State of New Hampshire
Public Utilities Commission

Docket No. DG 22-041

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

Petition for Approval to Recover Revenue Decoupling Adjustment Factor Costs

Objection to Motion to Dismiss

I. Introduction

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty ("Liberty" or the "Company"), through counsel, objects to the Motion to Dismiss submitted by the Office of the Consumer Advocate ("OCA"), on July 6, 2022, in the above-referenced proceeding (the "Motion"). OCA's Motion requests that the New Hampshire Public Utilities Commission (the "Commission") dismiss the Company's petition in this proceeding *with prejudice*, without any administrative proceeding to consider the merits of the Company's petition (Motion at 1, 6). OCA's Motion suggests that an administrative review of the merits of the Company's petition is unwarranted because, *even if all facts alleged are true and accurate*, the petition cannot be granted as a matter of law (id. at 1-2). For several reasons, OCA's Motion must be denied.

The legal principle that OCA asks the Commission to rely on as exclusive support for a dismissal is an alleged impermissible, retroactive impact associated with operation of the Revenue Decoupling Mechanism ("RDM") tariff provisions (Motion at 4-6). This false proposition is incorrect from both a legal and ratemaking perspective for the reasons demonstrated below. Moreover, OCA omits any reference to the Company's approved low-income tariff that, by its plain terms, authorizes the Company's recovery of the discount afforded to R-4 customers in each decoupling year, *which did not occur* in the 2019-2020 and 2020-2021 decoupling years due to the

interrelation of the low-income tariff with the RDM tariff. Consequently, if the issue is going to be decided "as a matter of law" on the basis of operative tariff provisions, then the provisions of the low-income tariff would need to be given effect thereby authorizing recovery by the Company.

Similarly, in its Motion, OCA seeks to brush aside all consideration of the complex set of facts that pertain to the Company's request for relief with the sweeping conclusion that, even if all facts alleged by the Company are true, the Commission cannot possibly act because, "as a matter of law," any recovery in this proceeding would have some sort of vaguely implied, impermissible retroactivity (Motion at 2-3). Notably, OCA does not use the term "retroactive ratemaking" in its Motion, although it is the only legal concept that would purport to render the Company's required relief "impermissible" as a matter of law.

Nor does OCA attempt any demonstration of how the alleged impermissible outcome would actually occur under the facts of the case (all assumed to be true in OCA's Motion), if the Company were allowed recovery. OCA offers a cursory reference to the Appeal of Pennichuck Water Works, 120 N.H. 562 (1980) and related cases, surrounded by florid reference to literary themes. However, OCA makes no attempt to show how allowing recovery would violate the principles of the Pennichuck ruling. Rather, OCA addresses "Revenue Decoupling" in Section IV of the Motion, wherein OCA acknowledges that the RDM is a reconciling mechanism but fails to provide further substantive follow-up to that point explaining how an impermissible retroactive impact would occur. To warrant dismissal, it is not sufficient for OCA to offer up nothing more than a series of oblique references to an impermissible retroactive impact or to assert conclusively that a tariff is tantamount to an approved contractual arrangement, without examining the facts underlying that conclusion.

In fact, given that reconciling mechanisms are designed for the very purpose of allowing retrospective adjustments, as OCA concedes, the Commission would have to make factual findings simply to come to the conclusion that impermissible retroactive ratemaking or some other impermissible retroactive impact has occurred. Consequently, if all of the facts alleged in the Company's petition are assumed to be true, then the Company is due a refund of $4,024,830 because the facts support correction of the mistake that was made in the reconciling mechanisms associated with the RDM and the low-income factor. Stated differently, the facts establish that there is no impermissible retroactive ratemaking associated with the Company's recovery and no impermissible retroactive change to the tariff that is necessitated to grant the Company recovery.

Accordingly, the Company's petition demonstrates that the interrelated operation of the RDM and low-income tariff provisions should not have deprived the Company of $4,024,830 in revenue collections through the RDM, representing the Company's recovery of the low-income discount. The Company is aware that work will be required of all parties to investigate the facts and law involved in this proceeding and is grateful for those anticipated efforts. However, loss of this amount would cause severe, unfair, and unreasonable damage to the Company, particularly if it results from dismissal of the case with prejudice (and without a review on the merits). Therefore, the Commission review is warranted and necessary, requiring denial of OCA's Motion.

II. Legal Analysis

Notably, OCA's Motion is the mirror image of the Motion in Limine that OCA submitted to the Commission on October 4, 2021, in Docket No. DG-21-130, regarding the Company's Winter 2021/2022 Cost of Gas and Summer 2022 Cost of Gas.[1] OCA's Motion in Limine requested that

[1] Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty Winter 2021/2022 Cost of Gas and Summer 2022 Cost of Gas, Docket No. DG 21-130 Motion in Limine of the Office of the Consumer Advocate Seeking Prehearing Determination that Request to Recover $4 Million Constitutes Illegal Retroactive Ratemaking.

the Commission narrow the scope of that docket to eliminate consideration of the Company's request for recovery of its under-collected RDM revenue and determine, as a matter of law, that Liberty may not recover the amount of $4,024,830 that was improperly refunded to residential customers (Motion in Limine at 10-11).

