that Liberty's monthly Revenue Decoupling Adjustment shall be calculated pursuant to the terms of NHPUC No. 11 – Gas, Tariff for Gas Service as of August 1, 2021; and it is

FURTHER ORDERED, that recalculation of monthly Revenue Decoupling Adjustments recorded prior to August 1, 2021, is not authorized based on the text of NHPUC No. 11 – Gas, Tariff for Gas Service; and it is

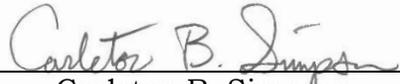
FURTHER ORDERED, that a prehearing conference addressing the issued identified herein is scheduled to occur on July 12, 2022, at 9:00 a.m.; and it is

FURTHER ORDERED, that any hearings in this matter shall be conducted in accordance with the attached hearing guidelines.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of April, 2022.



Daniel C. Goldner
Chairman



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket# : 20-105

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Service List - Docket Related

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Service List - Docket Related

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