STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Energy North Natural Gas Corp. d/b/a Liberty
Energy North Natural Gas Corp. d/b/a Liberty – Keene Division

Docket Nos. DG 21-130 and DG 21-132

Post-Hearing Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to the above-captioned dockets, and submits the following post-hearing brief, addressing the issues raised at the October 25, 2021 hearings in these two related cost-of-gas (COG) proceedings:

I. Introduction

Energy North Natural Gas Corporation d/b/a Liberty ("Liberty") commenced these two proceedings on September 15, 2021 by submitting its annual cost-of-gas filing in Docket No. DG 21-130 and its semi-annual cost-of-gas filing for Liberty's Keene division in Docket No. DG 21-132. The latter involves proposed rate adjustments to account for the cost of providing propane and compressed natural gas (CNG) to customers in Keene. The former concerns the cost of natural gas provided to the remainder of Liberty's customers within its service territory as well as adjustments to the Company's Local Distribution Adjustment Charge ("LDAC"), a reconciling rate mechanism that

is applicable throughout Liberty's service territory, allowing the Company to recover costs associated with revenue decoupling,[1] site remediation, rate case expenses, the reconciliation of temporary rates to permanent rates, the Gas Assistance Program for income-eligible customers, and certain other recurring costs. There is a separate LDAC applicable to residential customers and commercial/industrial customers. Liberty proposes to make its new COG and LDAC rates applicable on November 1, 2021, consistent with past practice.

Originally, Liberty sought to modify its LDAC to begin recovery of $4,024,830 in revenues that Liberty contends were improperly refunded to customers via the RDAF in the initial two years after the decoupling mechanism was implemented (2018-2019 and 2019-2020). This prompted a motion from the OCA on October 4, 2021 for a pre-hearing determination that this sum was not improperly refunded to customers and should therefore not be included in the LDAC.[2] Liberty filed an objection to the OCA motion on October 14, 2021. Also filed on that date was a letter from the Department of Energy ("Department") in which the Department

[1] Revenue decoupling, first approved by the Commission for Liberty in 2018 with respect to distribution charges (as distinct from COG charges), is intended to sever the connection between revenue and units of gas sold to customers. The chief purpose of revenue decoupling is to eliminate the so-called "throughput incentive" that tends to discourage a utility from promoting energy efficiency and other measures calculated to reduce sales. Revenue decoupling also neutralizes the effect of weather-related sales fluctuations. The salient characteristic of revenue decoupling as it has been approved for Liberty is that it is a symmetrical mechanism – i.e., it moves rates either up or down, as appropriate. The revenue decoupling portion of the LDAC is referred to in the Company's tariffs as the Revenue Decoupling Adjustment Factor ("RDAF").

[2]Because we requested this determination at the threshold of hearing, we styled the pleading as a motion *in limine*. However, as the Commission noted, in light of the the relief we sought the motion was more correctly treated as the equivalent of a motion for summary judgment. Order No. 26,535, *infra*, at 1 n.1.

agreed with the OCA's reasoning but suggested a different treatment of the issue (basically, deferring it to a future phase of the proceeding rather than attempting to resolve it in time for the proposed effective date of the new COG and LDAC charges).

On October 22, 2021, the Commission issued Order No. 26,535, dismissing without prejudice the Liberty request to recover the $4,024,830. The Commission indicated that Liberty could seek such recovery via a separate petition to be considered in a new docket, after November 1, 2021, at which time the OCA and the Department could renew their objections to recovery as necessary. The Commission ruled that in light of the need for expediency in COG/LDAC dockets, the instant proceedings "must remain focused to the narrow issues of the cost of gas and any other rates or charges that the Commission has already reviewed and approved in prior dockets." Order No. 26,535 at 2.

However, as became evident during the October 25 hearings, Order No. 26,535 did not defer to the satisfaction of all parties issues related to the proper implementation of the RDAF. It was also apparent that certain other issues remained in dispute. At the conclusion of the hearing in DE 21-130, the Department moved that the Commission determine that *all* issues related to RDAF reconciliation be deemed provisional, subject to future reconciliation on grounds of imprudence or otherwise, for purposes of the COG/LDAC orders the Commission plans to issue for effect on November 1. The OCA joined this motion; Liberty

objected to it. Accordingly, the Commission invited briefs from the parties to be filed on or before October 27, 2021 and gave the parties leave to file a single brief applicable to both dockets. The OCA is availing itself of the opportunity to file a single brief inasmuch as, in our view, any issues in dispute are common to both proceedings.