OCA's primary basis for the Motion in Limine was the argument that the Commission should not even consider the Company's request for recovery of the under-collected low-income discount because it would constitute "impermissible retroactive ratemaking" as a matter of "black letter law" (Motion in Limine at 5-7). Similarly in OCA's Motion in this proceeding, OCA asserts that the Company's petition "cannot be granted as a matter of law" because "basic and longstanding principles of utility law, applicable in New Hampshire, preclude the relief sought by Liberty" (Motion at 2). OCA's singular theory is that the New Hampshire Constitution "prohibits laws (including tariffs enjoying the force and effect of law) that create a 'new obligation in respect to a past transaction'" and that "the utility cannot correct this mistake retroactively" (Motion at 3). OCA cites to no authority whatsoever for the premise that revenues cannot be properly recouped where there are "errors in the tariff" and, in fact, this proposition is false, particularly in relation to reconciling mechanisms and the facts in this case.

In its Motion in Limine, OCA conceded that as a "matter of law," the concept of "retroactive ratemaking" does not apply to reconciling mechanisms that, by their very nature, are recovering over- and under-collections from a prior period. Specifically, OCA stated that:

> It bears noting why a decoupling mechanism is itself ***not an example of retroactive ratemaking***, given that under such a mechanism future revenue requirements are adjusted in light of previous revenue surpluses or deficiencies. The answer is that the adjustment mechanism is itself spelled out in the tariff so that, unlike customers of the unregulated firm described hypothetically by the Court in Pennichuck Water Works, ***customers of a utility with a decoupling mechanism are on notice of the pending adjustment*** and can, theoretically, adjust their consumption accordingly. See, e.g., Regulatory Assistance Project, "Revenue Regulation and Decoupling

(2016) at 50-51 and n.54 (***describing the proper design of a decoupling mechanism to avoid retroactive ratemaking***).[2]

Motion in Limine at 6, fn.3, (emphasis added).

Moreover, the Commission has already established that "retroactive ratemaking" does not apply to reconciling mechanisms, such as the Cost of Gas mechanism. See, Concord Natural Gas Corp., 67 N.H. PUC 113, 114 (1982).

In this case, the amounts at issue were mistakenly refunded to customers through the RDM and, if approved by the Commission, would be properly and lawfully recouped by the Company through that same reconciling mechanism. The concept of "retroactive ratemaking" is applicable exclusively to the recovery of costs through base distribution rates consistent with the theory of the "filed rate doctrine." Retroactive ratemaking does not occur where a reconciling mechanism is collecting or refunding revenues to customers by its normal operation, pursuant to approved tariffs and regulations, without any change in the underlying costs recovered through base rates. In fact, OCA's acknowledgement that the Revenue Decoupling Mechanism is "not an example of retroactive ratemaking" concedes, at a minimum, that there is a threshold issue of fact in this proceeding as to *whether* any retroactive ratemaking or other impermissible retroactive impact would occur if the request were granted.

In the instant Motion, OCA attempts to sidestep the issue of retroactive ratemaking by asserting the proposition that revenue adjustments required to address "errors in the tariff" somehow create impermissible retroactivity, whereas recovering revenues related to past periods

[2] According to the OCA Motion, the cited treatise is available at https://www.raponline.org/wp-content/uploads/2016/11/rap-revenueregulation-decoupling-guide-second-printing-2016-november.pdf. The referenced treatise does not discuss the potential for "retroactive ratemaking" or the need to take steps to avoid retroactive ratemaking in relation to implementation of the revenue decoupling mechanism. This is likely because it is well established that retroactive ratemaking is not implicated by implementation of a reconciling mechanism operating outside base rates.

through the reconciling mechanism would *not* constitute impermissible retroactive ratemaking. Because OCA seeks to sweep the entire factual investigation off the table, OCA misses the fact that the Company's petition demonstrates that the Company could have recovered the correct level of revenues by applying the approved tariff terms in a different manner, but still within the approved terminology of the tariff. The Company's petition shows that Liberty brought this to the attention of parties in the first cost of gas proceeding (2019-2021), through sworn testimony of the Company's witnesses, and the Commission Staff witness argued against this application of the tariff terms – the important point being that the correct outcome could have occurred through the approved RDM provisions, but Staff argued against such an application.[3] As a result, an investigation is required to establish the facts before any conclusion can be reached that the mere allegation of "error in the tariff" precludes recovery as a matter of law.

