

STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION

Docket DG 23-067

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. D/B/A LIBERTY

Request for Change in Distribution Rates

Opposition to Department of Energy's Motion for Rehearing

Pursuant to N.H. Code Admin. Rules Puc 203.07 and Puc 202.03, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty (“Liberty” or the “Company”) hereby responds to the Department of Energy’s (“DOE”) Motion for Rehearing of Order No. 26,899 (the “Motion”). The Motion requests that the New Hampshire Public Utilities Commission (the “Commission”) (1) grant rehearing to reconsider the Commission’s Order No. 26,899 (Oct. 31, 2023) with respect to the approximately \$500,000 in revenues that the Company would have recovered if temporary rates had been approved for effect October 1, 2023 (as requested by the Company); and (2) defer the decision on recoupment to the permanent rate phase of this proceeding (Motion at 7). In support of these requests, the DOE argues that the Commission has violated the Administrative Procedures Act (“APA”) and acted in contradiction to RSA 378:29 (Motion at 5-7). The Office of the Consumer Advocate (“OCA”) filed a letter in support of the Motion on December 1, 2023.

As detailed below, the Commission was authorized to allow recovery of the approximately \$500,000 in revenue that would have been recovered during October 2023 if rates had become effective on October 1 (the “October 2023 Revenues”). Further, while the Company does not oppose deferring the issue of recoupment to the permanent rate phase of this proceeding, the Company does not agree that RSA 378:29 precludes recovery of the October 2023 Revenues.

In support of its opposition to DOE's Motion, Liberty states the following:

I. Background

On July 27, 2023, Liberty filed its petition requesting a change in distribution rates (the "Petition") together with supporting testimony and attachments. The Company's petition included a request to implement temporary rates effective October 1, 2023. On August 25, 2023, the Commission issued Order No. 26,877 suspending the Company's proposed tariffs for a period not to exceed 12 months and scheduling a hearing on Liberty's request for temporary rates for September 27, 2023.

On September 26, 2023, the Commission issued a procedural order postponing the hearing on temporary rates until October 27, 2023. The procedural order stated that the hearing was being postponed because "...[DOE] has not filed a written position regarding the Company's temporary rate proposal with the Commission, nor has a settlement agreement been filed for the Commission's consideration." Procedural Order at 2. The Commission's Procedural Order further directed DOE to submit a filing indicating when it would file a written statement of position no later than September 29, 2023. *Id.* Also, on September 26, 2023 (after the issuance of the procedural order), DOE filed a written statement advising that the DOE and Liberty had "reached a settlement agreement under which Liberty would increase rates on a temporary basis designed to collect an additional \$8,700,000 (approximately) in revenue." DOE Position Statement at 1.

Liberty filed a letter in support of DOE's position statement on September 26, 2023, and requested that the September 27, 2023, hearing be reinstated.¹ The Commission issued a second

¹ DOE's September 26, 2023 position statement indicated that DOE would be prepared to present the settlement to the Commission at a hearing on September 27, 2023, as originally scheduled. The Office of the Consumer Advocate ("OCA") filed a letter on September 27, 2023 expressing support for the settlement as outlined in the DOE position statement and confirming that OCA remained available to participate in a hearing on September 27, 2023.

procedural order on September 27, 2023, confirming that the hearing on temporary rates would be postponed until October 27, 2023. On September 28, 2023, Liberty filed a Motion for Order Nisi Approving Temporary Rates, Effective October 1, 2023 (“Motion for Order Nisi”). The Company’s Motion for Order Nisi included an alternative request for relief to allow for recovery of the October 2023 Revenues during the temporary rate period if the temporary rate effective date was delayed until November 1, 2023 (Motion for Order Nisi at 6). This alternative request was made to ensure that the Company would not be harmed due a delayed hearing based on circumstances outside of its control; this alternative relief request was also intended to allow the Company to receive the full benefit of the settlement agreement reached between the parties (*id.*).

The Commission issued a procedural order on September 29, 2023, denying the Company’s request for an order nisi but stating that “... the approach delineated by Liberty as an alternative form of relief requested in its [Motion for Order Nisi] is reasonable, insofar as the recovery of the proposed settlement revenue requirement for temporary rates could be effectuated over a slightly shorter recovery period (of November 1, 2023 through July 31, 2024).” Sept. 29, 2023 Proc. Order at 2. The September 29, 2023, procedural order also (1) set an October 16, 2023, deadline for the Company to resubmit its proposed rate schedules with a proposed recovery period of November 1, 2023, through July 31, 2024; and (2) set an October 20, 2023, deadline for the DOE to file testimony regarding the temporary rates settlement proposal. *Id.*

The Company submitted proposed rate schedules on October 16, 2023, that calculated recovery of the approximately \$8.7 million settlement agreement over a nine month period. The DOE filed the testimony of Faisal Deen Arif on October 20, 2023, recommending approval of the proposed temporary rate amount of \$8,706,258 (the “DOE Testimony”) (DOE Testimony at 7). The DOE Testimony was silent with respect to the Company’s request to recover the October 2023

Revenues and the Company's October 16, 2023, revised rate schedules that provided for recovery of the October 2023 Revenues (see DOE Testimony).