II. Revenue Decoupling

The dispute about revenue decoupling concerns the effect of the low-income discount provided to eligible customers via what is designated in the Company's tariffs as Rate R-4. In the rate case concluded earlier this year, DG 20-105, the parties (i.e., Liberty, the Department, and the OCA) entered into a comprehensive settlement agreement that was approved by the Commission in Order No. 26,505 (July 30, 2021). As noted in Order No. 26,505, the parties agreed to clarify the decoupling mechanism and, to that end, they appended specific tariff language to the settlement. One intended purpose of the revised tariff language was to assure that the Company no longer refunded via the decoupling mechanism (i.e., the RDAF) certain revenues that were previously foregone as a low-income discount to eligible customers under Rate R-4. The new tariff went into effect on August 1, 2021.

The question that remains in dispute concerns the extent to which Liberty can apply the new tariff language retroactively. In our motion *in limine*, we characterized the Company's effort to recover $4,024,830 from 2018-2019 and 2019-

2020 as an exercise in impermissible retroactive ratemaking. Although questions related to the recovery of $4,024,830 have now been deferred, the retroactive ratemaking problem remains a live issue because, as became apparent at the October 25 hearing in DG 21-130, Liberty also seeks to apply the recently clarified decoupling mechanism retroactively to cover what it considers improperly refunded low-income charges applicable to the period from October 1, 2020 to July 31,2021 – i.e., the ten months prior to the effective date of the new RDAF tariff.

Thus, in order for the Commission to effectuate the intention stated in Order No. 26,505 to defer questions related to the retroactive effect of the decoupling mechanism to a future proceeding (assuming Liberty requests it), a course of action that the OCA fully supports at this point, it is necessary for the Commission to rule in the instant dockets that it is likewise deferring any issues related to the effect of the decoupling mechanism prior to August 1, 2021 to that future proceeding.

In arguing to the contrary, Liberty made a novel argument. Through counsel, Liberty contended that because the new tariff was in effect on September 1, 2021, the Company was entitled to apply the terms of that new tariff to the COG filing it made on that date even though the RDAF reconciliation it was proposing reached backward to service provided and revenues collected well before the decoupling mechanism was clarified via the rate case settlement.

Such an approach would be inconsistent with New Hampshire law. For the reasons stated in our October 4, 2021 *limine* motion, particularly at pages 5 through

7, Liberty's quest to apply the revised tariff language to service rendered prior to August 1, 2021 violates part 1, article 23 of the New Hampshire Constitution and the relevant caselaw applying that constitutional language to rate regulation by the PUC. *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) ("it is a basic legal principle that a rate is made to operate in the future and cannot be made to apply retroactively") (quoting *Southwest Gas Corp. v. Public Service Comm'n*, 474 P.2d 379, 383 (Nev. 1970)). The arguments tendered by the OCA on this point via our October 4, 2021 are incorporated herein by reference, to the extent necessary for the Commission to grant the Department's motion as it was made at hearing.

Liberty has sought to obscure through sophistry the fundamental principle that each day a customer takes service from the Company, that customer is entitled to do so according to the tariff that is in effect that day. A customer who took service on (for example) May 1, 2021 was placed on constructive notice that, *inter alia* (1) because of revenue decoupling, a future adjustment might lead to additional revenue payable to the customer to compensate the Company for revenue lost that day due to or energy efficiency abnormal weather, but (2) unfortunately for the Company, any such deficiency would not take into account the discount provided to low-income customers.

The New Hampshire Supreme Court has made clear that public utility tariffs "do not simply define the terms of the contractual relationship between a utility and its customers." *Appeal of Verizon New England, Inc.*, 158 N.H. 693, 695 (2009)

(citation omitted). Utility tariffs also "have the force and effect of law and bind both the utility and its customers." *Id.* (citation omitted). Therefore, principles applicable to statutory construction apply, including reliance on the "plain and unambiguous" meaning of the language employed. *Id.* The tariff in question is the one that was applicable from October 1, 2020 through July 31, 2021. As to whether that tariff plainly and unambigiously allowed Liberty to 'clarify' the decoupling mechanism in the manner it now seeks to do so, or as to whether there is ambiguous language that might be so interpreted in light of the intent of the drafters of the tariff, there is at the very least insufficient evidence to make a determination at this time. In these circumstances, it is appropriate to grant the Department's motion so as to render any decisions about the RDAF mechanism made in these dockets provisional, so that they are subject to future reconciliation once the proper working of the mechanism during the disputed periods is ascertained.

