STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Energy North Natural Gas Corp. d/b/a Liberty

Petition for Approval to Revenue Decoupling Adjustment Factor Costs

Docket No. DG 22-XXX

Motion to Dismiss of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and moves for an order dismissing the petition of Energy North Natural Gas Corp. d/b/a Liberty ("Liberty") that is the subject of this proceeding. In support of this request, the OCA states as follows:

I. Introduction

On July 5, 2022 Liberty instituted this proceeding by filing a petition requesting authority to recover approximately $4 million from its customers, a sum the Company contends was "incorrectly directed to return to customers due to an error embedded in the tariff" of the utility. Petition at 1. For the reasons that follow, the relief requested by Liberty is inconsistent with New Hampshire law. Because, in these circumstances, it would be improvident for the Commission to require the parties to litigate, and for the Commission to devote its own limited resources to addressing, a petition that cannot be granted as a matter of law, dismissal at the initial stage of the proceeding is appropriate.

II. The Legal Standard

When considering a motion to dismiss, the Commission "assume[s] that the factual allegations in the petition are true and all reasonable inferences therefrom most be construed in favor of the petitioner[s]." Order No. 26,225 (March 13, 2019) in Docket No. DG 17-152 at 5-6 (citations omitted); *see also* Order No. 26,534 (October 22, 2021) in Docket No. DE 21-020 at 7-9 (granting OCA motion to dismiss petition in part); *Krainewood Shores Ass'n, Inc. v. Town of Moultonborough*, 174 N.H. 103, ___, 260 A.3d 804, 806 (2021) (same, in context of civil proceedings) (citation omitted). When presented with a dismissal motion, the tribunal must determine whether the allegations in the petition "sufficiently establish a basis upon which relief may be granted." *Id.*

Basic and longstanding principles of utility law, applicable in New Hampshire, preclude the relief sought by Liberty. A public utility's tariffs "define the terms of the contractual relationship between a utility and its customers" and "have the force and effect of law and bind both the utility and its customers." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (citations omitted); *see also Electricity N.H., LLC v. Old Dutch Mustard Co.*, 2022 WL 813743 (D.N.H.) at *3 (noting that "[t]he rights and liabilities as defined by the tariff cannot be varied or enlarged by other contract or tort") (citing *Guglielmo v. WorldCom, Inc.*, 148 N.H. 309, 313 (2002)); *In re Verizon New England, Inc.*, 158 N.H. 693, 695 (2009) (noting that because "a tariff has the same force and effect as a statute, it must be interpreted "in the same manner" as a statute would be interpreted); and

Appeal of Vicon Recovery Systems, Inc., 130 N.H. 801, 805 (1988) (concluding that the common law contract doctrines of "impossibility of performance and commercial frustration do not apply" to obligations arising out of a Commission-approved tariff).

Therefore, "the customers of a utility have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change." *Pennichuck*, 120 N.H. at 566. "Once customers consume a unit of those services, they are legally obligated to pay for it and in that sense the transaction has been completed and the charges are set in accordance with the rates then in effect and on file with the PUC." *Id.* (also recognizing exception for service rendered while a proposed rate increase is pending). This principle is rooted in no less an authority than Part 1, Article 23 of the New Hampshire Constitution, which prohibits laws (including tariffs enjoying the force and effect of law) that create "a new obligation in respect to a past transaction." *Id.*

Although Liberty's petition is supported by prefiled testimony that runs to more than 2,000 pages including attachments, the dispositive legal principle can be succinctly stated: Liberty filed and gained approval of a tariff whose correct application deprived the Company of some $4 million that the utility now considers itself entitled. Assuming *arguendo* that Liberty is correct – that the tariff in question was improvidently drafted from the Company's perspective – the utility cannot correct this mistake retroactively.

III. Liberty's Arguments

Obviously anticipating these arguments, Liberty includes in its petition certain obfuscatory language and specious arguments. All must be rejected.

According to Liberty, the utility was "incorrectly directed" to return the $4 million to customers "due to an error embedded in the tariff." Petition at 1. The pitch, presumably, is that the *Commission* erred by directing the return of the money and can now correct the mistake regardless of what the applicable tariff required. This claim, which is not elaborated upon elsewhere in the petition, is pure sophistry. Elsewhere, Liberty concedes that the tariff as *correctly applied* through part of 2018, all of 2019, and part of 2020 (until the revision of the utility's tariffs as the result of a rate case) required "an improper comparison" of revenue targets and collected revenues so as to cost the utility the $4 million it now wants back. Petition at 2.

The petition further contends that the relief it seeks here is of a piece with "a number of orders approving refunds and collections to correct errors in other reconciling charges . . . and to correct simple failures to properly implement approved rates." *Id.* at 3 (suggesting that "[t]he Commission's overriding goal has been to reach the correct answer" regardless of whether the error favored the utility or its customers). But in each of the instances cited by the Company, the applicable tariff explicitly provided for the reconciliation that was conducted *post facto* and/or the error in question was *inconsistent* with the requirements of the applicable tariff.

The law governing utility tariffs in New Hampshire allows customers to be put on notice that today's service may be subject to tomorrow's reconciliation. What it does not allow is the situation in which today's tariff – binding terms and conditions enjoying the force and effect of law – can be retroactively revised in light of tomorrow's discovery of errors *in the tariff*.

IV. Revenue Decoupling

That this situation involves revenue decoupling – very much a reconciling mechanism – should not be permitted to confuse anyone and thus obscure the applicable legal principles. In her prefiled testimony, Liberty witness Erica L. Menard has succinctly and correctly described the nature and purpose of revenue decoupling. It is "designed to eliminate the dependence of a utility's revenues on system throughput." Direct Testimony of Erica L. Menard at Bates 15, lines 2-4. "The impetus for implementing revenue decoupling across the country is the drive to reduce energy consumption through energy efficiency initiatives and conservation measures." *Id.* at lines 7-9. "Revenue decoupling was devised to . . . allow[] a utility to recover the base revenue requirement approved in its most recent base-rate proceeding – no more and no less – despite fluctuations or reductions in sales due to conservation." *Id.* at lines 14-17.

If anyone ever doubted that the realities of revenue decoupling mechanisms are an order of magnitude more complex than the straightforward justification for such an approach to utility revenue Ms. Menard provided, consider that it took her fully 81 pages of written testimony to explain why, from the company's perspective,

the tariff was flawed and efforts to improve the decoupling mechanism were downright Kafkaesque. For present purposes, the Commission can and should assume that Ms. Menard's account is as elegant and true as Homer's account of the equally epic journey home of Odysseus after the Trojan War. One might even discern a tragic and ironic element here, given that Liberty was laudably the first utility to make good on the promise made by all five regulated electric and natural gas companies in New Hampshire to embrace decoupling in 2016. *See* Order No. 25,932 (2016) in Docket No. DE 15-137 at 59-60 (approving utility commitments to pursue decoupling in a future rate case).

Alas, these complications and ironies notwithstanding, the fundamental legal principles governing tariffs and their revisions are immovable.

V. Conclusion

For the reasons stated above, the Commission should conclude that it cannot grant the relief requested by Liberty, evening assuming the correctness of the factual allegations in the petition and accompanying testimony. Dismissal is therefore not only appropriate but a welcome alternative to requiring everyone to spend months litigating a case whose outcome is a foregone conclusion as a matter of law.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Dismiss the petition of Energy North Natural Gas Corporation with prejudice, and

B. Grant such further relief as shall be necessary and proper in the circumstances.

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