The Commission held a hearing on temporary rates on October 27, 2023. At the outset of the hearing, the OCA stated that it supported the proposed settlement amount of \$8.7 million (2023 Oct. 27 Tr. at 11). OCA also stated that it is OCA's position that RSA 378:29 sets the commencement date for recoupment as November 1, 2023 (i.e., the effective date of temporary rates) (2023 Oct. 27 Tr. At 11). In response to OCA's statement regarding recoupment, DOE stated that while its interpretation of RSA 378:29 is consistent with OCA's interpretation, the recoupment amount and recovery will be part of the full rate case and could be considered at that time (id. at 14). OCA confirmed that it agreed with DOE that recoupment would be considered as part of the full rate case and had presented its position regarding the recoupment period for purposes of preliminary matters (id. at 15). Without taking a position on the recoupment period, the Company confirmed that the recoupment period was an issue for consideration during the full rate case setting permanent rates (see id.). The Company did confirm, however, that it still proposed to recover the settlement amount including the October 2023 Revenues over a nine-month period (id. at 21). At the conclusion of the hearing, OCA and DOE expressed support for the settlement amount of approximately \$8.7 million without taking a position on the recovery period (see id. at 123, 129).

On October 31, 2023, the Commission issued Order No. 26,899 approving temporary rates for effect November 1, 2023 (the "Order"). The Order declined to allow recovery of the settlement amount over a nine-month period based on a determination that this would result in an increased weighted average cost of capital above the currently approved level. Order at 7. The Commission determined that such a result was contrary to Commission precedent and was unsupported by the

record. Id. at 7-8. However, the Commission did approve recovery of the October 2023 Revenues at the time that permanent rates are set. Id. at 8. To allow for recovery of the October 2023 revenues, the Commission stated “[t]hus, at the end of the proceeding, the permanent rates ultimately approved will be reconciled back to an effective date of the temporary increase, of October 1, 2023.” Id.

II. Standard of Review

RSA 541:3 allows for rehearing of a Commission order:

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

The standard governing the Commission’s review of a motion for rehearing pursuant to RSA 541:3 is well established. “The Commission may grant rehearing or reconsideration for ‘good reason’ if the moving party shows that an order is unlawful or unreasonable.” *Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Order No. 26,087 at 3-4 (Dec. 18, 2017) (citations omitted). “A successful motion must establish ‘good reason’ by showing that there are matters that the Commission ‘overlooked or mistakenly conceived in the original decision,’ or by presenting new evidence that was ‘unavailable prior to the issuance of the underlying decision.’” Id. “A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome.” Id.

III. Argument

As detailed below, the DOE has failed to satisfy the standard of review. It is clear that all parties were on notice that recovery of the October 2023 Revenues would be considered as part of the hearing on temporary rates. Further, even if RSA 378:29 sets the commencement for the recoupment period as November 1, 2023, this would not preclude the Commission from allowing the Company to recover the October 2023 Revenues. Accordingly, if a determination of the recoupment period is deferred until the full rate proceeding the Commission should confirm that recovery of the October 2023 Revenues is authorized.

A. RSA 378:29 does not Preclude Recovery of the October Revenues

DOE cites RSA 378:29 in support of its argument that the Commission was not authorized to allow recovery of the October 2023 Revenues (Motion at 6). However, RSA 378:29 addresses reconciliation of final and temporary rates at the conclusion of a rate proceeding and does not govern the Commission's authority to approve recovery of the October 2023 revenues. Specifically, RSA 378:29 states

“[i]f, upon final disposition of the issues involved in such proceeding, the rates as finally determined are in excess of rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.”

The Company's request in the Motion for Order Nisi was to recover the October 2023 revenues during the temporary rate period (Motion for Order Nisi at 6). This recovery during the temporary rate period was set forth in the revised rate schedules filed on October 16, 2023. The Commission's Order determined that recovery of the October 2023 Revenues is appropriate but

declined to permit recovery during the temporary rate period. Without taking a position on the Company's recovery of the October 2023 Revenues, DOE now objects to the Commission's determination that the October 2023 Revenues will be recovered as part of recoupment in this proceeding. Putting aside the recovery mechanism for the October 2023 Revenues, it is clear that the Commission's Order was attempting to remedy the impacts of the postponed hearing on temporary rates. This is consistent with the overall purpose of temporary rates.

Temporary rates are permitted pursuant to RSA 378:27 to allow the utility to earn "a reasonable return on the cost of the property of the utility used and useful in the public service...". To facilitate the objective of temporary rates, the Court has held that the Commission can order temporary rates to take effect as early as the date on which a utility files its request for a change in permanent rates (i.e., the Court has gone so far as to allow retroactive application of temporary rates). *Appeal of Pennichuck Water Works*, 120 N.H. 562, at 567 (1980). The Court has allowed these concessions in recognition of the fact that utility rates may not be immediately changed because of "delays inherent in the regulatory process." Id. at 566. It is therefore clear that the Commission is not precluded from allowing recovery of the October 2023 Revenues. It is noteworthy that DOE's Motion does not argue that the Company is precluded from recovering the October 2023 Revenues but instead focuses on the recoupment period.