III. Fixed Price Option

At hearing, the Commission received evidence demonstrating that the price of the Fixed Price Option (FPO) that Liberty has offered its natural gas customers is lower than the rate residential customers not selecting the FPO will pay. The effect is notably drastic with respect to customers outside of the Keene Division. Those non-Keene customers have been offered a FPO rate of $0.9256 per therm, versus a winter rate of $1.1339 per therm for customers not taking the FPO. At

hearing, Liberty's testimony was that approximately 12 percent of the customers offered that FPO of $0.9256 have accepted the offer, which presumably leaves 88 percent of the customer base to be charged the $1.1339 per therm.

This situation cannot be squared with the statutory requirement that rates be "just and reasonable." *See* RSA 374:1 and RSA 378:7. The FPO also transgresses the requirement that rates not discriminate unjustly between similarly situated customers. *See* RSA 365:29 (authorizing reparations in such circumstances). "[T]he Commission is responsible for ensuring that a utility's rates are not discriminatory, preferential, or unfair." *Appeal of Lakes Region Water Co.*, 171 N.H. 515, 520 (2018) (noting that "preferential treatment" of certain customers is impermissible) (citation omitted).

A year ago, the Commission approved an FPO for Keene customers of $1.04353 (adjusted to $1.0277 "to account for a higher FPO interim rate"), versus a non-FPO COG rate of $1.0253 per therm. Order No. 26,428 (Dec. 2, 2020) in Docket No. DG 29-152 at 9. The Commission noted that "[n]ormally, the FPO rate is two cents greater than the proposed COG rate." *Id.* at 3 (also noting that in this instance, the COG and FPO rates were approximately 20 cents apart). The Commission characterized the FPO option as "one price per therm, as stated by the Company, in advance, *and subject to Commission approval*, regardless of market price fluctuations." *Id.* at 5 (emphasis added). Both the FPO and non-FLO rates were approved on a "provisional" basis, subject to a subsequent prudence review. *Id.* at 9.

Similarly, in October 2020 the Commission approved an FPO rate for non-Keene customers of $0.5771 per therm and an initial non-FPO rate of $0.5571 per therm. *See* Order No. 26,419 (Oct. 30, 2020) in Docket No. DG 20-141 at 1.

A Westlaw search reveals that since Liberty acquired its gas franchises in New Hampshire the FPO rate offered by Liberty and approved by the Commission in October of each year has been two cents lower than the initial non-FPO rate, with the exception of the winter of 2014-2015, when the differential was 7.95 cents. *See* Order No. 25,730 (Oct. 31, 2014) in Docket No. DG 14-220 at 1, 9. Of note is the reality that the winter of 2014-15 was, as noted at hearing, the last time there was an upward lurch in the wholesale price of natural gas. Also of note is the Commission's observation in July 2014 that Liberty's practice, at least at that time, was to "hedge[] most of the gas required to serve FPO customers." Order No. 25,691 (July 10, 2014) in Docket No. DG 14-133 at 3 (approving the removal of commercial and industrial customers from the FPO program to reduce risks associated with un-hedged portion of supplies needed to serve FPO demand given that non-residential customers could readily obtain fixed prices in the competitive market, effectively doing their own hedging); *see also* Order No. 25,164 (Oct. 29, 2010) in Docket No. DG 10-249 at 9 (authorizing previous owner of Keene division to suspend its FPO program for the winter of 2010-11 because, in light of then-occuring supply interruptions, there was a "likelihood of resulting incremental costs being

shouldered by non-FPO customers if the FPO program were not suspended").