To that end, OCA's Motion correctly identifies that a legal predicate of the dismissal is that all facts alleged in the Company's petition must be assumed to be true. If these particular facts are alleged to be true, the error is in the application of the tariff, which OCA suborned. An error in the application of the tariff is a mistake that is eminently subject to remedy through operation of the reconciling mechanism because otherwise, no mistake could ever be cured through a reconciling mechanism including a simple math error, which defies the very purpose of having a reconciling mechanism. These are facts that the Commission needs to investigate before reaching any determination on dismissing the Company's request.

In that regard, there are two inherent flaws in OCA's argument that the Commission should reject the Company's petition as a matter of law based a vague theory of retroactive changes to the

3 These facts are discussed in the Pre-Filed Direct Testimony of Erica L. Menard, pages 40-56. Although the terms of the approved tariff were flawed, an interpretation of the terms would have enabled the correct calculation, as discussed in Ms. Menard's testimony.

tariff. These flaws are that: (1) the cited case law, and the ratemaking principle established therein, pertain to base-rate changes and not to the operation of any reconciling mechanism; and (2) the cited case law contemplates a retroactive "increase" in cost recovery caused by a change in the tariff operation, whereas here the Company is rightfully seeking to obtain recovery of under-collected revenues that are necessary to maintain ***revenue neutrality*** associated with provision of the low-income discount rate, which by its plain terms allows recovery of the low-income discount rate. OCA has not addressed this aspect of the issue in its Motion.

Historically, the prohibition against retroactive ratemaking arose from the "filed rate doctrine." The filed-rate doctrine generally prohibits a regulated utility from charging rates for its services other than those approved and filed with the public utility commission. The New Hampshire legislature has codified this requirement of previously approved rates applying to prior consumption in the provisions of RSA 378:1, as follows:

> Every public utility shall file with the public utilities commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges and prices for any service rendered or to be rendered….

RSA 378:3 also precludes utilities from charging any other rates absent prospective Commission approval, stating as follows:

> Unless the commission otherwise orders, no change shall be made in any rate, fare, charge or price, which shall have been filed or published by a public utility in compliance with the requirements hereof, except after 30 days' notice to the commission and such notice to the public as the commission shall direct.

RSA 378:14 further clarifies that:

> No public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.

The considerations underlying the filed-rate doctrine as reflected in RSA 378 include preserving the Commission's primary jurisdiction over the reasonableness of rates and ensuring that utilities charge only those rates of which the Commission has been made cognizant, establishing the predictability of filed rates, and preventing unjust discrimination. *See* Appeal of Lakes Region Water Company, 171 N.H. 515 (2018).

As was the case with OCA's Motion in Limine, OCA's Motion rests solely on the principle that utilities may not charge new rates (derived by a change in tariff terms) to past consumption, citing Appeal of Pennichuck Waterworks, 120 N.H. 562, 566 (1980). Specifically, OCA argues as follows:

> We are mindful of the fact that public utilities may not increase their rates with the same freedom as an unregulated business. However, even where a product is unregulated, the consumer is confident once he purchases a product that the merchant will not later claim ***that he is liable for a retroactive price increase on the product.***

Motion at 6, citing, Appeal of Pennichuck Waterworks, 120 N.H. 562, 566 (1980) (emphasis added).

In the Pennichuck case, the utility filed a request for an increase in base rates including a temporary rate. The issue of retroactive ratemaking arose with respect to a request for approval of those temporary rates. The utility in that proceeding used quarterly billing *that would have resulted in customers being charged the temporary rate for water already consumed.* i.e., the change would have been a retroactive change in base rates, charging the customer a rate for water consumed although such rate had not been approved by the Commission at the time the water was consumed. To avoid the potential for "retroactive ratemaking," the PUC allowed the temporary rates to go into effect, but on a date that was no earlier than when the company had put its customers

on notice of the proposed increase through its filing, to ensure that quarterly-billed customers would not be billed under the new rates for past consumption.

The precedent in Pennichuck is not applicable to the circumstances in this case involving the Company's request for recovery of the under-collection of the $4 million in low-income discount revenue that were inadvertently refunded to customers. If recovery of the lost revenues through the LDAF is approved by the Commission, the LDAF will collect a prior under-collection consistent with the intended operation of the Revenue Decoupling Mechanism and low-income rate factor to collect the approved revenue target. Therefore, there is no basis to argue that this is retroactive ratemaking. See Aquarion Water Company of New Hampshire, Docket DW 21-085 Order No. 25,412, at 3 citing Pennichuck (approving AWC-NH's temporary rates based on a finding that customers were put on notice of the proposed changes in rates and that customers were provided with an opportunity to adjust their consumption or adjust to the proposed increased rate).