Specifically allowing for recovery of the October 2023 Revenues is particularly compelling here where the September hearing on temporary rates was postponed for reasons outside of the Company's control and to provide additional time for DOE to file a position statement. See Sept. 26, 2023 Procedural Order. Notably, the Company was prepared to proceed on the original

September temporary rate hearing date² and was the only party disadvantaged by the hearing's postponement. The Commission acted appropriately and within its authority pursuant to RSA 378:7 and RSA 374:4 to set just and reasonable rates by authorizing recovery of the October 2023 Revenues to mitigate the impacts of this delay³ (Motion for Order Nisi at 6-7).

B. The Commission did not Violate the Administrative Procedural Act

DOE's second argument is that the Commission's Order violated the APA by failing to provide adequate notice that the recoupment period would be determined. DOE alleges that the procedural orders issued on September 26, 27, and 29, and October 19 do not reference recoupment and therefore the Commission violated the APA by authorizing the Company to recover the October 2023 revenues (Motion at 5). However, DOE also acknowledges that the APA requires only a "short and plain statement of the issues involved" (*id.*). It is clear that the Commission's September 29, 2023, Procedural Order satisfies this requirement with respect to the Company's request to recover the October 2023 Revenues.

Specifically, the September 29, 2023, Procedural Order stated "... the approach delineated by Liberty as an alternative form of relief requested in its [Motion for Order Nisi] is reasonable, insofar as the recovery of the proposed settlement revenue requirement for temporary rates could be effectuated over a slightly shorter recovery period (of November 1, 2023 through July 31, 2024)." Sept. 29, 2023, Proc. Order at 2. The September 29, 2023, Procedural Order then states

² The Company filed its exhibit and witness list on September 20, 2023, consistent with Order No. 26,877. No other party provided comments or edits to the draft exhibit and witness lists circulated by the Company in advance of filing (2023 Sept. 21 Tr. at 21-22).

³ The Commission determined that the October 2023 Revenues will be recovered at the conclusion of the temporary rate period resulting in DOE's Motion; however, no party has argued that the Commission lacked the authority to consider the Company's proposal for recovery over the temporary rate period (either by approving collection of the settlement revenue requirement over a nine-month period or by increasing the twelve month revenue requirement calculation to include the \$500,000 over the twelve month calculation period). The Company should not be denied recovery of the October 2023 Revenues based on concerns regarding the recovery mechanism where it is clear that the Commission had authority to consider an alternative proposal.

“[t]o that end, we order Liberty to resubmit its proposed rate schedules for temporary rates incorporating the proposed settlement revenue requirement of \$8,706,258 for a proposed recovery period of November 1, 2023 through July 31, 2024 no later than October 16, 2023.” *Id.* (emphasis in original). The Procedural Order made clear that the Commission required receipt of the rate schedules in support of the Company’s alternate recovery period prior to the October 27, 2023, hearing.

Consistent with the Commission’s Procedural Order, on October 16, 2023, the Company submitted revised rate schedules designed to recover the settlement amount revenue requirement amount over a shortened time period. The DOE’s attempt to imply in its motion that it was not clear that the Commission would consider the Company’s request to recover the October 2023 Revenues fails in light of the Commission’s directive for the Company to file updated rate schedules proposing recovery of the entire settlement amount over a shortened time period. There would be no reason to require the Company to submit updated rate schedules if the Commission did not intend to consider the request to recover the October 2023 Revenues.

Despite this directive and the Commission’s directive for DOE to file testimony following submission of the Company’s revised rate scheduled, DOE elected not to address recovery of the October 2023 Revenues in its written testimony filed on October 20, 2023, or in its recommendation to the Commission at the hearing on October 27, 2023. DOE should not now be permitted to assert that it was not provided with notice and/or an opportunity to address recovery of the October 2023 Revenues.

WHEREFORE, Liberty respectfully requests that this Commission:

- A. Deny DOE’s Motion;

- B. Affirm its authorization for the Company to recover the revenues that would have been recovered in October 2023;
- C. Defer consideration of the recoupment amount until the time that final rates are set; and
- D. Grant such further relief as it deems appropriate.

Respectfully submitted,

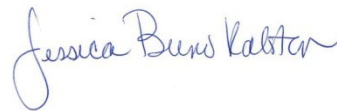
Liberty Utilities (Granite State Electric)
Corp., d/b/a Liberty

By its Attorneys,



Date: December 7, 2023

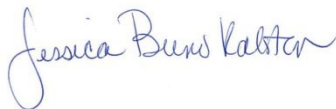
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Certificate of Service

I hereby certify that on December 7, 2023, a copy of this response to Department of Energy's Motion for Rehearing has been forwarded to the service list for docket DE 23-039.

A handwritten signature in blue ink that reads "Jessica Buno Ralston". The signature is written in a cursive style.

Jessica Buno Ralston