Although Liberty suggested at hearing that it could not withdraw its FPO option this winter because it had already offered the rate to customers (and, indeed, a typical number had accepted the offer), in reality no such impediment exists. The text of the letters sent by Liberty are of record as part of Exhibit 5 in DG 21-132. (Although the pages of exhibit 5 are not numbered, the letters are on the fourth and fifth pages.) The fourth paragraph of each letter clearly states that the applicable FPO rate "has been submitted to the New Hampshire Public Utility [sic] Commission for approval" and that such approval was "expected by November 1." "Expected" is, obviously, not synonymous with "guaranteed." In contract terms, via the plain meaning of this paragraph in the offer letters, customers were on actual notice that their participation in the FPO program was contingent upon approval by the Commission. Thus, Commission approval of the FPO was a condition precedent to Liberty's obligation to perform. *See, e.g., Greenwald v. Keating*, 172 N.H. 292, 298 (2019) (noting that conditions precedent are not favored when interpreting contracts but are enforceable when "required by the plain language of the agreement in question") (citation omitted).

In sum, if the Commission approves the FPO program as submitted, because the FPO rate is lower than the non-FPO rate, residential customers not participating in the Fixed Price Option are guaranteed to be subsidizing customers who were observant or clever enough to accept what is essentially a windfall price

deal. Windfall price deals have no place in a regulatory universe whose purpose is to yield just, reasonable, and not unduly discriminatory rates. The Company's argument, essentially that 'a deal is a deal' because there has already been offer and acceptance by its FPO customers, does not withstand scrutiny given that the written offer was a contingent one. (The Commission should, however, instruct Liberty to revise any future written FPO offers to make the contingent nature of the offer more clear.) It is understandable that Liberty does not wish to damage its customer relationships by writing to those who signed onto the FPO with unwelcome news of the program's termination, but because the utility assumes precisely zero business risk arising out of the FPO program it cannot expect non-FPO customers to foot the bill for avoiding damage to the utility's goodwill.

Therefore, the Commission should reject the FPO options as proposed in both dockets but allow Liberty to propose new FPO programs for this winter if the utility wishes to do so.

IV. Energy Efficiency Charge

Finally, as explained at hearing, the OCA supports Liberty's request for approval of a small increase in the energy efficiency component of the LDAC. In Order No. 26,440, entered on December 29, 2020 in Docket No. DE 20-092, the Commission directed the utilities participating in the state's ratepayer-funded energy efficiency programs (including Liberty) to continue to operate the programs pursuant to the approved 2020 budgets while maintaining the then-applicable

System Benefits Charge ("SBC") rates. The System Benefits Charge appears pursuant to RSA 374-F:3, VI as a nonbypassable charge on electric bills; part of the SBC funds energy efficiency programs. Order No. 26,440 was silent on the corresponding component of the LDAC as it appears on the bills of natural gas customers. As Liberty made clear at hearing, the small increase to the energy efficiency component of the LDAC was in service of complying with the directive to maintain the energy efficiency programs in 2021 subject to their 2020 budgets.[3]

V. Conclusion

For the reasons stated *supra*, the Commission should (1) defer consideration of any effects of the recent "clarification" of the applicable revenue decoupling mechanism in the Company's tariff, including all effects as to service provided through July 31, 2021, (2) reject the Fixed Price Option proposed by the Company in both dockets, and (3) otherwise grant the approvals requested in these dockets by Liberty.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant the motion of the Department of Energy to defer consideration of the effects of the recent changes to the revenue decoupling mechanism

[3] The OCA's agreement that Liberty is entitled to the small requested increase in energy efficiency charges, so as to maintain the budget of its energy efficiency programs at 2020 levels, should not be construed as the OCA acquiescing to the Commission's ongoing refusal to rule on the merits of the triennial energy efficiency plan pending in DE 20-092, which called for increases to the utilities' energy efficiency budgets for 2021, 2022, and 2023. *See* Scott Hempling, *Preside or Lead? The Attributes and Actions of Effective Regulators* (Second Edition, 2013) at 252 (describing the "regulatory obligation" as "the obligation to *make the best decisions* regardless of ox-goring") (emphasis added) and RSA ch. 363-A, which makes the cost of the PUC (and the Office of the Consumer Advocate) chargeable to utilities which, of course, pass 100 percent of those costs on to ratepayers.

and reserve the right to make appropriate reconciling adjustments to the Local Distribution Adjustment Clause in the tariffs of Energy North Natural Gas Corporation;

B. Reject the Fixed Price Option proposed by Energy North Natural Gas Corporation for both its Keene and non-Keene service territories, subject to the Company having an opportunity to submit new Fixed Price Option proposals, and

C. Otherwise approve the petitions pending in these dockets.

Sincerely,

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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis