

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION
Docket No. DE 23-039
Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty
Request for Change in Distribution Rates

Response to Department of Energy Motion to Dismiss

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and pursuant to N.H. Code Admin. Rules Puc 203.07 hereby responds in support of the Department of Energy’s Motion to Dismiss the May 5, 2023, distribution rate filing of Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty (“Liberty”). Further, should the Department prevail in its Motion to Dismiss, the OCA asks the Commission to require Liberty’s shareholders, rather than its customers, to cover all costs incurred in connection with this proceeding to date, particularly those incurred by the OCA. In support of this request, the OCA states as follows:

I. Facts and Circumstances

The Department’s current Motion to Dismiss is actually its second motion to dismiss in this docket. The Department’s first Motion to Dismiss focused on the impropriety of Liberty having filed its first full rate filing without having filed its 2022 FERC Form 1. As explained in the Department’s first motion, the 2022 FERC Form 1 reports detailed accounting results that are essential to the Department’s

review of the rate request. However, unlike its first motion, the Department's second motion to dismiss addresses not the lack of information from the initial rate case filing but, rather, the insufficient and inaccurate information that Liberty presented in its second full rate case filing, which Liberty presumably made in an effort to meet its RSA 378:8 burden to demonstrate that its proposed rates are lawful, just, and reasonable. The Department goes to great lengths explaining the discrepancies and inconsistencies between the data in the 2022 FERC Form 1 and the data in the rate case, with reference to the October 25, 2023 report of the audit staff of the Department's Enforcement Division.¹ This is not Liberty's first rate case, and the Company has had every reasonable opportunity to meet its RSA 378:8 statutory burden — especially given it has made two full rate filings (tabs 6 & 11).

The Department's first motion was rendered moot on May 2, 2023 by Order No. 26,814, which rejected, without prejudice, Liberty's first filing as incomplete because Liberty had not yet filed its 2022 FERC Form 1.² In its second rate case filing Liberty petitioned the Commission pursuant to RSA 378:27 and RSA 378:28 to approve (1) an increase in permanent rates to be effective with service rendered on and after July 2023, (2) temporary rates to be effective on and after July 1, 2023,

¹ The Enforcement Division's audit report is 190 pages in length and raises no fewer than 28 distinct audit issues – everything from the relatively insignificant (e.g., Audit Issue 26, concerning \$5,265 in artwork improperly accounted for as plant in service) to the deeply troubling (e.g., Audit Issue 1 (“General ledger Settlement Set-up”) and Audit Issue 26, “FERC Form 1 does not Agree with the Filing.”

² While FERC Form 1 is not a requirement for a rate case filed with the Commission, the Commission noted that because Liberty relied on Form 1 by incorporating the document by reference in its rate case filing, Order 26,814 made Form 1 a filing requirement.

pending the Commission’s final determination on Liberty’s request for a permanent rate increase, and (3) approval of a three-year forward-looking multi-year rate plan for the rate years ending June 30, 2024, June 30, 2025, and June 30, 2026.

On May 26, 2023, the Commission via Order No. 26,829 suspended Liberty’s proposed tariffs for a period of not to exceed 12 months, or until May 5, 2024, pursuant to RSA 378:6, I(a), pending further investigation. The Commission took notice of the issues presented in the filing, such as but not limited to: “whether the burden of proof under RSA 378:8 is met for each rate and ratemaking methodology change proposed.”

On June 30, 2023, the Commission, via Order No. 26,855 approved a temporary increase of \$5,462,876 to Liberty’s annual electric distribution revenues, effective July 1, 2023 — meaning for an average residential ratepayer, a monthly bill increase of approximately \$3.29, or 1.5 percent.

On December 13, 2023, the Department filed its second motion and Expedited Motion to Stay (tab 90) pursuant to New Hampshire Code Admin. Rule Puc 203.07, and in response to the Department’s Audit Division findings.

II. Reasons for Dismissal

Dismissal of Liberty’s second filing is both appropriate and necessary under applicable legal precedent and statutes — specifically, U.S. Supreme Court precedent found in *Hope Natural Gas Company* (1944), and *Bluefield Water Works* (1923), N.H. Supreme Court Precedent in *Appeal of Richards* (1991), and RSA 378.

Hope and *Bluefield* establish the principles that under a “just and reasonable” statutory standard, a utility must have a reasonable opportunity to earn a return on investment — and that rates must neither be confiscatory nor exploitative of customers. See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1994) (stating “regulation does not insure that the business shall produce net revenues”) (citation omitted); and *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 690 (1923) (explaining that the company is entitled to ask for a fair return upon the value that which it employs for the public convenience). These principles were also acknowledged by the New Hampshire Supreme Court in *Appeal of Richards*, 134 N.H. 148, 164 (1991) (explaining there are constitutionally permissible means of determining “just and reasonable” rates other than traditional rate making methodology).