OCA's Motion does not provide any "black letter law" to substantiate the claim that, in this proceeding, the requested recovery is precluded as a matter of law. OCA's Motion simply raises the specter of retroactive ratemaking with reference to the Pennichuck case, which is not applicable to the circumstances at hand. OCA's Motion does not offer any explanation as to how the Pennichuck principle applies to the facts in this case, which would be necessary to demonstrate that retroactive ratemaking, is in fact, implicated in this case. OCA has not addressed the fact that a different interpretation of the *approved tariff language* would have yielded the correct result. OCA has not addressed Staff's role in promoting the Company's adherence to the interpretation that Staff preferred rather than making the correction that the Company's witnesses testified was appropriate. These are facts that need to be examined and that – if assumed to be true – warrant the Company's recovery of the undercollection.

OCA concedes that, by its normal operation, the RDM "is ***not*** an example of retroactive ratemaking." OCA Motion in Limine at 6, fn.3 (emphasis added); see also, OCA Motion at 5. The tariff associated with a reconciling mechanism provides the requisite notice to customers that rates will adjust from time to time. This "notice" to customers was one of the reasons cited by the court in support of its determination in Pennichuck that allowing the temporary rates to go into effect on a date that would have, at least partially, applied a new rate to former consumption due to the quarterly billing cycle was improper and in violation of the N.H. Constitution. Specifically, the Court found that customers "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 at 566 (emphasis added.)

In arguing that New Hampshire law prohibits a public utility from correcting errors that occur in reconciling mechanisms, OCA does not examine the difference between collecting an increased cost through base rates (and applying the increased base rate retroactively to past consumption) and collecting revenues on a pass-through basis through a reconciling mechanism. On that point, the Commission has previously ruled that:

> The Commission does not accept the Company's argument that the disallowance of any portion of the penalty that was included in the summer cost of gas adjustment is retroactive ratemaking. The nature of the fuel clauses approved by this Commission are such that they are always based on estimated costs for a forward-looking period and a *subject to reconciliation*. Over and under-collections are carried in deferred accounts and are brought forward to a future adjustment period. ***Furthermore, if the Commission Staff found errors in the past bookings of the cost of gas adjustment, an adjustment would be made***.

Concord Natural Gas Corp., 67 N.H. PUC 113, 114 (1982) (emphasis added).

In New Hampshire, the courts have not yet examined whether the concept of "retroactive ratemaking" would apply in relation to the operation of a reconciling mechanism. However, in

Massachusetts, rulings of the Massachusetts Supreme Judicial Court follow the same concept articulated by the Commission in Concord Natural Gas Corp., i.e., that the nature of reconciling mechanisms is to allow prospective recovery of past over- or under-collections. Specifically, the Massachusetts Supreme Judicial Court has affirmed that reconciling mechanisms like the cost of gas adjustment are an ***exception*** to the prohibition against retroactive ratemaking. Southern Union Co. v. Dep't of Pub. Util., 458 Mass. 812, 822-823 (2011); Fitchburg Gas & Elec. Light Co., D.T.E. 99-66-A at 16, 24-27 (2001) ("[I]nsofar as this case arose from the operation of the [Cost of Gas Adjustment], it implicates a reconciling mechanism that lies outside the retroactive ratemaking stricture that constrains Department action under G.L. c. 164, s. 94."), affirmed, Fitchburg Gas & Elec. Light Co. v. Dep't of Telecomm. & Energy, 440 Mass. 625, 637 (2004) ("Fitchburg").

III. Conclusion

The Company's petition demonstrates that the interrelated operation of the RDM and low-income tariff provisions should not have deprived the Company of recovery of $4,024,830. The loss of this amount would cause severe, unfair and unreasonable damage to the Company, particularly if resulting from dismissal of the case with prejudice. OCA's Motion to Dismiss has not raised any defensible basis for the Commission to reject the Company's petition. OCA concedes that a legal predicate of such dismissal is the assumption that all facts alleged are true. If all facts are alleged as true, then the approved tariff terms would have authorized the Company to collect the disputed revenues on a timely basis in the respective decoupling year, but for Staff's opposition to that application. There is also no retroactive ratemaking implicated here, nor does OCA's Motion

allege as such. Therefore, the Commission review is warranted and necessary, requiring denial of OCA's Motion.

WHEREFORE, Liberty respectfully requests that the Commission:

A. Deny the OCA's Motion;

B. Address the merits of Liberty's request to recover the $4,024,830 on a reasonable schedule that provides OCA and other potential parties adequate time to address the factual and legal issues raised by the Company's petition; and

C. Grant such other relief as is just and equitable.

Respectfully submitted,

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

Date: July 15, 2022 By: _____

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Certificate of Service

I hereby certify that on July 15, 2022, a copy of this objection has been electronically forwarded to the service list in this docket.

Michael J. Sheehan