Under the Fifth Amendment to the U.S. Constitution, Liberty has a right to the reasonable opportunity discussed in *Hope* in which the resulting rates are not confiscatory as described in *Bluefield*— meaning that Liberty cannot be effectively deprived of its property without due process of law and without just compensation. Liberty also has statutory rights under RSA 378 (providing generally that a utility may request a permanent rate increase, the Commission has a responsibility to assure that rates are just, reasonable, and lawful). Since RSA 378:8 explicitly places the burden of proof upon Liberty, Liberty must therefore file reliable schedules, supported by accurate books and records, in order to demonstrate its claimed revenue requirement forms the basis for the requisite Commission determination

that the permanent rates of this utility are just and reasonable. In light of these legal precedents and rights, Liberty is not *guaranteed* a reasonable return on its investment but instead only a reasonable opportunity.

In the context of a rate case filing, Liberty's opportunity to earn a reasonable return is secured by the utility demonstrating that its permanent rate request is just and reasonable. To the extent Liberty fails to meet its statutory burden, its permanent rate request cannot be just and reasonable, and therefore allowing the currently applicable permanent rates to remain in effect is not confiscatory.³ In other words, since Liberty is relying on unreliable books and records, it is the utility itself, rather than the regulator, that is depriving the company of its opportunity for a reasonable return.

The Office of the Consumer Advocate does not have an Audit Staff like the Department of Energy, and therefore our office relies on the efficacy of Liberty's books and records, which underly the schedules in the rate case. The Department's audit demonstrates, or at least strongly indicates, that neither the Department, the OCA, other intervenors, or ultimately the Commission itself, can rely on those books and records. Since RSA 378:8 places the burden of proof upon the utility, the question is whether Liberty has met its burden. It has not.

³ It therefore inexorably follows that the temporary rates approved pursuant to RSA 378:27 in Order No. 23,039 (June 30, 2023) must now be refunded to customers to the extent the revenues received by the Company exceed those it would have received under the previously approved permanent rates.

The Department's Enforcement Division identifies many significant issues which indicate that Liberty's books and records do not match its FERC Form 1 or full rate filing. *See* Department's Motion to Dismiss at 6 – 13, tab 90 (explaining that the Audit Report identifies 28 issues which include nearly 200 entries that need correcting). One such example is that Liberty had presented its financial information as accurate when in fact it had inadvertently omitted information as basic as rental expenses that were only corrected following data requests by the Department and the OCA. Department's Motion at 12. The Department boldly states: "... Liberty understood that its FERC Form 1 for 2022 did not match its books and records at the end of the test year 2022, and Liberty did not attempt to align the two." *Id.* at 8. Such a significant claim should not be taken lightly by the Commission — especially considering both the potential impact upon residential ratepayers should the Department's second motion prevail, and the significant amount of resources the OCA and the Department have invested in reviewing and responding to Liberty's rate filing to date.

Ultimately, the Department's Audit Staff is unable to verify whether the starting point for Liberty's rate request is accurate, and therefore the Department's ability to recommend whether said request is just and reasonable. *Id.* at 11. Meaning, neither the revenue requirement that Liberty has requested, nor any other revenue requirements as proposed by the various parties to this docket (including the OCA) can form the basis for the requisite determination that the permanent rates of this utility are just and reasonable. Approval of Liberty's rate

filing when it cannot be determined to be just and reasonable goes against the public interest, would be exploitative of customers, and would be inconsistent with both federal and state precedent.

III. Liberty's shareholders must cover all costs incurred in connection with this proceeding to date.

The OCA does not contest that under a typical rate case, Liberty would normally be able to recover some of the incurred costs in this proceeding via a surcharge to its rates — for example, the OCA's incurred costs for employing experts in this case as covered by assessments collected from the utility by the Department. *See* RSA 363:28, III (establishing the Department's special assessment process with respect to the OCA's expenses); *see also* Order No. 26,714 (October 28, 2022) in DE 21-030 (authorizing recovery from ratepayers of rate case expenses incurred by utility, Department, and OCA via special charge). However, the question here is that but for Liberty failing to meet its statutory burden resulting in a rate request that can only be determined to be unjust and unreasonable, should Liberty's customers have to pay for Liberty's mistakes — the answer is unequivocally, no. Therefore, Liberty's shareholders, and not its customers, must cover the cost. It would otherwise be Sisyphean to expect Liberty's customers to have to cover said cost of pushing Liberty's boulder up the hill in DE 23-039 and again in a future rate proceeding should the Department's second motion prevail when RSA 378:8 places the burden of proof upon Liberty — especially when Liberty has had every reasonable opportunity to file accurate information in either of its

two full rate filings in this docket to date. But for Liberty failing to meet its statutory burden, the work of the OCA, the Department, and others would not be made fruitless should the Department prevail in its Motion to Dismiss.

IV. Conclusion

Considering the regrettable situation described above, the Commission should grant the Department's Motion to Dismiss and issue an order requiring Liberty's shareholders, but not its customers, to cover all the costs in connection with this proceeding to date.

WHEREFORE, the OCA respectfully requests that this honorable Commission:

- A. Grant the Department's Motion to Dismiss pursuant to N.H. Code Admin. Rules Puc 203.07,
- B. Issue an order requiring Liberty's shareholders, but not its customers, to cover all the costs in connection with this proceeding to date, and
- C. Grant such further relief as shall be necessary and proper in the circumstances.

Dated: December 26, 2023



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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.

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